THE LAW SOCIETY OF HONG KONG 香港律師會

SUBMISSIONS ON THE REVISED PROPOSALS FOR AMENDMENTS TO SUBSIDIARY LEGISLATION UNDER THE CJR

The Law Society has reviewed the Judiciary's latest Consultation Paper "*Revised Proposals for Amendments to Subsidiary Legislation under the Civil Justice Reform*" and notes most of the proposed amendments to the previous draft Rules of the High Court (RHC) are relatively minor. The Law Society has the following comments on those RHC where more major changes have been proposed.

1. Order 11 – Service of Process, etc out of the jurisdiction

No comments on the proposed amendments.

2. Order 22 – Offers to Settle and Payments into Court

2.1 O.22 rr.7(7) to (11) Form and content of a sanctioned offer

This rule refers to the withdrawal or "reduction" of a sanctioned offer. However, the expression "reduction" is not appropriate in the case of a sanctioned offer from the Plaintiff. It is more appropriate to describe it as "*amendment of the offer to one less advantageous [to the offeree] [than an earlier one]*". This would also be consistent with the provisions in O.22 rr.11(3) and (4) where the word "amendment" is also used (in relation to the time when a sanctioned offer or a sanctioned payment is made and accepted).

See **Annexure 1** for the suggested manuscript changes.

2.2 O.22 r.10 (7) Offer to settle a claim for provisional damages

This rule defines "*provisional damages*" as follows:-

"In this rule, "*provisional damages*" ( ) means damages for personal injuries that are to be assessed on the assumption that the injured person will not develop the disease or suffer the deterioration referred to in section 56A of the Ordinance."

This definition refers to S.56A of the High Court Ordinance but only mentions the first half of S. 56A(2), omitting the second half, namely "*further damages at a future date if the injured person develops the disease or suffers the deterioration*".

S. 56A(2) provides as follows:-

"(2) Subject to subsection (4), as regards any action for damages to which this section applies in which a judgment is given in the Court of First Instance, provision may be made by rules of court for enabling the Court, in such circumstances as may be prescribed, to award the injured person-

(a) damages assessed on the assumption that the injured person will not develop the disease or suffer the deterioration in his condition; and

(b) further damages at a future date if he develops the disease or suffers the deterioration."

The omission does not appear to be deliberate as O.22 r.10(3)(b) anticipates a claim for further damages. We therefore suggest amending r.7(10) to read as follows (as highlighted in bold):-

"In this rule, "*provisional damages*" ( ) means damages for personal injuries that are to be assessed on the assumption that the injured person will not develop the disease or suffer the deterioration **and further damages at a future date if he develops the disease or suffers the deterioration** referred to in section 56A of the Ordinance."

2.3 O.22 r.20 Other consequences of acceptance of a sanctioned offer or a sanctioned payment

2.3.1 O.22 r.20(3)

O. 22 r.20(2)(b) refers to the consequences of acceptance of a sanctioned offer which relates to **the whole of the claim**. It provides, inter alia, that either party may apply to enforce those terms without the need for a new claim.

O.22 r.20(3) refers to acceptance of a sanctioned offer or a sanctioned payment which only relates to **a part or issue of the claim**. But this rule does not provide that either party may enforce the terms. Such an omission may lead to arguments that those terms cannot be enforced until resolution of the rest of the claim. It is submitted that this is not the intended result because O.22 r.20(6) provides that where a sanctioned offer has been accepted and a party has not honoured the terms of the offer, the other party may apply to the Court to claim the remedy of breach of contract without the need to start a new claim.

We therefore suggest adding a new sub-paragraph (b) to O.22 r.20(3) that "either party may apply to enforce the terms of the offer without the need for a new claim".

2.3.2 O.22 r.20(6)

As referred to above, r.20(6) provides that where a sanctioned offer has been accepted and a party has not honoured the terms of the offer, the other party may apply to the Court to claim the remedy of breach of contract.

This means that the non-defaulting party cannot simply have judgment entered on the terms of the offer and enforce it, but still needs to apply to the Court to claim the remedy of breach of contract. This is unsatisfactory. Such a concern has been raised in the Law Society's Submissions dated 12 July 2006 (under section H paragraph A 5 on page 18) and does not seem to have been taken up).

