

CIVIL JUSTICE REFORM

Final Report

Chief Justice's Working Party

on Civil Justice Reform

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Abbreviations

ADR	Alternative dispute resolution
AE	The Academy of Experts
APAA	Asian Patent Attorneys Association, Hong Kong Group
APIL	Association of Personal Injury Lawyers (UK)
Bar Association	The Hong Kong Bar Association
BCC	The British Chamber of Commerce
BL	Basic Law
BLJ	Lord Brennan QC, William Blair QC et al, <i>Bullen & Leake & Jacob's Precedent's of Pleadings</i> , Sweet & Maxwell (2001)
BOR	Hong Kong Bill of Rights
BSCPI	The Special Committee on Personal Injuries of the Hong Kong Bar Association
CEDR	The Centre for Effective Dispute Resolution
Commission	European Commission of Human Rights
CPR	Civil Procedure Rules (enacted in England and Wales)
DOJ	Department of Justice
E Ct HR	European Court of Human Rights
ECHR	European Convention on Human Rights
H&A	Charles Hollander QC & Tom Adam, <i>Documentary Evidence</i> 7 th Ed, Sweet & Maxwell (2000)
HA	Hospital Authority
HCO	High Court Ordinance, Cap 4
HKCA	Hong Kong Construction Association
HKCP	<i>Hong Kong Civil Procedure 2002</i> , Sweet & Maxwell
HKCS	Hong Kong Christian Service

HKFEMC	The Hong Kong Federation of Electrical and Mechanical Contractors
HKFI	Hong Kong Federation of Insurers
HKFLA	Hong Kong Family Law Association
HKIA	Hong Kong Institute of Architects
HKI Arb	Hong Kong Institute of Arbitrators
HKIS	Hong Kong Institute of Surveyors
HKM Centre	Hong Kong Mediation Centre
HKMC	Hong Kong Mediation Council
HKMLA	Hong Kong Maritime Law Association
HKRRLS	Hong Kong Reprographic Rights Licensing Society
Hollander and Adam	Charles Hollander and Tom Adam, <i>Documentary Evidence</i> , Sweet & Maxwell (7 th Ed, 2000)
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
J&G	Jacob & Goldrein, <i>Pleadings Principles and Practice</i> , Sweet & Maxwell (1990)
JCGWG	Judicial Clerk Grade Working Group
L&P	Lord Lester of Herne Hill QC & David Pannick QC, <i>Human Rights Law and Practice</i> (Butterworths 1999) & Supplement (2000)
Law Society	The Law Society of Hong Kong
LAD	Legal Aid Department
LAM	Leigh-Ann Mulcahy (Gen Editor), <i>Human Rights and Civil Practice</i> , Sweet & Maxwell (2001)
LCD	The Lord Chancellor's Department
LCD-EF	<i>Civil Justice Reform Evaluation – Emerging Findings (March 2001)</i> published by the LCD

LCD-FF	<i>Civil Justice Reform Evaluation – Further Findings (August 2002)</i> published by the LCD
Legco	The Legislative Council. References to members of Legco “speaking in Legco” are references to the debate on the Interim Report held on 8 May 2002
LSWP	Law Society’s Working Party on Civil Justice Reform
More Civil Justice?	Tamara Goriely, Richard Moorhead and Pamela Adams, <i>More Civil Justice? The Impact of the Woolf Reforms on pre-action behaviour</i> , Research Study 43 Summary, (The Law Society and the Civil Justice Council).
Interim Report	The Interim Report and Consultative Paper issued by the Chief Justice’s Working Party on Civil Justice Reform, November 2001
RHC	Rules of the High Court, Cap 4
RSC	Rules of Supreme Court
S&E	Jessica Simor & Ben Emmerson QC, <i>Human Rights Practice</i> , Sweet & Maxwell (looseleaf)
SCLHK	Society of Construction Law Hong Kong
SJE	Single joint expert
WB/LAD	Works Bureau/Legal Advisory Division
White Book	<i>Civil Procedure</i> , Sweet & Maxwell (2003)
WIR	<i>Access to Justice</i> , Interim Report by Lord Woolf (June 1995)

List of Appendices

- Appendix 1: The consultation activities undertaken by the Working Party.
- Appendix 2: The persons and organizations who responded to the consultation.
- Appendix 3: Academy of Experts' Code of Practice, Code of Practice for Experts within Europe and Expert's Declaration.
- Appendix 4: The Courts' case-load.

Executive Summary

Section 1: Introduction

1. In February 2000, this Working Party was appointed by the Chief Justice :-

“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.”

2. Its membership is as follows :-

The Hon Mr Justice Chan, Permanent Judge of the Hong Kong Court of Final Appeal (Chairman)

The Hon Mr Justice Ribeiro, Permanent Judge of the Hong Kong Court of Final Appeal (Deputy Chairman)

The Hon Mr Justice Ma, Chief Judge of the High Court (as from 18 August 2003)

The Hon Mr Justice Rogers, Vice-President of the Court of Appeal

The Hon Mr Justice Seagroatt, Judge of the Court of First Instance (until 17 August 2003, appointment terminating upon retirement from the Bench)

The Hon Mr Justice Hartmann, Judge of the Court of First Instance

The Hon Madam Justice Chu, Judge of the Court of First Instance

Mr Ian Wingfield, Law Officer, Member of the Department of Justice appointed in consultation with the Secretary for Justice

Mr S Y Chan, Director of Legal Aid

Mr Geoffrey Ma SC, Barrister appointed in consultation with the Chairman of the Bar Association (until 3 December 2001) re-appointed as the Hon Mr Justice Ma CJHC (above).

Mr Ambrose Ho SC, Barrister appointed in consultation with the Chairman of the Bar Association (as from 3 December 2001)

Mr Patrick Swain, Solicitor appointed in consultation with the President of the Law Society

Professor Michael Wilkinson, University of Hong Kong

Mrs Pamela Chan, Chief Executive of the Consumer Council

Master Jeremy Poon, Master of the High Court (Secretary)

Mr Hui Ka Ho, Magistrate (Research Officer)

3. On 21 November 2001, the Working Party published an Interim Report and Consultative Paper (“the Interim Report”) containing 80 Proposals for consultation. Some 5,000 copies of the print version and over 500 CD-ROMs were distributed, as were about 12,000 copies of the Executive Summary. The Working Party’s website received over 41,000 hits, including almost 6,000 download hits (over 1,600 of which were for downloading the entire Report).
4. There was a seven-month consultation period during which various public seminars and briefings were held and almost 100 written submissions received. Details of the consultation process and of the entities and persons who sent in written submissions are set out in Appendices 1 and 2 to the Final Report.
5. Having deliberated on the responses received and drafts of the Final Report, the Working Party now seeks, in the light of those responses, to identify the areas where reform is considered necessary or desirable and to make recommendations to the Chief Justice accordingly. A total of 150 Recommendations are listed in the Final Report. The Proposals made in the

Interim Report and the corresponding Recommendations in the Final Report are annexed to this Executive Summary.

Section 2: A new code or selective amendment? [*Proposals 74 and 75 – Recommendation 1*]

6. The Interim Report posed the question whether proposed reforms should be implemented through the adoption of an entirely new code of civil procedure along the lines of the Civil Procedure Rules 1998 (“CPR”) in England and Wales (based on the recommendations of Lord Woolf) [Proposal 74] or whether our existing High Court Rules should essentially be maintained with selective amendments grafted onto them [Proposal 75].
7. Consultees’ views were split on this issue. While the Working Party recognizes that cogent arguments exist in favour of Proposal 74, it has decided, on balance, to recommend Proposal 75.
8. It has reached this conclusion taking into account the peculiar circumstances of our legal system in the light of assessments which have been made of the impact of the CPR during the first 4½ years or so of their operation in England and Wales. It is noted that the CPR have been successful in some areas but disappointing in others, notably in relation to the reduction of legal costs.
9. The Working Party has sought :-
 - (a) to try, if possible, to avoid the pitfalls revealed by the CPR experience, for example, in respect of measures carrying front-loaded costs;
 - (b) to try to form a realistic view of the benefits likely to be achievable under local conditions; and,

- (c) to ask whether such benefits can be achieved with less disruption than by introduction of an entirely new code.
10. It has concluded that in local circumstances :-
- (a) adopting a series of reforms by amendment to our existing rules would be preferable and would be less disruptive and less demanding than adopting an entirely new code;
 - (b) some of the most beneficial reforms (eg, Part 36 reforms and closer control over interlocutory applications) can readily be adopted; and,
 - (c) the Proposal 75 approach would allow any particular reforms that prove unsuccessful to be more readily reversed.
11. In deciding which reforms to recommend in the light of the responses received in the consultation process, the Working Party has been guided by the objectives of improving the cost-effectiveness of our system of civil procedure, reducing its complexity and lessening the delays encountered in litigation; always subject to the fundamental requirements of procedural and substantive justice.
12. Procedures become more cost-effective where they help to ensure that each item of costs incurred achieves more towards bringing the parties closer to a resolution of their dispute, whether by reaching settlement or arriving at a final adjudication.
13. To that end, the Working Party has sought, for example, to find ways of simplifying procedures, lessening the number of procedural steps needed, getting more done at any one hearing, dealing with more applications on paper, penalising unnecessary applications, discouraging over-elaboration in

pleadings, witness statements and oral evidence, restricting interlocutory appeals, and so forth.

14. These aims also involve countering the excesses of the adversarial system, fostering greater openness between the parties, finding ways of encouraging earlier settlement and giving proper consideration to alternative modes of dispute resolution.
15. The reforms recommended call for the court's greater involvement in case managing litigation and monitoring its progress, setting timetables tailored to the needs of particular cases.
16. As explained in the Interim Report and touched upon further below, one cannot be assured that a reduction of litigation costs will necessarily follow from such reforms alone. Other factors are equally important. However, by improving cost-effectiveness, cutting delays and reducing complexity, such reforms should help to achieve overall cost reductions and to make the system more responsive to the needs of individual cases.

Section 3: Procedural reform and the Basic Law

17. The Final Report addresses the principles applicable where the rights and freedoms guaranteed by the Basic Law and the Hong Kong Bill of Rights may intersect with some of the procedural reforms canvassed. The proposed reforms must be able to operate in conformity with such rights.
18. Article 35 of the Basic Law ("BL 35") and Article 10 of the Hong Kong Bill of Rights ("BOR 10") are the main provisions relevant. They focus on the rights of access to the courts and to a fair and public hearing.
19. The applicable principles may be summarized as follows :-

- (a) The access and hearing rights are not absolute but may be subject to appropriate restriction.
 - (b) A restriction may be valid provided that :-
 - (i) it pursues a legitimate aim;
 - (ii) there is a reasonable proportionality between the means employed and the aim sought to be achieved; and,
 - (iii) the restriction is not such as to impair the very essence of the right.
 - (c) The access and hearing rights only apply to rules and proceedings which are decisive of rights and obligations. They do not apply where purely interlocutory or case management questions arise.
 - (d) While the access and hearing rights find expression in concepts such as an entitlement to and presence at a public hearing, to the public pronouncement of the court's judgment with reasons, and so forth, legitimate and proportional procedural limitations on these features of the process have often been accepted as valid.
 - (e) The constitutional acceptability of procedures on appeal is judged in the context of the proceedings as a whole, with less being required to satisfy the access and hearing rights on appeal where there has been ample regard for those rights in the lower court or courts.
20. The Working Party is satisfied that the proposals made in the Final Report are capable of being implemented consistently with the applicable constitutional guarantees.

Section 4: Defining the underlying objectives and the court's case management powers [*Proposals 1 to 3 – Recommendations 2 to 4*]

21. The CPR adopt as fundamental certain principles which define the “overriding objective” of the civil justice system. The English court is directed to give effect to the overriding objective in exercising its procedural and case management powers (which are also defined).
22. The Working Party identifies four different facets of the CPR’s overriding objective and notes that, in the light of its recommendation in favour of reforms by way of amendment as opposed to introduction of a wholly new code, the CPR overriding objective, if adopted, would function differently in Hong Kong.
23. The Working Party recommends a somewhat altered approach, summarised as follows :-
 - (a) A rule should be introduced expressly acknowledging as legitimate aims of judicial case management :-
 - (i) increasing the cost-effectiveness of the court’s procedures;
 - (ii) encouraging economies and proportionality in the way cases are mounted and tried;
 - (iii) the expeditious disposal of cases;
 - (iv) greater equality between parties;
 - (v) facilitating settlement; and,
 - (vi) distributing the court’s resources fairly;

always recognizing that the primary aim of case management is to secure the just resolution of the parties' dispute in accordance with their substantive rights.

- (b) These aims should be referred to as the “underlying objectives” of the civil justice system to avoid misunderstandings which may result from describing them as “overriding”.
- (c) The concept of “proportionality” should form part of the underlying objectives, but without the specificity attempted in the CPR provisions. This is to avoid spawning minute analysis and argument. The concept should import merely commonsense notions of reasonableness and a sense of proportion to inform the exercise of procedural discretions.
- (d) It is desirable to have a rule, linked to the underlying objectives, which draws the court's case management powers together and places them on a clear and transparent legal footing.

Section 5: Pre-action protocols [*Proposals 4 and 5 – Recommendations 5 to 9*]

- 24. In England and Wales, pre-action protocols have been introduced with a view to encouraging reasonable pre-action behaviour by the parties and to promoting settlement of the dispute without resort to litigation. The protocols prescribe the exchange of information about claims and defences according to a timetable before proceedings are issued; enabling the parties to negotiate on a properly-informed basis and with the court given power to penalise non-compliance by way of costs and other orders.
- 25. While the potential benefits of such an approach are recognized, many consultees expressed concern that the imposition of pre-action protocol

obligations would lead to a front-end loading of costs, and so make litigation more expensive. The experience in England and Wales also raises questions as to the extent to which enforcing compliance with pre-action protocols is practicable.

26. In the light of these considerations, the Working Party recommends that :-
- (a) Pre-action protocols should not be prescribed for cases across the board. But they might usefully be adopted in some specialist lists, subject to the approval of the Chief Judge of the High Court and after due consultation with regular court users and any other interested persons.
 - (b) When deciding upon the scope of the obligations imposed by any such protocols, efforts should be made to minimise front-loaded costs.
 - (c) Any protocol adopted ought to prescribe the range of consequences which may follow from non-compliance, identifying the contexts in which non-compliance may be taken into account and the sanctions that a court might be asked to impose.
 - (d) Special allowances may have to be made in relation to unrepresented litigants in this context.
27. To promote settlement without resort to litigation, “costs-only proceedings” should be introduced enabling parties who have reached settlement on the substantive dispute but who cannot agree on costs to have the relevant costs taxed by the master.

Sections 6 and 7: Commencing proceedings and disputing jurisdiction

[Proposals 6 and 7 – Recommendations 10 to 17]

28. At present, the rules governing the way proceedings are commenced are unnecessarily complicated, there being four different procedures for bringing cases before the court: writs, originating summonses, originating motions and petitions.
29. The Working Party recommends confining the modes of commencement to writs and originating summonses, with an indication that the former should be used where substantial factual disputes are likely to arise and the latter, where questions of law involving no or little factual investigation are to be placed before the court. Where a party has chosen the wrong procedure for starting a case, the court should readily allow it to be switched to the appropriate procedure.
30. Certain specialised proceedings, such as bankruptcy, company winding-up, non-contentious probate and matrimonial proceedings, have their own rules and procedures and should continue to be excluded from the general operation of the Rules of the High Court.
31. In some cases, proceedings are started in Hong Kong but the defendant wishes to contend that the action should be stayed on the ground that the Hong Kong court either lacks jurisdiction or should, as a matter of discretion, decline to hear the case. Procedural arrangements for such applications are necessary. The present rules are relatively undeveloped for applications of the latter type. The Working Party recommends amending O 12 r 8 along the lines of CPR 11 to deal with discretionary stay applications.

Section 8: Default Judgments and admissions [*Proposal 8 – Recommendation 18*]

32. This proposal, supported by the Working Party, is aimed at encouraging the parties to dispose of money claims where there is no defence by using a default judgment process which requires no appearance before a judge and so tends to save time and costs. It proposes to expand the range of cases that can be dealt with in this way and to allow a defendant greater flexibility in the manner of consenting to judgment. The Working Party also recommends retaining the Hong Kong courts' approach as to when admissions may be withdrawn.

Section 9: Pleadings [*Proposals 9 to 13 – Recommendations 19 to 36*]

33. The Working Party recommends that some of the basic rules regarding pleadings should remain unchanged. Thus, it agrees with consultees who were generally of the view that it is unnecessary to re-state the requirements of pleadings. The annexing of documents to pleadings and identifying witnesses to be called in the pleadings are thought to be undesirable (without prejudice to specialist rules in relation, for example, to the filing of medical reports with pleadings in personal injury cases). The present rule permitting points of law to be raised in the pleadings and the rules relating to when pleadings may be amended are recommended to be left unchanged.
34. Changes which are recommended, in relation both to the original pleadings and requests for further and better particulars, seek to enhance the proper function of pleadings; that is, to define each party's case with sufficient precision to facilitate settlement or otherwise to enable proper preparation for trial, balancing the need for sufficient detail against the need to avoid prolixity and unnecessary detail.

35. With these aims in mind, the Working Party recommends first, that there should be a rule requiring substantive defences, as opposed to bare denials or non-admissions, to be pleaded; and secondly, that pleadings should be verified by a statement of truth.
36. Substantive defences are obviously desirable because a bare denial or non-admission tells you next to nothing about a defendant's case. The rule envisaged requires a defendant who has a different version of events to state that version or otherwise to give reasons why he does not accept the version pleaded. At the same time, it is recommended that the rules should make it clear that it is unnecessary to plead to every detailed allegation provided that the substance of the defence has been set out.
37. The requirement that pleadings be verified is taken from the CPR. It is aimed to discourage pleadings which, whether by design or carelessness, do not accurately reflect the true case of the party in question. A side-benefit is that a verified pleading can be treated as evidence in interlocutory proceedings, thereby enabling, in some cases, the avoidance of duplicated costs.
38. A statement of truth takes the form of a declaration of belief that the facts stated in the relevant pleading are true. It may be signed by the party on whose behalf the pleading is filed or (in suitable circumstances) by that party's legal representative. Unlike an affidavit or affirmation, a statement of truth does not require the person making it to be sworn or affirmed and does not require attendance before someone qualified to administer oaths or take affidavits. Nevertheless, a person who makes a statement of truth without an honest belief in the truth of the facts pleaded faces possible sanctions, up to and including possible proceedings for contempt.

39. The Final Report discusses some of the detailed rules that would be required in relation to verified pleadings including rules :-
- (a) to identify the person who should provide the verification, particularly where the party is a corporation or a partnership, or where an insurer is involved;
 - (b) to define the circumstances when it would be appropriate for a legal representative to make a statement of truth on behalf of his client;
 - (c) to deal with verification where alternative inconsistent cases are pleaded; and,
 - (d) as to the sanctions appropriate for putting forward a false statement of truth.
40. The Working Party also makes recommendations regarding the clarification of pleadings. Parties should only seek further and better particulars where there is a genuine need to do so and not where the substance of the other side's case is sufficiently clear, and will in due course be made clearer by the exchange of witness statements and expert reports. It also recommends that where a pleading which comes to the court's notice is badly inadequate so as to pose a serious risk of injustice or of requiring significant expenditure of unnecessary costs, the court should have power of its own motion to give appropriate directions for the pleading to be clarified.

Section 10: Summary disposal of proceedings [*Proposal 14 – Recommendation 37*]

41. The Working Party considered the proposal that the present tests applicable to the summary disposal of proceedings should be replaced by a “no reasonable prospect of success” test. In the light of consultees' responses

and since the benefits of adopting such a test are thought to be questionable, Proposal 14 was not supported.

Section 11: Sanctioned offers and payments [*Proposal 15 – Recommendations 38 to 43*]

42. What are referred to in England and Wales as “Part 36 offers and payments” are referred to in the Final Report as “sanctioned offers and payments”. They involve a procedure for one party to make offers or payments into court to settle a dispute. If the other party does not accept, he runs the risk of costs and interest sanctions if he subsequently fails at the trial to better what was offered, even if he wins the action. It is a procedure which aims to encourage the parties to take possible settlement seriously and to avoid unproductive prolongation of the litigation.
43. Part 36 offers have proved a great success in England and Wales and the proposal for their introduction in Hong Kong received widespread support. The Working Party recommends their adoption, together with relevant ancillary provisions, suitably adapted for operation in Hong Kong. In particular, it is recommended that in Hong Kong :-
- (a) the provisions relating to sanctioned offers and payments should not apply to offers made before commencement of proceedings unless an applicable pre-action protocol adopted in a relevant specialist list prescribes otherwise;
 - (b) given the general absence of pre-action protocols, a sanctioned offer or payment should remain open for acceptance for 28 days after it is made unless the court’s leave is obtained to withdraw it sooner; and,

- (c) 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 qualify as sanctioned offers.

Section 12: Interim remedies and Marevas in aid of foreign proceedings [*Proposals 16 and 17 – Recommendations 44 to 51*]

44. Proposal 16, which canvasses consolidating various interim remedies in a single rule, was considered unnecessary in the light of the Working Party's decision to adopt Proposal 75, as discussed above.
45. The Privy Council, in *Mercedes Benz AG v Leiduck* [1996] 1 AC 284, applying the House of Lords' decision in *Siskina (Cargo Owners) v Distos SA* ("*The Siskina*") [1979] AC 210, decided that it is in law not possible to obtain a Mareva injunction to restrain a defendant who has assets in Hong Kong from dealing with those assets pending resolution of the claim against him in a foreign court where, under the present conflict of laws rules, the Hong Kong courts do not have jurisdiction to deal substantively with that dispute. Accordingly, where a plaintiff has begun proceedings in another jurisdiction, the Hong Kong courts are presently unable to give interim Mareva relief, even though the qualifying conditions for such relief can otherwise be satisfied and even though those foreign proceedings could, if successful, lead to enforcement of the foreign judgment against the defendant in Hong Kong.
46. For policy reasons considered cogent and in the light of doctrinal developments which have eroded the strictness of the view taken in *The Siskina*, the Working Party recommends that legislation be introduced empowering Hong Kong courts to grant such Mareva relief where the foreign proceedings in question may lead to a judgment or an arbitral award which would, in the ordinary course, be enforced in Hong Kong, whether by

registration or at common law. This would also entail legislation enabling a Hong Kong writ or originating summons to be served outside the local jurisdiction in relation to such free-standing Mareva proceedings. Supporting procedural rules would also have to be introduced.

Section 13: Case management, timetabling and milestones [*Proposals 18 and 19 – Recommendations 52 to 62*]

47. These Proposals suggested the introduction of :-
- (a) an early questionnaire to help determine what directions are needed in each case and what timetable the court should set;
 - (b) a timetabled series of milestone dates, including the trial date, which are largely immovable but complemented by the parties being given flexibility to agree changes to non-milestone time-limits without having to apply to the court; and,
 - (c) an approach whereby parties are not permitted to hold up the trial on the grounds of their own lack of preparedness (in the absence of some exceptional reason justifying this), such parties having instead to bear the consequences of their own lack of readiness as the trial proceeds.
48. Consultees' responses were largely supportive and the Working Party makes the following recommendations :-
- (a) Court-determined timetables which take into account the reasonable wishes of the parties and the needs of the particular case should be introduced.
 - (b) To help the court to fix a timetable, a questionnaire containing relevant information and any directions proposed by the parties

should be filed as part of the summons for directions procedure, due allowances being made for unrepresented litigants.

- (c) The timetable set by the court should be realistic and should fix milestone dates normally consisting of a pre-trial review and the first day of trial or a specified period during which the trial is to commence.
- (d) Where the case is such that the usual milestones cannot realistically be set at the summons for directions stage, the court should set as the first milestone a case management conference during which the pre-trial review and trial date or trial period can be fixed in the light of what is known at that stage.
- (e) Milestone dates should in practice be treated as immutable with the parties given flexibility to agree to variations of non-milestone timetables without reference to the court. Only in the most exceptional circumstances should a milestone date be changed.
- (f) Where a party cannot secure the agreement of all the other parties for a time extension relating to a non-milestone event, the court should exercise its discretion to grant such an extension only if sufficient grounds are shown and provided that the extension does not necessitate changing the trial date or trial period. If an extension is granted, it should involve an immediate “unless order” specifying a suitable sanction in the event of further non-compliance.

49. In relation to cases that have become dormant, the Working Party recommends :-

- (a) that where the parties have not progressed to the point of obtaining a timetable, the court should not compel them to continue with the proceedings;
- (b) but 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 hearing.

A plaintiff should then be given 3 months to apply to reinstate the action for good reason, failing which the action should stand dismissed and the defendant should automatically become entitled to his costs. In cases where the defendant has filed a counterclaim, he should have an additional grace period of 3 months from the expiry of the plaintiff's grace period to apply to reinstate his counterclaim. If he fails to do so, the counterclaim should also stand dismissed with no order as to costs.

- 50. The ultimate aim should be for the use of milestone dates and the progressive diminution of cases on the Running List. But how, when and to what extent that aim should be implemented raises practical and administrative issues which must be worked out by the Chief Judge of the High Court and the court administration in consultation with members of the profession and other interested parties.
- 51. In the meantime, flexible measures, such as the possible establishment of a running list for interlocutory matters, should be adopted to permit any vacated dates in judicial diaries to be efficiently utilised.
- 52. As indicated in the next section, specialist lists should be accorded a high level of procedural autonomy. This should apply in relation to the timetabling procedures they adopt.

Section 14: Dockets, specialist lists and vexatious litigants [*Proposals 20 to 22 – Recommendations 63 to 69*]

53. The Working Party does not recommend a docket system generally for managing cases in Hong Kong. However, it supports the continued use of what is effectively a docket system in relation to certain specialist list procedures or pursuant to applications made under PD 5.7 in respect of cases thought appropriate for such treatment.
54. Under O 72 of the RHC, the Chief Justice has designated four specialist lists, namely, the Commercial; Personal Injury; Construction and Arbitration; and Constitutional and Administrative Law Lists. The rules give the judges in question control of the proceedings in their list and, subject to any directions given, the relevant judge hears all chambers applications himself. This means that the specialist list judge has a high degree of procedural autonomy enabling him (often with the assistance of a consultative group of court users) to develop procedures designed for the peculiar needs of cases on the list. Particular provisions of the RHC may be excluded or varied by practice direction applicable to the specialist list or by specific order in relation to a particular case.
55. There was general support from consultees and in the Working Party for this high level of procedural autonomy to continue, with freedom to adopt pre-action protocols if thought desirable. It is also recommended that consideration be given to the establishment of a new specialist list to deal with intellectual property and information technology cases, ie, an “IP/IT” list, after consultation with the legal profession and other interested parties.
56. Section 27 of the HCO, which deals with vexatious litigants, lays down a cumbersome procedure and lacks the flexibility needed to meet practical

problems. The provision on which it is based has since been updated and enhanced in England and Wales.

57. No doubt to compensate for the shortcomings of section 27, the English and the Hong Kong courts have asserted an inherent power, quite separate from the jurisdiction conferred by statute and without the intervention of the Attorney-General or the Secretary for Justice, to prevent a person from initiating civil proceedings which are likely to constitute an abuse of the process of the court, basing themselves on *J S Grepe v Loam* (1887) 37 Ch D 168, as extended by *Ebert v Venvil* [2000] Ch 484.
58. It is the Working Party's view that such a power is highly desirable but that the legal foundations of the doctrine, both at common law and under the Basic Law, are questionable. While the court undoubtedly has power to stop abuses of its own process in respect of a case which has been started, quite different issues arise where an attempt is made to interfere with a citizen's constitutional right of access to the court in fresh proceedings. A power subjecting vexatious litigants to a requirement of getting the court's leave before starting fresh proceedings may validly be conferred on the court, but the better view is that this requires express legislative provision.
59. The Working Party accordingly recommends that legislation should be introduced to enhance the provisions of section 27 and to put the jurisdiction now being exercised on a sounder footing. Such legislation should in particular allow vexatious litigant orders to be made not only on the application of the Secretary for Justice but also on the application of the persons vexed.

Section 15: Multi-party litigation and derivative actions [*Proposals 23 and 24 – Recommendations 70 and 71*]

60. The Working Party recommends that a scheme for multi-party litigation should be adopted in principle. Schemes implemented in comparable jurisdictions should be studied with a view to recommending a suitable model for Hong Kong.
61. The proposal in respect of derivative actions has been overtaken by events, a legislative bill having been introduced whereby members of a corporation are to be allowed to bring derivative actions on behalf of the company without leave of the court.

Section 16: Discovery [*Proposals 25 to 29 – Recommendations 72 to 80*]

62. Several new approaches to the discovery obligation were canvassed. However, the preponderance of opinion was significantly against change and in favour of retaining the *Peruvian Guano* principles, many taking the view that in Hong Kong, insufficient compliance rather than excessive disclosure represents the problem. It was also suggested that the new approach adopted in the CPR has not yielded significant benefits.
63. Many consultees argued, and the Working Party agrees, that case management is the preferable way of tempering possible *Peruvian Guano* excesses, for instance, by the court directing, where appropriate, that discovery should take place in stages or initially in relation to particular issues; or that it should be limited to particular classes of documents; or that documents need not be listed individually but by bundle or by file in certain categories, and so forth. Ample powers already exist in the RHC for this purpose. Accordingly, the Working Party does not recommend adoption of a different discovery obligation but favours retention of the *Peruvian Guano*

test coupled with judicious case management to restrain excessive discovery.

64. The Working Party recommends that the jurisdiction conferred on the court by section 41 of the HCO to order potential parties to make pre-action disclosure be widened so that the jurisdiction is exercisable in all types of cases (and not merely in relation to personal injury and death claims).
65. The applicant should have to show that he and the respondent are likely to be parties to anticipated proceedings and that the requirements of O 24 r 7A are satisfied. In other words, the documents must be shown to be (i) likely to be in the possession, custody or power of the person from whom they are sought; (ii) relevant to an issue arising out of the claim in question; and (iii) by (virtue of O 24 r 13) necessary either for disposing fairly of the cause or matter or for saving costs. Only specific documents or classes of documents which are directly relevant to the issues in the anticipated proceedings should be covered. The power should not extend to background documents or “train of inquiry” documents.
66. The Working Party similarly recommends that section 41 of the HCO be amended to enable orders for post-commencement, pre-trial discovery from non-parties to be made in all types of cases. The applicant should be required to show that the documents sought are of a class that could be obtained under a subpoena at the trial and also that the requirements of O 24 r 7A and O 24 r 13 are satisfied.

Section 17: Interlocutory applications and summary assessment of costs [Proposals 30 to 32 – Recommendations 81 to 92]

67. With a view to reducing the number of interlocutory applications (which generally add to costs and delay), the Working Party is in favour of introducing rules and practice directions whereby :-

- (a) the parties are encouraged to adopt a reasonable and cooperative attitude in relation to all procedural issues, penalising unreasonable attitudes by costs sanctions where appropriate;
- (b) the court is empowered, of its own motion and without hearing the parties, to make procedural orders nisi which are necessary or desirable and unlikely to be controversial, with liberty to the parties to apply for the order not to be made absolute;
- (c) interlocutory orders made after non-compliance with an order made on the summons for directions are “self-executing”, ie, they prescribe an appropriate sanction which automatically applies in the event of any further failure to comply; with any relief from such sanction not being granted as a matter of course, but being dependent upon the party in default being able to give a reasonable explanation for non-compliance and on any such relief being made subject to appropriate terms;
- (d) applications are, so far as practicable, dealt with on paper without the need for a hearing and, to this end, appropriate procedures are introduced to enable the master either to deal with the application at once on the papers, or to adjourn it for an oral hearing before either a master or a judge; with an appeal as of right from the master to the judge;

- (e) unwarranted interlocutory appeals are met with appropriate costs and other sanctions; and,
 - (f) far fewer time summonses will be taken out or allowed.
68. It is recognized that unrepresented litigants may find it difficult to formulate their submissions on paper. In such cases, the master would generally be expected not to deal with the matter purely on paper.
69. A summary assessment of costs is a process whereby the court which has just heard an interlocutory application assesses in a broad-brush way the amount of costs one party should be ordered to pay to the other without a process of taxation; and ordering payment to be made within a short period of time, rather than at the end of the proceedings. Orders for summary assessment have been found to be a useful deterrent against unwarranted or unreasonable interlocutory applications in England and Wales.
70. The Working Party recommends that the court should be encouraged, where appropriate, to undertake such summary assessments, always retaining a discretion to make a provisional summary assessment or ordering the costs to go to taxation. Supporting procedural rules aimed at ensuring that the court has sufficient information to make the summary assessment are outlined in the Final Report. It is also recognized that efforts must be made to promote consistency and realism in the making of such orders.

Section 18: Wasted costs [*Proposals 33 and 34 – Recommendations 93 to 97*]

71. In the light of consultees' views, the Working Party recommends that the present threshold for making wasted costs orders – impropriety, unreasonableness or delay such as to amount to misconduct on the part of the lawyer in question – should not be lowered to include negligence which

does not amount to misconduct. It recommends that the present jurisdiction should be extended to cover barristers.

72. Steps should be taken to reduce the danger of disproportionate satellite litigation being spawned by the wasted costs jurisdiction. It should be made clear in the rules or practice directions that :-

- (a) the risk of a wasted costs claim being disproportionate in terms of effort or expense will be treated as an important negative factor when deciding whether the relevant lawyer should show cause why he should not have to bear the costs personally under O 62 r 8(2); and,
- (b) the court will refuse to make a “show cause” order unless on the material before it there is a clear case which, if unanswered, would justify a wasted costs order: nebulous or highly arguable allegations likely to lead to disproportionate satellite litigation should be rejected as a basis for a wasted costs application.

73. Measures must also be taken against possible abuse by one party seeking a wasted costs order against the other side’s lawyers as a means of intimidation or oppression or of depriving the other side of their lawyers familiar with the case. Accordingly, the rules should provide, both in relation to applications for a “show cause” order and at the stage of deciding whether to make a wasted costs order, that :-

- (a) applications against the other side’s lawyers should only be made at the conclusion of the proceedings;
- (b) threats of such proceedings should be treated as improper if made with a view to pressurising or intimidating the other party or his lawyers; and,

(c) any party who wishes to put the other side's lawyers on notice of a potential claim for wasted costs should refrain from doing so unless he is able to particularise the misconduct on the part of such lawyers alleged to be the reason for incurring wasted costs and to identify the evidence or other materials relied on in support.

74. The court should also be sensitive to cases where a practitioner is precluded by legal professional privilege from giving his full answer to any such application, so that in such cases, the court should not make an order unless, proceeding with extreme care, it is satisfied that there is nothing the practitioner could say, if unconstrained, to resist the order; and that it is in all the circumstances fair to make the order.

Section 19: Witness statements and evidence [*Proposals 35 to 37 – Recommendations 98 to 100*]

75. Proposal 35 canvassed adoption of CPR provisions which give the court power to exclude evidence that would otherwise be admissible with a view to countering the tendency to overload the evidence and to invest disproportionate effort and expenditure in the preparation of witness statements. This attracted objections from many consultees as being contrary to fundamental common law principles, as being unworkable and as undesirably requiring the judge to descend into the arena. The general view was that the court ought instead to use its case management powers and costs sanctions to deter prolixity rather than attempt to exclude evidence.

76. In the context of other reforms which have been proposed, the Working Party agrees that such a case management approach is preferable. It is also noted that a more stringent attitude towards relevance has been adopted in

some authorities so that undue prolixity may render reiterations of evidence irrelevant and subject to exclusion on that ground.

77. To discourage over-worked witness statements, the Working Party recommends adopting a rule giving the court discretion to permit witnesses to go beyond the contents of their witness statements if there is good reason for doing so and, if necessary, allowing them to do so subject to terms.

Section 20: Expert evidence [*Proposals 38 to 40 – Recommendations 101 to 107*]

78. Expert evidence is presently governed by section 58 of the Evidence Ordinance which lays down as conditions of admissibility the requirement that the witness and the subject-matter of the evidence qualify for expert status, and that the evidence is relevant to the issues in dispute. By O 38 r 4, the court has power to limit the number of experts to be called and, by O 38 r 36, expert evidence can only be called with the leave of the court if pre-trial disclosure of the substance of his evidence, usually by exchange of expert reports, has been made.
79. In the Working Party's view, it is unnecessary to introduce a general discretionary power to exclude expert evidence which has not been excluded under the present rules. The Working Party accordingly recommends against adopting Proposal 38.
80. Under Proposal 39, five measures aimed at countering a lack of impartiality or independence among expert witnesses were canvassed. Three of these received widespread support: (i) a rule expressly emphasising the supremacy of the expert's duty to the court over and above any duty owed to the client or person paying his fees; (ii) a rule requiring the expert to acknowledge that overriding duty in his report; and (iii) a rule requiring him

to declare his agreement to be bound by an approved code of conduct for experts. The Final Report makes recommendations along those lines.

81. The fourth measure, involving the suggestion that experts be required to disclose the substance of the instructions upon which their report is based, raised serious concerns as to the abrogation of legal professional privilege and possible inconsistency with the right to confidential legal advice protected by Article 35 of the Basic Law. In the light of these concerns (which raise arguable issues), the Working Party has decided against adoption of this proposal.
82. The fifth measure canvassed was aimed at supporting the independence of experts by permitting them to approach the court for directions in their own names and capacity without notice to the parties, but at the parties' expense. This met cogent objections, including the argument that it is likely to inject distrust between parties and their experts through use of an undesirably non-transparent procedure which was likely to erode legal professional privilege. Many consultees also suggested that such a power is unlikely to be used, it being much more plausible that an expert would ask his client to seek directions if any question regarding his own role arose.
83. The Working Party recognizes that the appointment of single joint experts may be beneficial only in certain cases and may be counter-productive in others. It recommends that the court should have 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 specified guidelines, that the other party's refusal to agree to a single joint expert is unreasonable in the circumstances.

Section 21: Case managing trials [*Proposal 41 – Recommendations 108*]

84. As with similar proposals discussed above, the Working Party recommends against introducing a power for the court to exclude otherwise relevant and admissible evidence which may be thought likely to contribute to prolixity in the trial context.
85. The favoured approach, recommended by the Working Party, is to adopt enhanced powers for managing trials (such as those to be found in Western Australia) enabling appropriate directions to be given at the pre-trial review stage and also to rein in prolixity by adopting a more stringent view of relevance in the course of the trial.

Section 22: Leave to appeal [*Proposals 42 to 47 – Recommendations 109 to 118*]

86. Reflecting the general support for this proposal by consultees and the practice that has long been in place in other jurisdictions, the Working Party recommends that a requirement for leave to appeal should be introduced for interlocutory appeals from the CFI judge to the Court of Appeal. Excepted from this rule should be cases where the interlocutory decision is decisive of a party's substantive rights (involving summary judgments, striking-out orders and the like) and also specially exempted cases (such as orders for contempt, refusals of habeas corpus, refusals of leave to bring judicial review proceedings, and so forth). Appeals from the master to the CFI judge should continue to be available as of right.
87. Procedures designed to avoid separate oral hearings for applications for leave to appeal should be introduced. Where the Court of Appeal refuses leave, such refusal should be final, with no right to apply for leave to appeal to the Court of Final Appeal. Where, however, the Court of Appeal grants

leave and determines the appeal, leave to appeal to the CFA may be granted under section 22(1) of the Hong Kong Court of Final Appeal Ordinance where the question involved is one which, by reason of its great general or public importance, or otherwise, ought to be submitted to the Court for decision.

88. It is not recommended that a requirement for leave to appeal should be introduced in respect of final (as opposed to interlocutory) judgments at first instance.
89. Where leave to appeal is required, leave should only be granted where the court considers that the appeal would have a reasonable prospect of success (understood to mean something more than a prospect of success which is “not fanciful”, but without having to be “probable”). Leave should also be granted where there is some other compelling reason why the appeal should be heard.

Section 23: Appeals [*Proposals 48 to 50 – Recommendations 119 to 121*]

90. The proposed introduction of a case management questionnaire was thought unhelpful by all the judges of the Court of Appeal and is therefore not recommended.
91. However, in accordance with the unanimous views of those judges, the Working Party recommends that procedures be introduced to enable interlocutory applications relating to pending appeals (eg, for a stay of execution or for security for the costs of the appeal) to be dealt with on paper by two Justices of Appeal without a hearing, giving brief reasons for their decision; or, if appropriate, directing that there should be a hearing before themselves or before a panel of three judges. Appeals from such

decisions should be subject to the usual requirements of the Court of Final Appeal for leave to appeal in respect of interlocutory questions.

92. Appeals to the Court of Appeal are presently in the nature of a re-hearing where the facts may be re-assessed and, exceptionally, new evidence admitted. Consultees were generally against changing this and were not in favour of the Court of Appeal moving more towards a function of reviewing the lower court's decision, as has occurred in England and Wales under the CPR. The Working Party agrees and does not recommend change in this context.

Section 24: General approach to inter-party costs [*Proposal 51 – Recommendation 122*]

93. Under the RHC, the award of costs is in the court's discretion. However, O 62 r 3(2) establishes as the usual or dominant approach, the principle that costs should be ordered to "follow the event", ie, paid by the loser to the winner of the interlocutory application or the action, as the case may be. The rules also recognize that costs orders may be used to deter unwarranted steps in the proceedings. The latter approach is, however, not expressed to be a dominant principle.
94. Proposal 51 canvassed modification to the dominant rule in three respects :-
- (a) that the "follow the event" principle should no longer be dominant, but merely one principle to guide the court's discretion;
 - (b) that the reasonableness or otherwise of the parties' conduct should be expressly linked to the "overriding objective" canvassed in Proposal 1 and should be made the basis for making interlocutory costs orders; and,

(c) that costs orders should be made in respect of the parties' conduct before as well as during the proceedings.

95. The Working Party recommends adoption of the first and second aspects of the proposal with certain qualifications :-

(a) the "follow the event" principle should remain the usual approach when dealing with the costs of an action and any interlocutory costs ordered to be "in the cause";

(b) it should also remain an important basis for dealing with interlocutory costs but should not be accorded dominant status in that context; the use of costs orders to deter unreasonable interlocutory behaviour should be given equal, if not greater, prominence; and,

(c) the rule should require the court to have regard to the underlying objectives referred to in Recommendation 2, as well as other relevant matters.

96. The third suggestion, for costs order to be made in respect of pre-commencement conduct, is not adopted, in line with the Working Party's objective of avoiding front-loaded costs.

Section 25: Costs transparency [*Proposals 52, 53, 55 and 56 – Recommendations 123 to 129*]

97. The Final Report responds to criticisms from some quarters that the Interim Report is deficient in failing to deal with conditional (or contingency) fees and higher rights of audience for solicitors. Each of these matters involves complex questions and falls outside the Working Party's remit. However, in so far as it is suggested that they necessarily represent an expedient way to reduce costs in civil litigation, that proposition is not accepted.

98. The Working Party, with the exception of one member, recommends adoption of Proposal 52 after further consultation as to its implementation. This involves solicitors and barristers being placed under an obligation to provide their clients with full information as to the basis on which fees and disbursements will be charged; giving their best estimates of their fees and other costs to cover various stages of the litigation process; and updating or revising information and estimates as and when circumstances require, giving reasons for any such changes. It is envisaged that solicitors should have a duty to provide such information and estimates upon receiving instructions and that barristers should provide the same via their instructing solicitors upon request by the client or the solicitors.
99. After reviewing previous unsuccessful attempts by the Bar Council at introducing relevant reforms and surveying the published views of various sectors of the public on the matter, the Interim Report canvassed in Proposal 53 the removal, by legislation if necessary, of restrictive rules currently forming part of the Bar Code which prevent publication by those barristers who may wish to do so, of information about their practices, fees charged and experience or expertise in a seemly and properly regulated manner.
100. However, in view of strongly divergent views, the majority of the Working Party considered it inappropriate to reach a concluded view at the present stage. No one disputed that transparency in relation to barristers' fees is desirable, but the Working Party (except two members) considered it preferable to recommend that further consultation should be undertaken by the Chief Justice as to whether rules permitting the publication by barristers of information about their fees are desirable, leaving all options open for the present. The Working Party so recommends.

101. The two members were opposed to any consultation which contemplated change by way of legislation, arguing that professional autonomy has to be respected and preserved.
102. The Working Party noted the difficulties experienced in England and Wales in attempting to define and operate a system of benchmark costs. The concern expressed by some members that the concept of “benchmark costs” might encourage anti-competitive behaviour persists. The Working Party accordingly considers that a less ambitious course, involving the regular collection, tabulation and publication of available reliable information as to fees and costs, derived from sources such as awards made on taxation, should be adopted with a view to developing costs indications for general guidance.
103. The Working Party does not recommend adoption of the proposal that the parties should be obliged to make mutual disclosure of costs incurred and estimated future costs given strong opposition from many consultees, primarily on the ground that this would impair legal professional privilege.

Section 26: Challenging one’s own lawyer’s bill [*Proposal 54 – Recommendation 130*]

104. The Working Party recommends against altering the rules which presently govern a client’s entitlement to challenge his own lawyer’s charges on a solicitor and own client taxation.

Section 27: Taxing the other side’s costs [*Proposals 57 to 61 – Recommendations 131 to 136*]

105. A provision in the 1st Schedule to Order 62 lays down an anomalously generous criterion for the acceptance of counsel’s fees on a party and party

taxation. The Working Party recommends its deletion so that such fees are taxed in accordance with the usual party and party approach.

106. It is also recommended that sanctioned offers and payments be applicable to the costs of undertaking inter-partes taxations, except in cases involving legally-aided parties.
107. The Working Party supports the proposal that the court should have a 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.
108. The Working Party also supports introduction of rules or practice directions, backed by flexible costs sanctions, 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.

Section 28: CPR Schedule [*Proposal 62 – Recommendation 137*]

109. This Proposal is nugatory in the light of Recommendation 1.

Section 29: Alternative dispute resolution [*Proposals 63 to 68 – Recommendations 138 to 143*]

110. The Interim Report placed before consultees six options for how the court should approach alternative dispute. These involved :-
 - (a) a statutory rule which makes ADR compulsory for particular types of cases;
 - (b) a rule whereby the court may order the parties to engage in ADR;

- (c) a rule making ADR compulsory where one party elects for ADR;
 - (d) a rule enabling the Director of Legal Aid to limit legal aid to ADR in appropriate cases, making an attempt at ADR a condition of any further legal aid;
 - (e) a rule making an unreasonable refusal of ADR or uncooperativeness in the ADR process the basis for making an adverse costs order; and,
 - (f) an approach whereby the court's role is limited to encouraging and facilitating purely voluntary ADR.
111. The Final Report focusses particularly on mediation, but intends the discussion to take in all relevant forms of ADR.
112. Five general concerns or objections were voiced in the consultation process touching upon (i) the constitutionality of making access to the court conditional on undertaking mediation; (ii) the duty of the court to resolve disputes rather than sending parties elsewhere; (iii) the adequacy of mediation services in Hong Kong; (iv) the inherent probability of failure where mediation is other than voluntary; and (v) the risk of incurring additional costs where mediation fails. The legal aid proposal was also thought by some to be discriminatory against poorer litigants and the costs proposal thought to be of doubtful workability.
113. The Working Party agrees that these concerns are important and must be addressed in deciding which of the options to recommend. After detailed consideration of each of the issues raised, the Working Party has decided to make the following recommendations :-
- (a) that the uncontroversial Proposal 68 (for the court to provide litigants with better information and support with a view to encouraging

greater use of purely voluntary mediation) should be adopted in conjunction with other appropriate measures to promote court-related mediation;

- (b) that, subject to further study and consultation and subject to detailed rules being promulgated, the Legal Aid Department should have power in suitable cases to limit its initial funding of persons who qualify for legal aid to the funding of mediation, retaining its power to fund court proceedings where mediation is inappropriate or where mediation has failed; and,
- (c) that Proposal 67 should be adopted, so that, subject to the adoption (after due consultation) of appropriate rules, the court should have power, after taking into account all relevant circumstances, to make adverse costs orders in cases where mediation has been unreasonably refused after a party has served a notice requesting mediation on the other party or parties; or after mediation has been recommended by the court on the application of a party or of its own motion.

Section 30: Unrepresented litigants

114. The Final Report discusses actual and potential initiatives from within and outside the Judiciary towards helping unrepresented litigants to navigate litigation in the courts. It describes recent measures taken by the Judiciary, especially the establishment in December 2003 of a Resource Centre for unrepresented litigants in the High Court Building. Details are on the Centre's website at <http://rcul.judiciary.gov.hk/rc/cover.htm>. Aspects of recommendations for reform which require sensitivity to the needs of such litigants are also discussed.

Section 31: Judicial review [*Proposals 69 to 73 – Recommendations 144 to 149*]

115. The Working Party recommends adopting Proposal 69 to help clarify the rules as to when judicial review procedures must, and when they may, be used.
116. It also supports the proposal that provision should be made to enable persons wishing to make representations 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.
117. Proposals 71 and 72 are supported. The Working Party considers it beneficial to have a rule requiring applications for leave to bring a claim for judicial review to be served on the proposed respondent and on any other persons known by the applicant to be directly affected by the claim. The persons served would have 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. Where leave is granted, the order granting leave and any case management directions should 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 would then be entitled, if they so wish, to file grounds and evidence to contest, or to support on additional grounds, the claim for judicial review.
118. The Working Party is not in favour of Proposal 73 for a rule expressly empowering the court in stated circumstances, after quashing a public authority's decision, itself to take that decision.

Section 32: Material support for the reforms [*Proposals 76 to 80 – Recommendation 150*]

119. The Final Report emphasises the need for adequate resources, proper training of all concerned, the supporting use of information technology and continuous monitoring in relation to the implementation of the proposed reforms. Consultees were unanimously of the view that these are essential requirements.

FINAL REPORT

Section 1: Introduction

1.1 Terms of reference

1. In February 2000, this Working Party was appointed by the Chief Justice 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.”

1.2 Membership of Working Party

2. The Working Party consists of the following members :-

The Hon Mr Justice Chan, Permanent Judge of the Hong Kong Court of Final Appeal (Chairman)

The Hon Mr Justice Ribeiro, Permanent Judge of the Hong Kong Court of Final Appeal (Deputy Chairman)

The Hon Mr Justice Ma, Chief Judge of the High Court (as from 18 August 2003)

The Hon Mr Justice Rogers, Vice-President of the Court of Appeal

The Hon Mr Justice Seagroatt, Judge of the Court of First Instance (until 17 August 2003, appointment terminating upon retirement from the Bench)

The Hon Mr Justice Hartmann, Judge of the Court of First Instance

The Hon Madam Justice Chu, Judge of the Court of First Instance

Mr Ian Wingfield, Law Officer, Member of the Department of Justice appointed in consultation with the Secretary for Justice

Mr S Y Chan, Director of Legal Aid

Mr Geoffrey Ma SC, Barrister appointed in consultation with the Chairman of the Bar Association (until 3 December 2001) re-appointed as the Hon Mr Justice Ma CJHC (above).

Mr Ambrose Ho SC, Barrister appointed in consultation with the Chairman of the Bar Association (as from 3 December 2001)

Mr Patrick Swain, Solicitor appointed in consultation with the President of the Law Society

Professor Michael Wilkinson, University of Hong Kong

Mrs Pamela Chan, Chief Executive of the Consumer Council

Master Jeremy Poon, Master of the High Court (Secretary)

Mr Hui Ka Ho, Magistrate (Research Officer)

1.3 The Interim Report and Consultative Paper

3. On 21 November 2001, the Interim Report and Consultative Paper (“the Interim Report”) was published. It was made available in print and CD-ROM versions and also published on the internet.¹ Its publication was accompanied by a press conference as well as briefings to members of the Legislative Council’s Panel on Administration of Justice and Legal Services, representatives of the Bar Council, the Council of the Law Society, the Department of Justice and the local media. Judges and masters of the High Court and District Court were also briefed.
4. It was originally intended that the consultation period should last for five months, ending on 30 April 2002. However, at the request of the Bar Council, this was extended by two months to the end of June 2002. During the consultation period, members of the Working Party gave a number of

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¹ The Working Party’s website is at <http://www.civiljustice.gov.hk>.

press interviews on the mooted reforms. They also gave lectures and spoke at seminars involving various interested bodies, as indicated on our website. *Appendix 1* lists the Consultation Activities undertaken.

5. Some 5,000 copies of the print version and over 500 CD-ROMs of the Interim Report were distributed, as were approximately 12,000 copies of the Executive Summary. The website received over 41,000 hits, including almost 6,000 download hits (over 1,600 of which were for downloading the entire Interim Report).
6. A total of 96 written submissions were received, ranging from substantial responses by interested entities discussing the whole range of proposals to individual comments on particular proposals. They also included a few responses of no relevance to the consultation exercise. The names and available details of the respondents are listed in *Appendix 2*.

1.4 The object of this Final Report

7. The Working Party now seeks, in the light of the responses received in the consultation process, to identify the areas where reform is considered necessary or desirable and to make recommendations to the Chief Justice accordingly.
8. We should perhaps make it clear that recommendations made in this Final Report are formulated with a view to identifying the changes thought necessary or desirable, not as an exercise in drafting. Furthermore, the recommendations made focus directly on the rules thought to require change, without attempting to identify any consequential changes that would be necessary if the recommendations were accepted. Where existing rules have not been mentioned, this is because the Working Party has not

considered any reforms specifically directed at those rules. However, such rules may require consequential amendment or may profit from further consideration on a separate occasion.²

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² This applies in particular to rules relating to enforcement of judgments and orders which have not been addressed either in the Interim Report or in this Final Report.

Section 2: A new code or selective amendment?

Proposals 74 and 75

Proposal 74

Assuming that a series of Proposals in this Report are to be recommended by the Working Party, they should be implemented by adopting a new set of rules along the lines of the CPR and of relevant rules from other jurisdictions (with any necessary modifications).

Interim Report paras 693-701

Proposal 75

In the alternative to Proposal 74, recommended Proposals should be implemented by amending, but otherwise retaining, the existing RHC.

Interim Report paras 693-701

9. As is evident from the numerous proposals floated for consultation in the Interim Report, a large number of procedural innovations deriving from other jurisdictions, particularly England and Wales, merit consideration and may help to increase the cost-effectiveness of litigation in Hong Kong. Some of these innovations could no doubt be grafted onto our existing system of rules. Such was the approach in New South Wales and is the approach canvassed by *Proposal 75*. It also falls to be considered whether, as Lord Woolf forcefully argued, the adoption of an entirely new code along the lines of the Civil Procedure Rules 1998 (“CPR”) is either essential or desirable for the effective implementation of the proposed reforms. This is the option canvassed by *Proposal 74*.

2.1 The consultation response

10. The choice between the two Proposals is not an easy one. While this issue was raised near the end of the Interim Report, after discussion of the range of possible reforms, it should be dealt with here at the outset since the option chosen provides the setting for dealing with all the other proposals.
11. Respondents to the consultation were much divided in their views.³ As the Hon Ms Margaret Ng, speaking in Legco, pointed out, the broad themes in the Interim Report mostly received general support in principle but were nonetheless “deeply controversial when it comes to the details of implementation.”⁴ Some of those in favour of adopting an entirely new code along the lines of the CPR⁵ argued that such an approach :-
- was needed to promote a necessary cultural change;
 - would introduce rules in plain English which would be more user-friendly;
 - would avoid possible clashes between old rules and new concepts, and so avoid satellite litigation;

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³ Indeed, the DOJ thought it premature to take a stand on this issue and reserved its position until after the Final Report.

⁴ References to named members of the Legislative Council “speaking in Legco” are references to speeches made on 8 May 2002 when a motion debate on the Interim Report was held.

⁵ Including, sometimes with qualifications, several High Court judges, the District Court judges and masters, the Hon Ms Margaret Ng speaking in Legco, the APAA, the JCGWG, three firms of solicitors and three individual respondents. One set of barristers’ chambers preferred *Proposal 74*, but said it held no strong view.

- would avoid a great deal of drafting since most of the CPR could simply be adopted;
- would enable the courts to treat English decisions on the CPR as persuasive precedents.

12. Those in favour of *Proposal 75* and so of proceeding by way of amendment to the RHC included the Bar Association and the Law Society.⁶ A variety of reasons were given, including the following :-

(a) The Bar Association stressed the relative ease of mastering amendments over having to learn a whole new code :-

“..... given the long history of the existing rules, it is relatively easier for lawyers and judges to adapt to changes by familiarising themselves with specific amendments as opposed to a wholly new code.”

(b) The Law Society thought a new code unnecessary :-

“..... the reforms can and should be implemented (to the same degree in substance) by amending and supplementing the existing rules and where necessary re-interpreting existing rules.”

(c) One set of barristers’ chambers argued in favour of incremental change :-

“We believe that a ‘step-by-step’ approach, rather than a ‘root and branch’ change, is more appropriate for Hong Kong. We consider that the existing civil system, which has evolved over 150 years, if it is properly used and amended where necessary, represents a tested framework for the efficient and effective administration of civil justice. It provides reasonable certainty as to the likely result which is important.”

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⁶ Others in favour of *Proposal 75* included several other High Court judges, the High Court masters, a set of barristers’ chambers, a firm of solicitors, the HKMLA and a member of the English Bar.

- (d) One judge stressed the need for caution as a reason for favouring *Proposal 75* :-

“The amendment route, whilst requiring a greater investment initially in terms of effort, is considerably less fraught with risks and therefore the less likely to disappoint in the long run.”

- (e) A solicitors’ firm questioned the benefits of opting for an entirely new procedural code :-

“It is far too early to categorically state that there should be wholesale civil procedure reform based on the experience of England. Further, the little credible evidence that exists to date suggests that whilst reform may have reduced (in part) the complexity of civil litigation (in fast track cases in England), there has not generally been any significant saving of costs or reduction in delay. On that basis, thus far, we are not convinced that it is ‘necessary’ to have wholesale civil procedure reform in Hong Kong.”

- (f) The HKMLA favoured a cautious, phased approach, monitoring the impact of reforms before considering further steps. They also pointed to the increasing complexity of the CPR as a reason to avoid their adoption.

2.2 *The Working Party’s view*

(a) *The anticipated benefits of an entirely new code*

13. In March 2001, the first evaluation of the operation of the CPR was published by the Lord Chancellor’s Department (the “LCD”) entitled *Emerging Findings* (“LCD-EF”). The criteria adopted for measuring the success of the reforms involved asking to what extent they had led to :-

- (a) litigation being avoided wherever possible;
- (b) litigation becoming less adversarial and more co-operative;
- (c) litigation becoming less complex;

- (d) the timescale of litigation becoming shorter and more certain;
 - (e) the cost of litigation becoming more affordable, more predictable, and more proportionate to the value and complexity of individual cases; and,
 - (f) parties of limited financial means becoming able to conduct litigation on a more equal footing.
14. These criteria are helpful in trying to decide whether to adopt the CPR as a whole. One may ask – while always bearing in mind the circumstances peculiar to Hong Kong – to what extent those benefits appear to have been achieved in England and Wales during the first 4½ years or so of the new code’s operation.
15. From available assessments of the performance of the CPR, it appears that the CPR have been successful in some areas but disappointing in others. It seems clear that fewer proceedings are being started and that the time taken between issuing those proceedings and trial has on average been significantly reduced. It also appears that in some areas, litigation may have become less adversarial and more cooperative with more cases settling earlier and fewer cases settling at the courtroom door. These are the successes, particularly in relation to smaller, lower-value cases. However, there have been notable disappointments in relation to costs and complexity. There is also doubt as to whether greater equality between wealthy and less wealthy litigants has been achieved.
16. Of special concern has been the acknowledged failure, so far, to bring litigation costs down. Worse still, the problem of front-end loading of costs

arising from introducing measures such as the pre-action protocols has actually led to an increase in costs in some cases.

- (a) In March 2001, the 3rd survey of the English Law Society's Woolf Network⁷ found that 45% of respondents thought that front-loaded costs were a problem.
- (b) In February 2002, the 4th Woolf Network survey recorded 81% of respondents as saying that they did not agree that the new procedures were cheaper for their clients.
- (c) In its second Evaluation published in August 2002, entitled *Further Findings* ("LCD-FF"), the LCD suggested that it was still too early to provide a definitive view on costs. However, it acknowledged that costs were a major problem :-

“A key criterion of the Access to Justice report was that litigation should be less expensive and the costs more proportionate to the value and complexity of claims. There has been a mixed response to the question of the effect of the reforms on the cost of litigation although there is growing evidence of an increase in at least some areas. For example, 45% of respondents to the Law Society Woolf Network 3rd survey said that front-loading of costs was a problem.”⁸

- (d) Lord Justice May was cited as having highlighted costs “as the biggest problem which could endanger the success of the CPR.”⁹
- (e) In a study¹⁰ conducted by Goriely, Moorhead and Abrams to assess the impact of the reforms on parties' pre-action behaviour in relation

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⁷ A group of some 130 solicitors who agreed to be polled by the Law Society on their perception of the CPR's operation (initially twice yearly, later yearly) as a means of monitoring the reforms.

⁸ At §7.2.

⁹ LCD-FF §7.3.

to personal injury, clinical negligence and housing claims, the authors described costs as posing an intractable problem, commenting as follows :-

“Reducing costs was a major objective of the reform process. Although the evidence on this issue is far from conclusive, initial indications do not suggest that case costs have decreased. Each potential saving in the reform is offset by other changes that require more work, or bring forward work to an early stage, so that it is required in a greater proportion of cases.”

Their findings also suggested that in the areas studied, costs had not become less disproportionate.

“..... both costs and damages had increased. This meant that, when expressed as a proportion of damages, costs had remained constant. In both the pre- and post-Woolf samples, the cost of small cases amounted to 68% of damages.”

- (f) While 92% of the respondents to the 5th Woolf Network survey of December 2002 considered that the reforms were working well overall, this was subject to important qualifications. The Executive Summary reported that the areas where concerns were expressed involved “the costs rules and problems with conditional fees, frontloading of costs, poor court performance, judicial inconsistency and insufficient enforcement of protocols”.
- (g) When addressing the 5th Worldwide Common Law Judiciary Conference in Sydney on 10 April 2003, Lord Woolf CJ

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¹⁰ Tamara Goriely, Richard Moorhead and Pamela Adams, *More Civil Justice? The Impact of the Woolf Reforms on pre-action behaviour*, Research Study 43 Summary, (The Law Society and the Civil Justice Council).

acknowledged that the CPR “have not yet tackled the problem of costs”.¹¹

17. Turning to the issue of complexity, the hope that the new code would provide a simple, user-friendly system of civil procedure appears not to have been fulfilled. The belief was that it might be possible in most cases to do away with references to decided cases, relying instead on broadly formulated rules construed with the guidance of the overriding objective and supplemented by practice directions and practice guides expressed in helpful language.
18. This has proved over-optimistic, as inspection of the White Book (now similar in size and complexity to the pre-CPR White Book, supplemented by a volume of forms) or any search of a legal database on a procedural question will testify. The rules, practice directions and practice guides are substantial in volume. Since judicial decisions and transcripts of judgments, including those on procedural points are now widely accessible, case-law on the CPR is increasing and is frequently being cited in judgments. The accretions of case-law to the RSC are being replaced by accretions to the CPR. One respondent to the 5th Woolf Network survey questioned “whether Woolf will resemble pre-Woolf procedure in 5, 10 or 15 years’ time.”
19. In some cases, the build-up of case-law has been essential since the new code has naturally thrown up questions requiring clarification by the court. The case of *Lownds v Home Office* [2002] 1 WLR 2450 (Practice Note) is one example. There, a costs bill of £19,405.38 had been run up by the

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¹¹ In a wide-ranging speech on “Current Challenges in Judging”, his Lordship stated: “The general view of the new rules is that they have improved procedure but, for reasons that I have not time to explain, they have not yet tackled the problem of costs.”

claimant in respect of a claim which had settled for £3,000. The CPR rule for taxing (“assessing” in CPR language) costs on the standard basis provides that the costs must be reasonably incurred and also “proportionate”. The costs judge assessed them in this case at £16,784.53. Lord Woolf CJ in the Court of Appeal described the important issues raised as follows :-

“Because of the central role that proportionality should have in the resolution of civil litigation, it is essential that courts attach the appropriate significance to the requirement of proportionality when making orders for costs and when assessing the amount of costs. What has however caused practitioners and the members of the judiciary who have to assess costs difficulty is how to give effect to the requirement of proportionality. In particular there is uncertainty as to the relationship between the requirement of reasonableness and the requirement of proportionality. Where there is a conflict between reasonableness and proportionality does one requirement prevail over the other and, if so, which requirement is it that takes precedence? There is also the question of whether the proportionality test is to be applied globally or on an item by item basis, or both globally and on an item by item basis.”¹²

20. The concept of “proportionality” is central to the Woolf reforms. It is therefore significant (and perhaps a little surprising) that these basic questions as to how that concept works in this important context remained outstanding until *Lownds* was decided in March 2002, almost 3 years after the CPR first came into operation. Given the doubts, there will have been unavoidable inconsistency in judges’ decisions in earlier, similar cases. Plainly, judicial guidance is an essential aspect of establishing the new code

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¹² The Court of Appeal explained that the correct approach involved a two-stage approach, looking first at the global amount and then at each item of the bill in turn. If the global amount was not disproportionate, one needs only to consider the reasonableness of each item. But if disproportionate, the necessity of incurring each item would also have to be considered and if unnecessary, the item would be disallowed. The court considered the proportionate amount to be in the region of £6,500 to £7,000 but left the award untouched since it decided against giving the guidance offered retrospective effect.

and illustrating how the broad concepts it employs should operate. This inexorably leads to the development of a procedural jurisprudence.

21. The aim of making the rules more understandable to unrepresented litigants by eliminating the use of legal Latin and replacing archaic expressions with more modern ones may have had some success in England and Wales. However, in the Hong Kong context, where the vast majority of unrepresented litigants refer to the Chinese rather than the English version of the RHC, this benefit does not accrue from adopting the CPR. Instead, as indicated above, simplifying and modernising the English version would require a fresh Chinese translation, but with little return to justify such an investment of labour. While it is possible that the more modern English of the CPR would be easier to translate and might result in rules in Chinese which may be a little easier to understand, the problems of Latinisms and archaic English do not arise in relation to the Chinese version of the RHC in its present form. Procedural concepts have been given functional translations, that is, translations in contemporary Chinese indicating the purpose or effect of the procedure in question, requiring no modernisation.

(b) An entirely new code would mean more disruption

22. The effort involved in effecting a major reform to the civil justice system would be substantial whichever approach is adopted. However, whereas the *Proposal 75* approach of amending the RHC might involve more effort in the initial drafting process, it is likely to make considerably fewer demands on the legal community as a whole.¹³ Learning about amendments and

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¹³ Meaning the elements of our legal community, being members of the legal profession and otherwise, which may have cause to be concerned with civil litigation.

additions to familiar rules in the RHC will take some doing. But it would be less disruptive and less demanding than to require everyone to master an entirely new procedural code. If, for example, we were to adopt the CPR, every member of the legal community would have to learn not only what changes have been made and what new measures introduced, but also the new terminology and where exactly in the new rules equivalents – if they exist – of procedures presently contained in the Orders of the RHC are to be found. They would also have to familiarise themselves with the case-law that has developed in relation to the CPR in England and Wales and discard much of the familiar case-law illuminating the RHC.

23. While it is tempting to think that adopting the CPR wholesale would result in huge savings in the drafting department, adopting the CPR methodology of introducing broadly formulated rules coupled with practice directions and practice guides¹⁴ would still necessitate a substantial amount of drafting work, as well as consultation with local interest groups, to ensure that the Hong Kong version of each rule and practice direction is properly adapted to local conditions. Additionally, a fresh Chinese translation would have to be prepared, an effort hard to justify in the light of the serviceable Chinese version which presently exists, as explained below. A significant cost in terms of drafting would be involved even if the *Proposal 74* approach were to be adopted.
24. The Working Party therefore approaches the choice between the two Proposals on the footing that adopting an entirely new code – effectively the whole of the CPR subject to some modifications – is likely to involve

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¹⁴ Described in the Interim Report at §§134-137, §227 and §231.

significantly more cost in terms of effort and disruption for the legal community in Hong Kong. One must therefore ask to what extent such additional cost would be justified. This provides the background against which the pros and cons of each of these two Proposals are to be assessed.

(c) The Working Party's approach

25. The foregoing discussion indicates that serious doubts exist as to whether some of the key benefits intended to flow from adopting an entirely new code would in fact materialise if the CPR were adopted in Hong Kong. The ratio of effort to anticipated benefits would appear somewhat less favourable than the ratio envisaged by Lord Woolf in the English context, militating against adoption of *Proposal 74*.

26. The approach which the Working Party therefore adopts is :-

(a) to try, if possible, to avoid the pitfalls revealed by the CPR experience, for example, in respect of measures carrying front-loaded costs;

(b) to try to form a realistic view of the benefits likely to be achievable under local conditions; and

(c) to ask whether such benefits can be achieved with less effort than by introduction of an entirely new code.

27. In the Working Party's view, some of the most beneficial reforms can readily be adopted without a wholesale change to the existing rules. Two of these were discussed by Lord Phillips MR as part of his general review of how the Woolf reforms were working, delivered at a Law Society Civil Litigation Conference held on 24 January 2002.

- (a) The first of the great successes involves Part 36 offers of settlement,¹⁵ as to which his Lordship stated :-

“The number of actions settling before trial has increased by 20% and the number settling at the door of the court has diminished by 10%. I suspect that these figures are largely due to the simple, but inspired, innovation which is an important element of the Woolf reforms, namely that under Part 36 of the Rules not merely a defendant, but also a claimant can make a settlement offer.”

- (b) The second involves a bundle of measures, including the making of immediately payable and summarily assessed costs orders in place of orders for costs payable “in any event”, which have resulted in the reduction of interlocutory skirmishes and interlocutory appeals. Lord Phillips put it as follows :-

“There was a fear that the new rules would lead to a proliferation of interlocutory in-fighting. This fear has not been realised. I believe that this is largely attributable to what has been described as a ‘pay as you go’ system of awarding costs. Under CPR 44 the court is required to make a summary assessment of costs on giving judgment on an interlocutory application and those costs had to be paid within 14 days. In the old days interlocutory costs orders would not normally have to be paid until conclusion of the litigation. The fear of having to call upon one’s client to write a cheque for costs incurred in an interlocutory skirmish must be a powerful disincentive to interlocutory proceedings unless success seems certain. The reduction of interlocutory in-fighting and, in particular, of interlocutory appeals is one of the major success stories of the Woolf reforms.”

28. Clearly, it would be quite simple to introduce the equivalent of Part 36 offers and payments by amending the RHC. This could also be done in respect of rules changing the court’s approach to the costs of interlocutory applications. The same applies to other measures aimed at discouraging unnecessary interlocutory applications. And a rule making leave to appeal necessary for interlocutory appeals can obviously be added without

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¹⁵ Discussed as “sanctioned offers and payments” in Section 11 below.

difficulty, such a rule having been part of the RSC before adoption of the CPR in England and Wales.