The proposal appears to be at odds with the procedure in Order 20 rules (2) and (3) which provides a mechanism for enforcement. An accepted offer can be enforced within those proceedings without the need for a new claim. **We suggest this rule should be re-drafted.**

2.4 O.22 Cost consequences where plaintiff fails to do better than a sanctioned offer or a sanctioned payment

2.4.1 O22 r.21(1)

There is a typographical mistake namely "This rules" shall be changed to "This **rule**".

2.4.2 O.22 rr. 21 (3) to (6)

The Paper did not provide any explanation for these new rules which appear to mirror the proposals in O.22 r.22 when a plaintiff does better than the proposal in a defendant's sanctioned offer and the court can impose similar sanctions on the defendant. Rules (3) to (6) equalises the treatment by the court towards both plaintiffs and defendants in relation to acceptance or rejection of sanctioned offers. **The Law Society considers, on balance, these new rules will encourage settlement of cases.**

3. Order 24 - Discovery and Inspection of Documents

No comments on the proposed amendments.

4. Order 25 – Case management Summons and Conference

4.1 Order 25 r.2(j) and r.8

We note neither O.25 r.2(j) nor O.25 r.8 have been amended and question the compatibility of the proposed amendments with the provisions in the existing paragraph 7 of Practice Direction 18.1 for the Personal Injuries List as r.8 appears to be ignored in practice.

5. O.38 - Evidence

5.1 O.38 r.4A(4) Evidence by a Single Joint Expert

This rule sets out the circumstances of the case to be taken into account by the Court before determining whether to order the parties to appoint a single joint expert, where a party disagrees with the appointment.

This has apparently taken up part of the Law Society's Submissions dated 12 July 2006 under Section R paragraph A 5(b), page 40. It was suggested in that paragraph of the Submissions that one of the circumstances which could be taken into account was "the value of the claim and importance of the issue on which expert evidence is sought, proportionate to that value" (under point (i)).

However, O.38 r.4A(4)(c) of the Revised Proposals provides that the circumstances include "**the value and importance to the parties of the claim**, as compared with the cost of employing separate expert witness to give evidence" (emphasis added).

It is submitted that it is not appropriate to focus merely on the subjective element of the importance of the claim to the parties in determining whether a single joint expert shall be appointed. It is more appropriate to consider objectively the importance of the issue in determining the claim. We therefore suggest amending O.38 r.4A(4)(c) to read as follows:-

> "the **value of the claim and importance of the issue on which expert evidence is sought** ~~value and importance to the parties of the claim~~, as compared with the cost of employing separate expert witness to give evidence".

See **Annexure 2** for the suggested manuscript changes.

6. Order 41A – Statements of Truth

No comments on the proposed amendments.

7. Order 53 - Applications for Judicial Review

7.1 O53 r.2A. Application for leave to apply for judicial review

Sub-rule (2): the re-ordering of this sub-rule and the extra requirement to include the name and description of the respondent makes sense. This extra detail will, presumably, also need to be reflected in the new application for leave (Form No.85B in Appendix A). The current Form No.86A also has the following words at the end of it: "*Grounds must be supported by an affidavit which verifies the facts relied on*". Presumably, these same words should appear at the end of the new application for leave (Form No.85B).

7.2 O53 r.2C. Acknowledgment of service of notice of application for leave

The new Acknowledgement of Service of the notice of application for leave for judicial review will be Form 86B in Appendix A, but this new form does not appear to be included as part of the Revised Proposals.

7.3 O.53 r.5 Mode of applying for judicial review

We understand the application for judicial review by an originating summons will be much the same as Form No.86 in Appendix A currently is. We suggest the words "originating summons" should be used consistently throughout Order 53.

7.4 O.53 r.5D Court's powers to hear any person

We note that our suggestion has been adopted; namely, that criteria be adopted to ensure that "any person" who wishes to be heard at the hearing of an application for judicial review must be able to demonstrate sufficient interest in the proceedings. The proposed criteria that any such person be "a proper person to be heard at the hearing of the application for judicial review" would appear to suffice and is consistent with current terminology in Order 53 (e.g. Order 53 rule 9(1) - Hearing of application for judicial review).

7.5 O53. r.9 Hearing of application for judicial review

The words "in opposition" are duplicated in the same sentence in Order 53 rule 9(1).