29. The Working Party is therefore in favour of *Proposal 75* for the implementation of reforms by amendment, rather than the wholesale adoption of the CPR. It will be on this footing that discussion of the various proposed reforms in the following pages proceeds. Additions to and subtractions from the RHC as they presently exist would have to be made if the recommendations made below are accepted. However, the framework of the RHC and most of the corpus of the rules would remain in place.
30. An additional consideration also supporting the amendment approach is of importance. Where one retains the well-established basic structure of the rules, adding to or subtracting from it by amendment, any changes which unexpectedly turn out to be counter-productive are likely to be more easily undone by falling back on the pre-existing scheme than changes which form part of an entirely new code. Where an entirely new code is adopted, the pre-existing structure will have been removed or radically altered, making it difficult to unscramble a reform that proves to have been a mistake. This would especially be so if the provisions in question are closely related to fundamentally new concepts or mechanisms, such as those involving pre-action protocols or the overriding objective or proportionality. Easier reversibility is valuable where introduction of a reform is thought to be desirable but to require a degree of caution.

Recommendation 1: The proposed reforms recommended for adoption in this Final Report should be implemented by way of amendment to the RHC rather than by adopting an entirely new procedural code along the lines of the CPR.

31. In deciding which reforms to recommend, the Working Party has been guided by the objectives of improving the cost-effectiveness of our system of civil procedure, reducing its complexity and lessening the delays encountered in litigation, in the light of the responses received in the consultation process; always subject to the fundamental requirements of procedural and substantive justice.
32. Procedures become more cost-effective where they help to ensure that each item of costs incurred achieves more towards bringing the parties closer to a resolution of their dispute, whether by reaching settlement or arriving at a final adjudication.
33. To that end, the Working Party has sought, for example, to find ways of simplifying procedures, lessening the number of procedural steps needed, getting more done at any one hearing, dealing with more applications on paper, penalising unnecessary applications, discouraging over-elaboration in pleadings, witness statements and oral evidence, restricting interlocutory appeals, and so forth.
34. These aims also involve countering the excesses of the adversarial system, fostering greater openness between the parties, finding ways of encouraging earlier settlement and giving proper consideration to alternative modes of dispute resolution.

35. The reforms recommended call for the court's greater involvement in case managing litigation and monitoring its progress, setting timetables tailored to the needs of particular cases.
36. As explained in the Interim Report and touched upon further below, one cannot be assured that a reduction of litigation costs will necessarily follow from such reforms alone. Other factors are equally important. However, by improving cost-effectiveness, cutting delays and reducing complexity, such reforms should help to achieve overall cost reductions and to make the system more responsive to the needs of individual cases.

Section 3: Procedural reform and the Basic Law

37. There are certain points at which our constitutional guarantees of rights and freedoms may intersect with some of the procedural reforms canvassed.¹⁶ This was mentioned in the Interim Report and touched upon by some of the respondents to the consultation. Concern was expressed about proposals relating to mandatory alternative dispute resolution (“ADR”),¹⁷ to dispensing with certain oral hearings¹⁸, to empowering the court to limit the evidence adduced,¹⁹ and the like.
38. The Working Party recognizes that any procedural reforms must be able to operate in conformity with applicable rights guaranteed by the Basic Law (“BL”) and the Hong Kong Bill of Rights (“BOR”). It is therefore necessary to identify the principles which have to be accommodated.

3.1 The constitutional provisions and international counterparts

39. Article 35 of the Basic Law (“BL 35”) and Article 10 of the Hong Kong Bill of Rights (“BOR 10”) are the main provisions relevant to procedural issues. By BL 35, Hong Kong residents are guaranteed a right of access to the courts in the following terms :-

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¹⁶ Such constitutional issues may also intersect with existing procedural arrangements, but that is not a matter for present discussion save in so far as it bears on a proposal for reform.

¹⁷ The Bar Association, the BSCPI and the JCGWG.

¹⁸ The Law Society and the HKMLA.

¹⁹ The Bar Association and a solicitors’ firm.

“Hong Kong residents shall have the right to confidential legal advice,²⁰ access to the courts, choice of lawyers for timely protection of their lawful rights and interests or for representation in the courts, and to judicial remedies.

Hong Kong residents shall have the right to institute legal proceedings in the courts against the acts of the executive authorities and their personnel.”

40. BL 39 relevantly provides :-

“The provisions of the International Covenant on Civil and Political Rights as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.

The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law

41. As the Court of Final Appeal has held,²¹ the Hong Kong Bill of Rights Ordinance effects the incorporation into our domestic laws of the International Covenant on Civil and Political Rights (“ICCPR”) as applied to Hong Kong. By BOR 10, everyone is entitled, inter alia, to “a fair and public hearing” before the court, provided for as follows :-

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

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²⁰ The relevance of BL 35 to procedural rules seeking to abrogate legal professional privilege is discussed in Section 20 below in the context of expert witnesses.

²¹ *HKSAR v Ng Kung Siu* (1999) 2 HKCFAR 442 at 455; *Lau Cheong v HKSAR* (2002) 5 HKCFAR 415.

42. BOR 10 implements Article 14 of the ICCPR and is substantially similar to Art 6(1) of the European Convention on Human Rights (“ECHR”) which provides as follows :-

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

43. In *Shum Kwok Sher v HKSAR* (2002) 5 HKCFAR 381 at §59, the Court of Final Appeal confirmed that :-

“In interpreting the provisions of Chap III of the Basic Law²² and the provisions of the Bill, the Court may consider it appropriate to take account of the established principles of international jurisprudence as well as the decisions of international and national courts and tribunals on like or substantially similar provisions in the ICCPR, other international instruments and national constitutions.”

44. Accordingly, guidance as to the scope and nature of the rights provided for by BL 35 and BOR 10 may be sought in the jurisprudence of the European Court of Human Rights in Strasbourg (“E Ct HR”) and the opinions of the European Commission of Human Rights (“the Commission”) regarding ECHR Art 6(1), and from any relevant decisions and comments of the Human Rights Committee (“HRC”) concerning ICCPR 14.

45. While the ECHR does not explicitly lay down a right of access to the courts, it has been held by the E Ct HR,²³ as one might expect, that such right is

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²² Containing both BL 35 and BL 39.

²³ *Golder v United Kingdom* (1975) 1 EHRR 524 at §36; *Z v United Kingdom* (1999) 28 EHRR CD 65; Judgment 10 May 2001 at §91.

inherent in the right to a fair and public hearing provided for by Art 6(1). The ECHR jurisprudence therefore proceeds on the footing that the Convention guarantees a right of access to the courts.

3.2 The focus of the case-law

46. The international jurisprudence bearing on procedural issues has tended to focus on the rights of access to the courts and to a fair and public hearing (together referred to here as “the access and hearing rights”). It has generally involved challenges to procedural arrangements :-
- (a) which deny certain classes of persons the right to bring proceedings in court, requiring them, for instance, first to seek the court’s or some other person’s permission, or to make certain advance payments, and so forth;
 - (b) which deny a party the right to a public and/or oral hearing and/or to be present at the hearing;
 - (c) which deny or restrict the admission of evidence which a party seeks to call in support of his case; and
 - (d) which involve the court making decisions without giving reasons or without pronouncing its judgment orally in public.
47. There may be other procedures which could engage the access and hearing rights or other constitutional rights. However, a discussion of the abovementioned categories in the context of the access and hearing rights sufficiently illustrates the principles involved and identifies the concerns to be borne in mind when considering procedural reform in Hong Kong.

3.3 *The principles*

(a) *The access and hearing rights are not absolute*

48. It is well-established in the international jurisprudence (likely to be adopted by the Hong Kong courts²⁴) that the access and hearing rights are not absolute but may be subject to appropriate restriction. Since the earliest days of the E Ct HR, it has been pointed out that the right of access by its very nature calls for regulation by the State.²⁵

49. Indeed, the non-absolute nature of the right to a fair and public hearing is expressly indicated in Art 6(1) itself (as well as in BOR 10), since provision is made for excluding the press and the public from all or part of a trial for the reasons specified.

50. It has often been re-iterated by the Strasbourg court²⁶ that, quite apart from the cases specifically provided for, a limitation on the access and hearing rights may be valid provided that :-

- (a) the restriction pursues a legitimate aim;
- (b) there is a reasonable proportionality between the means employed and the aim sought to be achieved; and,
- (c) the restriction is not such as to impair the very essence of the right.

51. Accordingly, the fact that a procedural rule has the effect of restricting any aspect of the access and hearing rights does not necessarily mean that it is

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²⁴ See the Decision of the Appeal Committee of the Court of Final Appeal in *Chow Shun Yung v Wei Pih Stella & Anr* (Unreported) FAMV No 2 of 2003, 14 May 2003.

²⁵ *Golder v United Kingdom* (1975) 1 EHRR 524 at §38.

²⁶ For instance, in *Ashingdane v United Kingdom* (1985) 7 EHRR 528 at §57 and *Tolstoy-Miloslavsky v United Kingdom* (1995) 20 EHRR 442 at §59.

unconstitutional. It may be a justifiable limitation, some examples of which are discussed below.

(b) *The access and hearing rights only apply to rules and proceedings which are decisive of rights and obligations*

52. The scope of Art 6(1) of the ECHR in relation to civil cases is confined by its opening sentence :-

“In the determination of his civil rights and obligations, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

53. The effect of these words, which is well-established in the European case-law, was summarised in *Jacobsson v Sweden (No 2)*²⁷ as follows :-

“..... according to the principles laid down in its case-law [the E Ct HR] must ascertain whether there was a dispute (*‘contestation’*) over a ‘right’ which can be said, at least on arguable grounds, to be recognised under domestic law. The dispute must be genuine and serious; it may relate not only to the existence of a right but also to its scope and the manner of its exercise; and the outcome of the proceedings must be directly decisive for the right in question.”

54. In other words, the access and hearing rights are only engaged where :-

(a) the person asserting those rights has an arguable entitlement to a civil right;²⁸ and,

(b) where the rules or proceedings said to be incompatible with the access and hearing rights are decisive of that person’s rights and do not involve purely interlocutory or case management issues.

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²⁷ Case No (8/1997/792/993) Judgment, 19.2.98 at §38.

²⁸ *Lithgow v United Kingdom* (1986) 8 EHRR 329 at §192; *Powell and Rayner v United Kingdom* (1990) 12 EHRR 355 at §36.

55. The latter requirement was put by the Strasbourg court in *Fayed v United Kingdom*²⁹ as follows :-

“In order for an individual to be entitled to a hearing before a tribunal, there must exist a ‘dispute’ (*contestation*) over one of his or her civil rights or obligations. It follows, so the Court’s case-law has explained, that the result of the proceedings in question must be directly decisive for such a right or obligation, mere tenuous connections or remote consequences not being sufficient to bring Article 6 para. 1 into play”

56. Thus, in *APIS v Slovakia*³⁰ where the complaint related to the treatment of an interim injunction, Art 6(1) was held to be inapplicable, the E Ct HR stating :-

“The Court notes that the alleged violation occurred in the course of interlocutory proceedings relating to an interim injunction. The decision of the Supreme Court of 30 May 1997 was only an interim order and it did not involve a decision on the merits of the case which was at that time dealt with by the Bratislava City Court. In these circumstances, the Court finds that the interlocutory proceedings complained of did not involve a ‘determination’ of the applicant company’s civil rights or obligations within the meaning of Article 6 § 1 of the Convention.”

57. On the other hand, apart from trials on liability, proceedings involving determination of a preliminary point on liability,³¹ quantum³² and costs³³ have all been held to be decisive of rights and obligations and to engage the protections.³⁴

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²⁹ (1994) 18 EHRR 393 at §56.

³⁰ Application 39754/98 (Admissibility decision).

³¹ *Obermeier v Austria* (1990) 13 EHRR 290 at §66-67.

³² *Silva Pontes v Portugal* (1994) 18 EHRR 156 at §30-36.

³³ *Robins v United Kingdom* (1997) 26 EHRR 527 at §28-29.

³⁴ See L&P, §4.6.7.

58. The comparable words of BOR 10³⁵ are not identical to the Art 6(1) equivalent. BOR 10 operates in respect of a “determination of [a person’s] rights and obligations in a suit at law” while Art 6(1) speaks of a “determination of his civil rights and obligations”. However, it seems clear that the effect of the two provisions is the same in the present context and that the scope of BOR 10 is also limited in the manner mentioned above.
59. This is of considerable importance in the context of civil procedure. In one of the earliest reported cases on the CPR after their adoption in England and Wales, Lord Woolf repelled an attempt by counsel to introduce an Art 6(1) objection to an order for a single joint expert stating :-

“It would be unfortunate if case management decisions in this jurisdiction involved the need to refer to the learning of the European Court of Human Rights in order for them to be resolved. In my judgment, cases such as this do not require any consideration of human rights issues, certainly not issues under article 6. It would be highly undesirable if the consideration of case management issues was made more complex by the injection into them of article 6 style arguments. I hope that judges will be robust in resisting any attempt to introduce those arguments. Certainly, on this occasion, this court gave Mr Temple short shrift. Notwithstanding any high regard for Mr Temple, I consider that that was the only way in which that argument could be treated.”³⁶

60. This rejection of interlocutory satellite litigation based on human rights issues is consistent with Strasbourg court’s view that Art 6(1) is inapplicable to interlocutory proceedings. However, Lord Woolf plainly accepts that the position differs where the matter is decisive of a person’s rights and obligations. Thus, in *AG v Covey; AG v Mathews*,³⁷ his Lordship was

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³⁵ “In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”

³⁶ *Daniels v Walker* [2000] 1 WLR 1382 at 1386-7.

³⁷ [2001] EWCA Civ 254, 19 February 2001 at §§60-61.

dealing with conjoined appeals involving persons against whom vexatious litigant orders had been made. Such orders may shut out the litigant from access to the courts in a manner decisive of his rights. In deciding the appeal, Lord Woolf referred to the E Ct HR's decision in *Tolstoy-Miloslavsky v United Kingdom* (1995) 20 EHRR 442, for guidance as to when restricting the right of access to the courts may be legitimate and, applying the general principles discussed above, upheld the decision of the Divisional Court.

(c) *The right of access to the courts in practice*

61. As previously indicated, the E Ct HR in *Golder v United Kingdom* accepted that the right of access to the courts was inherent in Art 6(1). It held that such right “secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal.”³⁸ At the same time, the Court accepted that it was not an absolute right and that many states legitimately restricted access to the courts in respect of minors, persons of unsound mind and so forth.³⁹
62. Applying the general principles mentioned above, particular restrictions on access have been upheld. For instance, in *Tolstoy-Miloslavsky v United Kingdom* (1995) 20 EHRR 442 at §59-§63, a condition requiring the would-be appellant to put up the sum of £124,900 within 14 days by way of security for the costs of an appeal was held to pursue a legitimate aim, not to be disproportionate and not to impair the essence of the right of access.

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³⁸ (1975) 1 EHRR 524 at §36.

³⁹ At §39.

Restrictions on proceedings by bankrupts and vexatious litigants are further examples of legitimate restrictions.⁴⁰

(d) *The right to a fair and public hearing as it operates at first instance*

63. The primary focus of the right to a fair and public hearing is on the trial process at first instance during which the parties' substantive rights and obligations are decided. As mentioned above, the rights are not intended to bite at prior, interlocutory, stages. Moreover, they apply somewhat differently in the context of appellate proceedings.

64. On the plane of first instance hearings, the E Ct HR has held that under Art 6(1) the right to a "fair and public hearing" generally :-

(a) entails an entitlement to an oral hearing held in public unless there are exceptional circumstances that justify dispensing with such a hearing;⁴¹

(b) involves a prima facie right for a person charged with a criminal offence to be present at the hearing;⁴² and,

(c) requires the court to give reasons for its decision⁴³ and to pronounce its judgment in public.⁴⁴

65. However, applying the general principle upholding the validity of proportionate restrictions which pursue a legitimate aim and do not impair

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⁴⁰ The position of vexatious litigants is dealt with more fully in Section 14.

⁴¹ *Fredin v Sweden (No 2)* No 20/1993/415/494 at §21; *Fischer v Austria* (1995) 20 EHRR 349 and §44 and *Jacobsson v Sweden (No 2)*, Judgment 19.2.98 at §46.

⁴² *Ekbatani v Sweden* (1988) 13 EHRR 504 at §25.

⁴³ *Hiro Balani v Spain* (1995) 19 EHRR 566 at §27.

⁴⁴ As expressly required by Art 6(1).

the very essence of the access and hearing rights, the E Ct HR has held numerous restrictions to be acceptable.

(i) *Public hearing*

66. Thus, in *B and P v United Kingdom*⁴⁵ the court gave examples of “exceptional circumstances” which would justify a restriction on the right to a public hearing as follows :-

“..... it is established in the Court’s case-law that, even in a criminal law context where there is a high expectation of publicity, it may on occasion be necessary under Article 6 to limit the open and public nature of proceedings in order, for example, to protect the safety or privacy of witnesses or to promote the free exchange of information and opinion in the pursuit of justice.”

(ii) *Public pronouncement of judgment*

67. In the same case, while noting that Art 6(1) states without qualification that “Judgment shall be pronounced publicly”, the Court upheld as proper, a restriction on public pronouncement in a case involving the interests of children, stating :-

“Having regard to the nature of the proceedings and the form of publicity applied by the national law, the Court considers that a literal interpretation of the terms of Article 6 § 1 concerning the pronouncement of judgments would not only be unnecessary for the purposes of public scrutiny but might even frustrate the primary aim of Article 6 § 1, which is to secure a fair hearing.”⁴⁶

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⁴⁵ Nos 36337/97 and 35974/97, 24.4.01 at §37.

⁴⁶ At §48. In Hong Kong, BOR 10 qualifies the right to public pronouncement of judgments “where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.” It is likely that in other cases, where publicity would be contrary to the interests of justice, the court would be held entitled to restrict such publicity in appropriate and proportionate terms.

(iii) *Oral hearing*

68. Similarly, it has been held that where the proceedings at first instance raised limited issues and did not raise any issue of fact or law requiring oral submissions, the court could properly dispense with an oral hearing and decide the case on the basis of the parties' written submissions.⁴⁷

(iv) *Presence at hearing*

69. The right to be present at the hearing has been differently applied in civil, as opposed to criminal, cases.⁴⁸ As Jessica Simor and Ben Emmerson QC put it :-

“The presence of the parties to civil litigation does not have the same significance as the presence of an accused in a criminal trial. There may however be cases in which fairness requires the presence and participation of the person directly affected by the decision.”⁴⁹

(v) *Restricting evidence*

70. Disputes as to the admissibility of evidence have been held by the Commission⁵⁰ generally not to be within the ambit of Art 6(1). However, where, looking at the proceedings as a whole, restrictions on evidence are such as to destroy the essential fairness of the hearing, such restrictions would be unconstitutional.⁵¹

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⁴⁷ *Jacobsson v Sweden (No 2)* No. 8/1997/792/993, Judgment, 19.2.98 at §49.

⁴⁸ See the opinions of the Commission in *Muyldermans v Belgium* (1993) 15 EHRR 204 at §64 and in *Wilson v United Kingdom* Application No 00036791/97.

⁴⁹ S&E, §6.144. See also L&P §4.6.28.

⁵⁰ In its decision holding the application inadmissible in *Charlene Webb v United Kingdom* (1997) 24 EHRR CD 73, at CD74.

⁵¹ And no doubt also bad at common law.

(vi) *Giving reasons*

71. While reasons generally have to be given, there is no obligation on the court to give a “detailed answer to every argument”.⁵² It is again a question of meeting flexibly the requirement for essential fairness. In *Hiro Balani v Spain* (1995) 19 EHRR 566 at §27, the E Ct HR described its approach as follows :-

“The extent to which this duty to give reasons applies may vary according to the nature of the decision. It is moreover necessary to take into account, inter alia, the diversity of the submissions that a litigant may bring before the courts and the differences existing in the Contracting States with regard to statutory provisions, customary rules, legal opinion and the presentation and drafting of judgments. That is why the question whether a court has failed to fulfil the obligation to state reasons, deriving from Article 6 of the Convention, can only be determined in the light of the circumstances of the case.”

(e) *The right to a fair and public hearing in appellate proceedings*

72. It is accepted in the international jurisprudence that the right of access inherent in Art 6(1) does not give anyone the right of appeal to a court.⁵³ However, where an appeal process does exist, the requirements of Art 6(1) (as applicable to appeals) must be observed.⁵⁴

73. In judging whether a procedure on appeal is in conformity with the guaranteed rights, the E Ct HR’s approach is to look at the role of the appeal court in the context of the entirety of the proceedings,⁵⁵ focussing on the

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⁵² *Van de Hurk v the Netherlands* Application No 00016034/90, 19.4.94, §61.

⁵³ *Tolstoy-Miloslavsky v United Kingdom* (1995) 20 EHRR 442 at §59.

⁵⁴ *Ibid.*

⁵⁵ *Pretto v Italy* (1984) 6 EHRR 182 at §27; *Helmets v Sweden*, No. 22/1990/213/275, Judgment 26 September 1991 at §31

“realities” of the procedure,⁵⁶ what the court’s powers were and how the applicant’s interests were presented and protected before the court.⁵⁷ In the light of such matters, the court asks itself whether the relevant appellate arrangements substantially meet the purposes of Art 6(1).

74. For example, in *Axen v Germany* (1983) 6 EHRR 195, after proceedings publicly heard at first instance, the applicant appealed to the German Federal Court of Justice which dismissed the appeal without a hearing and without publicly pronouncing judgment, merely serving it on the applicant in writing. Its members had unanimously considered the appeal on points of law to be ill-founded and that oral argument was unnecessary; having sought the views of the parties in writing beforehand.

(a) The E Ct HR examined the entirety of the proceedings, asking whether, taken as a whole, they met the purposes of Art 6(1) which were described at §25, to be as follows :-

“The public character of proceedings before the judicial bodies referred to in Article 6 para. 1 protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts, superior and inferior, can be maintained.”

(b) It was held that they did since (i) there had been a public hearing below; (ii) dismissing the appeal on legal grounds meant that the Federal Court was merely approving and making final the decision below, which had been pronounced in open court; (iii) had the

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⁵⁶ *Pretto v Italy* (1984) 6 EHRR 182 at §22.

⁵⁷ *Ekbatani v Sweden* (1988) 13 EHRR 504 at §28.

Federal Court been minded to reverse the lower court, its rules would have made oral argument compulsory.⁵⁸

75. Similarly, in *Sutter v Switzerland*,⁵⁹ an applicant was convicted of certain offences by the District Court after public hearings and then brought an appeal to the Court of Cassation. The appeal court deliberated in camera and dismissed the appeal, serving the applicant with the operative provisions of the judgment immediately and with the full text later.

(a) The E Ct HR dismissed his complaints under Art 6(1) having found that :-

“The Court of Cassation did not rule on the merits of the case, as regards either the question of guilt or the sanction imposed by the Divisional Court. It dismissed Mr. Sutter’s appeal in a judgment that was devoted solely to the interpretation of the legal provisions concerned. In the particular circumstances of the case, oral argument during a public hearing before the Court of Cassation would not have provided any further guarantee of the fundamental principles underlying Article 6.”⁶⁰

(b) As to the duty to pronounce the judgment in public, the E Ct HR again held that this had substantially been met by the Court of Cassation effectively confirming and making final the lower court’s publicly issued judgment.⁶¹

76. Even where the appellate proceedings may involve a review of both fact and law, the absence of a public hearing is not necessarily a violation of

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⁵⁸ At §28 and §32.

⁵⁹ Judgment 23 January 1984 (originally application no. 8209/78).

⁶⁰ At §30.

⁶¹ At §34.

Art 6(1). In *Helmerts v Sweden*,⁶² the E Ct HR put it in the following terms :-

“.....even where a court of appeal has jurisdiction to review the case both as to facts and as to law, the Court cannot find that Article 6 always requires a right to a public hearing irrespective of the nature of the issues to be decided. The publicity requirement is certainly one of the means whereby confidence in the courts is maintained. However, there are other considerations, including the right to trial within a reasonable time and the related need for expeditious handling of the courts’ case-load, which must be taken into account in determining the necessity of a public hearing at stages in the proceedings subsequent to the trial at first instance.”

(f) *Applications for leave to appeal*

77. In many jurisdictions, leave to appeal is often dealt with on the papers, without a hearing and without reasons for dismissal of the application. The requirements of BOR 10 and Art 6(1) are more easily satisfied in relation to applications for leave to appeal since they generally follow one or two layers of public hearings with reasoned judgments and raise only narrow questions relating to known criteria for granting or refusing leave. Thus, it was said in *Helmerts v Sweden*,⁶³ that :-

“.....Provided a public hearing has been held at first instance, the absence of such a hearing before a second or third instance may accordingly be justified by the special features of the proceedings at issue. Thus, leave-to-appeal proceedings and proceedings involving only questions of law, as opposed to questions of fact, may comply with the requirements of Article 6, although the appellant was not given an opportunity of being heard in person by the appeal or cassation court (see, inter alia, the above-mentioned Ekbatani judgment, Series A no. 134, p. 14, para. 31).”

78. In *Monnell and Morris v United Kingdom* (1987) 10 EHRR 205, this was held to apply even in the criminal field where an applicant could, albeit on

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⁶² Application No. 22/1990/213/275, Judgment 26 September 1991, at §36.

⁶³ Case No. 22/1990/213/275, Judgment 26 September 1991 at §36.

limited grounds, seek to raise factual issues in the Court of Appeal. In this case, the applicants were not only refused leave to appeal, but were ordered to suffer “loss of time”⁶⁴ by the English Court of Appeal, without the applicants being present in person or heard in oral argument. Their complaint to the E Ct HR was rejected. After reviewing the law and practice of the English Court of Appeal, the E Ct HR stated :-

“It is not in dispute that at first instance before the Crown Court each applicant had received the benefit of a fair trial The limited nature of the subsequent issue of the grant or refusal of leave to appeal did not in itself call for oral argument at a public hearing or the personal appearance of the two men before the Court of Appeal”⁶⁵

79. Where the application for leave to appeal is to a final court of appeal, even less is needed to meet the requirements of the right to a fair and public hearing. Thus, in *Charlene Webb v United Kingdom* (1997) 24 EHRR CD 73, the Privy Council had refused the petitioner’s application for special leave to appeal without giving reasons. Her attempt to have the E Ct HR review the case on that ground was ruled inadmissible by the Commission.

(a) The Commission began by reminding itself :-

“..... that the manner in which Article 6 para. 1 applies in relation to appeal proceedings depends on the special features of the proceedings involved. Account must be taken of the entirety of the proceedings in the domestic legal order and the role of the appeal court therein: in the case of leave to appeal proceedings, the nature of those proceedings and their significance in the context of the proceedings as a whole must be considered, together with the powers of the appellate jurisdiction and the manner in which the proceedings are actually conducted.”⁶⁶

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⁶⁴ That is, that part of the time spent in custody pending appeal should not count towards serving their sentence.

⁶⁵ At §58.

⁶⁶ At CD74.

(b) It noted that :-

“..... where a supreme court refuses to accept a case on the basis that the legal grounds for such a case are not made out, very limited reasoning may satisfy the requirements of Article 6 of the Convention.”⁶⁷

(c) The Commission’s conclusion was as follows :-

“The Commission further notes that special leave to appeal to the Privy Council will only be given where a case raises a point of ‘great and general importance’ or in cases of ‘grave injustice’. In the context of appeals to the Privy Council, where there has been a full appeal before the Court of Appeal, it must be apparent to litigants who have been refused leave that they have failed to satisfy the Privy Council that their case involves either a point of ‘great and general importance’ or a ‘grave injustice’. The factual position is therefore similar to the position before the Federal Constitutional Court in Germany, where no detailed reasons for rejection of a case are given.”⁶⁸

80. The same conclusion was reached in *Nerva v United Kingdom*,⁶⁹ in relation to the dismissal of an application for leave to appeal by the House of Lords without reasons after having provisionally indicated that leave would be granted and after calling for written submissions and holding a five-minute hearing. The E Ct HR held the applicant’s complaint as to the lack of reasons to be manifestly unfounded and stated -

“.....the High Court and Court of Appeal judgments were fully reasoned and addressed in detail the substance of the applicants’ submissions in the light of adversarial argument. The judgment of the Court of Appeal represented an authoritative and binding view of the law as it stood, subject to any different view which might be taken by the House of Lords consequent upon a successful appeal. Secondly, as to the limited reasons given by the House of Lords Appeal Committee, the Court considers that it is implicit in that decision that the applicants’ case did not raise a point of law of general public importance, which is the gateway requirement for leave being granted. The Court observes that where a supreme court refuses to accept a case on the basis that the legal grounds for such a case are not made out, very limited reasoning may satisfy the

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⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ Application 42295/98, 11.7.00.

requirements of Article 6 of the Convention. In its opinion that principle extends to the House of Lords' decisions on applications for leave to appeal.”

81. There is no doubt that the procedure of the Court of Final Appeal in relation to applications for leave to appeal, viewed in the context of the entirety of the proceedings leading to such applications, satisfies the applicable criteria.⁷⁰ Such applications are almost always preceded by two oral and public hearings, where the parties are permitted to be present, resulting in reasoned judgments which are available for public scrutiny. As with the House of Lords and particularly the Privy Council, the grounds for leave to appeal are limited, as defined in the Hong Kong Court of Final Appeal Ordinance, Cap 484, sections 22 and 32. Where there may be arguable grounds for granting leave to appeal, an oral and public hearing before the Appeal Committee of the Court, consisting of three members, is held. Where the application is dismissed, sometimes detailed reasons are given, but commonly, the reasons will amount to no more than a statement that the criteria for leave to appeal have not been met.
82. Where, on the face of the application for leave to appeal, read in the light of the (usually) two judgments below, there is no reasonable basis for the grant of leave, the procedure under rule 7 of the Hong Kong Court of Final Appeal Rules may be invoked. The Registrar acts as a filter against such wholly unfounded applications and, if of the opinion that the case falls within rule 7, affords the applicant a final opportunity to demonstrate in writing why the application should not be summarily dismissed. The application papers are then placed before the Appeal Committee, with any further written representations of the applicant filed in response to the

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⁷⁰ As held by the Appeal Committee in *Chow Shun Yung v Wei Pih Stella & Anr* (Unreported) FAMV No 2 of 2003, 14 May 2003.

Registrar's summons. If the Committee is unanimous that the application is without any reasonable basis (within the meaning of the applicable rules), it dismisses it on the papers and without an oral hearing, publishing its decision on the notice board in the Court's precincts and serving its order on the applicant. In the light of the prior history of the proceedings and of the Registrar's summons setting the context for such a summary dismissal, reasons are dispensed with since the dismissal is self-evidently based on the Appeal Committee being satisfied that it is not reasonably arguable that the application meets the limited criteria for granting leave. If, on the other hand, having seen the papers, the Appeal Committee considers the application to be arguable, a leave application is listed for oral hearing in the usual way.

3.4 Relevance to the proposed reforms

83. It will be evident from the foregoing discussion that on analysis, many of the procedural reforms under discussion may not in fact engage the access and hearing rights guaranteed by the Basic Law. Interlocutory and case management issues are excluded from the scope of such rights. And where the trial or other process for determining the parties' rights and obligations has met the constitutional safeguards, the requirements in respect of subsequent appellate proceedings are less stringent, being permitted to draw upon the open processes and reasons developed below without necessarily adopting similar processes at the appellate level.
84. There remains nonetheless possible intersection between proposed procedural reforms and the access and hearing rights at points involving trial on the merits and other proceedings decisive of the parties' substantive rights and obligations. In such a context, those rights do not take effect as

absolute rights but must be applied in accordance with the principles mentioned above. We will accordingly return to consider how such principles are to be applied as and when such Basic Law issues arise for consideration.

Section 4: Overriding objective and case management powers

Proposals 1 to 3

Proposal 1

Provisions expressly setting out the overriding objectives of the civil justice system should be adopted with a view to establishing fundamental principles to be followed when construing procedural rules and determining procedural questions.

Interim Report paras 225-233

Proposal 2

A rule placing a duty on the Court to manage cases as part of the overriding objective of the procedural system and identifying activities comprised within the concept of case management should be adopted.

Interim Report paras 240-256

Proposal 3

Rules listing the Court's case management powers, including a power to make case management orders of its own initiative should be adopted.

Interim Report paras 240-256

4.1 The approach adopted in the CPR

85. The overriding objective provided for by CPR 1.1, is in the following terms :-

- “(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.
- (2) Dealing with a case justly includes, so far as is practicable—

- (a) ensuring that the parties are on an equal footing;
- (b) saving expense;
- (c) dealing with the case in ways which are proportionate—
 - (i) to the amount of money involved;
 - (ii) to the importance of the case;
 - (iii) to the complexity of the issues; and
 - (iv) to the financial position of each party;
- (d) ensuring that it is dealt with expeditiously and fairly; and
- (e) allotting to it an appropriate share of the court’s resources, while taking into account the need to allot resources to other cases.”

86. By CPR 1.2, the English court must try to give effect to the overriding objective when interpreting any of the Rules or exercising any power conferred by them. CPR 1.3 requires the parties to help the court to further the overriding objective. And CPR 1.4 places a duty on the court to further the overriding objective “by actively managing cases”. It then provides a list of what “active case management” includes, as follows :-

“Active case management includes—

- (a) encouraging the parties to co-operate with each other in the conduct of the proceedings;
- (b) identifying the issues at an early stage;
- (c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;
- (d) deciding the order in which issues are to be resolved;
- (e) encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure;
- (f) helping the parties to settle the whole or part of the case;
- (g) fixing timetables or otherwise controlling the progress of the case;

- (h) considering whether the likely benefits of taking a particular step justify the cost of taking it;
- (i) dealing with as many aspects of the case as it can on the same occasion;
- (j) dealing with the case without the parties needing to attend at court;
- (k) making use of technology; and
- (l) giving directions to ensure that the trial of a case proceeds quickly and efficiently.”

87. Having identified the aims and types of activity that constitute the active case management envisaged, CPR 3.1 confers relevant powers on the court to pursue those aims:-

- “(1) The list of powers in this rule is in addition to any powers given to the court by any other rule or practice direction or by any other enactment or any powers it may otherwise have.
- (2) Except where these Rules provide otherwise, the court may—
 - (a) extend or shorten the time for compliance with any rule, practice direction or court order (even if an application for extension is made after the time for compliance has expired);
 - (b) adjourn or bring forward a hearing;
 - (c) require a party or a party’s legal representative to attend the court;
 - (d) hold a hearing and receive evidence by telephone or by using any other method of direct oral communication;
 - (e) direct that part of any proceedings (such as a counterclaim) be dealt with as separate proceedings;
 - (f) stay the whole or part of any proceedings either generally or until a specified date or event;
 - (g) consolidate proceedings;
 - (h) try two or more claims on the same occasion;
 - (i) direct a separate trial of any issue;
 - (j) decide the order in which issues are to be tried;
 - (k) exclude an issue from consideration;

- (l) dismiss or give judgment on a claim after a decision on a preliminary issue;
 - (m) take any other step or make any other order for the purpose of managing the case and furthering the overriding objective.
- (3) When the court makes an order, it may—
- (a) make it subject to conditions, including a condition to pay a sum of money into court; and
 - (b) specify the consequence of failure to comply with the order or a condition.
- (4) Where the court gives directions it may take into account whether or not a party has complied with any relevant pre-action protocol.
- (5) The court may order a party to pay a sum of money into court if that party has, without good reason, failed to comply with a rule, practice direction or a relevant pre-action protocol.
- (6) When exercising its power under paragraph (5) the court must have regard to—
- (a) the amount in dispute; and
 - (b) the costs which the parties have incurred or which they may incur.
- (6A) Where a party pays money into court following an order under paragraph (3) or (5), the money shall be security for any sum payable by that party to any other party in the proceedings, subject to the right of a defendant under rule 37.2 to treat all or part of any money paid into court as a Part 36 payment.
- (7) A power of the court under these Rules to make an order includes a power to vary or revoke the order.”
88. Moreover, in furtherance of the proactive stance courts are required to take, CPR 3.3 empowers the court to make such orders of its own initiative unless the rule in question provides otherwise.

4.2 *The consultation response*

89. The overriding objective and the cluster of Rules just described introduce some of the main concepts underpinning the Woolf Reforms. *Proposals 1*

to 3 sought consultees' views as to the extent to which this approach should be adopted in Hong Kong. A number of respondents expressed unqualified support for such a change.⁷¹ However, many, while expressing broad support for an overriding objective and rules regulating case management, did so with some reservations.⁷² Concerns were voiced, for instance, as to whether :-

- (a) the new methodology might divert the court from deciding cases in accordance with their substantive merits;
- (b) such broad concepts as those in CPR 1 might lead to inconsistent interpretations and therefore to inconsistent and uncertain results;
- (c) such broad concepts might be used inappropriately to override other, more appropriate, concepts;
- (d) it would be a mistake to abandon tried and tested case-law;
- (e) judges were of a sufficient calibre and experience to exercise such broad discretions fairly and consistently;
- (f) judges would receive sufficient training to help them to exercise the discretions fairly and consistently, given that such training may require significant resources;

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⁷¹ Including the APAA, the HKFEMC, the HKFLA, the HKRRLS and two individual respondents.

⁷² Including the Bar Association, the BSCPI, the Law Society, the HKMLA, the Consumer Council, the BCC, the JCGWG, the Hon Mr Martin Lee SC, the Hon Ms Margaret Ng, the Hon Ms Miriam Lau, the Hon Ms Audrey Eu SC, the Hon Mr Albert Ho and the Hon Mr Ambrose Lau, one set of barristers' chambers, three firms of solicitors and four individual respondents. Another solicitors' firm was against having an overriding objective.

- (g) excessive proactivity on the part of judges might cause them to lose, or be thought to have lost, their impartiality;
- (h) excessive proactivity might force parties who might otherwise settle to go to trial; and,
- (i) whether a docket system is essential if proactive case management is to work.

4.3 The different facets of the overriding objective and associated rules

90. In considering the extent to which the overriding objective and the rules described above ought to be adopted in Hong Kong, it is important to distinguish different facets of those rules.
91. First, the overriding objective is designed to function in the context of the CPR operating as an entirely new procedural code. It is intended to provide the foundation for a new methodology for deciding procedural issues. Instead of applying the detailed provisions of the RSC supplemented by case-law, the CPR are formulated in broad terms, the court being expected to apply them purposively, guided by the overriding objective and the declared aims of case management. This may be referred to as the “new code methodology” facet of the overriding objective.
92. Secondly, the overriding objective introduces the concept of “proportionality” as a specific basis for deciding procedural issues (“the proportionality facet”).
93. Thirdly, the court is required to be active in managing cases, making orders of its own initiative, with a view to furthering the overriding objective (“the active case management facet”).

94. Fourthly, general case management powers are expressly conferred on the court and listed in CPR 3.1 (“the express powers facet”).

4.4 The new code methodology facet

95. If the Working Party’s recommendation⁷³ that reform of our civil justice system should be implemented by way of amendment to the RHC rather than by adopting an entirely new code along the lines of the CPR is accepted, an overriding objective, if introduced here, would not function in quite the same manner as contemplated by the Woolf reforms.

96. Nevertheless, as was pointed out in the Interim Report, one may still argue in favour of grafting an overriding objective onto the existing system, as occurred in New South Wales, thereby introducing aspects of the CPR’s methodology for approaching procedural issues. The broad concepts of the overriding objective and associated rules could serve as a foundation for deciding such issues. Should we follow this example in Hong Kong? The Working Party has important reservations as to whether, and if so, how, this should be done.

97. In the first place, the methodology is such that it is likely to be subjected to misuse. The introduction of an overriding objective consisting of broad concepts, expressed in general terms, but apparently endowed with “overriding” qualities, is likely to give rise to misguided arguments and interlocutory applications. The learned editors of the current edition of the

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⁷³ *Recommendation 1.*

White Book acknowledge this and, in a telling passage,⁷⁴ describe how use of the overriding objective has sometimes been distorted.

(a) Given the breadth of the overriding objective :-

“It is probably true to say that, in almost any circumstance in which the court exercises a power given to it by the CPR, it would be possible to justify (at least in part) the particular manner in which the power is exercised in the light of one or other of the aspects of the overriding objective as listed in r.1.1(2).”

(b) It is therefore unsurprising that it may often be the case that :-

“..... the particular objectives will be used selectively and merely for the purpose of giving added weight to particular exercises of powers given to the court by the CPR and to preferred interpretations of rules.”

(c) Indeed :-

“..... in some cases advocates have urged that the dominant if not exclusive considerations for resolving certain procedural issues were to be found in CPR 1.1.”

(d) As the learned editors point out, such over-reliance on the overriding objective has sometimes led to absurd results, as in *Law v St Margarets Insurances Ltd*,⁷⁵ where the overriding objective was used to support the wholly unsustainable outcome that a default judgment entered against a wrong defendant should not be set aside.

(e) Some of the dangers are summarised as follows :-

“Premature and unnecessary recourse to the overriding objective may lead to inadequate legal analysis of important procedural issues (thus hindering the proper development of the law), to radical provisions in the CPR not being consistently applied as intended, and to an erratic ‘palm tree justice’ approach to interlocutory work (leading to inconsistent treatment of like situations)”

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⁷⁴ White Book 1.3.2.

⁷⁵ [2001] EWCA Civ 30, 18 January 2001.

98. The trap into which the misguided are likely to be led would involve regarding the overriding objective as providing all the answers and, because of its “overriding” character, as permitting specific procedural provisions to be ignored or given insufficient weight. This would be a fundamental error since such rules will in many cases have been refined over the years to deal fairly with the specific procedural issue at hand. To quote from the White Book once more :-

“..... such relevant law and practice, which will often have its own objectives (not inconsistent with the overriding objective) designed to do justice expressly or impliedly ‘built-in’, should be given its full and proper effect and, in being applied, should not be distorted or diminished by strained attempts to bring into consideration selected aspects of the overriding objective as listed in r.1.1(2).”

These considerations carry all more weight where the reforms are to proceed by way of amendment and where the RHC, supplemented by the case-law, are to be retained.

99. In the Working Party’s view, it would be useful to introduce a rule expressly acknowledging as legitimate aims of judicial case management :-

- increased cost-effectiveness in the court’s procedures;
- economies and proportionality in the way cases are mounted and tried;
- the expeditious disposal of cases;
- greater equality between parties;
- facilitating settlement; and,
- distributing the court’s resources fairly

always subject to recognition that the primary aim of case management should be to secure the just resolution of the parties’ dispute in accordance with their substantive rights.

100. It would be wise to avoid suggesting that any such rule has an “overriding” character, to avoid encouraging over-elaborate and misguided reliance being

placed on it. It should be made clear that such a rule merely makes explicit what are implicit objectives which “underlie” specific rules of the RHC, supporting the internal logic of such rules. Such specific rules should accordingly continue to demand intelligent application informed, but not overridden, by the underlying principles.

4.5 *The proportionality facet*

101. “Proportionality” as introduced by the overriding objective in CPR 1.1(2)(c) involves the court being required to deal with the case :-

“..... in ways which are proportionate

- to the amount of money involved;
- to the importance of the case;
- to the complexity of the issues; and
- to the financial position of each party.”

102. The problem encountered is that “proportionality” bears different meanings in different contexts, and has sometimes generated uncertainty as to how it should be applied.

(a) This is illustrated by *Lownds v Home Office* [2002] 1 WLR 2450 (Practice Note), discussed above in Section 2, where considerable uncertainty had sprung up as to how “proportionality” ought to be applied when taxing costs in a case where the costs incurred had much exceeded the claim amount.

(b) *Callery v Gray* [2002] 1 WLR 2000⁷⁶ provides another example. The concept of proportionality was here again relevant to taxation, with the court having to decide whether costs had been “proportionately and reasonably incurred.”⁷⁷ Much controversy arose as to how these concepts should be applied to the regime of “after the event insurance” effected in tandem with conditional fee agreements.⁷⁸ Was it reasonable and proportionate to incur an insurance premium at the very outset given that the case might rapidly settle and so render the insurance unnecessary? The extent of the uncertainty was indicated by Lord Hoffmann who recounted that the House of Lords had been told that no less than 150,000 cases were awaiting the outcome of the decision.

103. Examples of some of the different contexts in which “proportionality” takes on varying meanings include the following,⁷⁹ namely, “proportionality” as requiring :-

- (a) litigation costs to bear a reasonably proportionate relationship with the amount at stake in the dispute;
- (b) procedures to be appropriately matched to the case, that is, ensuring that elaborate procedures (which may be appropriate for big and complex cases) are not used unnecessarily in ordinary cases;

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⁷⁶ Discussed further in Section 25 below.

⁷⁷ See CPR 44.4(2) and CPR 44.5(1).

⁷⁸ Explained in Section 25 below.

⁷⁹ See White Book 1.3.5.

- (c) applications for drastic forms of relief, such as Anton Piller orders or orders for committal for contempt, to be avoided where such relief would be disproportionate in the circumstances;
- (d) procedural sanctions and orders to be issued in a manner proportionate to the requirements of procedural and substantive justice, for instance, not striking out the entire claim when a lesser sanction would suffice, and not ordering extensive particulars or further discovery where the benefits are likely to be slight and would not justify the expense and effort involved;
- (e) cases to be instituted in the correct tribunal, avoiding the High Court where the simpler procedures of a lower court or tribunal would suffice; and,
- (f) procedural orders to be made which are proportionate to the financial position of each party (in accordance with CPR 1.1(2)(c)(iv)).

104. As the editors of the White Book point out, while in CPR 1.1(2)(c) the word “proportionate” is used in the technical sense defined in other Rules and practice directions :-

“the words ‘proportionate’ and ‘disproportionate’ are used in a general sense and not for the specific purpose of drawing attention to this aspect of the overriding objective.”

105. Some elements of the “proportionality” concept discussed above are already reflected in some of our existing rules, for instance, those requiring the court to refuse an order if it is “not necessary either for disposing fairly of the cause or matter or for saving costs.”⁸⁰ A well-developed rule of this kind is

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⁸⁰ Eg, in relation to specific discovery under O 24 r 8 and interrogatories under O 26 r 1.

found in O 38 r 2A(1) which concerns the court's power to order witness statements to be exchanged, stating :-

“The powers of the Court under this rule shall be exercised for the purpose of disposing fairly and expeditiously of the cause or matter before it, and saving costs, having regard to all the circumstances of the case, including (but not limited to) -

- (a) the extent to which the facts are in dispute or have been admitted;
- (b) the extent to which the issues of fact are defined by the pleadings;
- (c) the extent to which information has been or is likely to be provided by further and better particulars, answers to interrogatories or otherwise.”

106. In the Working Party's view, “proportionality” should form part of a rule stating the underlying principles guiding case management, but without the specificity of CPR 1.1(2)(c) set out above. It should try to avoid spawning minute analysis and argument. It should instead be a reminder that commonsense notions of reasonableness and a sense of proportion should inform the exercise of a judicial discretion in the procedural context.

4.6 The facets concerning active case management and express powers

107. The third and fourth facets can be taken together. As discussed in Section 13 below, the Working Party is recommending the introduction of a court-determined timetable fixed after the parties complete a questionnaire designed to enable the timetable to take into account the reasonable wishes of the parties and the needs of the particular case.

108. In giving the timetabling directions, or in dealing with any specific interlocutory application, the court ought to have ample powers to make the orders it considers best suited to advance the fair, expeditious and economical resolution of the dispute. If the parties can agree reasonable directions, all the better. However, where the parties cannot agree, and

where for instance, they each put forward proposals which are contentious, the court plainly ought to have power to reject both sides' proposals and to make orders considered appropriate even if neither party has sought such orders. In this sense, the court ought to engage in "active case management."

109. It should, however, be made clear that the Working Party is not in favour of unwarranted proactivity by the court. The case management powers are there to curb the excesses of the adversarial system, not to displace that system. What the Working Party favours, reflected in *Proposal 3*, is to make more systematic the approach to case management presently accepted as a matter of common law, as discussed in the Interim Report.⁸¹ Most of the powers listed in CPR 3.1 already exist, but somewhat patchily, scattered in various provisions of the RHC or to be found in the court's inherent jurisdiction.
110. CPR 1.4, CPR 3.1 and CPR 3.3 (with suitable modifications) draw these powers together and place them on a clear and transparent legal footing, creating a scheme for case management by the court :-
- setting out the declared aims of such case management;
 - setting out a range of general case management powers, including power to act of its own motion, additional to powers provided by specific rules (unless expressly displaced by such rules); and,
 - linking the exercise of these powers to the furtherance of the overriding objective of procedural justice.

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⁸¹ At §§234 to 239.

111. In the Working Party's view, such a scheme, suitably adapted for Hong Kong, would promote fairness and consistency in judicial case management. As the legal community becomes increasingly familiar with the proposed reforms, such rules would facilitate consensual case management by the parties.

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.

Section 5: Pre-action protocols

Proposals 4 and 5

Proposal 4

Steps should be taken, in cooperation with interested business, professional, consumer and other groups, to develop pre-action protocols suitable to Hong Kong conditions with a view to establishing standards of reasonable pre-action conduct in relation to specific types of dispute.

Interim Report paras 258-275

Proposal 5

Rules should be adopted allowing the court to take into account the parties' pre-action conduct when making case management and costs orders and to penalise unreasonable non-compliance with pre-action protocol standards.

Interim Report paras 258-275

112. In most cases, there will have been some attempt at resolving the dispute between the parties, with or without the help of lawyers, before court proceedings are issued. Where the potential plaintiff does seek legal advice, one would expect his lawyers to write a letter before action to the prospective defendant setting out the basis of the complaint and what the claimant requires by way of satisfaction of that complaint. Where the defendant does not accept the claim, one would expect a reasoned response indicating why not. These are commonsense steps to be taken by parties to any dispute so that legal proceedings might be avoided. Seeing that it rests on a sound basis, the potential defendant may concede the claim. Conversely, seeing the soundness of the response, a claimant may drop his

claim. Or negotiations may commence on the basis of the exchange and a compromise settlement arrived at.

113. However, as pointed out in the Interim Report, this process often does not take place properly or at all, so that proceedings are launched without the matters in issue being sufficiently identified or understood. Pre-action protocols, backed by costs and other financial sanctions, were introduced by the Woolf reforms to try to compel the parties to engage meaningfully in such pre-action dialogue in the hope of preventing ill-conceived and unnecessary litigation.

5.1 What pre-action protocols require of the parties under the CPR

114. In England and Wales, there are presently six approved pre-action protocols which came into operation on various dates between April 1999 (when the CPR first came into force) and March 2002. They are the Personal Injury, Clinical Negligence, Construction and Engineering Disputes, Defamation, Professional Negligence and Judicial Review pre-action protocols.
115. These were developed in close consultation with interest groups involved in litigation in the areas in question and vary in their detail and scope. Typically, these protocols :-
- (a) identify the cases to which they apply and state their objectives;⁸²

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⁸² Eg, “to encourage the exchange of early and full information about the prospective legal claim; to enable the parties to avoid litigation; and to support the efficient management of proceedings where litigation cannot be avoided” (Construction & Engineering, §1.3).

- (b) prescribe the information and documents which the claimant must give to the prospective defendant when notifying him of the claim;
 - (c) require the defendant to acknowledge the claim and to respond with specified information and documents if he does not accept it; and,
 - (d) lay down a timetable for these exchanges.
116. Some of the protocols specify additional requirements, for instance, as to how experts should be dealt with,⁸³ as to the holding of a pre-action meeting,⁸⁴ or as to the need to consider ADR.⁸⁵ Templates for claim letters and responses are also sometimes included.
117. Where a case is not covered by one of the approved protocols, the parties are subject to the Practice Direction on Protocols which requires them “to act reasonably in exchanging information and documents relevant to the claim and generally in trying to avoid the necessity for the start of proceedings.”⁸⁶ This normally involves :-
- (a) the claimant writing to give details of the claim;
 - (b) the defendant acknowledging the claim letter promptly;
 - (c) the defendant giving within a reasonable time a detailed written response; and

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- ⁸³ Eg, Personal Injury protocol §3.14-§3.20.
- ⁸⁴ Eg, Construction & Engineering protocol §5.1-§5.3.
- ⁸⁵ Eg, Professional Negligence protocol §C3.
- ⁸⁶ Practice Direction – Protocols §4.1.

(d) the parties conducting genuine and reasonable negotiations with a view to settling the claim economically and without court proceedings.⁸⁷

118. As with the approved protocols, the Practice Direction requires information to be exchanged in considerable detail.

(a) The claimant's claim letter is required, among other things, to give sufficient concise details to enable the recipient to understand and investigate the claim without extensive further information; to enclose copies of the essential documents which the claimant relies on; and to identify and ask for copies of any essential documents, not in his possession, which the claimant wishes to see.⁸⁸

(b) When the prospective defendant replies substantively, he is expected to give detailed reasons why the claim is not accepted, identifying which of the claimant's contentions are accepted and which are in dispute; to enclose copies of the essential documents which the defendant relies on; to enclose copies of documents asked for by the claimant, or explain why they are not enclosed; and to identify and ask for copies of any further essential documents, not in his possession, which the defendant wishes to see.⁸⁹

119. Plainly, the conscientious observance of the protocols and the Practice Direction would require a significant amount of investigative and preparatory work by the parties before any proceedings are started.

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⁸⁷ *Ibid*, §4.2.

⁸⁸ *Ibid*, §4.3.

⁸⁹ *Ibid*, §4.6.

5.2 Non-compliance with pre-action protocols under the CPR

120. If there is non-compliance with any relevant pre-action protocol or the Practice Direction, this can be taken into account by the court in giving directions.⁹⁰ It could, for instance, order the non-complying party to pay money into court,⁹¹ such sums becoming security for any sum payable by that party to any other party in the proceedings.⁹² Non-compliance could also result in swingeing orders in respect of costs and interest, including :-

- “(1) an order that the party at fault pay the costs of the proceedings, or part of those costs, of the other party or parties;
- (2) an order that the party at fault pay those costs on an indemnity basis;
- (3) if the party at fault is a claimant in whose favour an order for the payment of damages or some specified sum is subsequently made, an order depriving that party of interest on such sum and in respect of such period as may be specified, and/or awarding interest at a lower rate than that at which interest would otherwise have been awarded;
- (4) if the party at fault is a defendant and an order for the payment of damages or some specified sum is subsequently made in favour of the claimant, an order awarding interest on such sum and in respect of such period as may be specified at a higher rate, not exceeding 10 above base rate (cf CPR rule 36.21(2)), than the rate at which interest would otherwise have been awarded.”⁹³

5.3 The consultation response

121. Most respondents accepted that the aims of pre-action protocols are laudable and that substantial benefits could flow from the observance of well-

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⁹⁰ CPR 3.1(4).

⁹¹ CPR 3.1(5).

⁹² CPR 3.1(6A).

⁹³ Practice Direction – Protocols §2.3.

designed pre-action protocols developed after due consultation. However, many of them expressed significant reservations.⁹⁴

122. The most serious concern, based on the experience of the pre-action protocols in England and Wales, was that they would result in the “front-loading” of costs, that is, in requiring the parties to incur costs even before commencement of the proceedings and therefore at a much earlier stage of the dispute than otherwise.⁹⁵ Where the case thereafter goes by default or rapidly settles, this may mean that costs have been unnecessarily incurred and that litigation has been made more expensive.
123. This concern led a number of respondents to stress that pre-action protocols and the sanctions for non-compliance should not be introduced for all cases across the board. Some thought that they should not be used in ordinary, simple cases but should be reserved for complex cases.⁹⁶ Others supported the introduction of protocols for cases on certain specialist lists. A number pointed to the existence and apparent success of the practice direction PD18.1 in Hong Kong, which has effectively introduced a pre-action protocol for personal injury cases, as showing that such protocols were suitable for the Personal Injury list.⁹⁷ There were also calls for the

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⁹⁴ Respondents broadly in favour of the protocols, but often subject to qualification, included the Bar Association, the Law Society, the High Court masters, the District Court judges and masters, the LAD, the DOJ, the HA, the SCLHK, the HKFI (putting forward the view of Allianz Insurance), the HKFEMC, the APIL, the HKFLA, the HKCS, the APAA, the Hon Ms Audrey Eu SC, the JCGWG, the BCC, the HKRRLS, one set of barristers’ chambers, three firms of solicitors and one individual respondent.

⁹⁵ Including the Bar Association, the Law Society, the DOJ, the SCLHK, the Hon Ms Audrey Eu SC, the BCC, two firms of solicitors and one individual respondent.

⁹⁶ Including the DOJ and an individual respondent.

⁹⁷ The Bar Association, the Law Society, the LAD, the HKFI (putting forward the view of Allianz Insurance), the APIL, the High Court masters and a firm of solicitors. The

cont’d

establishment of pre-action protocols for construction and engineering cases,⁹⁸ clinical negligence cases⁹⁹ and intellectual property cases.¹⁰⁰

5.4 The Working Party's view

124. The Working Party's view is that the aims of pre-action protocols are plainly worthwhile but that experience shows that they must be approached with circumspection because of their likely impact on costs.

125. The main aims of pre-action protocols are to promote early settlement or, failing that, to promote efficiency in the conduct of the proceedings. Such results can only be achieved if the parties are required to exchange sufficiently detailed information about the claim to form the basis of settlement and the marshalling and formulation of such information inevitably requires costs to be incurred. There is no doubt that in England and Wales, pre-action protocols have caused costs to be front-loaded.

(a) The early evaluation of the Woolf reforms conducted by the LCD in March 2001, reported :-

“It is clear that the introduction of pre-action protocols has resulted in the front-loading of costs before proceedings are issued.”¹⁰¹

..... *cont'd*

BSCPI was more guarded, suggesting that protocols may do well in smaller claims with minor injuries, but questioning the benefits otherwise.

⁹⁸ By the Law Society, the SCLHK, the HKFEMC and one firm of solicitors.

⁹⁹ By the HA and the LAD.

¹⁰⁰ By the APAA and the HKRRLS.

¹⁰¹ LCD-EF §7.3.

- (b) This was repeated in its second evaluation published in August 2002,¹⁰² which went on to state that one motor insurance company's figures showed that :-

“..... in the three years prior to the introduction of the reforms costs had increased in line with inflation with costs claimed rising at around 4% pa and costs paid at around 3%. From 1999 to 2001, however, claimed costs had risen by an average of 15% pa while costs paid had increased by around 12%; substantially more than inflation.”¹⁰³

- (c) In the Woolf Network's 3rd survey, some 45% of the respondents had thought that front-loaded costs were a problem for the reforms. About two years later, the 5th survey, conducted in December 2002, continued to acknowledge that “front-loading is causing considerable problems.”

- (d) Goriely, Moorhead and Adams, in their 2002 study, *More Civil Justice?* reported that pre-action protocols were generally well-received in personal injury cases but that :-

“The new approach did lead to some ‘front-loading’, in which more work was carried out in the early stages of a case. Claimant solicitors said they were now more likely to interview their client before writing the first letter to the defendant, and that such interviews tended to be longer. One potential problem is that it now takes longer to write the initial letter to the defendant. Whereas before the reforms, half of all first letters were sent within a fortnight; now half of letters took over a month, with around one in five taking over three months.”¹⁰⁴

126. It must accordingly be recognized that if pre-action protocols are adopted in Hong Kong this is likely to lead to a front-loading of costs in the cases to which they apply. Protocols should therefore only be adopted where such

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¹⁰² LCD-FF §7.9.

¹⁰³ *Ibid.*

¹⁰⁴ At p xiv.

front-loading is considered justifiable in that the benefits of early settlement resulting from the protocol are likely to outweigh the disadvantages of such front-loading.

127. One must therefore conclude at once that pre-action protocols should not be applied across the board since (as the Interim Report showed) some 60% of all ordinary High Court Actions go by default (where pre-action protocols would be an unnecessary burden).¹⁰⁵ In contrast, the default judgment rate in Commercial Actions and Construction and Arbitration List proceedings is considerably lower. This lends support to the view that pre-action protocols may have a larger role to play in relation to cases in specialist lists than elsewhere.
128. Another consideration relevant to the possible introduction of pre-action protocols concerns their enforcement. It has recently been reported in England and Wales that non-compliance with pre-action protocols, particularly by insurance companies in personal injury cases, is on the increase and that sanctions against non-compliance are not being enforced.¹⁰⁶ For example, two responses to the Woolf Network's 5th survey were summarised as follows :-

“There is no clear and effective sanction for breach of the Protocol. Many defendants often disregard the Protocols, and they are not really ‘punished’ consistently by the courts. There is widespread disregard of the Personal Injury Protocol by Defendants and insurers.”

“Despite the protocol, insurance companies are very poor at providing essential documentation (wage details and accident reports). Medical reports obtained by insurance companies are always late in being served. The disclosure form for simple actions is far too complex. An improvement would be that prior to

Notes

¹⁰⁵ Interim Report, Appendix C, Table 6.

¹⁰⁶ *More Civil Justice?* at p vi.

disclosure, any party should be able to request the other to include specified documentation in their list or state they do not have it.”

129. This trend was also highlighted by the APIL in their submission to the Working Party, stating :-

“Anecdotal evidence from our members, however, suggests that there may have been a ‘honeymoon period’. Some members feel that whilst defendants initially complied with the protocol’s requirements, they now do so to a lesser extent. This concern has been reflected by APIL president, Frances McCarthy, who has stated:

‘The protocols have transformed the way in which parties deal with each other before litigation. The culture of openness which has been generated, together with the part 36 offer, has led to a dramatic increase in pre-issue settlements. But some insurers are beginning to try and manipulate the protocols. We are receiving letters from insurers in response to the letter of claim which ignore the basic premise that liability is resolved before the issue of quantum falls to be decided. Where liability is purportedly not in dispute, no unambiguous admission is made. Where liability is denied, proper reasons are not given and/or documents in support of the denial are not supplied. The claimant’s statement is requested as of right. This behaviour is not universal; many insurers behave perfectly properly, but a disquieting number seem to focus on sliding out of their obligations. What is more worrying is that claimants’ lawyers are not always calling them to account.’”

130. It would appear that the party who could seek to enforce the protocol often does not find it economic to do so partly because of uncertainty as to whether the court would order any meaningful sanction for such non-compliance so as to justify the effort and expense of attempting enforcement. This must be borne in mind when considering whether and to what extent pre-action protocols should be introduced in this jurisdiction. It would be particularly galling for a party who has conscientiously observed the protocol and met with non-compliance on the other side to be advised or to discover that it is not worthwhile trying to enforce compliance. Such a situation would undermine the protocol system’s credibility. These concerns suggest that pre-action protocols should only be introduced in

specialist lists where there is active support for the system by the court and court-users so that enforcement and effective sanctions are likely.

131. Experience appears to support the abovementioned approach. In England and Wales, approved pre-action protocols, particularly in the personal injury and clinical negligence spheres (which have been the subject of most study), have generally been positively received.

(a) The APIL, in their submission to the Working Party stated :-

“APIL was involved in drafting the pre-action protocol for personal injury cases in England and Wales and believes that it has generally been successful. Research conducted by APIL in October 1999 concluded that 48% of respondents felt that earlier settlement had been reached as a result of the protocol and that 33% of cases avoided litigation.”

(b) In *More Civil Justice?* the authors reported:-

“A general finding from this study is that litigators like clear structures. They want timetables and example letters, provided that both can be adapted where necessary. Thus, in general, the protocols have been well received. Personal injury litigators appreciated the new-style letter before action and liked having a deadline for the response. Clinical negligence specialists spoke well of the standard form for pre-action discovery and thought the 40-day compliance period worked well.”¹⁰⁷

.....

“Those involved in personal injury and clinical negligence work also felt positive about the protocols. By establishing clear ground rules on how claims should be formulated and responded to, protocols were thought to focus minds on the key issues at an early stage and encourage greater openness. This smoothed the way to settlement.”¹⁰⁸

Notes

¹⁰⁷ At p iv.

¹⁰⁸ At p v.

- (c) In the Woolf Network's 5th survey, 66% of respondents considered the problems of front-loading to be outweighed by the benefits of early settlement.
132. These were views concerning specialised areas of litigation where approved pre-action protocols had been established after close consultation with interest groups. The response to the Practice Direction on Protocols which extends pre-action obligations to parties generally has been much less positive. Thus, the Woolf Network's 5th survey found that 42% of the respondents considered that Practice Direction not to be working well.
133. In the light of the foregoing considerations, the Working Party is of the view that :-
- (a) Pre-action protocols should not be prescribed for cases across the board, whether by a general protocol or by a general practice direction on protocols.
- (b) It should be open to the courts operating existing as well as any additional¹⁰⁹ specialist lists, subject to the approval of the Chief Judge of the High Court and after due consultation with regular users of those courts and any other interested persons, to introduce suitable pre-action protocols, to be applied to cases brought in those lists.
- (c) The decision to introduce pre-action protocols and determination of their content would reflect the procedural autonomy allowed to such specialist lists.¹¹⁰ However, when deciding upon the scope of the

Notes

¹⁰⁹ Discussed in Section 13.

¹¹⁰ Discussed further in Section 13.

obligations which should be imposed by such protocols, efforts should be made to minimise front-loaded costs.

- (d) Rules should be introduced enabling the court, in its discretion, when exercising any relevant power, to take into account a party's non-compliance with any applicable pre-action protocol in accordance with the terms of the protocol in question. The protocol ought to prescribe the range of consequences which could follow from non-compliance, identifying the contexts in which the court can be asked to take such non-compliance into account¹¹¹ and the sanctions that a court might be asked to impose.¹¹²
- (e) 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 should be the case that without access to legal advice, they were unaware of any applicable protocol obligations or, after becoming aware of them, that they were unable properly to comply with them.

5.5 Costs-only proceedings

134. One additional matter¹¹³ should be raised at this juncture. Where the substance of a dispute is settled, the parties are often able to reach a global settlement covering the costs incurred. However, this is not always the case and costs can be a fatal sticking point. Such costs may be in more significant amounts where pre-action protocols have been observed and so

Notes

¹¹¹ Cf CPR 3.1(4); CPR 44.3(4) and (5).

¹¹² Cf CPR 3.1(5), (6) and (6A); Practice Direction – Protocols §2.3.

¹¹³ Touched on by the Hon Mr Ambrose Lau speaking in Legco.

may become a more important factor in determining whether settlement can be achieved. A defendant who is prepared to accept liability and to pay the damages claimed may nevertheless regard the claimant's costs incurred in meeting protocol obligations to be unreasonably high and unacceptable. It is therefore important that the front-loaded costs generated by pre-action protocols should not be allowed to undermine settlements achievable on the substantive dispute.

135. The CPR's response to this potential problem has been to create a procedure enabling parties to bring "costs-only proceedings". This is a procedure allowing the parties to seek taxation of the pre-settlement costs even though no proceedings seeking substantive relief have been commenced in court. CPR 44.12A relevantly provides as follows :-

- "(1) This rule sets out a procedure which may be followed where—
- (a) the parties to a dispute have reached an agreement on all issues (including which party is to pay the costs) which is made or confirmed in writing; but
 - (b) they have failed to agree the amount of those costs; and
 - (c), no proceedings have been started.
- (2) Either party to the agreement may start proceedings under this rule by filing a claim form in accordance with Part 8.
- (3) The claim form must contain or be accompanied by the agreement or confirmation.
- (4) In proceedings to which this rule applies the court—
- (a) may
 - (i) make an order for costs to be determined by detailed assessment; or
 - (ii) dismiss the claim; and
 - (b) must dismiss the claim if it is opposed."

136. In England and Wales, it appears that a surprisingly high percentage of settlements are reached on the basis that costs should go to taxation. The Woolf Network's 5th survey reported the following question and the answers received :-

“In what proportion of cases, which settle prior to issue, are you finding it necessary to involve the court in resolving costs issues?”

<i>Cases</i>	<i>Respondents</i>
0% - 10%	44%
10% - 30%	22%
30% - 50%	16%
50% - 80%	12%
80% - 100%	6%

137. It is of course not ideal that a case that has settled should require the court's involvement to resolve a residual dispute as to costs and it is to be hoped that parties would make every effort to reach global settlements to avoid this. Nonetheless, it would be desirable to have a rule along the lines of CPR 44.12A so as to avoid the even less desirable consequence of having no settlement at all by virtue of an unresolved disagreement as to costs.

138. Unless the parties have contracted for some other treatment, it would be appropriate that all such costs be taxed on a party-and-party basis and that such proceedings be started by originating summons with detailed procedures regulated by practice direction.

5.6 The Working Party's recommendations

139. In the light of the foregoing discussion, the Working Party makes the following recommendations.

Recommendation 5: Pre-action protocols should not be prescribed for cases across the board, whether by a general protocol or by a general practice direction on protocols.

Recommendation 6: It should be open to the courts operating existing as well as any additional specialist lists, subject to the approval of the Chief Judge of the High Court and after due consultation with all relevant persons, to introduce suitable pre-action protocols to be applied to cases brought in those lists.

Recommendation 7: Rules should be introduced enabling the court when exercising any relevant power, in its discretion, to take into account a party's non-compliance with any applicable pre-action protocol in accordance with the terms of the protocol in question.

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.

Recommendation 9: A procedure should be introduced to enable parties who have settled their substantive dispute to bring costs-only proceedings by way of originating summons and subject to practice directions, for a party-and-party taxation of the relevant pre-settlement costs.

Section 6: Commencement of Proceedings

Proposal 6

Proposal 6

The way to commence proceedings should be simplified to involve only two forms of commencement, abolishing distinctions between writs, originating summonses, originating motions and petitions.

Interim Report paras 276-277

6.1 The consultation response

140. *Proposal 6* was generally supported by the twenty-odd respondents who addressed the issue. Only one respondent indicated opposition but gave no reasons. Several¹¹⁴ suggested that it might be sufficient to introduce a single mode of commencing proceedings. One qualification advanced¹¹⁵ was that the modes of commencement in specialist proceedings, such as company cases, should be preserved.
141. In our view, the law as it stands is unnecessarily complicated and changes should be made with a view to simplifying the way in which a case is commenced. How and to what extent such simplification should be attempted requires the present position to be examined more closely.

Notes

¹¹⁴ Including the Bar Association, High Court masters and the judges and masters of the District Court.

¹¹⁵ By one set of barristers' chambers.

6.2 *The present position*

142. Four modes of commencing proceedings are presently recognized under the Rules of the High Court, Cap 4 (“RHC”), namely, by issuing a writ, an originating summons, an originating motion or a petition.¹¹⁶
143. However, O 1 r 2(2) excludes from the ambit of the RHC generally, certain types of proceedings which have their own procedural rules. Bankruptcy, company winding-up, non-contentious probate, Prize Court, matrimonial, adoption and domestic violence proceedings are all excluded. Commencement of proceedings in such cases is governed by the rules peculiarly applicable to them, eg, rules requiring the presentation of petitions in bankruptcy, company winding-up and matrimonial proceedings.
144. Leaving aside the excluded proceedings, the approach of the RHC is first to provide¹¹⁷ that in certain cases, writs *must* be used as the means of commencement. These include claims in tort (other than for trespass to land), those based on fraud, claims for damages for breach of duty resulting in death or personal injury or damage to property, claims for patent infringement, Admiralty actions in rem¹¹⁸ and probate actions.¹¹⁹
145. Similarly, the Rules¹²⁰ provide that in certain cases, proceedings *must* be begun by originating summons. This covers applications made under any written law unless commencement by some other means is expressly

Notes

¹¹⁶ O 5 r 1.