The references to "summons" in Order 53 rule 9(1) and (2) might usefully be changed to "originating summons".

7.6 O 53 r.16 Transitional provision relating to Part 22 of the Amendment Rules 2007

With the proposed Order 53 r.15 now to be deleted in its entirety, we note the transitional provision relates to Part 22 of the Amendment Rules 2007 ("Judicial Review - Recommendations 144-148"). Presumably, rule 16 can be renumbered Order 53 r.15. The Steering Committee may also wish to consider whether the transitional provision (both in the context of Order 53 and more generally) might be more simply expressed. For example:

> "Where an application for leave to apply for judicial review is issued or an application for judicial review is pending before the commencement of Part 22 of the Amendment Rules 2007 **[**and made in accordance with this Order in force before that commencement**]**, then nothing in that Part is to apply in relation to such application for leave or application for judicial review and this Order in force before the commencement will continue to apply as if that Part had not been made."

Consider deleting the words in square brackets.

8. Order 59 - Appeals to the Court of Appeal

The Law Society notes the proposed amendments codify the procedures for leave to appeal as outlined in Part 8 of the Civil Justice (Miscellaneous Amendments) Bill 2007. We have no further comments.

9. Order 62 - Costs

In general, the amendments to Orders 62 and 62A RHC are procedural and unobjectionable. We would draw attention to the following:

9.1 Order 62 r.5 Special matters to be taken into account in exercising discretion

This now has reference to the court taking into account the underlying objectives set out in Order 1A r.1 which is unobjectionable.

9.1.2 Order 62 r.5(2)(d)

This is new in that the court can look at a party's conduct before commencing proceedings in exercising its discretion as to costs. We do not object.

9.2 Order 62 rr.8-8D Personal liability of legal representatives for costs

These rules deal with wasted costs orders against legal representatives. We believe that the necessary protections for legal representatives are included.

9.3 Order 62 r.17B Taxing Master may set aside his own decision

This is a new provision allowing a taxing master to set aside his own decision in cases where a party either fails to object to a bill of costs or does not appear at the hearing. It is not clear why this provision is required, but there is nothing wrong with the taxing master having such a power.

9.4 Order 62 r.21B Provisional taxation

This rule gives the taxing master power to conduct a provisional taxation. This is to be the normal procedure, as advised by the Registrar, we very much welcome and support this initiative.

9.5 Order 62 r.22 Delay in service of notice of commencement of taxation or in proceeding with taxation

This contains new provisions on delay by a party starting or proceeding with taxation. The current regime provides little effective sanction for delay in taxation, and so we welcome and support this change.

10. First Schedule Part I Scale of Costs

This provides for copying charges of $4 per page for the first bundle and $1 for the remaining bundles. This is acceptable to us.

11. Second Schedule Part I Costs on Judgment without trial for liquidated or unliquidated sum

11.1 Rule 1

This accepts the Law Society's recommendation to reduce the number of fixed costs items and to substantially increase the amount of fixed costs if a defendant pays after the issue of a writ or if a default judgment is obtained. (The amounts are increased to $9,000 to $10,000.) These amendments are to be commended.

11.1.1

We suggest a review as the proposed amendments in rule 1 is unclear.

"….shall apply in relation to the following cases if the writ of summons therein was issued after [~~1 January 1966~~] and the commencement of the Amendment Rules 2007."

12. Second Schedule Part II

This still keeps miscellaneous scale costs for judgments for costs, garnishees and writs of execution. The fixed costs are increased and are acceptable.

13. Second Schedule Part III

We suggest the sum for entering default judgment on a claim for a liquidated sum in Item 1 should be $1,000 (rather than the proposed $300); logic dictates the same work will be done by a defendant entering a judgment for costs when a plaintiff abandons a claim to

match the costs allowed in paragraph 1(b) in Part II. (See page 46 where there is a difference of $1,000 in costs under sub-paragraph (a) of paragraph 1 and sub-paragraph (b) of paragraph 1).

14. Order 62A r.15(3)

This new rule mitigates the general rule in O 62A r.15 by giving the taxing master discretion to make a different order. This flexibility is welcomed.

15. The District Court (Amendment) Rules

Save to the extent that comments made above on the RHC are applicable, mutatis mutandis, to the equivalent DCR, the Law Society supports the proposed changes.

The Law Society of Hong Kong
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