¹¹⁷ O 5 r 2.

¹¹⁸ O 75 r 3(1) and RHC Appendix B, Form 1.

¹¹⁹ O 76 r 2(1).

¹²⁰ O 5 r 3.

required or authorized. This applies to applications under various Ordinances, for example, those made for the appointment of a new trustee, for vesting orders or for authority to deal with trust property, etc, under the Trustee Ordinance (Cap 29); for exemption from jury service under the Jury Ordinance (Cap 3);¹²¹ by persons aggrieved by any action taken by the Official Receiver,¹²² and so forth.

146. Additionally, specific provisions of the Rules provide for applications to be made by originating summons in a wide range of cases, for instance, applications for interpleader relief,¹²³ for pre-action disclosure of documents,¹²⁴ for certain orders under the Mental Health Ordinance (Cap 136),¹²⁵ for sale of property subject to a charging order,¹²⁶ for certain orders under the Arbitration Ordinance (Cap 341),¹²⁷ for an order making a minor a ward of court,¹²⁸ and so on.
147. In cases falling outside either of the “must” categories mentioned above, subject to the rules regarding originating motions and petitions discussed below, the RHC allow the plaintiff to commence proceedings either by

Notes

- ¹²¹ Cap 3, section 28(1A)(b).
¹²² Under the Companies Ordinance (Cap 32), s 360K(5).
¹²³ O 17 r 3(1).
¹²⁴ O 24 r 7A(1).
¹²⁵ Eg, O 32 r 9, for leave to bring proceedings.
¹²⁶ O 50 r 9A.
¹²⁷ O 73 rr 3, 9 and 10.
¹²⁸ O 90 r 3(1).

using a writ or an originating summons.¹²⁹ Order 5 r 4(2) gives important guidance as to when each mode is appropriate :-

“Proceedings -

- (a) in which the sole or principal question at issue is, or is likely to be, one of the construction of any written law or of any instrument made under any written law or of any deed, will, contract or other document, or some other question of law, or
- (b) in which there is unlikely to be any substantial dispute of fact,

are appropriate to be begun by originating summons unless the plaintiff intends in those proceedings to apply for judgment under Order 14 or Order 86 or for any other reason considers the proceedings more appropriate to be begun by writ.”

148. Unlike writs and originating summonses, originating motions and petitions can only be used for starting proceedings if their use is expressly required or authorized by the RHC or some other written law. But, where they are the specified method of commencement, use of the writ or originating summons is excluded.¹³⁰

149. Originating motions are prescribed, for example, in judicial review cases, to be issued after leave has been granted by the court.¹³¹ They are likewise the stipulated means for initiating an appeal before the Court of Appeal.¹³² They are also how certain applications are brought before the court under the Arbitration Ordinance,¹³³ the Trade Marks Ordinance,¹³⁴ the Companies

Notes

¹²⁹ O 5 r 4(1).

¹³⁰ O 5 r 4(1).

¹³¹ O 53 r 5(1).

¹³² O 59 r 3(1), O 106 r 12.

¹³³ O 73, r 2.

¹³⁴ O 100 r 2(2).

Ordinance,¹³⁵ the Patents Ordinance,¹³⁶ the Drug Trafficking (Recovery of Proceeds) Ordinance¹³⁷ and the Organized and Serious Crimes Ordinance.¹³⁸

150. Many of the classes of proceedings in which petitions are used are those excluded from the ambit of the RHC by O 1 r 2(2), as mentioned above. However, the RHC also prescribe their use, for instance, in relation to various non-winding-up applications under the Companies Ordinance.¹³⁹ Petitions are also prescribed as the means for bringing certain applications under various Ordinances, eg, the Limited Partnerships Ordinance (Cap 37)¹⁴⁰ and the Mental Health Ordinance (Cap 136).¹⁴¹

6.3 *Unnecessary complexity*

151. While we would accept the need for some well-established exceptions to be retained, it is difficult to see why the scheme for starting proceedings should be of such complexity. Why is it necessary to distinguish between cases where writs or originating summonses are mandatory and cases where they are optional? Why require originating motions and petitions to be used in other cases, excluding therefrom use of writs and originating summonses?
152. The complication seems particularly unnecessary since O 2 r 1(3) makes it clear that:-

Notes

- ¹³⁵ O 102 r 4.
¹³⁶ O 103 r 29.
¹³⁷ O 115 r 3(1).
¹³⁸ O 117 r 9(1).
¹³⁹ O 102 r 5.
¹⁴⁰ Cap 37 s 5(5).
¹⁴¹ Cap 136 s 15.

“The Court shall not wholly set aside any proceedings or the writ or other originating process by which they were begun on the ground that the proceedings were required by any of these rules to be begun by an originating process other than the one employed.”

153. Furthermore, O 2 r 1(1) provides that any procedural failures in beginning or purporting to begin any proceedings are merely irregularities and do not nullify the proceedings or any step taken in them. Accordingly, although some of the rules are couched in mandatory terms, non-compliance is of relative insignificance – at worst perhaps sounding in an unfavourable costs order.
154. It is our view that it ought to be sufficient for the rules to adopt the approach of O 5 r 4(2), giving guidance as to when writs and when originating summonses are appropriate, without making it mandatory to use either mode of commencement in relation to any particular types of claims. The rules could simply state that the writ should generally be used where it is likely that factual questions will be in dispute, making it desirable that there be pleadings to set out each side’s factual case and providing the framework for discovery, witness statements, cross-examination and so forth, bearing on those issues. Conversely, the rules might state that originating summonses are appropriate where there is unlikely to be any substantial dispute of fact, such as where the sole or principal question at issue is one of law or construction.
155. If the parties should choose an inappropriate mode of commencement, the court could continue to give suitable directions to enable the case to change its procedural course. An originating summons issued where there are substantial factual disputes would be directed to proceed as if begun by writ, as presently done under O 28 r 8. Similarly, a dispute which raises a simple question of law without any factual dispute can be ordered to be tried

summarily or without pleadings or discovery, as currently provided for under O 14A and O 18 r 21 respectively.

156. It may perhaps have originally been thought that petitions and originating motions involve the seeking of relief from the court without there necessarily being any identifiable defendant or respondent so that different rules relating to service, etc, had to be engaged. However, looking at the examples of originating motion and petition cases mentioned above, there appears nowadays to be a likely respondent, at least in most cases: the Secretary for Justice or a relevant public authority in judicial review and criminal seizure cases, the arbitrator and/or the other party in arbitration cases, and so forth. Even if there is no identifiable respondent, use of the originating summons with a formula such as “Let all persons concerned attend [before the named judge at the stated time and place]” would suffice to bring the matter before the court which could, if necessary, order particular persons to be served. There accordingly appears to be no reason why all proceedings presently started by originating motion or petition should not be begun by originating summons, or, if the circumstances warrant it, by writ.
157. The proceedings listed in O 1 r 2(2) should remain unaffected by the RHC as amended on the grounds that they are regulated by their own well-established rules, designed with peculiar considerations in mind. For instance, in bankruptcy and company winding-up cases, creditors other than the petitioning creditor and contributories, will often join in and may possibly take over the proceedings. The roles to be played in the proceedings by the Official Receiver, provisional liquidator, liquidator and trustee in bankruptcy also require special treatment. Similarly, the invocation of Admiralty *in rem* jurisdiction against a vessel raises peculiar

issues not encountered in purely *in personam* proceedings and not mirrored in other parts of the RHC.

158. If the overall approach to commencement of proceedings is relaxed in the manner recommended, consideration may have to be given to the possibility of adding other specialised proceedings, governed by their own procedural rules and requirements, to the O 1 r 2(2) list.
159. Election petitions lodged under various electoral laws to question the validity of an election may need special treatment. At present, such petitions are prescribed as the only means of mounting such a challenge,¹⁴² but the electoral laws go on to provide that the procedures adopted for the conduct of such petitions should approximate as closely as possible to High Court procedures.¹⁴³ It may therefore be confusing, although perhaps strictly accurate, to provide that the RHC should not apply to them by adding election petitions to the O 1 r 2(2) list. It would be preferable for O 1 r 2(2) to be amended so as to acknowledge the preservation of such petitions and the manner in which they adopt RHC procedures by analogy.

6.4 Single mode of commencement

160. We have considered but rejected the suggestion that a single mode of commencement should be adopted. Writs and originating summonses cater respectively for disputes which do and disputes which do not involve potentially contested questions of fact: writs for the former and originating

Notes

¹⁴² Such as the Legislative Council Ordinance (Cap 542) s 61(2); the District Councils Ordinance (Cap 547) s 49 and the Chief Executive Election Ordinance (Cap 569) s 32.

¹⁴³ See, eg, Legislative Council (Election Petition) Rules (Cap 542) r 2 and District Councils (Election Petition) Rules (Cap 547) r 2.

summonses for the latter. Where a party decides to issue a writ, he automatically triggers a process involving pleadings, discovery, witness statements, etc, designed for resolving factual disputes. Such procedural steps are avoided as unnecessary where an originating summons is issued to determine a question of law or construction in an uncontroversial factual context. This distinction is well-known and in the great majority of cases, the appropriate choice will be made. Where, an inappropriate choice is made, this can readily be remedied by the court directing a change, as discussed above.

161. But if a plaintiff is offered only a single means of starting proceedings, he cannot, by the expedient of choosing the appropriate mode of commencement, invoke any particular procedural scheme. A further step would be needed to establish how the case should proceed. Therefore, the apparent simplification would be specious and no saving would be achieved by adopting the single mode of commencement. The further step might, for instance, involve an early hearing where a procedural judge gives directions for the case in question. This may be helpful in large, highly complex cases, but in the great mass of cases, would involve an unnecessary procedural step and the front-loading of costs. Retaining two modes of commencement and allowing the parties to choose which to invoke would be more cost-effective.

6.5 Recommendations

162. Our recommendations in relation to *Proposal 6* are therefore as follows :-

Recommendation 10: Application of the RHC should continue to be excluded in relation to the classes of proceedings set out in O 1 r 2(2) (“the excluded proceedings”).

Recommendation 11: In so far as appropriate, other specialised types of proceedings governed by their own procedural rules and requirements should be added to the excluded proceedings and special provision should be made in respect of election petitions.

Recommendation 12: The rules of the RHC making it mandatory to commence certain proceedings by writ or, as the case may be, by originating summons, should be abolished.

Recommendation 13: In all cases other than the excluded proceedings, the parties should be permitted to commence proceedings either by writ or by originating summons, with the RHC indicating that a writ is appropriate where a substantial dispute of fact is likely and that an originating summons is appropriate where there is unlikely to be a substantial dispute of fact, such as where the sole or principal issue is one of law or construction.

Recommendation 14: Originating motions and petitions should be abolished (save where they are prescribed for commencing any of the excluded proceedings).

Recommendation 15: Unless the court otherwise directs (in accordance with applicable laws), all hearings of originating summonses should take place in open court.

Recommendation 16: It should continue to be the case that an inappropriate mode of commencement does not invalidate steps taken in the proceedings so commenced and that in such cases, the court should give suitable directions for continuation of the proceedings in an appropriate manner.

Section 7: Disputing Jurisdiction

Proposal 7

Proposal 7

Part 11 of the CPR should be adopted to govern applications to challenge the court's jurisdiction or to invite it to decline jurisdiction.

Interim Report para 278

7.1 The consultation response

163. *Proposal 7* attracted little comment. Some who responded¹⁴⁴ suggested that this was not a necessary change. One respondent expressed the concern that adoption of the CPR rule would require the plaintiff to incur the costs of delivering a statement of claim before knowing whether the defendant was intending to mount a challenge to jurisdiction.

7.2 Commentary

164. The present rule, namely, O 12 r 8, sets out a procedural code for challenging the court's jurisdiction to entertain the plaintiff's claim. Where the defendant contends that the court lacks jurisdiction, the rule allows him safely to acknowledge service and, within the time specified, to bring on the challenge without being deemed to have submitted to the jurisdiction even if his challenge ultimately does not succeed.

Notes

¹⁴⁴ Including the Law Society and one solicitors' firm.

165. CPR 11 extends this code to cover applications for a stay of proceedings brought by defendants seeking to persuade the court, as a matter of discretion, to decline to exercise jurisdiction (which it undoubtedly possesses) over the plaintiff's claim. Such applications are generally mounted on the ground of *forum non conveniens*. CPR 11 requires such applications to be made within the time specified, in default of which the defendant is deemed to have accepted that the court has (and ought to exercise) jurisdiction to try the claim.
166. We are of the view that it is desirable to apply these express arrangements to discretionary stay applications as they add to procedural certainty and consider that O 12 r 8 should be amended to achieve this.
167. Order 12 r 8 presently requires the defendant, after acknowledging service, to bring the application "within the time limited for service of a defence". It therefore allows him to wait until he sees the statement of claim before deciding whether to challenge jurisdiction or apply for a discretionary stay. We consider this sensible since sight of the statement of claim may be important to the defendant's assessment of whether the claim is properly within the court's jurisdiction or is one which ought to be stayed. A defendant who is confident that a challenge lies may of course mount his application without waiting for the statement of claim, but we do not consider that the rule should make early applications a requirement. If a challenge is mounted and the plaintiff seeks to maintain the proceedings in Hong Kong, costs will in any event have to be incurred to establish the basis for the court's jurisdiction or its exercise, and no significant savings would flow from avoiding service of the statement of claim. Indeed, it would often be by reference to the statement of claim that the plaintiff would seek to justify continuing with the claim in Hong Kong.

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.

Section 8: Default Judgments and Admissions

Proposal 8

Proposal 8

Provisions along the lines of Part 14 of the CPR should be adopted to provide a procedure for making admissions and for the defendants to propose terms for satisfying money judgments.

Interim Report paras 279 – 283

8.1 The consultation response

168. This Proposal received broad support, including support from the Bar Association, the Law Society and the High Court masters. There was, however, a perceived need¹⁴⁵ to address the basis upon which admissions should be allowed to be withdrawn.

8.2 Commentary

169. *Proposal 8* canvasses adoption of certain features of Part 14 of the CPR aimed at encouraging the parties to dispose of money claims by a default judgment process which requires no appearance before a judge and so tends to save time and costs.

170. At present, the plaintiff is able to enter judgment against the defendant by such an administrative process, but only where the defendant fails to file an acknowledgment of service after being served with a writ or where he fails

Notes

¹⁴⁵ Expressed by an individual respondent.

to file a defence after having acknowledged service.¹⁴⁶ In other words, the process only applies where the defendant unconditionally surrenders to the claim.

171. Where the defendant has no defence against debt-collection type claims, he will, in most cases, face up to this and not resist the claim, allowing judgment to be entered under the present rules. However, in a significant number of cases, although the defendant (usually unrepresented) realises that he has no defence to the whole or most of the claim, he may be unwilling, for various reasons, to allow judgment unconditionally to be entered against him. This leads to more or less desperate attempts to stave off judgment, requiring the plaintiff to incur the effort, delay and expense of applying to the court for summary judgment or even of having to take the matter towards trial.
172. CPR 14 broadens the scheme for judgments to be entered administratively and allows the defendant to make payment proposals which might make him more inclined to consent to judgment where he has no defence.
- (a) CPR 14 applies only to money claims, both liquidated and unliquidated, and allows the defendant to admit part of the liquidated amount claimed, or, in the case of unliquidated claims, to put forward the sum in respect of which he is willing to submit to judgment.¹⁴⁷

Notes

¹⁴⁶ Under O 13 and O 19 of the RHC, maintained in Part 12 of the CPR. Where the plaintiff's claim is for a liquidated sum or solely for recovery of land (without involvement of a mortgage), final judgment may be entered. If the claim is unliquidated or involves an unliquidated element, interlocutory judgment is entered, establishing the defendant's liability but necessitating an application to the court to quantify the amount of the judgment.

¹⁴⁷ CPR 14.4, 14.5, 14.6 and 14.7.

- (b) If the defendant offers to submit to judgment for only part of the sum claimed or for a quantified sum in satisfaction of an unliquidated claim, the plaintiff can of course refuse the offer and continue with his action.
- (c) If the whole claim is admitted or if the plaintiff decides to accept judgment for part of his claim, the defendant may seek time to pay the amount due, either as a single sum or by instalments¹⁴⁸ at a specified rate of payment. In doing so, he has to file a statement of his means.¹⁴⁹ If the plaintiff accepts the defendant's payment proposals, he can immediately have the judgment administratively entered in those terms.
- (d) If the plaintiff is happy with the admission (whether as to the whole or part of his claim) but unhappy with the defendant's payment proposals, he can refer those proposals for determination by the court.¹⁵⁰ This would be done by a judicial officer without a hearing pursuant to guidelines set by the judges. The parties would, however, have the right to refer the determination to a judge¹⁵¹.
- (e) Provision can be made for recovery of fixed costs and claims for interest under this system.¹⁵²

Notes

¹⁴⁸ CPR 14.9.

¹⁴⁹ 14PD.2.2.

¹⁵⁰ CPR 14.10.

¹⁵¹ CPR 14.11 to 14.13.

¹⁵² White Book 14.4.6, CPR 14.14.

173. A plaintiff would serve his statement of claim (whether or not endorsed on the writ) accompanied by a form explaining the abovementioned options for the defendant, a measure that ought to be helpful to unrepresented litigants.
174. This scheme does not affect the making of admissions in relation to other types of claim or at other stages of an action. Nor does it affect applications to the court for judgment on admissions under the RHC.¹⁵³

8.3 *Withdrawal of admissions*

175. Both under the RHC and the CPR, the court has a discretion to allow an admission made by one party to be amended or withdrawn.¹⁵⁴ As mentioned above, some of the respondents have raised concerns about the principles to be applied in the exercise of that discretion.
176. Shortly before the CPR came into operation, by a majority, the English Court of Appeal in *Gale v Superdrug Stores plc* [1996] 1 WLR 1089, held that the principles generally governing amendments to pleadings¹⁵⁵ were also applicable to the withdrawal of admissions: they could be withdrawn unless this would cause injustice to the other party and in the absence of bad faith or overreaching on the part of the applicant, a party seeking to prevent withdrawal of an admission had to adduce evidence that specific prejudice would result from such withdrawal. Millett LJ (as he then was) took the view that :-

Notes

¹⁵³ Under O 27 r 3, cf CPR 14.3.

¹⁵⁴ CPR 14.1(5).

¹⁵⁵ Expressed in cases like *Cropper v Smith* (1884) 26 Ch D 700, *Clarapede & Co v Commercial Union Association* (1883) 32 WR 262 and *Shoe Machinery Co v Cutlan* [1896] 1 Ch 108.

“It is not normally necessary for a party to justify his decision to amend his pleadings or withdraw an admission. It is enough that he wishes to do so.”¹⁵⁶

177. After the CPR entered into force, some doubt has arisen in England and Wales as to whether this remains the position. This is due to the observation of Lord Bingham CJ (as he then was) that there was “very considerable persuasive force” in the views expressed by Thorpe, LJ, the dissenting judge in *Gale v Superdrug Stores plc*, “particularly in the new procedural environment inaugurated by the CPR”¹⁵⁷
178. In *Gale*, the defendant had wished to withdraw an admission of liability that had stood for two years while the parties were debating quantum. Thorpe LJ dissented from the more indulgent approach of the majority, on the basis that modern case management required “a more disciplinary approach to adversarial manoeuvring” and indicating that he would have upheld the judge’s view that there had been an insufficient explanation for the defendant’s change of position.
179. In our view, the approach in Hong Kong is well-established and has tended to be somewhat stricter than the approach adopted by the majority in *Gale*. The courts in this jurisdiction have generally required the party seeking to resile from an admission to provide a proper explanation for its withdrawal and at the same time required the party resisting to provide evidence of any prejudice it might suffer should the admission be withdrawn.

Notes

¹⁵⁶ At 1100.

¹⁵⁷ In *Sollitt v DJ Broady Ltd* (Unreported, English Court of Appeal, 23.2.00). The approach of Thorpe LJ in his dissenting judgment also attracted Seagroatt J in *Li Fat Mui v Able Engineering* [1998] 1 HKC 469 at 472.

180. Thus, in the much-cited case¹⁵⁸ of *Tse Yuk-tin v Chee Cheung Hing & Co Ltd* [1984] HKLR 391, Hunter J stressed the need for a proper explanation as to how the admission came to be made and why it is sought to be withdrawn :-

“..... the court allows a party to withdraw an admission deliberately made or to resile from a conscious choice for good reason, and if good reason is shown. In particular it expects the party to put before it a convincing credible explanation of the circumstances in which the admission was in fact made, which is sought to be said to have been made under a mistake. A typical sort of case is where a party is able to say ‘yes, when I said this, or when I admitted this, I believed that to be the case, I have now got some totally fresh evidence in my possession which if true suggests that it was not the case, and I want to advance that proposition’. Conversely if no credible or convincing explanation is given, that is a powerful factor in favour of the exercise of discretion against the application.”¹⁵⁹

On this approach, the court is obviously not limiting itself to examining the applicant’s conduct for bad faith or overreaching as the grounds for refusing leave to withdraw the admission.

181. In *Re Chung Wong Kit (A Bankrupt)* [1999] 1 HKC 684 at 688, the Court of Appeal acknowledged the approach in *Tse Yuk-tin* and, citing *Gale v Superdrug Stores plc*, also held that the party resisting the application had the burden of showing that he would suffer specific prejudice as a result of the admission being withdrawn.

182. In other words, the Hong Kong courts have approached withdrawals of admissions by placing first a burden on the applicant to explain why the admission was made and why it is now sought to resile from it, and, secondly, where a proper explanation is forthcoming, by allowing

Notes

¹⁵⁸ Approved by the Court of Appeal, eg, in *Leung Kin Fook v Eastern Worldwide Co Ltd* [1991] 1 HKC 55 and *Taisei Kogyo Kaisha Ltd v Billiongold Co Ltd* [1992] 2 HKC 153.

¹⁵⁹ At 395.

withdrawal unless the prejudice which this would cause to the other party, as established by evidence, makes this course unjust.

183. The courts are well-equipped to perform such balancing exercises in the exercise of discretion and we consider the introduction of rules to regulate their approach unnecessary and undesirable.

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 instalments) in submitting to entry of judgment by default.

Section 9: Pleadings

Proposals 9 to 13

184. The Interim Report identified various ways in which pleadings commonly fail to perform their intended function of promoting fair and efficient litigation.¹⁶⁰ It raised for discussion the introduction of reforms with four main thrusts :-

- (a) a rule requiring pleadings to comprise a concise statement of the nature of the case and the facts relied on;¹⁶¹
- (b) a rule requiring substantive defences to be pleaded;¹⁶²
- (c) a rule requiring pleadings to be verified as true;¹⁶³
- (d) a rule providing for proactive judicial scrutiny of pleadings for their sufficiency.¹⁶⁴

185. The Interim Report also discussed the possibility of making it more difficult to obtain leave to amend pleadings¹⁶⁵ and of providing that further and better particulars should be refused if the request is disproportionate.¹⁶⁶

186. Those responding to the consultation generally acknowledged that pleadings were often unsatisfactory and that there was a need for improvement.

Notes

¹⁶⁰ Interim Report §§284-287.

¹⁶¹ *Proposal 9.*

¹⁶² *Proposal 10.*

¹⁶³ *Proposal 11.*

¹⁶⁴ *Proposal 12.*

¹⁶⁵ *Proposal 13.*

¹⁶⁶ As part of *Proposal 12.*

However, different views were expressed in relation to the various proposals discussed in the Interim Report.

9.1 *The contents of pleadings*

(a) *Re-stating the requirements*

Proposal 9

Rules should be adopted aimed at returning pleadings to a simpler form, comprising a concise statement of the nature of the claim and of the facts relied on, together with any relevant point of law.

Interim Report paras 284-288, 298

187. *Proposal 9* had little support. Many respondents¹⁶⁷ expressed the view that such a re-statement is unnecessary and would not add anything to the RHC as they presently exist. Thus, O 18 r 7(1) already provides that :-

“..... every pleading must contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence but not the evidence by which those facts are to be proved, and the statement must be as brief as the nature of the case admits.”

188. Further guidance as to what pleadings should contain is provided by O 18 r 7A in relation to personal injury cases and by O 18 r 8 as to pleading such matters as limitation, fraud and illegality. In O 18 r 12, guidance is given as to the need for particulars when alleging certain states of mind, misrepresentation, fraud, breach of trust and so forth.

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¹⁶⁷ Including the Bar Association, the BSCPI, the Law Society, one set of barristers' chambers and a firm of solicitors. The proposal was, however, endorsed by the BCC.

189. There is much force in the view that the rules already state sufficiently what is required. Where pleadings fail properly to set out the facts or to identify the issues, or are long-winded or require many subsequent amendments, this is not due to any lack of a rule. Such defects may be attributable to incompetence on the part of the pleader or inadequate instructions or insufficient thought given to the nature of a party's case. As Lord Woolf noted, many have pointed out that such shortcomings :-

“..... do not arise from defects in the rules of court, but from the repeated failure of parties and lawyers to observe those rules and of the court to police them.”¹⁶⁸

190. Lord Woolf nevertheless decided that the basic function of pleadings required re-statement as part of his endeavour to instil a change of culture in the civil justice system.¹⁶⁹ However, since the Working Party has decided against recommending a wholesale re-writing of the rules along the lines of the CPR, we are of the view that adoption of a rule re-stating the basic requirements of pleadings would serve little purpose in the Hong Kong context. *Proposal 9* is therefore not recommended. Other initiatives may be more fruitful.

<p>Recommendation 19: Proposal 9 (for a restatement of what pleadings should contain) not be adopted.</p>
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¹⁶⁸ WIR, p 154, §6.

¹⁶⁹ WIR, p 154, §§4 and 6.

(b) *The fundamental approach*

191. In assessing such other initiatives, the proper functions and purposes of pleadings¹⁷⁰ must be borne in mind. Pleadings have important functions before, during and after trial.
192. Thus, in the pre-trial context, by defining each party's case with some precision, the pleadings may provide the basis for an early settlement¹⁷¹ or for making an open offer of settlement or a payment into court. If the action has to proceed, the pleadings set the parameters of discovery, expert evidence, witness statements and trial preparation. They also form the basis for case management by the court.
193. At the trial, the pleadings “define the issues and give the other party fair notice of the case which he has to meet.”¹⁷² By limiting the parties to the pleaded issues, they are prevented, without first obtaining leave to amend, from introducing fresh issues which might take the other side by surprise and lead to disruptive adjournments.
194. After the trial, the pleadings may be referred to in order to identify the questions decided for the purposes of the doctrine of *res judicata*.¹⁷³
195. Defective pleadings hamper such functions. Three main defects exist: (i) inaccurately stating a party's case, (ii) being too sparse, or (iii) being

Notes

¹⁷⁰ See BLJ, p 9, §1-11 and §1-12; and J&G pp 2-4.

¹⁷¹ Which could, of course, preferably be reached on the basis of letters before action and before issue of the writ.

¹⁷² Per Lord Hoffmann in *Barclays Bank v Boulter* [1999] 1 WLR 1919 at 1923.

¹⁷³ See Halsbury's Laws of Hong Kong, Vol 11, §170.024, n7; and the approaches adopted in *Hoystead v Commissioner of Taxation* [1926] AC 155 and in *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581.

prolix and excessively detailed. Any reforms should address these shortcomings. They should encourage pleaders to obtain proper instructions and to give the case due thought so as to avoid pleading a false case which will require amendment and give rise to wasted interlocutory effort and expense. Rules and reforms should also impel the pleader towards striking a balance which avoids both excessive sparsity and excessive detail.

196. The need for such a balance was recently recognized by the House of Lords in *Three Rivers DC v Bank of England* [2001] 2 All ER 513 at 528, where Lord Hope, referring to the pre-CPR position, stated :-

“In my judgment a balance must be struck between the need for fair notice to be given on the one hand and excessive demands for detail on the other. In *British Airways Pension Trustees Ltd v Sir Robert McAlpine & Sons Ltd* (1994) 45 Con LR 1 at 4-5 Saville LJ said:

‘The basic purpose of pleadings is to enable the opposing party to know what case is being made in sufficient detail to enable that party properly to prepare to answer it. To my mind it seems that in recent years there has been a tendency to forget this basic purpose and to seek particularisation even when it is not really required. This is not only costly in itself, but is calculated to lead to delay and to interlocutory battles in which the parties and the court pore over endless pages of pleadings to see whether or not some particular point has or has not been raised or answered, when in truth each party knows perfectly well what case is made by the other and is able properly to prepare to deal with it.’”

197. As indicated in the passage from Saville LJ, this need for a balance applies not only to the original pleadings but also to requests and applications for further and better particulars. Since present-day procedures involve pre-trial exchanges of witness statements, expert reports and so forth, alerting each party to the details of the other side’s case, there is much less justification for engaging in satellite litigation merely to clarify the pleadings. This was

emphasised by Lord Woolf MR in the English Court of Appeal¹⁷⁴ in *McPhilemy v Times Newspapers Ltd* [1999] 3 All ER 775 at 792-3 as follows :-

“The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of that party’s witness statements will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. This does not mean that pleadings are now superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader. This is true both under the old rules and the new rules.”

198. It is with these principles in mind that the other possible reforms should be addressed.

(c) *Annexing documents and identifying witnesses in pleadings*

199. In England and Wales, the relevant practice direction provides that in claims based on written agreements, a copy of the contract or documents constituting the agreement should be attached to the particulars of claim.¹⁷⁵ It also permits a party to attach to his statement of case “any document which he considers is necessary to his claim or defence”.¹⁷⁶

200. These ideas did not find favour with some respondents to the consultation.¹⁷⁷ Nor does the Working Party consider it desirable to introduce such a rule.¹⁷⁸

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¹⁷⁴ And endorsed by Lord Hope in the *Three Rivers* case at para 50.

¹⁷⁵ 16PD7.3.

¹⁷⁶ 16PD13.3(3).

¹⁷⁷ Including the Bar Association and a set of barristers’ chambers. The Law Society thought documents should be attached if they were not too bulky.

The rule presently applicable¹⁷⁹ requires parties to state briefly, where relevant, “the effect of any document or the purport of any conversation” referred to in the pleading. It discourages setting out the precise words of the document or conversation “except in so far as those words are themselves material”.

201. In our view, the present rule encourages the pleading to convey a more focused account of the nature of each party’s case. To allow contracts and other documents to be annexed to pleadings could well lead to slackness and less precision. Pleadings may seek to rely on such documents to plug gaps in the pleadings or they may put forward the undifferentiated terms of the agreement rather than highlighting the specific aspects of the contract or other document relied on. The other party may be left to hunt for the significance of such documents and may have to incur the trouble and expense of seeking further and better particulars.
202. If a party served with a pleading which refers to a written agreement or other document so desires, he can, under the present rules, obtain inspection pursuant to O 24 r 10.
203. The CPR practice direction also expressly permits a party to “give in his statement of case the name of any witness he proposes to call.”¹⁸⁰ This does not appear to be a necessary or desirable rule.¹⁸¹ Since witness statements

..... *cont’d*

¹⁷⁸ Without prejudice to existing contrary procedures such as those adopted in the Personal Injuries list requiring particular documents (eg, medical reports) to be filed with the pleadings.

¹⁷⁹ O 18 r 7(2).

¹⁸⁰ 16PD13.3(2).

¹⁸¹ The Bar Association expressed a like view.

are exchanged in due course, naming intended witnesses in the pleadings does not appear to further any of the beneficial functions of pleadings. It is preferable to avoid any blurring of the distinction between the facts material to the case (which must be pleaded) and the evidence intended to be adduced to establish such facts (which should not). Naming a witness may also well involve the front-loading of costs since many will consider it necessary first to obtain a witness statement before putting forward someone as an intended witness.

(d) *Pleading law*

204. The RHC are permissive as to the raising of points of law in the pleadings.¹⁸² This has not changed under the CPR.¹⁸³ However, certain respondents to the consultation have suggested that points of law should not be permitted to appear in the pleadings or that such references should in some way be limited.¹⁸⁴
205. The Working Party's view is that the current position should remain unchanged. In some cases, the pleading of a point of law usefully makes a party's case clearer to the other side. *Barclays Bank Plc v Boulter* [1999] 1 WLR 1919 at 1923, is an example of such a case. The defendant wished to contend that a bank had constructive notice of alleged undue influence and misrepresentation but, while having pleaded the material facts, had not expressly alleged such notice. Lord Hoffmann pointed to the pragmatic virtues of doing so :-

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¹⁸² O 18 r 11.

¹⁸³ 16PD13.3(1).

¹⁸⁴ APAA.

“..... the question of whether notice of certain facts amounted to constructive notice of other facts is a question of law. If, therefore, the pleading alleged all the facts which would, as a matter of law, give rise to constructive notice on the part of the bank of the alleged undue influence and misrepresentation, that should technically be enough. It would enable Mrs Boulter to argue the legal consequences of the facts she had alleged or proved: see *Independent Automatic Sales Ltd v Knowles & Foster* [1962] 1 WLR. 974, 981. However, as Buckley J said in that case, this is ‘not . . . a convenient course normally to be followed’ because it may result in the question of law taking the other side by surprise. Mr Coney would have avoided a lot of trouble if he had taken a less austere approach to the rules of pleading and said expressly that he was alleging constructive notice on the part of the bank.”

206. In such circumstances, a reference to the legal point helpfully conveys the nature of the party’s case. On the other hand, while points of law can be raised in a pleading (as O 18 r 11 states), it is not permitted to “plead law” as such.¹⁸⁵ In other words, the pleading should not be turned into a legal submission or skeleton argument.

Recommendation 20: We should not adopt the practices of (i) requiring written contracts and documents constituting contracts to be annexed to the pleadings; (ii) permitting other documents to be so annexed; or (iii) permitting intended witnesses to be named in the pleadings.

Recommendation 21: The rule permitting points of law to be raised in the pleadings should remain unchanged.

9.2 Requiring substantive defences to be pleaded

Proposal 10

Rules be introduced requiring defences to be pleaded substantively, with reasons given for denials and positive cases advanced.

Interim Report paras 289, 298

207. *Proposal 10* addresses the second of the main defects mentioned above,¹⁸⁶ namely, that of excessive sparseness in the pleading. A defence consisting of bare denials and non-admissions does nothing to advance the proper functions of pleadings. Thus, in England and Wales, CPR 16.5(1) and (2) were introduced in the following terms :-

“(1) In his defence, the defendant must state—

- (a) which of the allegations in the particulars of claim he denies;
- (b) which allegations he is unable to admit or deny, but which he requires the claimant to prove; and
- (c) which allegations he admits.

(2) Where the defendant denies an allegation—

- (a) he must state his reasons for doing so; and
- (b) if he intends to put forward a different version of events from that given by the claimant, he must state his own version.”

208. Respondents to the consultation¹⁸⁷ generally supported introduction of a similar rule and the Working Party recommends adoption of this Proposal.

Notes

¹⁸⁶ See paragraph 184 above.

¹⁸⁷ Including the Bar Association, the BSCPI, the Law Society, the HKMLA, the High Court masters, the BCC and a set of barristers’ chambers.

Cagey pleadings merely increase costs and delay settlement. A greater openness as to the true nature of each party's case is to be encouraged.

(a) *Excessive detail in substantive pleading*

209. There is, however, a danger that such a rule, aimed at countering insufficient pleading, may result in the opposite defect of prolixity or inordinate detail. It should accordingly be made clear that in pleading a defence substantively, the defendant should not deal obsessively with each and every allegation in the statement of claim but that he should aim to strike the balance mentioned above.

210. A useful provision to this end is CPR 16.5(3) which provides :-

“A defendant who—

- (a) fails to deal with an allegation; but
- (b) has set out in his defence the nature of his case in relation to the issue to which that allegation is relevant;

shall be taken to require that allegation to be proved.”

211. This helpfully lays the emphasis on disclosing the nature of the defendant's case and relieves the defendant from dealing with every single allegation in the statement of claim, provided the nature of his case relevant to that allegation has been made clear.¹⁸⁸ It is recommended that such a provision be adopted.

Notes

¹⁸⁸ This operates as an exception to the general rule which would remain in force, namely, that an allegation of fact in the statement of claim which is not traversed in the defence is deemed to be admitted: O 18 r 13(1).

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 has 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.

(b) Application to subsequent pleadings

212. Some respondents¹⁸⁹ have suggested that a rule requiring substantive pleadings should also be applied to the reply and any subsequent pleadings.
213. In our view, that suggestion should not be accepted. The rule requiring substantive pleadings makes sense in relation to defendants who are obliged to plead to the plaintiffs' allegations. If a defendant ignores a factual allegation made by the plaintiff, he is deemed by O 18 r 13(1) to admit it.¹⁹⁰ Such a rule is required to enable the parties and the court to know where each party stands in relation to each issue.

Notes

¹⁸⁹ Including the Bar Association and one set of barristers' chambers.

¹⁹⁰ This is subject to the proposed introduction of the exception that a defendant need not traverse an allegation if his case in relation to that allegation is clear.

214. However, there is no obligation on the plaintiff to plead a reply at all. He does so where he wishes to raise previously unpleaded facts which the defence has made relevant. He is therefore not concerned with responding to each allegation pleaded in the defence but with introducing further facts material to his case. The approach of both the RHC (by O 18 r 14) and the CPR (by CPR 16.7(1)) has accordingly been to imply a joinder of issue in the reply in relation to all untraversed factual allegations in the defence. It follows that a rule requiring the reply to plead substantively to all factual allegations in the defence is inappropriate. The same applies to any subsequent pleadings.

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

(c) The defence of tender before action

215. A minor point arises on a different plane in relation to the pleading of a defence. Presently, under O 18 r 16, a defendant who wishes to plead the defence of tender before action is allowed to do so if he pays the sum tendered into court. However, the case law establishes that this common law defence only applies to liquidated claims and not to claims for unliquidated damages.¹⁹¹

Notes

¹⁹¹ *Davys v Richardson* (1888) 21 QBD 202 at 204-5; HKCP 2002, 18/16/1.

216. The CPR have extended this defence¹⁹² so that it is available “whether or not a specified amount is claimed.” A defendant wishing to rely on this defence must pay into court the amount which he says was tendered.¹⁹³ As this may facilitate early settlement, the Working Party recommends that a similar rule be adopted.

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

9.3 *Requiring pleadings to be verified*

Proposal 11

A requirement for all pleadings to be verified by statements of truth should be introduced and the making of a false statement without an honest belief in its truth should be made punishable as a contempt.

Interim Report paras 290-292, 298

(a) The nature of the requirement

217. *Proposal 11* addresses the first of the main defects often found in pleadings mentioned above,¹⁹⁴ namely, the fact that such pleadings do not accurately reflect the true case of the party in question. It canvasses adoption of a

Notes

¹⁹² Re-named “tender before claim”, see White Book 16.5.6.

¹⁹³ CPR 37.3. The sum so paid in also counts as a Part 36 payment.

¹⁹⁴ See paragraph 184 above.

requirement introduced by the CPR that the pleadings¹⁹⁵ (and certain other documents¹⁹⁶) be verified by a “statement of truth”.¹⁹⁷

218. Under the CPR, a statement of truth takes the form of a declaration of belief that the facts stated in the relevant pleading are true.¹⁹⁸ It may be signed by the party on whose behalf the pleading is filed or that party’s legal representative¹⁹⁹ and takes effect in law as a statement that “the party putting forward the document believes the facts stated in the document are true.”²⁰⁰ Where a pleading is verified by a statement of truth, the CPR provide that it may be used as evidence at interlocutory hearings.²⁰¹
219. A pleading which has not been verified is not a nullity. It is effective as a pleading (but not as evidence) unless it is struck out by the court, the parties being at liberty to apply for a striking out.²⁰²
220. A statement of truth lacks the formality of an affidavit or affirmation. It does not involve the person who makes it being sworn or affirmed and does not involve his attendance before a person qualified to administer oaths or

Notes

¹⁹⁵ Including the statement of claim, defence, reply and subsequent pleadings, as well as any further and better particulars and any amendments: CPR 22.1(1)(a) and (b), and CPR 22.1(2).

¹⁹⁶ Listed in CPR 22.1(1) and (2) and in 22PD.1, including witness statements and expert reports.

¹⁹⁷ The present discussion is confined to the verification of pleadings. Verification of other documents, such as witness statements and expert reports is dealt with separately.

¹⁹⁸ The form prescribed by 22PD.2.1 is “[I believe] [the (claimant or as may be) believes] that the facts stated in this [name document being verified] are true.”

¹⁹⁹ CPR 22.1(6). If the party is a minor or a patient, it is signed by his “litigation friend” (his next friend or guardian ad litem) or the legal representative of that litigation friend.

²⁰⁰ CPR 22.1(4).

²⁰¹ CPR 32.6(2)(a).

²⁰² CPR 22.2.

take affidavits.²⁰³ Nevertheless, a person who verifies a pleading without an honest belief in the truth of the facts pleaded faces possible proceedings for contempt.²⁰⁴

(b) *Justification and consultation response*

221. The White Book points to two justifications for requiring pleadings to be verified :-

“First, if a party is required to certify his belief in the accuracy and truth of the matters put forward the statement of case is less likely to include assertions that are speculative and fanciful and designed to obfuscate Secondly, in certain circumstances, a statement of case may be relied on as evidence. If it is to be used as such it is right that the facts asserted in it should be verified.”²⁰⁵

222. The second justification is ancillary. It is convenient and may avoid duplication of work to be able to rely on a verified pleading as evidence. But the true justification is that it is intended to be salutary for a party and his legal representative to have to verify a pleading on penalty of contempt. It is likely to deter sloppy and speculative pleadings and to provide a disincentive against advancing a downright dishonest case. As Patten J stated in *Clarke v Marlborough Fine Art (London) Ltd* [2002] 1 WLR 1731 at 1742 :-

“The purpose of Part 22 is simply to exclude factual allegations which to the knowledge of the claimant or other party are untrue or which the party putting forward the pleading to the court is unable to say are true.

In the most simple case the requirements of CPR r 22.1 will, if observed, exclude untruthful or fanciful claims but the notes to Part 22 also indicate that the purpose of the new rule was to discourage the pleading of cases which when settled were

Notes

²⁰³ Cf HKCP 2002, 41/1/10.

²⁰⁴ Provided for in CPR 32.14.

²⁰⁵ White Book 22.0.2.

unsupported by evidence and which were put forward in the hope that something might turn up on disclosure or at trial.”

223. The greater part of the respondents who addressed the issue²⁰⁶ supported introduction of a verification requirement although a number did so with certain reservations. Those reservations are addressed below. Subject to the modifications and refinements arising out of such reservations, the Working Party recommends adoption of *Proposal 11*.

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.

(c) *Reservations expressed*

(i) *Need to identify maker of statement of truth*

224. Some respondents to the consultation²⁰⁷ stressed the importance of it being made clear who should sign the statement of truth. In relation to pleadings,²⁰⁸ the need for guidance on this question was acknowledged in the CPR by additions being made to the relevant practice direction.²⁰⁹ The Working Party recognizes that guidance along similar lines should be

Notes

²⁰⁶ Including the Bar Association and the Law Society. The Bar Association pointed out that proceedings commenced by modes other than writ generally require a supporting affidavit.

²⁰⁷ Such as the APAA and a member of the HKFI.

²⁰⁸ Witness statements pose no difficulty. It is the witness who must sign, indicating that his account of the facts is true: CPR 22.1(6)(b) and 22PD.3.2.

²⁰⁹ White Book 22.1.15.

included in the rules. The position under the CPR may be summarised as follows.

- *Document put forward by “the party”*

225. Where pleadings are verified by a statement of truth, this amounts to a representation to the court that “the party putting forward” the pleading believes the facts stated in it are true.²¹⁰

226. Thus, although the rules permit the person signing the statement of truth to be either the party or the party’s legal representative, the pleading remains the party’s document which he puts forward as representing his case. The statement signed by the legal representative will refer to the client’s belief, not his own.²¹¹

227. Where a party is an individual and he or she signs the statement of truth, no difficulty arises. The signatory and the party are the same person so that the representation that the facts stated are true is unequivocally made.

- *Where the party is a corporation or a partnership*

228. Where, however, the party is not an individual but a corporation, a question arises as to who may sign on its behalf. One aspect of this question raises the usual corporate law issues as to who is authorized to act on the corporation’s behalf, for example, as to whether board authorization is required in the case of a company. The rules of court are not concerned with such issues and proceed on the assumption that the person signing is duly authorized to do so. However, the rules are concerned to establish the

Notes

²¹⁰ CPR 22.1(4).

²¹¹ 22PD3.7. The effect of signature by the legal representative is considered below.

level or class of officer or employee who, from the court's viewpoint, would be considered appropriate for the purposes of verifying the corporation's pleadings.

229. Under the CPR, guidance is given in the practice direction as follows :-

“Where a document is to be verified on behalf of a company or other corporation, subject to paragraph 3.7 below, the statement of truth must be signed by a person holding a senior position in the company or corporation. That person must state the office or position he holds.”²¹²

It goes on to identify as persons “holding a senior position” the following :-

- “(1) in respect of a registered company or corporation, a director, the treasurer, secretary, chief executive, manager or other officer of the company or corporation, and
- (2) in respect of a corporation which is not a registered company, in addition to those persons set out in (1), the mayor, chairman, president or town clerk or other similar officer of the corporation.”²¹³

230. Whether a signatory holding a particular position qualifies, for example, as “manager” of a company, is to be approached pragmatically and in the light of his realistic ability to confirm the accuracy of the allegations made.²¹⁴

231. In relation to partnerships, the guidance given by 22PD3.6 is as follows :-

“Where the document is to be verified on behalf of a partnership, those who may sign the statement of truth are;

- (1) any of the partners, or
- (2) a person having the control or management of the partnership business.”

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²¹² 22PD3.4.

²¹³ 22PD3.5.

²¹⁴ See the discussion of companies and in-house legal representatives in 22PD3.11.

232. These instances are obviously not exhaustive either of the types of body corporate or association where the question may arise. Nor are they exhaustive of what constitutes a “senior position.” New situations calling for discussion are bound to arise.²¹⁵ The rules should therefore indicate that duly authorized officers or employees holding analogous positions in analogous organizations or associations would also qualify.

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.

- *Where the statement of truth is signed by a legal representative*

233. Although, as indicated above, a pleading verified by a statement of truth signed by a legal representative constitutes the party’s representation of the truthfulness of its factual allegations, the legal representative who signs is taken to be making certain representations of his own to the court. These are set out in 22PD3.8 as follows :-

“Where a legal representative has signed a statement of truth, his signature will be taken by the court as his statement:

- (1) that the client on whose behalf he has signed had authorised him to do so,

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²¹⁵ Some of these are discussed in 22PD3.11, eg, as to who should sign on behalf of trustees and as to whether agents who manage property or investments for a party are able to sign.

- (2) that before signing he had explained to the client that in signing the statement of truth he would be confirming the client's belief that the facts stated in the document were true, and
- (3) that before signing he had informed the client of the possible consequences to the client if it should subsequently appear that the client did not have an honest belief in the truth of those facts.”

234. The Working Party considers this approach desirable and recommends the adoption of a rule on the effect of a legal representative signing a statement of truth.

235. One possible misconception should be dispelled. In their response, the LAD expressed concern “at the suggestion that a statement of truth in support of a pleading should be signed by the legal representative of a party, if the party itself is not available to sign it.” This was thought likely to cause practical difficulty as legally-aided clients are sometimes not contactable so that legal representatives may not be in a position to satisfy themselves of the matters referred to above “thereby rendering themselves liable to possible contempt proceedings.”

236. It is important to note that the rules do not impose any obligation at all on a legal representative to sign a client's statement of truth. They merely stipulate that a statement of truth must be signed and that this may be done either by the party or his legal representative. Plainly, the legal representative should sign only if he can meet the requirements of 22PD3.8. If he cannot meet those requirements, he should decline to sign. If neither he nor his client signs the statement of truth, the pleading could still be filed and would take effect as a pleading, but it might be liable to be struck out upon application by the other side.²¹⁶ No doubt if, for good reason, more

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²¹⁶ CPR 22.2 and 22PD.4.

time was needed by the LAD to contact its client, this would be afforded by the court before striking out the unverified pleading. In any case, there is no question of the rule putting the legal representative at risk of contempt proceedings.

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.

- *Where an insurer has conduct of the proceedings*

237. The CPR permit an insurer or the Motor Insurers' Bureau to sign a statement of truth on behalf of a party where either of them "has a financial interest in the result of proceeding brought wholly or partially by or against that party."²¹⁷ Provision is also made to deal with cases involving several insurers and several insured, permitting the statement of truth to be signed by "a senior person responsible for the case at a lead insurer" while also permitting the court to require the statement of truth also to be signed by one or more of the parties.²¹⁸ The Working Party's view is that similar rules should be adopted in Hong Kong.

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²¹⁷ 22PD3.6A.

²¹⁸ 22PD3.6B.

238. In a response received from the HKFI (enclosing comments submitted by one Hong Kong insurer), attention was drawn to certain practical problems met in practice in the UK :-

“By the time pleadings such as the Defence were required it was often difficult to re-establish contact with the policyholder/driver and other eyewitnesses. The policyholder who had been indemnified by this time often had little interest in defending the claim made against him and little motivation to sign Court documents. When the statement of truth became a possible source of accusations of contempt of court the policyholder/driver and witnesses’ motivation to assist reduced even further.”

239. That insurer pointed out (and the Working Party agrees) that the answer to this type of problem probably lies in steps to be taken by the insurer before indemnifying the insured. Thus, agreement might be secured that the insured’s incident report form is submitted on the basis that the facts there stated may be used to draw up pleadings on his behalf, that he believes those facts to be true and that he authorizes the insurer to sign a statement of truth relating to such facts, and so forth, thereby enabling the insurer or the legal representative appointed to act on the insured’s behalf to meet the requirements of 22PD3.8. If these recommendations proceed to the drafting stage, representatives of the insurance industry in Hong Kong should be consulted in this context.

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).

(ii) *Front-end loading of costs*

240. Several persons responding to the consultation²¹⁹ expressed concern that imposing a requirement for verification was likely to lead to an undesirable front-end loading of costs.
241. The Working Party's view is that provided pleadings are correctly approached in the light of their proper functions and purposes, the proposed verification requirement should not result in any unjustified front-loaded costs.
242. Thus, as discussed above, pleadings should not seek to lay out the evidence or recite every detail of a party's case. They should convey the nature of the case, stating the material facts in a manner which avoids both excessive sparsity and excessive detail. Properly drawn pleadings therefore do not call for front-end work on such detail or evidence and the verification requirement does not pre-suppose any greater exploration of the same. If, in good faith, a party reasonably verifies a pleading and subsequently discovers that it contains errors, that pleading may duly be amended, verifying the amendment.
243. Of course, the verification requirement is intended to deter the pleading of a false or speculative case, or a case based on insufficient instructions. To the extent that expense has to be incurred to formulate a proper pleading, such expense is necessary and involves no unjustified front-loaded costs. On the other hand, ill-prepared or ill-conceived pleadings hamper early settlement and define false parameters for discovery, witness statements, and so forth,

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²¹⁹ Including the Bar Association and the APAA. The High Court masters supported the initiative but thought that costs and delays might increase if the sanctions were too severe.

leading to wasteful interlocutory effort and additional costs. The Working Party accordingly considers it justified to insist on what are in truth minimum standards through introduction of a verification requirement.

(iii) Sufficient time to plead the defence

244. Some respondents²²⁰ suggested that more time should be given to the defendant to plead the defence if he has to deal substantively with the plaintiff's allegations and verify his case with a statement of truth. If the current 14 day time limit remains, it is likely only to lead to applications for time extensions, adding to costs. The Working Party agrees.

245. Where pre-action protocols operate, it may be fair to assume that the parties will have been in communication about the claim some time before the writ and statement of claim were served, giving the defendant an advance opportunity to marshal his defence. If (as would generally be true in Hong Kong) no pre-action protocol is applicable, the defendant may have received little advance warning of the claim. The current time limit of 14 days should be suitably increased (say, to 28 days).

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.

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²²⁰ Including the DOJ and the BSCPI.

(iv) *Overseas parties and commercial cases*

246. There was some suggestion that a verification requirement was somehow inappropriate for cases involving parties resident abroad²²¹ or in commercial cases. Thus, the Hong Kong Maritime Law Association stated :-

“We do not consider statements of truth are necessary or have a proper place in commercial cases. Often the party called upon to sign the statement will be abroad. Solicitors will not sign them. Moreover, in large commercial cases, the pleading may be put together by the solicitor for the party concerned from a large number of documents assembled from a pool of people. The upfront cost of litigation will be increased substantially, as it has in England.”

247. The Working Party is unable to agree with that suggestion. The concern as to front-loaded costs has already been discussed. As to the other points made :-

- (a) Pleadings in commercial cases are by no means immune from the vices identified above and the measures aimed at ensuring observance of minimum standards are equally justified in their context.
- (b) A party residing abroad is obviously able to convey instructions and documents to his lawyers and, as a matter of everyday practice (in the Commercial and Admiralty Lists, as elsewhere), such parties readily provide affidavits for use in the court. Assuming that his claim or defence is advanced bona fide on facts believed to be true, one can see no reason why he should be reluctant to sign a statement of truth verifying his pleadings or to provide the necessary assurances to his solicitors to enable them to sign. He has chosen to sue here or has had jurisdiction properly established against him here. We can see no

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²²¹ While supporting *Proposal 11*, the BCC questioned whether it “will accommodate the exigencies of oversea users of the Hong Kong Courts.”

reason why he should not adhere to our procedures if he wishes to pursue or defend the claim.

- (c) If, as is suggested, solicitors in large commercial cases sometimes take it upon themselves to construct their clients' case out of amassed documents, it would seem quite warranted to introduce a requirement that they obtain express confirmation from their client, through a statement of truth, that the end result does truly reflect their client's case based on truthful allegations of fact. If, in such cases, neither the client nor the solicitors are prepared to sign a statement of truth, one must question the propriety of anyone putting such a case forward.

248. Accordingly, while (as discussed below) the Working Party is in favour of upholding procedural autonomy in specialist lists, it considers that the recommendations made in relation to verification of pleadings ought generally to apply to cases in such lists, unless expressly excluded by practice direction or by direction in a particular case.

(v) *Contempt proceedings as a sanction*

249. A more substantial concern revolved around the question whether it was appropriate to have proceedings for contempt of court as a possible sanction for falsely verifying the pleadings.

250. CPR 32.14 provides as follows :-

- “(1) Proceedings for contempt of court may be brought against a person if he makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.
- (2) Proceedings under this rule may be brought only—
- (a) by the Attorney General; or
 - (b) with the permission of the court.”

251. Some respondents²²² thought that a heavy costs sanction might be sufficient. For the reasons which follow, and subject to a proposed modification to the rule (dealt with below), the Working Party's view is that contempt proceedings ought in principle to be available as a sanction for flagrant cases, with costs and other procedural sanctions being the more usual and proportionate response to most cases of inappropriate verification.

- *Not every inappropriate verification is a contempt – modification of the rule*

252. It is important to note that while the CPR 32.14 envisages contempt proceedings as a possibility where someone verifies pleaded allegations without believing them to be true, the rule does not (and cannot) create a new instance of contempt. As Sir Richard Scott V-C (as he then was) pointed out in *Malgar Ltd v RE Leach (Engineering) Ltd*²²³ :-

“It is not open to Rules of Court to introduce a new category of contempt, and CPR 32.14 does not do that. It provides for the possibility of a person being prosecuted for contempt if he makes or causes to be made a false statement, etc., but it does not predict what the outcome of the prosecution will be. That is a matter which must be left to the general law.”

253. It follows that someone who falls within CPR 32.14 is not necessarily guilty of contempt. The fact that he verified a pleading without believing that certain factual allegations made in it were true *may* but *does not necessarily* mean that he is a contemnor. The general law of contempt generally requires more to be established. Thus, as Sir Richard Scott explained in the *Malgar* case :-

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²²² Including the Bar Association.

²²³ The Times, 17 February 2000.

“..... it must in every case be shown that the individual knew that what he was saying was false and that his false statement was likely to interfere with the course of justice.”

254. Moreover, questions of degree, of relative gravity and proportionality arise. Looking at the facts of that case, his Lordship posed the question :-

“Does this context show an attempt to interfere with the course of justice of a sufficient seriousness to warrant committal proceedings?”

255. Sir Richard Scott acknowledged that :-

“..... it is important that flagrant breaches of the obligation to be responsible and truthful in verifying statements of case and in verifying witness statements should be policed and enforced if necessary by committal proceedings.”

However, on the facts of that case – where the false statements were not persisted in, having been abandoned a month after being made – a committal application was considered disproportionate in all the circumstances.

256. The Working Party respectfully agrees with the analysis and approach in the *Malgar* case. It also considers it desirable that the main features of that approach should be made explicit in the rule providing for possible contempt proceedings as a consequence of a false verification. Thus, the rule as expressed in the CPR might be modified by inserting at the end of CPR 32.14(2)(b), words to the following effect: “to be granted only if the court is satisfied that sanctions for contempt may be proportionate and appropriate.”²²⁴

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²²⁴ Running on to state as in CPR 32.14: “..... proceedings for contempt of court may be brought against a person if he makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.”

- *Other sanctions*

257. In most cases, orders for costs, perhaps on a higher scale, would be a sufficient response to cases of inappropriate verification of pleadings. Such orders could compensate the other parties for wasted effort caused by the misleading nature of the offending pleadings. But where parties suffer consequences of false verification which are not compensatable in costs, such as loss of the opportunity to secure evidence to meet the real case, and so forth, the fair response in serious cases may be to strike out the case of the party at fault.

258. Although the vast majority of cases would adequately be dealt with by orders of the abovementioned types, there nonetheless remains an important public interest in deterring persons from knowingly misleading the court and the other parties, so that contempt proceedings should remain available in support of that public interest.

- *Leave of the court*

259. In England and Wales, it appears that contempt proceedings may be brought in this context either by the Attorney-General or anyone else with the permission of the court. In the Working Party's view, only the parties and the Secretary for Justice should be able to bring such proceedings, with the leave of the court in each case.

- *Statement of truth rather than affidavit*

260. Contempt proceedings are less drastic than the potential penalty for making a false affidavit presently provided for by s 40 of the Crimes Ordinance (Cap 200). This provides :-

“Any person who wilfully uses for any purpose any affidavit which he knows to be false or does not believe to be true, wherever such affidavit may have been sworn, shall be guilty of an offence and shall be liable on conviction upon indictment to imprisonment for 7 years and to a fine.”

261. It is true that prosecutions for this offence are extremely rare. The same is likely to be true of committal for contempt for falsely verifying a pleading. Nonetheless, it is in principle possible for the maker of a false affidavit to face criminal prosecution – which is not being proposed in relation to the verification of pleadings by a statement of truth (as opposed to an affidavit).

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.

(d) *Verifying inconsistent alternatives*

262. The current rule is that a party is permitted to make alternative and inconsistent allegations of material fact in his pleadings.²²⁵ How then is verification to work in such cases?
263. This question, which is not without difficulty, was considered by Patten J in *Clarke v Marlborough Fine Art (London) Ltd* [2002] 1 WLR 1731, whose approach may be summarised as follows. Cases may arise where the party has no personal knowledge of the facts, but has evidence pointing to alternative possibilities. Provided that each alternative can be justified by some evidence (a requirement reflected in the Bar's Code of Conduct), the pleading and verification of such alternative pleas is permissible. CPR 22 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, each of which would be legally viable as part of the party's case.²²⁶
264. The Working Party's view is that a similar approach should be adopted in Hong Kong and set out in a rule. Each case would have to be examined separately. If the matter pleaded is plainly within the party's knowledge so that there could be no justification for him putting forward inconsistent factual alternatives, the pleading is embarrassing and cannot properly be put forward or verified. The same is true of inconsistent and mutually destructive allegations advanced, not as alternatives, but as part of a unified

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²²⁵ See J&G pp 55-56.

²²⁶ At 1742-3 and 1745, §§20-22 and §§28-30.

case.²²⁷ Where, however, the party putting forward the pleading has a reasonable basis for putting forward alternative and mutually inconsistent versions, the pleading is permissible and ought to be verifiable on the basis that the party believes, on the evidence available, that the facts correspond to one or other of the possibilities pleaded.

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.

9.4 Clarifying pleadings

Proposal 12

Rules should be adopted to establish a power to require clarification of and information on pleadings, exercisable by the court of its own motion or on application by a party, in accordance with the principles contained in the overriding objective.

Interim Report paras 293-295, 298

(a) Judicial scrutiny of pleadings

265. This Proposal, which generally received support,²²⁸ raised for consultation the desirability of a rule giving judges proactive powers in respect of

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²²⁷ Patten J so held in *Clarke v Marlborough Fine Art* at §18 and §28.

²²⁸ Including support from the Bar Association, the Law Society, the BSCPI, the High Court masters, a firm of solicitors and the BCC.

inadequate pleadings. Thus, for instance, by CPR 18.1, judges in England and Wales are given power to order a party to :-

“clarify any matter which is in dispute in the proceedings; or give additional information in relation to any such matter, whether or not the matter is contained or referred to in a statement of case.”

Where an order is made and clarification is given, the other party has to respond to the case as clarified.

266. The Working Party considers that it would be useful for the court to have this power, not by reference to any overriding objective,²²⁹ but as a specific rule in the context of pleadings. Such a power would promote the proper functions of pleadings and could be particularly helpful in cases involving unrepresented litigants who may be ill-equipped to require needed clarification from the other side. A power of this sort ought to be exercised flexibly, for example, by requiring a party to give necessary particulars or to file a fresh pleading properly setting out his case, as the circumstances may require.

267. However, two matters should be understood.

(a) The power should only be exercised when the pleading is seriously inadequate and fails to convey the nature of the party’s case or is such as to pose a serious risk of requiring significant expenditure of unnecessary costs. The power should, in other words only be used when its exercise is necessary for disposing fairly of the matter or for saving costs. It should not be exercised in respect of peripheral imperfections.

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²²⁹ Nor to the underlying objectives discussed in Section 4 above.

- (b) The power should only be exercised when the defective pleading comes to the court's notice in the ordinary course. It is not suggested that the court should proactively schedule a case management hearing simply to deal with defective pleadings.

Recommendation 33: The court should have power to require, of its own motion and in such manner as it sees fit, any party or parties to particularise or amend their pleadings where clarification is necessary for disposing fairly of the cause or matter or for saving costs.

(b) *Applications for further and better particulars*

268. As between themselves, the parties ought to have leeway to request, by correspondence, such further and better particulars of each other's pleadings as they consider desirable. However, where voluntary particulars are refused, applications to the court for particulars to be ordered should only be launched where there is a genuine need for clarification of the nature of the other side's case in order to ensure fairness or to avoid wasting costs. Attempts should also be made to schedule any such applications to be heard at general directions hearings rather than as specific pieces of satellite litigation.
269. As emphasised in *McPhilemy v Times Newspapers Ltd* [1999] 3 All ER 775, given the modern practice of requiring witness statements, expert reports and so forth to be exchanged, satellite litigation merely to clarify the pleadings is seldom necessary. A pleading which conveys the nature of a party's case, stating the material facts, should not attract an application for particulars even if certain details (which are peripheral or likely to emerge

in the usual course) are not disclosed. The Working Party is of the view that the rules should make this clear and that unnecessary applications should attract appropriate costs sanctions.

270. The present rule, O 18 r 12(3), provides as follows :-

“The Court may order a party to serve on any other party particulars of any claim, defence or other matter stated in his pleading, or in any affidavit of his ordered to stand as a pleading, or a statement of the nature of the case on which he relies, and the order may be made on such terms as the Court thinks just.”

It is desirable that this should be amended so that, as with orders for specific discovery, orders for further and better particulars will only be made where this is necessary for disposing fairly of the cause or matter or for saving costs.

Recommendation 34: The existing rule should be amended to make it clear that a court will only order delivery of further and better particulars where such order is necessary for disposing fairly of the matter or for saving costs.

(c) *Verification of voluntary particulars*

271. A minor point to note is that, as the White Book points out,²³⁰ the rules laying down the verification requirement in the CPR have (apparently accidentally) omitted to provide for voluntary particulars to be verified by a statement of truth. Assuming that the verification requirement is adopted, it should expressly include voluntary particulars.

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²³⁰ White Book 22.1.9.

Recommendation 35: Voluntary particulars should be required to be verified by a statement of truth.

9.5 Amending pleadings

Proposal 13

Rules making it more difficult to amend with a view to encouraging carefully prepared statements of case early in the proceedings should be adopted.

Interim Report paras 296-298

272. The object of this Proposal was to discourage slackness in drawing up pleadings on the part of pleaders who might assume that they could in due course amend the pleadings to reflect the party's true case. It received a mixed response. The Bar Association and the Law Society supported it, but many others²³¹ did not. The LAD thought that it might work hardship on unrepresented litigants and one respondent²³² thought such a rule should only apply after discovery.

273. The Working Party considers that no new rule is needed and that leave to amend should remain a matter within the court's discretion. The proposed requirement for verification of all pleadings by a statement of truth is likely to be a sufficient incentive for pleadings to be drawn up carefully. In any event, it is well-established that an appeal to the court's discretion has to be

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²³¹ Including the BSCPI, a set of barristers' chambers, a firm of solicitors and the HKMLA.

²³² A solicitors' firm.

based on material enabling the court to exercise it favourably.²³³ Accordingly, a party seeking to amend would in most cases be expected to explain why the amendment is required and, if it introduces allegations inconsistent with those previously verified, to explain how this arose.

Recommendation 36: Proposal 13 (for introducing rules making it more difficult to amend pleadings) should not be adopted.

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²³³ Eg, *Thambo Ratnam v Thamboo Cumarasamy* [1965] 1 WLR 8.

Section 10: Summary Disposal of Proceedings

Proposal 14

Proposal 14

The test for summarily disposing of proceedings or issues in proceedings should be changed to the "real prospect of success" test, construed as establishing a lower threshold for obtaining summary judgment, and applied in all procedural contexts where summary disposal of the case may ensue. Cases or issues in cases, whether advanced by plaintiff or defendant, which have no real prospect of success should not be allowed to proceed to trial unless some overriding public interest requires that they do proceed.

Interim Report paras 299-316

274. This proposal raised for consultation the possible introduction of a “real prospect of success” test as the sole basis for determining whether the whole or part of a claim or defence ought to be disposed of summarily in all relevant procedural contexts.²³⁴

275. It also canvassed the possible adoption of rules allowing the court to initiate summary disposal proceedings and giving the court flexibility in admitting evidence, including oral evidence, in summary disposal hearings.

10.1 The consultation response

276. The response was divided. The Law Society was in the forefront of those favouring a lower threshold for disposing of cases summarily. Their

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²³⁴ For example, whether to set aside a default judgment, to give the plaintiff summary judgment or to strike out a pleading.

response went so far as to criticise the *Saudi Eagle* test²³⁵ applied in Hong Kong as making it too easy to set aside regularly obtained default judgments.²³⁶ Since, as Sir Roger Ormrod explained,²³⁷ that test requires the defendant to “show that he has a defence which has a real prospect of success” and is restated in CPR 13.3(1)(a),²³⁸ it would appear that the Law Society was suggesting that a test even less stringent than the “real prospect of success” test should be adopted. One set of barristers’ chambers also voiced support for the lower threshold, arguing additionally that there should be no residual category of cases which, though lacking real prospects of success, ought “for some other good reason” to be allowed to proceed. A number of others²³⁹ were attracted by the suggestion that there should be a single, unifying test, although subject to certain reservations.

277. Those opposing such changes,²⁴⁰ including the Bar Association, did so on differing grounds. Some thought that the changes would make no difference in practice and opposed them as an unhelpful complication. Others thought that such changes *would* make a practical difference by lowering the threshold for summary disposal, but that this was undesirable.

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²³⁵ From *Alpine Bulk Transport Co Inc v Saudi Eagle Shipping Co Inc*, *The “Saudi Eagle”* [1986] 2 Lloyd’s Rep 221.

²³⁶ They also criticised as too stringent the current tests for summary judgment and for striking out pleadings.

²³⁷ At 223.

²³⁸ As pointed out in White Book 13.3.1.

²³⁹ Including the Law Society, the BSCPI, a set of barristers’ chambers, a firm of solicitors, the HKMLA and some judges.

²⁴⁰ Including the Bar Association (which took a different view from the BSCPI), a number of judges and masters, the HKFLA, the BCC and a firm of solicitors.

10.2 No practical difference?

278. The traditional view is that the different tests do (and ought in principle to²⁴¹) make a practical difference.²⁴² Thus, the “real prospect of success” test for setting aside a regularly obtained default judgment has been treated as requiring something more than the “no arguable defence” test used in applications for summary judgment. Thus, in *Yeu Shing Construction Co Ltd v Pioneer Concrete (HK) Ltd* [1987] 2 HKC 187 at 191, Silke VP encapsulated the principle governing the setting aside of such default judgments as follows :-

“..... there must be an arguable case which has merits and which ought to be tried, there being implied in that test, *which goes further than the test applicable to O. 14 proceedings*, a reasonable prospect of success.” (italics supplied)

Similarly, in *Premier Fashion Wears Ltd v Li Hing-chung* [1994] 1 HKLR 377 at 383, Godfrey JA citing *The Saudi Eagle* (*supra*) stated :-

“This, I believe, shows that for the purposes of 0.13, r.9 it is generally not sufficient for a defendant merely to show an arguable defence, although that alone would justify leave to defend being given under 0.14. A defendant who seeks to set aside a regular judgment must at least show that his case has a real prospect of success. To do so he must satisfy the court that his case, and the evidence he has adduced in support of it, carries some degree of conviction. It seems to me that unless potentially credible affidavit evidence from the defendant has demonstrated a real likelihood that he will succeed on fact, he cannot have shown that he has a real prospect of success.”

279. Nevertheless, the Working Party is respectfully of the view that there is room for doubting whether *in practice* the two tests really operate

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²⁴¹ In *The Saudi Eagle* (*supra* at 223), Sir Roger Ormrod said that “..... it would be surprising if the standard required for obtaining leave to defend (which has only to displace the assertion that there is no defence) were the same as that required to displace a regular judgment of the Court and with it the rights acquired by the plaintiff.”

²⁴² As pointed out in the Interim Report §306, the House of Lords in *Arthur JS Hall & Co v Simons* [2002] 1 AC 615, shared this view.

differently. In none of the cases mentioned above did the court focus on how the “real prospect of success” test actually differs from a test requiring the defendant to show that he has an arguable defence. Merely to say that the former test “goes further” gives little guidance. To say that the defendant “must satisfy the court that his case, and the evidence he has adduced in support of it, carries some degree of conviction” could just as easily be taken to be an elaboration of the “arguable defence” test as of the “real prospect of success” test. Such linguistic formulae pose questions of degree which are answered in an inherently subjective manner, so that the difference, if any, between the tests, especially when operated by different judges over a range of different cases, is fated to remain elusive.

280. Indeed, doubts as to whether the tests operate differently in their application have recently been surfacing in our courts. In *O Mark Polyethylene Products Pty Ltd v Reap Star Ltd* [2000] 3 HKLRD 144, the question arose as to whether any difference existed between the test for setting aside a default judgment under O 13 r 9 and the test for setting aside a summary judgment obtained in the absence of a defendant under O 14 r 11. Keith JA left this question open because “to the extent that there is a practical difference between the two” he was satisfied that the defendant had satisfied the former test, taken for such purposes to be the more demanding.²⁴³ Godfrey VP described the question as leading to “a minefield” because :-

“..... the principles which guide the court on an application to set aside a judgment under O 13 r 9 are themselves not entirely clear. It appears from *Alpine Bulk Transport Co Inc v Saudi Eagle Shipping Co Inc, The Saudi Eagle* [1986] 2 Lloyd’s Rep 221 that it is not sufficient, on an application under O 13 r 9, to show a merely ‘arguable’ defence that would justify leave to defend under O 14; it must both have ‘a real prospect of success’ and ‘carry some degree of

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²⁴³ At 148.

conviction'. Thus, the court must form a provisional view of the probable outcome of the action: see the Supreme Court Practice 1999 at para 13/9/18. Yet, as the editors add, in *Allen v Taylor* (1992) 1 PIQR 255, the Court of Appeal, holding that: . . . a judge had misdirected himself by giving too little weight to an assertion of a defendant on merits and too much to conduct, allowed an appeal following an analysis of the principles emerging from *The Saudi Eagle*. It qualified the requirement to form 'a provisional view of the probable outcome' where assessment of facts at a trial is essential to form a view. The Court held it enough that certain exculpatory facts 'could well be established'. The editors of the Supreme Court Practice express some reservations about that decision of the Court of Appeal."²⁴⁴

281. As discussed in the Interim Report,²⁴⁵ when in *Swain v Hillman* [2001] 1 All ER 91, the English Court of Appeal gave guidance as to how the "real prospect of success" formula should be approached, Lord Woolf stated :-

"The words 'no real prospect of being successful or succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success or, as Mr Bidder QC submits, they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success."

282. Citation of this passage in the speech of Lord Hope in *Three Rivers DC v Bank of England (No 3)* [2003] 2 AC 1 at 259, has thereafter been taken in England and Wales as a definitive endorsement of the abovementioned approach, not only in relation to the summary disposal of proceedings but to other procedural questions involving the "real prospect of success" test.²⁴⁶

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²⁴⁴ At 150. It was decided that the tests should be the same, namely the test applicable under O 13 r 9.

²⁴⁵ At §307.

²⁴⁶ See, eg, *Tanfern Ltd v Cameron-MacDonald* [2000] 1 WLR 1311 at 1316; *Intel Corp v VIA Technologies Inc* [2002] EWCA Civ 1905, [2002] All ER (D) 346 (CA) §35; *Three Rivers District Council and others v Bank of England (No 4)* [2002] EWCA Civ 1182, [2003] 1 WLR 210, [2002] 4 All ER 881 (CA) §33.

283. The position in England and Wales is therefore settled as a matter of authority. A “real prospect” is the antithesis of a “fanciful prospect”.²⁴⁷ However, as indicated in the Interim Report, it is not clear whether replacing the old “arguable defence” test with the new test so explained has made any practical difference. Could it not equally be said of a defence which is arguable that it is “not fanciful”? Does this new verbal formula affect the way in which courts actually deal with summary applications or the advice that lawyers give to their clients regarding the launching of applications for summary judgment or for striking out pleadings?
284. *Proposal 14* suggests that any new rule should be couched in terms making it clear that any “real prospect of success” test adopted in this jurisdiction is to be understood as establishing a lower threshold than applicable under the RHC for the grant of summary judgment. However, the Working Party considers that such an attempt to effect what is a relatively fine conceptual adjustment to the threshold for summarily disposing of a claim or defence is likely to suffer from the inherent difficulties discussed above, leading to unsatisfactory results. It is doubtful whether replacing the present rules with one importing the real prospect of success test would be beneficial or have any practical effect.

10.3 *Undesirable differences?*

285. If, on the other hand, one assumes that the tests really do differ and that the new test would in practice lower the threshold – make it easier – to obtain summary judgment or to strike out a claim or defence, a number of those responding argued that such a development would be undesirable. The

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²⁴⁷ *Derksen v Pillar* [2002] All ER (D) 261, §18.

concerns, some of which were mentioned in the Interim Report,²⁴⁸ include the following :-

- (a) Injustice could result. A lower threshold might encourage a judge to be too robust in condemning a claim or defence when he is not properly in a position to form a definitive view of the merits. Cases that look weak on the pleadings may take on a very different complexion at the trial, after discovery and cross-examination of the witnesses.
- (b) The lower threshold may lead to the proliferation of speculative or ill-judged summary judgment or striking out applications, resulting in delays and wasted costs.
- (c) A more robust disposal of cases may stultify development of the law.
- (d) Giving the judge greater scope for summarily disposing of claims or defences is likely to magnify the subjectivity inherent in such decisions, resulting in a greater risk of judicial inconsistency.

10.4 Recommendations

286. While *Proposal 14* has its attractions, the Working Party has decided not to recommend its implementation. The potential benefits of *Proposal 14* are in doubt. As discussed above, it is questionable whether a differently formulated test would operate differently in practice. Some of the anxieties expressed concerning adoption of a lower threshold are also legitimate.

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²⁴⁸ At §312.

287. Moreover, while the object of adopting a single test is appealing, such unification can in fact only be achieved in those procedural contexts involving assessment of the factual merits of a claim or defence.²⁴⁹ Summary applications in other contexts raise different issues and proceed on different principles. For example :-

- (a) Setting aside an irregularly obtained judgment does not require the defendant to show any merits, but occurs as of right.²⁵⁰ This remains the case under CPR 13.2.²⁵¹
- (b) Similarly, where a pleading is struck out as being bad on its face under O 18 r 19, the court assumes the correctness of the facts pleaded and decides as a matter of law that on such facts, the pleading plainly and obviously discloses no reasonable cause of action or defence, as the case may be. This continues to be so under CPR 3.4(2)(a).
- (c) Again, where the claim is struck out as an abuse of the process, it is the abusive nature of the proceedings that supplies the logic for summary disposal. The same applies under CPR 3.4(2)(b).

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²⁴⁹ Deciding whether to set aside a regularly obtained default judgment under O 13 r 9, deciding whether to grant summary judgment to a plaintiff under O 14 or O 86, and striking out a claim or defence under the inherent jurisdiction.

²⁵⁰ The Working Party notes the discussion in HKCP 2002, 13/9/3 of the suggestion in *Faircharm Investments v Citibank International plc* (1998) *The Times*, February 20, that merits must be shown even in this context. However, the Working Party considers that the orthodox position taken in *Po Kwong Marble Factory v Wah Yee Decoration Co Ltd* [1996] 4 HKC 157 (and the other cases cited at HKCP 2002, 13/9/4) preferable and correct in principle.

²⁵¹ Which has effectively overridden the *Faircharm Investments* case: see White Book 13.2.1.

(d) In respect of actions dismissed for want of prosecution, the principles require the court to be satisfied either that there has been a contumelious failure to comply with its peremptory order or other conduct amounting to an abuse of its process²⁵² or that the delay is inordinate and inexcusable and such as to give rise to serious prejudice to the defendants or to a substantial risk that a fair trial is no longer possible.²⁵³

288. A lower threshold for disposing summarily of cases may not be necessary. If rules which require pleadings to be verified are enacted, this may result in more care and restraint being exercised by parties and their lawyers in advancing a case, so that fewer palpably bad claims and defences will come into existence, reducing the need for broader summary disposal powers. Instead, the emphasis of the reforms should be on arming the court with suitable case management powers to reduce costs and delays, particularly by discouraging satellite litigation, thereby getting the parties more rapidly to the stage of settlement or to the trial without prior recourse to a summary disposal application.

Recommendation 37: Proposal 14 (for changing the test for summarily disposing of proceedings) should not be adopted.

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²⁵² See HKCP 2002, 25/L/3.

²⁵³ See HKCP 2002, 25/L/4. While England and Wales no longer apply the authorities in this area, favouring instead the more general principles of the CPR (*Biguzzi v Rank Leisure plc* [1999] 1 WLR 1926), these do not relate to the real prospect of success test: White Book 8–3.

10.5 Basic Law considerations

289. As discussed in Section 3 above, the access and hearing rights deriving from BL 35 and BOR 10 potentially come into play in relation to rules or processes which operate to determine decisively a party's rights and obligations. Procedures for the summary disposal of proceedings, if successful, are decisive of such rights and obligations and so do potentially engage the access and hearing rights.
290. However, as the Working Party is not proposing any changes to the existing scheme for summary disposal of proceedings in the various procedural contexts mentioned above, a discussion of the possible impact of the access and hearing rights is not called for in this Final Report. So far as the Working Party is aware, no constitutional challenges to the existing rules have to date been made.

Section 11: Sanctioned offers and payments

Proposal 15

Proposal 15

Rules governing the making and costs consequences of offers of settlement and payments into court along the lines of Part 36 of the CPR should be adopted.

Interim Report paras 317-323

11.1 Consultation response and recommendation

291. The innovations introduced by CPR 36 were described in some detail in the Interim Report.²⁵⁴ In this Final Report, we will refer to Part 36 offers and payments proposed for Hong Kong as “sanctioned offers” and “sanctioned payments”, that is, offers of settlement and payments into court sanctioned by the Rules as qualifying for specified legal consequences.

292. The proposed sanctioned offers and payments aim to encourage the parties to take possible settlement seriously and to avoid unproductive prolongation of the litigation. A plaintiff who rejects a sanctioned offer or payment and then fails to achieve a better result at the trial may, despite winning the case, be ordered to pay all of the defendant’s costs incurred after the time when the plaintiff could have accepted the offer. This substantially mirrors the rules already in place under Order 22 of the RHC. The major change brought about by CPR 36 involves rules providing that a defendant who rejects a plaintiff’s sanctioned offer and then finds that the plaintiff does

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²⁵⁴ At pp 121-127, §§317-323.

better at the trial, may be ordered to pay indemnity costs and additional interest at up to base rate plus 10% on the sum awarded.

293. The response elicited in the consultation on this Proposal was enthusiastic. All the respondents who addressed it were in principle in favour of adopting Part 36 in Hong Kong. Some suggested going further, for instance, by making the plaintiff pay indemnity costs to the defendant where he unwisely rejects the defendant's offer,²⁵⁵ or by extending the scheme to pre-Writ offers.²⁵⁶ Some injected a note of caution: one solicitors' firm and the LAD cautioned against possible abuses of the scheme by defendants, while two other firms warned against the pendulum swinging too far in favour of plaintiffs.
294. In the light of the success of Part 36 in England and Wales and of the very positive response, the Working Party recommends that *Proposal 15* be adopted subject to the modifications discussed below.

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.

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²⁵⁵ A set of barristers' chambers.

²⁵⁶ The BSCPI. CPR 36.10 allows the court to take into account pre-commencement offers which comply with Part 36 requirements.

11.2 Relevant Hong Kong considerations

(a) Offers and payments made by the defendant

295. As indicated above, the innovations made by Part 36 in relation to defendants are relatively minor when compared with the regime existing under O 22. Thus, where a plaintiff brings a money claim, the defendant still has to make a payment into court if he wants to trigger potential Part 36 consequences.²⁵⁷ And he can only make such a payment after proceedings have started.²⁵⁸

296. The main change in relation to defendants is in relation to claims other than money claims (and to the non-money component of mixed claims). Defendants can now make Part 36 offers in respect of such claims with the same costs consequences as those attaching to Part 36 payments made in response to money claims. CPR 36.20, which lies at the heart of the scheme for defendants provides as follows :-

- “(1) This rule applies where at trial a claimant—
 - (a) fails to better a Part 36 payment; or
 - (b) fails to obtain a judgment which is more advantageous than a defendant’s Part 36 offer.
- (2) Unless it considers it unjust to do so, the court will order the claimant to pay any costs incurred by the defendant after the latest date on which the payment or offer could have been accepted without needing the permission of the court.

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²⁵⁷ CPR 36.3(1), as under O 22 r 1. Under the CPR, a defendant may make a pre-commencement offer but then, when the proceedings are started, must back it up by paying a sum not less than the sum previously offered into court: CPR 36.10(3).

²⁵⁸ CPR 36.3(2). Presently, a payment into court may be made after service of the writ: HKCP 2002, 22/1/8.

297. Thus, as with a payment into court, a Part 36 offer *prima facie* entitles the defendant to an order for the plaintiff to pay all the post-offer costs even after winning the case, where the plaintiff has failed to better the defendant's offer at the trial. This rule is only disapplied where the court "considers it unjust" to make the order. The Hong Kong position is presently governed by O 22 r 14, a rule codifying the development of *Calderbank* offers²⁵⁹, in combination with O 62 r 5(d). They allow the court to "take into account" such offers of settlement in exercising its discretion as to costs, but without giving the defendant any defined *prima facie* entitlement.
298. The CPR also include some ancillary rules which helpfully clarify for both parties the effect of offers and payments, including :-
- (a) rules settling nomenclature²⁶⁰ and placing the sanctioned offers and payments in the legal context of offers for settlement generally;²⁶¹
 - (b) rules defining, in respect of plaintiffs and defendants respectively, the mechanics of making or improving,²⁶² receiving and clarifying,²⁶³ withdrawing or reducing,²⁶⁴ accepting²⁶⁵ and rejecting sanctioned

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²⁵⁹ After *Calderbank v Calderbank* [1976] Fam 93. See HKCP 2002, 22/14/1.

²⁶⁰ As in CPR 36.2.

²⁶¹ As in CPR 36.1(2).

²⁶² As in CPR 36.3, 36.5, 36.6 and 36.8.

²⁶³ As in CPR 36.8 and 36.9.

²⁶⁴ As in CPR 36.5(8) and 36.6(5).

²⁶⁵ As in CPR 36.16 and 36.17.

offers and payments, who can make or accept them and when²⁶⁶ this has to be done;

- (c) rules dealing with complications such as sanctioned offers made in respect of claims that are partly money claims and partly non-money claims;²⁶⁷ made by or to some, but not all, of the defendants;²⁶⁸ made by or to parties who require the court's sanction to settle proceedings,²⁶⁹ and so forth;
- (d) rules regarding non-disclosure of the offers and payments;²⁷⁰ and
- (e) rules specifying the consequences of acceptance²⁷¹ or rejection²⁷² of such offers and payments.

299. Although Order 22 may have to be re-written so that new provisions and terminology introducing reforms regarding the plaintiff's position can be accommodated, the Working Party's view is that the defendant's position under Order 22 should in substance be preserved, but with the addition of the innovations and ancillary provisions referred to above.

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.

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- ²⁶⁶ As in CPR 36.2(4) and 36.12.
- ²⁶⁷ As in CPR 36.4.
- ²⁶⁸ As in CPR 36.17.
- ²⁶⁹ As in CPR 36.18.
- ²⁷⁰ As in CPR 36.19.
- ²⁷¹ As in CPR 36.13, 36.14 and 36.15.
- ²⁷² As in CPR 36.20 and 36.21.

(b) *When sanctioned offers can be made*

300. In England and Wales, Part 36 offers²⁷³ are intended to be made even before commencement of proceedings, as part of the scheme of pre-action protocols and judicial scrutiny of the parties' pre-commencement conduct. Thus, CPR 36.10(1) provides :-

“If a person makes an offer to settle before proceedings are begun which complies with the provisions of this rule, the court will take that offer into account when making any order as to costs.”

301. In the light of the resistance shown in the consultation against the general adoption of pre-action protocols and against the court assuming powers to penalise the parties' pre-commencement conduct, primarily on the ground that such rules would result in unnecessary front-loaded costs (as previously discussed²⁷⁴), the Working Party recommends that only sanctioned offers and payments made at the time of or after service of the Writ should be taken into account for the purposes of the sanctioned consequences, 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. Accordingly, CPR 36.10(1) should not be adopted.²⁷⁵

302. In consequence, although parties would be encouraged to settle their disputes before starting proceedings, their rejection of any

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²⁷³ As opposed to Part 36 payments: CPR 36.3(2).

²⁷⁴ See Section 5 above.

²⁷⁵ As discussed in the following section of this Final Report, other aspects of CPR 36.10 are also recommended for adaptation in the Hong Kong context.

pre-commencement offers which would otherwise qualify as sanctioned offers would not subsequently be taken into account by the court (subject to the aforementioned exception concerning pre-action protocols in a specialist list). The court would only attach any adverse consequences to the non-acceptance of sanctioned offers made with or after service of the Writ (such consequences to take effect from the end of the period allowed for acceptance).

303. We have recommended retention of the present rule that a defendant faced with a money claim must make a payment into court if he is to qualify for relevant costs protection. Such payments cannot be made before commencement of proceedings since, before commencement, the court would not have taken cognisance of the parties or their dispute. While a defendant may nevertheless offer to pay a particular sum to the other party before commencement, this will not qualify as a sanctioned offer. Thus, CPR 36.10(3) should not be adopted, as there would be no need for a rule requiring any post-commencement payment into court to match or exceed any sum offered before commencement.

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.

(c) *Sufficiency of information*

304. Another consequence of not adopting pre-action protocols generally is that parties are likely to have less information about each other's case at the early stages of the proceedings. This could limit the effectiveness of sanctioned offers unless proper steps are taken by the parties.
305. The rules will necessarily reserve to the court a discretion as to whether and how far the adverse consequences of rejecting a sanctioned offer ought to be visited on any particular litigant. Thus, CPR 36.20(2) and CPR 36.21(4) provide for the adverse orders to be made "unless [the court] considers it unjust to do so". It would obviously be unjust to inflict such consequences on a party if the other side's case has not been conveyed to him sufficiently clearly to enable him fairly to evaluate it and to decide whether to accept the offer. Thus, in *Ford v GKR Construction Ltd (Practice Note)* [2000] 1 WLR 1397 at 1403, Lord Woolf stated :-

"If the process of making Part 36 offers before the commencement of litigation is to work in the way which the C.P.R. intend, the parties must be provided with the information which they require in order to assess whether to make an offer or whether to accept that offer. the rules refer to the power of the court to make other orders and make it clear that the normal consequence does not apply when it is unjust that it should do so. If a party has not enabled another party to properly assess whether or not to make an offer, or whether or not to accept an offer which is made, because of non-disclosure to the other party of material matters, or if a party comes to a decision which is different from that which would have been reached if there had been proper disclosure, that is a material matter for a court to take into account in considering what orders it should make. This is of particular significance so far as defendants are concerned because of the power of the court to order additional interest in situations where an offer by a claimant is not accepted by a defendant."

306. Thus, sufficiency of information is listed in CPR 36.21(5) among the factors relevant to the court's discretion as follows :-

"In considering whether it would be unjust to make the orders referred to in (2) and (3) above, the court will take into account all the circumstances of the case including—

- (a) the terms of any Part 36 offer;
- (b) the stage in the proceedings when any Part 36 offer or Part 36 payment was made;
- (c) the information available to the parties at the time when the Part 36 offer or Part 36 payment was made; and
- (d) the conduct of the parties with regard to the giving or refusing to give information for the purposes of enabling the offer or payment into court to be made or evaluated.”

307. Not only must the nature of the offeror’s case be clear (from correspondence, the pleadings, any affidavits filed and so on), the precise nature and terms of his sanctioned offer must also be clear. In the CPR, this is provided for by rules defining the formal requirements and mandatory contents of any sanctioned offer and also enabling the offeree, within 7 days of a Part 36 offer or payment being made, to request the offeror to clarify the offer or payment notice.²⁷⁶

308. It would accordingly be a mistake for a Hong Kong party to believe that his sanctioned offer carries the relevant consequences if it was made without properly apprising the other side of the nature of his case. He may not be required by the rules to take on the burdens of pre-action protocols in general, but, if he wishes to avail himself of the benefits of sanctioned offers and payments, he must ensure that he has nevertheless fairly acquainted the other side with all material aspects of his case.

309. If a case is initially insufficiently pleaded and if it is only by a later amendment that a party’s true case is revealed, it is likely that any costs or interest consequences to flow from the other side’s rejection of a sanctioned

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²⁷⁶ CPR 36.9. If there is failure to clarify, the court can be asked to order clarification, and then to fix the date when the Part 36 offer is to be treated as having been made.

offer would be confined to the post-amendment period, depriving the offer of any prior effect. This situation arose in *Factortame Ltd v Secretary of State for the Environment, Transport and the Regions* [2002] 1 WLR 2438, where Waller LJ explained the court's discretionary approach in such circumstances as follows :-

“It seems to me that so far as possible the judge should be trying to assess who in reality is the unsuccessful party and who has been responsible for the fact that costs have been incurred which should not have been. It is plainly right that a full scale trial examining privileged material, and listening to ex post facto justification should be avoided.

The starting point is that a claimant who fails to beat a payment in will prima facie be liable for the costs. An amendment may be of such a character that a judge will feel that the onus should be firmly placed on the defendant to persuade him that the prima facie rule should continue to apply; on the other hand the judge may be quite clear by reference to his feel of the case that the amendment is being used as an excuse to take money out of court that should have been accepted when originally made. Some cases will lie between the two extremes, and the judge will have to adjust his assessment to give effect to possibilities which it would be inappropriate to try out and thus by reference to his overall view of the case.”²⁷⁷

(d) *Withdrawal only with leave*

310. In order to make allowances for the absence in general of pre-action protocols, the Working Party recommends that the rules should require a sanctioned offer to remain open for acceptance for 28 days after it is made, unless leave to withdraw it sooner is obtained from the court. In this period, the offeree could, if necessary, seek clarification not merely of what is being offered,²⁷⁸ but also of the offeror's case and make any needed investigations into his own case, before deciding whether to accept the offer. This he could do in the secure knowledge that the offer would remain open for 28

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²⁷⁷ At § 27.

²⁷⁸ Under CPR 36.9 which gives him 7 days to do this.

days, subject only to the court permitting the offeror to cut it short. Thereafter, the offer could be withdrawn and if not, would continue to be capable of acceptance.

311. The 28 day period should be the required minimum period before commencement of the trial²⁷⁹ for the making of sanctioned offers, so that offers allowing less than 28 days before trial for acceptance would not qualify. In the Working Party's view, this requirement would be of particular importance in relation to sanctioned offers made by plaintiffs. It would be undesirable to enable a plaintiff to place a defendant under the significant threat of additional interest at potentially punitive rates at the very door of the court (having already incurred the bulk of the defence costs) as a means of forcing what may be an unfair settlement.
312. It should be noted that this recommendation departs from the CPR's approach as construed by the English Court of Appeal in *Scammell v Dicker* [2001] 1 WLR 631. Where proceedings have started and a Part 36 payment into court is made, the CPR make the court's leave a condition of the offeror withdrawing it.²⁸⁰ However, it was held in the *Scammell* case that Part 36 offers (as opposed to Part 36 payments) could be withdrawn at any time before acceptance.²⁸¹ The court's reasoning was (*inter alia*) as follows :-
- (a) Part 36 offers are contractual in nature and are subject to the contract formation rules regarding offer and acceptance.

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²⁷⁹ Or substantive hearing of an originating summons, here equally referred to as the "trial".

²⁸⁰ CPR 36.6(5).

²⁸¹ Four days after being made in that case.

- (b) Applying those rules, a Part 36 offer can be withdrawn at any time before it is accepted and does not have to remain open for acceptance for 21 days or any other period.
- (c) This is in line with the provisions of the Part which merely state that the offer has to “be *expressed* to remain open for acceptance for 21 days” and not that it has actually to remain open for that period. Nor do the rules state that leave to withdraw is required.
313. The decision in *Scammell v Dicker* is no doubt appropriate in England and Wales since, as noted above, it is there envisaged that Part 36 offers will often be made before commencement of proceedings and later taken into account by the court.²⁸² There could be no question of either party having to get the leave of the court to withdraw offers before any proceedings have even been started.
314. The position in Hong Kong would be different. Currently, leave to withdraw a payment into court is required under O 22 r 1(3). Since our recommendation is that sanctioned offers and payments can in general²⁸³ only be made after the commencement of proceedings, the Working Party’s view is that, as with payments into court, leave should be required to withdraw a sanctioned offer which would otherwise remain open for acceptance for the prescribed period.
315. Such an approach would be consistent with legal principle. In *Cumper v Potheary* [1941] 2 KB 58, a plaintiff wished to accept money that had been

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²⁸² CPR 36.10.

²⁸³ Subject to the abovementioned exception where a specialist list pre-action protocol provides otherwise.

paid into court but had failed to do so within the 7 days prescribed by the rule. He argued that since acceptance of the offer led to the formation of a contract, the contractual rules as to acceptance enabled him to accept the offer at any time up to the eve of the trial notwithstanding the lateness of his acceptance and the requirement in the rules for an order of the court. He argued that “an order from the court was mere machinery for pay office purposes.”²⁸⁴ The Court rejected this stating :-

“The answer to his contention is that there is nothing contractual about payment into court. It is wholly a procedural matter and has no true analogy to a settlement arranged between the parties out of court, which, of course, does constitute a contract. When once the seven days have expired the plaintiff can only get the money if he can obtain an order, and before the court makes an order it must consider whether it is right so to do.”²⁸⁵

316. The rule envisaged in *Recommendation 41* is a procedural rule of the kind contemplated in *Cumper v Potheary*, not to be displaced by the general rules on offer and acceptance in the law of contract.

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.

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²⁸⁴ At 67.

²⁸⁵ *Ibid.*

(e) *The court's general discretion as to costs*

317. The requirements for sanctioned offers discussed above are conditions which must be met for an offer to qualify as such and therefore to carry the prescribed financial sanctions. It should, however, be noted that offers which do not meet those requirements are not nullities. If a party is unable to meet a condition (eg, the 28 day requirement) or chooses to make an offer which does not comply with the requirements (eg, by expressly reserving the right to withdraw the offer at any time before acceptance), the offer will still take effect as a contractual offer and procedurally, would still be taken into account in the court's exercise of its general discretion as to costs.

318. This is in line with the CPR approach. As Lord Woolf pointed out in *Petrotrade Inc v Texaco Ltd (Note)* [2002] 1 WLR 947, in England and Wales the CPR do not :-

“..... prevent a party making an offer in whatever manner that party chooses, but if that offer is not in accordance with Part 36, ‘it will only have the consequences specified’ in Part 36 ‘if the court so orders’: rule 36.1.”²⁸⁶

319. In Hong Kong, s 52A of the HCO provides that, subject to the provisions of rules of court, the costs of and incidental to all civil proceedings in the High Court are in the court's discretion. The introduction of sanctioned offers would not affect this residual discretion which would enable the court to make an adverse costs order reflecting an unreasonable rejection of an “unsanctioned” offer.

320. Indeed, if the circumstances justify such a course, a court could even order indemnity costs to be paid in such cases. As in England and Wales, the

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²⁸⁶ At §56.

main thrust of our case-law was originally to regard indemnity costs as only appropriate where the paying party has initiated proceedings that are scandalous, vexatious, or malicious or for an ulterior motive, or has conducted them in an oppressive, abusive or improper manner.²⁸⁷

321. However, the Hong Kong courts²⁸⁸ have endorsed the pre-CPR approach of the English Court of Appeal in *Macmillan Inc v Bishopsgate Investment Trust Ltd*,²⁸⁹ which envisages the possibility of making indemnity costs orders against litigants “who cause costs to be incurred irrationally or out of all proportion as to what is at stake”.²⁹⁰

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.

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²⁸⁷ See *Overseas Trust Bank Ltd v Coopers & Lybrand (a firm) and Others and Peat, Marwick, Mitchell & Co (a firm)* [1991] 1 HKLR 177; *Sung Foo Kee Ltd v Pak Lik Co* [1996] 3 HKC 570; and *Choy Yee Chun (The representative of the estate of Chan Pui Yiu) v Bond Star Development Limited* [1997] HKLRD 1327.

²⁸⁸ In *Sung Foo Kee Ltd v Pak Lik Co* [1996] 3 HKC 570; and *Choy Yee Chun (The representative of the estate of Chan Pui Yiu) v Bond Star Development Limited* [1997] HKLRD 1327.

²⁸⁹ 10 December 1993 (unreported).

²⁹⁰ The position under the CPR (which give the court a wide discretion) were recently discussed in *Petrotrade Inc v Texaco Ltd (Note)* [2002] 1 WLR 974 and *Kiam v MGN Ltd (No 2)* [2002] 1 WLR 2810.

(f) *The court's general discretion as to interest*

322. The position in relation to plaintiffs and the award of additional interest is different. It is the Working Party's view that to qualify for an award of additional interest – potentially at base rate plus 10% on the sum awarded – the plaintiff should be required to meet the sanctioned offer requirements. If his offer does not meet those requirements, it will be taken into account in the exercise of the court's general discretion for awarding costs, perhaps supporting an order for costs at a higher rate of taxation. However, it would not qualify the plaintiff for an award of additional interest by reason of his having achieved a better-than-offered result at the trial.

323. The court has a statutory discretion to award interest under s 48 of the HCO which provides that the court may award :-

“..... simple interest, at such rate as the Court thinks fit or as rules of court may provide, on all or any part of the debt or damages in respect of which judgment is given, or payment is made before judgment, for all or any part of the period between the date when the cause of action arose and-

- (a) in the case of any sum paid before judgment, the date of the payment; and
- (b) in the case of the sum for which judgment is given, the date of the judgment.”

324. However, that statutory power's overriding purpose is to compensate the successful plaintiff for being kept out of his money.²⁹¹ It is true that the section provides for an award of interest covering “any part of the period” in question, so that it might in theory be possible for the court to award additional interest in respect of the period after the defendant ought to have accepted the plaintiff's offer. But making such an offer does not bear on the

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²⁹¹ See HKCP 2002, F1/48/1 and 6/L/10-28.

amount lost by the plaintiff by virtue of his being kept out of his money and in the Working Party's view, the purposes of s 48 do not extend to purposes akin to those underpinning Part 36. Accordingly, s 48 ought not to be read as enabling Part 36-type additional interest payments to be awarded in respect of settlement offers which do not 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.

Section 12: Interim remedies and Mareva injunctions in aid of foreign proceedings

Proposals 16 and 17

Proposal 16

The rules governing the grant of interim relief, the award of interim payments and security for costs should be rationalized and collected together, accompanied by a Practice Direction setting out appropriate court-approved forms for interim relief applications and orders, along the lines of CPR 25 and CPR 25PD.

Interim Report paras 324-331

12.1 Interim remedies generally

325. This Proposal canvasses adoption of CPR 25 and its accompanying practice direction which, as discussed in the Interim Report, are aimed at consolidating into one Part, the rules and practice bearing on a range of interim orders which a court may make. These include interim injunctions, *Mareva* injunctions, *Anton Piller* orders, orders for the detention, custody, preservation and inspection of property, and the like.
326. The Proposal elicited few responses. The Law Society considered that it was not a necessary reform.²⁹² For the reasons which follow, the Working Party agrees and has decided not to recommend its implementation.

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²⁹² On the other hand, the BCC, a firm of solicitors and an individual respondent indicated support for the Proposal although the first of them said such support was “tentative”.

- (a) While CPR 25 may be appropriate in the context of an entirely new procedural code using new nomenclature and language, such considerations are inapplicable here.
- (b) The changes effected by CPR 25 are minor. The legal principles governing applications for and the grant of such interim orders are to be found in the case-law and to some extent in statutes which are generally unaffected by the changes. Most of the procedural provisions mirror those already found in the RHC.²⁹³ Forms in use in Hong Kong for Mareva injunctions and Anton Piller orders can already be found in a published practice direction.²⁹⁴
- (c) In the circumstances, the benefit to be derived from adopting CPR 25 would be slight and does not appear to justify the effort which adoption of CPR 25 would require of users of the civil justice system. However, certain specific measures discussed below may be useful additions to the RHC.

Recommendation 44: Proposal 16 (for introducing a rule to consolidate various rules relating to interim relief) should not be adopted.

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²⁹³ In RHC O 23 (security for costs), O 29 (interim injunctions, interim preservation of property, interim payments etc) and O 43 (interim accounts).

²⁹⁴ PD 11.2, Mareva Injunctions and Anton Piller Orders.

12.2 Mareva injunctions in aid of foreign proceedings

Proposal 17

Interim relief by way of Mareva injunctions and/or Anton Piller orders should be available in relation to proceedings which are taking place, or will take place, outside the jurisdiction (and where no such substantive proceedings are contemplated in Hong Kong).

Interim Report paras 324-331

327. A plaintiff suing a defendant in a foreign court (and who has no jurisdictional basis for bringing suit for substantive relief against him here) is presently unable to obtain interim relief by way of a Mareva injunction in respect of any of the defendant's assets which may be located in Hong Kong. This Proposal addresses the question whether the law should be reformed to offer the possibility of such Mareva relief.

(a) The present law in Hong Kong

328. There is of course no doubt that the Hong Kong court has jurisdiction to grant Mareva injunctions. Adopting the case-law developed in England and Wales, the Hong Kong courts have assumed the jurisdiction over the last 20 years or more, taking as its statutory basis section 21L(1) of the HCO, which allows the court to grant an injunction (whether interlocutory or final) in all cases in which it appears "to be just or convenient to do so". The jurisdiction has now received legislative recognition in s 21L(3) which provides :-

"The power of the Court of First Instance under subsection (1) to grant an interlocutory injunction restraining a party to any proceedings from removing from the jurisdiction of the Court of First Instance, or otherwise dealing with, assets located within that jurisdiction shall be exercisable in cases where that party is, as well as in cases where he is not, domiciled or resident or present within that jurisdiction."

329. The situation which *Proposal 17* is concerned with arose in *Mercedes Benz AG v Leiduck* [1996] 1 AC 284, an appeal to the Privy Council from Hong Kong. The plaintiff had brought proceedings against the defendant in Switzerland for a fraud allegedly committed there. It sought a Mareva injunction from our courts in respect of the shares in a Hong Kong company owned by the defendant. The Privy Council, by a majority,²⁹⁵ upheld the decision of the Hong Kong Court of Appeal (also by a majority²⁹⁶) refusing such relief. It did so on two principal, related grounds.
330. First, although it was accepted that a Mareva injunction is best viewed as *sui generis*,²⁹⁷ the majority in the Privy Council adhered to the decision of the House of Lords in *Siskina (Cargo Owners) v Distos SA* (“*The Siskina*”) [1979] AC 210, firmly characterising a Mareva injunction as an interlocutory injunction which could have no existence independent of a cause of action sought to be enforced in the action. Lord Diplock stated the position in *The Siskina* (at 256) as follows :-

“A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action. It is granted to preserve the status quo pending the ascertainment by the court of the rights of the parties and the grant to the plaintiff of the relief to which his cause of action entitles him, which may or may not include a final injunction.”

Lord Mustill likewise stated in the *Leiduck* case (at 298) that :-

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²⁹⁵ Lord Nicholls of Birkenhead dissenting.

²⁹⁶ [1995] 1 HKC 448, Bokhary JA dissenting.

²⁹⁷ Per Lord Mustill at 301. Lord Nicholls, dissenting, also stressed the peculiar nature of such injunctions at 306-7.

“Their Lordships are far from convinced that it is permissible to issue an originating process claiming only Mareva relief, even against a defendant present within the jurisdiction, rather than to proceed by summons or motion in an existing action or one which the applicant undertakes to commence as a condition of obtaining an order.”

331. Secondly, given the abovementioned characterisation of the Mareva injunction, it was held that if a plaintiff issued a writ seeking only such an injunction, none of the grounds set out in O 11 for serving Hong Kong writs abroad would be engaged. In particular, O 11 r 1(1)(b) which allows service of process abroad in actions where “..... an injunction is sought ordering the defendant to do or refrain from doing anything within the jurisdiction” was held inapplicable since that rule is to be construed as covering only claims for final injunctions by way of substantive relief.²⁹⁸ As Lord Mustill put it,²⁹⁹ O 11 “is confined to originating documents which set in motion proceedings designed to ascertain substantive rights”. Accordingly, the Hong Kong court was held to lack power to entertain the Mareva application without being seised of any action to enforce a substantive legal or equitable right in respect of a defendant amenable to its jurisdiction.

(b) Why reform should be considered

332. While the *Leiduck* case represents the currently definitive statement of the law on this topic in Hong Kong, the Working Party considers the question of possible reform of the rules worthy of exploration for a number of reasons.

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²⁹⁸ *Mercedes Benz AG v Leiduck* [1996] 1 AC 284 at 299-304.

²⁹⁹ At 302.

333. First, policy considerations militate in favour of the courts having a discretionary power to provide such relief. As Lord Nicholls pointed out in his compelling dissent,³⁰⁰ in the *Leiduck* situation :-

“The first defendant’s argument comes to this: his assets are in Hong Kong, so the Monaco court cannot reach them; he is in Monaco, so the Hong Kong court cannot reach him. That cannot be right. That is not acceptable today. A person operating internationally cannot so easily defeat the judicial process. There is not a black hole into which a defendant can escape out of sight and become unreachable.”

His Lordship (at 313-4) described an inability to provide such relief as :-

“..... deeply regrettable in its unfortunate impact on efforts being made by courts to prevent the legal process being defeated by the ease and speed with which money and other assets can now be moved from country to country. The law would be left sadly lagging behind the needs of the international community.”

As Millett LJ pointed out in *Crédit Suisse Fides Trust SA v Cuoghi* [1998] QB 818 at 827 :-

“In other areas of law, such as cross-border insolvency, commercial necessity has encouraged national courts to provide assistance to each other without waiting for such co-operation to be sanctioned by international convention. International fraud requires a similar response. It is becoming widely accepted that comity between the courts of different countries requires mutual respect for the territorial integrity of each other’s jurisdiction, but that this should not inhibit a court in one jurisdiction from rendering whatever assistance it properly can to a court in another in respect of assets located or persons resident within the territory of the former.”

334. Secondly, since 1977 when *The Siskina* was decided, the strictness of the approach there adopted has been increasingly eroded and confined by several lines of authority. No longer is it accurate to say that interlocutory injunctions will only be granted in cases where such grant is ancillary and incidental to a pre-existing cause of action and needed to preserve the status

³⁰⁰ In the *Leiduck* case at 305.

quo pending the court's determination of the relevant substantive legal or equitable rights. As Lord Nicholls³⁰¹ pointed out :-

“Lord Diplock's categorisation of the circumstances in which alone an interlocutory injunction may be granted by the English court has been queried by, among others, Lord Keith of Kinkel, Lord Scarman, Lord Mackay of Clashfern, Lord Goff of Chieveley and Lord Browne-Wilkinson in *Castanho v Brown & Root (UK) Ltd* [1981] AC 557, 573, *South Carolina Insurance Co v Assurantie Maatschappij "De Zeven Provinciën" NV* [1987] 1 AC 24, 44 and *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334, 340-341, 343.”

335. The approach of the House of Lords in the *Channel Tunnel* case is particularly striking. While maintaining that an interim injunction had to be incidental to an attempt to enforce a substantive right and could not exist in isolation, and that the defendant had to be amenable to the court's jurisdiction, it was held not to be necessary that it should be ancillary to a claim for relief to be granted by an English court, but could be ordered in aid of proceedings in a foreign court or before a foreign arbitral tribunal. In rejecting the contrary argument advanced on the basis of *The Siskina* Lord Browne-Wilkinson commented³⁰² :-

“If correct, that submission would have the effect of severely curtailing the powers of the English courts to act in aid, not only of foreign arbitrations, but also of foreign courts. Given the international character of much contemporary litigation and the need to promote mutual assistance between the courts of the various jurisdictions which such litigation straddles, it would be a serious matter if the English courts were unable to grant interlocutory relief in cases where the substantive trial and the ultimate decision of the case might ultimately take place in a court outside England.”

His Lordship concluded³⁰³ :-

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³⁰¹ *Ibid* at 308.

³⁰² [1993] AC 334 at 341.

³⁰³ *Ibid* at 342-343.

“..... I can see nothing in the language employed by Lord Diplock (or in later cases in this House commenting on the *Siskina*) which suggest that a court has to be satisfied, at the time it grants interlocutory relief, that the final order, if any, will be made by an English court.”

Even applying the test laid down by *The Siskina* the court has power to grant interlocutory relief based on a cause of action recognised by English law against a defendant duly served where such relief is ancillary to a final order whether to be granted by the English court or by some other court or arbitral body.”

336. Cases showing that interlocutory injunctions are not restricted by the *Siskina* approach (which requires them to be ancillary to enforcement of a legal or equitable cause of action in the same proceedings) include those where it has been held that injunctions should be granted or could in principle be granted:-

- (a) to restrain the prosecution of foreign suits;³⁰⁴
- (b) to restrain a bankrupt from leaving the jurisdiction in aid of enforcement by the trustee of the bankrupt’s duty to supply information under the Insolvency Act 1981;³⁰⁵
- (c) to restrain a director and shareholder of a company in liquidation from leaving the country in aid of an order requiring his attendance for oral examination under the Companies Act 1985;³⁰⁶
- (d) on the application of a Chief Constable, to prevent dissipation of money in a bank account allegedly obtained by fraud,³⁰⁷ and,

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³⁰⁴ Eg, *British Airways Board v Laker Airways Ltd* [1985] AC 58, 81, 95, where there would be no action pending before the English courts.

³⁰⁵ *Morris v Murjani* [1996] 1 WLR 848. There was a pending application to commit the bankrupt for contempt, but the trustee was not seeking to enforce any cause of action or legal or equitable right against the bankrupt.

³⁰⁶ *In re Oriental Credit Ltd* [1988] Ch 204, 207-8.

- (e) to assist a hospital authority to perform its statutory duty, express and implied, to treat patients, maintain security and provide a therapeutic environment.³⁰⁸

337. Thirdly, in the United Kingdom, interim relief in support of foreign proceedings was initially introduced by section 25 of the Civil Jurisdiction and Judgments Act 1982 (in this section “the 1982 Act”) in respect of proceedings pending in the courts of parties³⁰⁹ to the Brussels and Lugano Conventions which are given legal effect by that Act.³¹⁰ Then, by statutory instrument,³¹¹ power to grant this relief was extended beyond the scope of those Conventions. As Millett LJ has pointed out :-

“The position has now been reached, therefore, that the High Court has power to grant interim relief in aid of substantive proceedings elsewhere of whatever kind and wherever taking place.”³¹²

In other words, the effect of *The Siskina* in relation to such Mareva injunctions and the position maintained in the *Leiduck* case have been swept away in the United Kingdom.

338. *Proposal 17* attracted little specific comment, but those who did respond were generally in support.³¹³ The Bar Association’s support was qualified

..... *cont’d*

³⁰⁷ *Chief Constable of Kent v V* [1983] QB 34; and *Chief Constable of Hampshire v A Ltd* [1985] QB 132, where the plaintiff had no cause of action but only certain public duties.

³⁰⁸ *Broadmoor Special Hospital Authority v Robinson* [2000] 1 WLR 1590.

³⁰⁹ Presently Austria, Belgium, Denmark, Finland, France, the Federal Republic of Germany, the Hellenic Republic, Iceland, the Republic of Ireland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland and the United Kingdom.

³¹⁰ See White Book 5-26 (text) and 25.4.2 (commentary).

³¹¹ The Civil Jurisdiction and Judgments Act 1982 (Interim Relief) Order 1997 (SI 1997, No 302) which entered into force on 1 April 1997.

³¹² *Crédit Suisse Fides Trust SA v Cuoghi* [1998] QB 818 at 825.

by the comment that caution is needed in case the jurisdiction is invoked in aid of doubtful foreign proceedings, for instance, where jurisdiction has been exorbitantly claimed or an exorbitant jury award obtained in a foreign jurisdiction.

339. In the light of the abovementioned developments and of the desirability of arming our courts with the power, where justice so requires, to provide interim relief in aid of foreign proceedings, the Working Party recommends that *Proposal 17* be adopted subject to the considerations discussed below in the light of the Bar Association's concerns.

Recommendation 45: Proposal 17 (for introducing Mareva injunctions and incidental relief in aid of foreign proceedings) should be adopted as modified and supplemented by Recommendations 46 to 51.

(c) *The nature of the proposed reform*

340. Interim relief of the type proposed is “intended to hold the position until a judgment comes into existence.”³¹⁴ It is relief :-

“granted to facilitate the process of execution or enforcement which will arise when, but only when, the judgment for payment of an amount of money has been obtained. The court is looking ahead to that stage, and taking steps designed to ensure that the defendant cannot defeat the purpose of the judgment by thwarting

..... *cont'd*

³¹³ Including the Bar Association, the BSCPI, a firm of solicitors and the BCC. It was not considered by the Law Society.

³¹⁴ Per Lord Mustill in the *Leiduck* case, at 299.

in advance the efficacy of the process by which the court will enforce compliance.”³¹⁵

341. Accordingly, such interim relief will only make sense where the foreign proceedings in question will potentially lead to a judgment or an arbitral award which can, in the ordinary course, be enforced in Hong Kong whether by registration or at common law. Such enforceability must be the first defining requirement of any such reform.³¹⁶ It is in this context that the Bar Association’s concern about the possibility of a foreign court’s exorbitant assumption of jurisdiction or making of orders which it would be contrary to public policy to enforce, may be met. Such foreign judgments are impeachable³¹⁷ and would therefore not found either enforcement or the interim jurisdiction.
342. Arbitral awards ought to be included in the reforms proposed for the avoidance of doubt, even though it may well be that under the law as it stands, a court could grant Mareva relief in aid of a foreign arbitration. Presently, by section 2GC(1)(c) of the Arbitration Ordinance, Cap 341, the court may, in relation to a particular arbitration proceeding, “grant an interim injunction or direct any other interim measure to be taken”. It was assumed in *Leviathan Shipping Co Ltd v Sky Sailing Overseas Co Ltd* [1998] 4 HKC 347, that this was a formula wide enough to encompass

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³¹⁵ Per Lord Nicholls, *ibid*, at 306

³¹⁶ This was the foundation of Lord Nicholls’s approach: *ibid*, at 306-7 and 310: “The boundary line of the Mareva jurisdiction is to be drawn so as to include prospective foreign judgments which will be recognised and enforceable in the Hong Kong courts.”

³¹⁷ See Dicey & Morris, *The Conflict of Laws*, 13th Ed, 14R-118 and 14R-141.

Mareva injunctions and international arbitrations.³¹⁸ This should be put beyond doubt.

Recommendation 46: The jurisdiction to grant a Mareva injunction in aid of foreign proceedings or arbitrations should be confined to proceedings and arbitrations capable of leading, in the ordinary course, to a judgment or arbitral award which can be enforced in Hong Kong.

343. Secondly, the reforms should be directed at overcoming the two legal obstacles which were found by the Privy Council to stand in the way of recognizing the relevant jurisdiction. They should aim at:-

- (a) granting to the court power to grant a Mareva injunction to restrain a defendant from disposing of assets in Hong Kong without that injunction necessarily being ancillary to any action in Hong Kong for the substantive enforcement of legal or equitable rights; and,
- (b) making it possible for a plaintiff who seeks such relief to obtain leave under Order 11 to serve a defendant abroad with a writ or originating summons which seeks solely a Mareva injunction in Hong Kong.

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³¹⁸ Although, as previously discussed, the *Channel Tunnel* case is authority for treating s 37(1) of the Supreme Court Act 1981 (our equivalent being s 21L(1) of the HCO) as a sufficient basis for granting an interim (non-Mareva) injunction in support of a foreign arbitration (provided jurisdiction is founded against the defendant and the plaintiff has a recognized cause of action against him), it cannot safely be relied on as the basis for claiming a Mareva jurisdiction in the present context.

344. A question which arises is whether either or both of these objectives would require primary legislation or whether they can be achieved merely by amendments to the RHC.
345. In relation to the first objective, the argument against having to enact primary legislation would rest on the proposition that sections 21L(1) and 21L(3) of the HCO sufficiently confer the necessary jurisdiction and that one therefore needs merely to amend O 29 to make it clear that such relief is available.
346. The Working Party is not inclined to accept such a construction of the two provisions. Section 21L materially provides as follows :-
- “(1) The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the High Court to be just or convenient to do so.
- (3) The power of the High Court under subsection (1) to grant an interlocutory injunction restraining a party to any proceedings from removing from the jurisdiction of the High Court, or otherwise dealing with, assets located within that jurisdiction shall be exercisable in cases where that party is, as well as in cases where he is not, domiciled or resident or present within that jurisdiction.”
347. Sub-section (1) distinguishes between interlocutory and final injunctions and sub-section (3) then clearly classifies Mareva injunctions as “interlocutory”. In the light of *The Siskina* and the *Leiduck* decisions which unequivocally lay it down that as an interlocutory injunction, Mareva injunctions require to be incidental to a substantive action, these provisions, if left unamended, would most probably be inconsistent with, and so render *ultra vires*, any amendment to O 29 purporting to permit Mareva injunctions to stand alone as the sole relief sought in Hong Kong proceedings.
348. Accordingly, the Working Party’s view is that s 21L should be amended, making it clear that Mareva injunctions (treated as a *sui generis* form of

injunctive relief) are capable of being sought independently in aid of foreign proceedings. Relevant amendments to O 29 could then follow.

Recommendation 47: Section 21L of the HCO should be amended to make it clear that a Mareva injunction can be sought in aid of foreign proceedings and arbitrations as an independent, free-standing form of relief, without being ancillary or incidental to substantive proceedings commenced in Hong Kong, followed by relevant amendments to O 29.

349. Similar considerations arise in relation to the second objective mentioned above. Is primary legislation needed to enable defendants to be served abroad with Mareva injunction proceedings or will it do simply to amend O 11 r 1(1)(b) making it clear that its coverage of actions where “..... an injunction is sought ordering the defendant to do or refrain from doing anything within the jurisdiction”, includes Mareva injunctions?³¹⁹
350. In the English cases, dicta can be found suggesting that the Rules Committee would be able to effect the necessary changes to O 11.³²⁰ However, since such a reform may be seen as a widening of the court’s “long arm” jurisdiction in respect of persons outside the HKSAR, particular

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³¹⁹ Cf CPR 6.20(4).

³²⁰ Bridge LJ, in *The Siskina* in the Court of Appeal ([1979] AC 210 at 242); Lord Hailsham *ibid* at 260, and Lord Mustill in the *Leiduck* case at 304-5. Lord Diplock in *The Siskina* at 260 thought such changes “would require at least subordinate legislation by the Rules Committee....., if not primary legislation by Parliament itself.”

care must be taken to ensure that the assertion of such jurisdiction is properly founded on statutory authority. As Lord Mustill stated in the *Leiduck* case:-

“The court has no power to make orders against persons outside its territorial jurisdiction unless authorised by statute; there is no inherent extra-territorial jurisdiction: *Waterhouse v Reid* [1938] 1 KB 743, 747, per Greer LJ.”

And in *IRC v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 at 638, Lord Diplock stressed that :-

“Rules of court made [by the Rules Committee] under [the relevant] sections are concerned with procedure and practice only; they cannot alter substantive law, nor can they extend the jurisdiction of the High Court.”

351. The HCO does not give the Rules Committee any express power generally³²¹ to make rules as to service of process abroad. The statutory basis for our O 11 appears to rest on a combination of :-

- (a) section 54 which empowers the Rules Committee to make rules of court regulating High Court practice and procedure to be followed “in all causes and matters whatsoever in or with respect to which the High Court has jurisdiction and any matters incidental to or relating to that procedure or practice”;
- (b) section 12(2) which establishes for the Court of First Instance an original jurisdiction “of a like nature and extent as that held and exercised by the Chancery, Family and Queen’s Bench Divisions of the High Court of Justice in England”; and “any other jurisdiction, whether original or appellate jurisdiction, conferred on it by any law”; and

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³²¹ Cap 4 s 12C(6) is discussed below.

- (c) the fact that the specified English courts had been given jurisdiction founded on service of process abroad.³²²

352. This somewhat indirect statutory basis for the making of the rules in O 11 could fuel the argument that any additions to O 11 which were not historically (or at some relevant moment) reflected in the practice and procedure of the English court, requires to be expressly sanctioned by an amendment to the Ordinance itself. Thus, it may be significant that express provision was obviously thought necessary for additions to O 11 to be made in respect of *in personam* collision proceedings in the Admiralty Jurisdiction. Section 12C(6) materially provides :-

“..... the Court of First Instance shall have jurisdiction to entertain an action in personam to enforce a claim to which this section applies whenever any of the conditions specified is satisfied, and the rules of court relating to the service of process outside the jurisdiction shall make such provision as may appear to the Rules Committee constituted under section 55 to be appropriate having regard to the provisions of this subsection.”

353. The Working Party accordingly considers that an amendment to the HCO along lines similar to section 12C(6) should be effected to section 21L or some other appropriate provision of the HCO, before proceeding to amend O 11 r 1(1)(b) so as to bring free-standing Mareva injunctions within its compass.

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For the historical basis of O 11 jurisdiction in England and Wales, see Lawton LJ in *The Siskina* [1979] AC 210 at 236. Such powers were given to the courts initially by the Common Law Procedure Act 1852, s 18 and then by the Supreme Court of Judicature Act 1875, s16 which enacted rules of court, including O 11, set out in a schedule.

Recommendation 48: Section 21L or some other appropriate provision of the HCO should be amended to give the Rules Committee clear authority to amend O 11 with a view to making applications for free-standing Mareva injunctions an eligible category for the grant of leave to effect service of process abroad, followed by relevant amendments to O 11.

354. It would also be necessary to introduce amendments to the RHC :-
- (a) to prescribe the mode of commencing proceedings for Mareva injunctions in aid of foreign proceedings, including possible initial *ex parte* applications, and to provide for the procedural course which should thereafter be followed;
 - (b) to provide that the grant, continuance, variation and discharge of such injunctions should be in the court's discretion, possibly identifying certain non-exhaustive principles to guide the court in the exercise of such discretion; and,
 - (c) to identify the range of orders that may be made in support of the Mareva injunction (such as disclosure and search orders).
355. In this context, the procedural rules and growing case-law relating to such orders made in the context of section 25 of the 1982 Act may provide helpful precedents.
356. Thus, prior to the CPR coming into force, applications for interim relief under s 25(1) of the 1982 Act were procedurally governed by O 29 r 8A of the Rules of the Supreme Court. The mode of commencement prescribed

for such applications was by originating summons and certain other provisions of O 29 were expressly made applicable.³²³

357. The terms of s 25 of the 1982 Act make it clear in the UK that the court has a complete discretion as to whether it should exercise the power. Section 25(2) provides that :-

“On an application for any interim relief under subsection (1) the court may refuse to grant that relief if, in the opinion of the court, the fact that the court has no jurisdiction apart from this section in relation to the subject matter of the proceedings in question makes it inexpedient for the court to grant it”

As Lord Bingham CJ puts it :-

“..... attention is focused on the inexpediency or expediency of granting interim relief having regard to the absence of jurisdiction to do so apart from section 25.”

358. It is probably unnecessary for the legislation or the rules to go much further in providing guidance for the exercise of the court’s discretion. Our courts would no doubt have regard to the relevant English case-law and decide on the extent to which it should be applied in Hong Kong. Thus, for instance, the English courts have held that :-

(a) The proper approach is to consider first whether the facts would warrant the relief sought if the substantive proceedings were brought in England, and if so, to ask whether, in the terms of s 25(2), the fact that the Court has no jurisdiction apart from that given to it by the Act makes it inexpedient to grant the interim relief sought.³²⁴

Notes

³²³ See White Book 1999, 29/8A/1-26. Under the CPR, the application is brought under CPR 8, and application for leave to serve out of the jurisdiction made under CPR 6.20(4): see White Book 25.4.2.

³²⁴ Morritt LJ in *Refco Inc v Eastern Trading Co* [1999] 1 Lloyd’s Rep 159 at 170-171.

- (b) The interim relief which an English court can grant is not limited to that which would be available in the court trying the substantive dispute. It should be willing to assist the other court by providing such interim relief as would be available if English courts were seised of the substantive proceedings.³²⁵
- (c) In exercising the discretion, the English court would pay great heed to whether the grant of relief would obstruct or hamper the management of the case by the court seized of the substantive proceedings or give rise to a risk of conflicting, inconsistent or overlapping orders. It would consider whether the primary court has itself declined to grant such relief and generally would avoid treading on the toes of the primary court or any other court involved in the case.³²⁶
- (d) Since such orders are often made effective by serving notice of the order on a third party (such as a bank at which the defendant has an account) within the local court's jurisdiction, such third parties should be given all reasonable protection, for instance, by ensuring that the court's order does not require them to breach their contractual or other legal obligations abroad.³²⁷

Reference may also be made to *Ryan v Friction Dynamics Ltd*, The Times 14 June 2000, where Neuberger J sets out a list of 9 principles derived from various decided cases.

Notes

³²⁵ *Alltrans Inc v Interdom Holdings Ltd* [1991] 4 All ER 458, 468, per Leggatt LJ and *Crédit Suisse Fides Trust SA v Cuoghi* [1998] QB 818 at 827 per Millett LJ.

³²⁶ Lord Bingham CJ in *Crédit Suisse Fides Trust SA v Cuoghi* [1998] QB 818 at 831-2.

³²⁷ *Bank of China v NBM LLC* [2002] 1 WLR 844.

359. As it is often necessary to make incidental orders, such as orders for disclosure regarding the relevant assets, if a Mareva injunction is to be effective, provision should be made to empower the court to make such orders to the same extent that they can be made in relation to purely domestic cases.

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 or 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 desirable 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.

Section 13: Case management timetabling and milestones

Proposals 18 and 19

Proposal 18

A rule should be adopted requiring the parties each to fill in and file a questionnaire shortly after the defendant serves its defence, providing the court with specified items of information to enable it to assess the procedural needs of the case with a view to fixing a timetable and giving appropriate directions for the conduct of the case including directions fixing milestones in the progress of the case which are, save in the most exceptional circumstances, immovable.

Interim Report paras 332-358

Proposal 19

Rules should be adopted which give the court maximum flexibility when devising timetables and directions and which also encourage the parties to make reasonable procedural agreements without requiring reference to the court unless such agreements may impinge upon specified milestone events in the prescribed timetable.

Interim Report paras 332-358

13.1 The thinking behind these Proposals

360. Where parties to litigation both desire to have the action proceed, our system functions perfectly well. However, where one party seeks to delay proceedings and to frustrate the other side, the present system is deficient and can be manipulated so that progress in the proceedings is not

maintained. The design faults of the system were examined in the Interim Report.³²⁸ It is a system which :-

- (a) incorporates rules of court which lay down a timetable not designed to take into account the needs of individual cases and so are generally disregarded;
- (b) places the onus on the conscientious party to maintain progress when faced with recalcitrance from the other side, requiring expensive and delay-inducing interlocutory applications;
- (c) often involves excessive leniency and tolerance of non-compliance by the courts; and,
- (d) adopts a policy whereby a cause is not listed for trial until the parties are fully prepared, thus permitting a recalcitrant party to exploit his own lack of preparedness as the basis for putting back the trial.

361. In the existing procedural scheme, a court-determined timetable is intended to be provided at the hearing of the summons for directions. However, experience has shown that such timetable is hardly ever effective. Parties often ask for “standard” time-limits to be imposed, without sufficient thought given to the exigencies of the particular case. The court is often not equipped to form an independent judgment as to the realism or otherwise of the directions proposed. Where a party thereafter drags his feet and fails to meet the time-limits set at the summons for directions, the system relies on the other side to complain *ex post facto* of such non-compliance by taking out interlocutory applications which generate expense and further delay. Such a system therefore offers opportunities for a party to inflict delay and

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³²⁸ At §§333-335.

expense on the other side, with repeated interlocutory applications depleting resources.

362. *Proposals 18 and 19* suggest the introduction of :-

- (a) an early questionnaire, to help determine what directions are needed in the case and what timetable the court should set;
- (b) a timetabled series of milestone dates including the trial date which are largely immovable, but complemented by the parties having flexibility to agree to time-limit changes for matters falling between milestone dates; and,
- (c) an approach whereby parties are not permitted to hold up the trial on the grounds of their own lack of preparedness (in the absence of some exceptional reason justifying this), but with such parties having instead to bear the consequences of their own lack of readiness as the trial proceeds.

13.2 The consultation response

363. These Proposals stimulated a lively response. The great majority were in favour of introducing a court-determined timetable better tailored to the individual case.³²⁹ The Law Society, however, thought timetabling by the court was a good idea for specialist lists but questioned whether it would work in “ordinary cases”. On the other hand, some users of specialist lists tended not to favour a timetabling approach, preferring instead a docket

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³²⁹ Those in favour included the Bar Association, the BSCPI, the DOJ, certain judges, the High Court masters, one set of barristers’ chambers, two solicitors’ firms and an individual respondent.

system and procedural autonomy in specialist lists.³³⁰ One firm thought, on the basis of anecdote, that the CPR's allocation questionnaire had placed a serious strain on judicial resources in England and Wales.³³¹

364. While almost everyone was in favour of the parties being given scope to deal consensually with procedural issues between any timetabled milestones,³³² a significant number of respondents were not in favour of having milestones intended to be largely immovable. They wanted the court to be able to deal with such milestones flexibly.³³³ The Bar Association, however, was in favour of both timetables and largely immovable milestones, subject to the details being fleshed out after proper consultation.³³⁴ Several suggested that one should not fix all the milestones at the outset, but set them in phases, thus enhancing flexibility. Some solicitors' firms suggested that timetables would not work unless supported by effective case management. The Working Party considers many of the suggestions received to have merit and has sought to take them into account in its recommendations. It also bears in mind the anxiety that has been expressed by many respondents to the consultation against introducing reforms likely to increase front-loaded costs, previously discussed.³³⁵

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³³⁰ The HKMLA in respect of the Commercial and Admiralty Lists and WB/LAD in relation to the Construction and Arbitration List.

³³¹ The BCC thought *Proposals 18 and 19* required great circumspection and thought parties should be able to opt out of the timetabling.

³³² The High Court masters had some reservations.

³³³ This was the view of the BSCPI, the Law Society (in so far as one had a timetable and milestones), one set of barristers' chambers and the DOJ. The High Court masters were in doubt as to what events should be used as milestones.

³³⁴ So was the APAA.

³³⁵ At Sections 5 and 9.

13.3 A timetabling procedure should be introduced

365. For the reasons listed in the Interim Report and mentioned above, the Working Party believes (along with the great majority of respondents in the consultation) that introduction of measures to arrive at a court-determined timetable which realistically takes into account the reasonable wishes of the parties and the needs of the particular case would be highly beneficial and ought in principle to be recommended.

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.

366. It will be necessary to return later to a discussion of the extent to which an effective timetable can be set while at the same time accommodating the need for flexibility. But before doing so, it may be helpful to set out the main lines of the Working Party's approach. The Working Party is also of the view (in agreement with the comment made by the Bar Association) that if these recommendations are accepted, timetabling details should be worked out in a consultation process involving judges and masters, the court registry, barristers, solicitors and other interested court users, followed by appropriate amendments to the RHC and the issue of relevant practice directions.

13.4 The timetable presently laid down in the RHC

367. The changes being contemplated in this Final Report might best be explained by reference to the timetable presently laid down by the RHC for actions begun by writ. Table 1, below, seeks to summarise the steps to be taken and by when, as prescribed by the RHC.

Table 1: Timetable for a writ action in the High Court under the RHC³³⁶

	A	B	C	D
	RHC	Step	Time limits (days)	Variation
1	O5 r1	Writ issued & served		O18 r 1: SOC indorsed or served with writ
2				O6 r8: writ SV w/in 12 months
3	O12 r5	AOS & NOITD	SV of writ + 14	
4				O12 r6: AOS may be later if no default judgment
5				O14 r1: apply for summary judgment after NOITD given
6				O16 r 1: D issues Third Party Notice after giving NOITD
7				O18 r 5A: No pleadings in vacation
8			after NOITD	O25 r1(7): party may take out SFD
9	O18 r1	SOC served	NOITD + 14	
10	O18 r2	Defence served	SV of SOC + 14	O18 r2: 14 days after AOS if SOC served with writ
11				O12 r 8: Jurisdiction challenged
12				O15 r 2: D serves counterclaim
13	O18 r3	Reply served	SV of defence + 14	
14				O18 r3: P serves defence to counterclaim
15			any time before COP	O20 r3: amend pleadings w/o leave

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³³⁶ Abbreviations used in Table 1: AOS = acknowledgment of service; COP = close of pleadings; D = Defendant; DSC = discovery; DTC = Defence to counterclaim; F&B = further and better; NOITD = Notice of intention to defend; P = Plaintiff; SOC = statement of claim; SFD = summons for directions; SV = service.

	A	B	C	D
	RHC	Step	Time limits (days)	Variation
16			any time	O20 r5: amend pleadings w/ leave
17			any time	O18 r12: Application for particulars
18	O18 r20	COP	SV of reply + 14	If no reply: 14 days after SV of DTC or if neither 14 days after defence
19	O24 r2	DSC lists of docs exchanged	COP + 14	
20				O24 r 3: apply for F&B list
21				O24 r7: apply for specific DSC
22	O25 r1	SFD	COP + 1 month	expiration of extended time limit for DSC (if any) + 14
23				O25 r1(4): If P fails to take out SFD, D does so or applies to dismiss action
24	O34 r2 PD5.1	Listing Master appointment to seek leave to set down	At least 14 days before Wednesday hearing	As per notice to Law Society dated 15.3.02, a time limit for seeking this appointment is now being set at the SFD.
25	PD5.1	Lodge checklist	By Friday before Wednesday	
26	O34 r2 PD5.1	Order giving leave to set down	At appointed listing hearing	Adjournment of listing hearing to allow completion of pre-trial steps
27	O34 r3	Setting down	Within period ordered by court	O34 r2(2): If P fails to set down, D does so or applies to dismiss action
28	O34 r8	Notify others of setting down	setting down + 24 hrs	
39	O34 r4 PD7.1	Assign to Running or Fixture list		Specialist Lists follow own procedures.
30	O35	Trial	At assigned time	

368. Column A identifies the relevant RHC rule or practice direction. Column B identifies the step in the action, with Column C giving the time allowed by the rules for taking such step. Column D identifies some variables which may intervene, complicating the progress of a case, for example, where a plaintiff decides to seek summary judgment (Row 5D), or a defendant decides to challenge the Hong Kong court's jurisdiction (Row 11D).

369. In practice, the course of an action departs in important respects from the course envisaged in the RHC.
- (a) First, as pointed out previously, the time-limits prescribed by the rules set out in Column C are not in practice observed (for example, because of intervention of a Column D variable or because one or other of the parties simply ignores the time-limit).
 - (b) Secondly, the sequence of discovery (Row 19B) and the summons for directions (Row 22B) is usually inverted in practice. Generally, discovery has not taken place before the summons for directions is heard and a direction for the exchange of lists of documents is usually given at the hearing of the summons.
 - (c) Thirdly, the RHC's scheme omits to set any time-limit for making the application for leave to set the case down for trial (Row 24). Previously, the practice at the summons for directions was simply for that application to be adjourned *sine die* with liberty to restore. However, in March 2002, the High Court masters decided as a matter of practice to direct that the application to set down had to be made by a stated time (usually within 14 days after the anticipated completion of any outstanding pre-trial steps). The Registrar notified the Law Society accordingly by letter dated 15 March 2002, and this has since been the practice followed.
 - (d) Fourthly, cases commonly reach the checklist stage still not ready for trial, requiring the application to set down to be adjourned to permit further trial preparation to proceed.

13.5 A questionnaire-based timetable should be introduced as part of the summons for directions

370. For there to be a better-tailored court-determined timetable, the court must be given accurate information about the case. To achieve this, it is proposed that each party be required :-

- (a) to fill in a questionnaire giving the court and the other parties information and his best estimates regarding the nature, size, complexity and case management needs of the case;³³⁷ and
- (b) to propose directions and time-limits for compliance linked to his view of the needs of the case up to and including a proposed trial date or proposed trial period, that is, a period during which the trial is to commence.

371. It is envisaged that this questionnaire should constitute the first part of the summons for directions procedure, to be completed prior to discovery but after the close of pleadings. This is a little later than the time suggested in *Proposal 18* for administering the questionnaire.³³⁸ This is partly with a view to minimising front-loaded costs and partly to ensure that all the pleadings are available to the parties before they attempt to complete the questionnaire.

372. The parties should, as far as possible, try to agree the directions and timetable for the case in the light of the information exchanged via the questionnaire. The questionnaire should first be completed by the plaintiff.

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³³⁷ A similar approach is presently adopted in the Construction and Arbitration List, where an “information sheet” has to be served on the court before the hearing of the summons for directions: PD 6.1/9 and App. A.

³³⁸ It proposes that this should be done “shortly after service of the defence”.

Its content is to be decided in consultation with the legal profession and other major court users, but it is likely to touch upon topics such as the following :-

- (a) whether the parties are presently or anticipate that later they will be legally represented;
- (b) whether the parties have attempted ADR (giving details) and if not, whether any of the parties has offered to or is willing to engage in ADR (giving details);³³⁹
- (c) whether any persons are intended to be joined as parties or brought in as Third Parties;
- (d) whether any interlocutory applications are intended or outstanding;
- (e) whether any amendments to the pleadings are intended;
- (f) whether requests for further and better particulars of the pleadings are intended or outstanding;
- (g) whether interrogatories are likely to be served or outstanding;
- (h) whether any directions for modifying discovery obligations or the manner of their implementation are proposed with a view to achieving economies in respect of discovery;³⁴⁰
- (i) the approximate volume of the documents considered relevant to the case and how much time it would take to assemble and list them;
- (j) the number of factual witnesses likely to be called;

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³³⁹ See Section 29 for a discussion of ADR in the context of the civil justice system.

³⁴⁰ See *Recommendation 76*.

- (k) how long it is likely to take to prepare witness statements for such witnesses;
 - (l) whether expert evidence may be needed, in what fields and broadly in relation to what matters;
 - (m) if expert evidence is needed, whether appointment of a single joint expert is considered appropriate and if not, why not,³⁴¹
 - (n) if party-appointed experts are to be appointed, how much time it is likely to take to have their expert reports ready for exchange;
 - (o) whether a case management conference should be held;
 - (p) the extent to which the proceedings may be conducted in Chinese;
 - (q) whether the Technology Court may beneficially be used for all or any part of the proceedings; and,
 - (r) the estimated length of the trial.³⁴²
373. On the basis of the information and estimates supplied, the plaintiff would then propose what he considers to be suitable directions and a timetable for the action.
374. The questionnaire would then be passed on to each defendant who would indicate in columns alongside those filled in by the plaintiff, whether they agree with the plaintiff's estimates and proposed directions, and if not, what their own estimates and proposals are. The questionnaire would then be returned to the plaintiff who would consider whether, in the light of the

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³⁴¹ In the light of the proposed guidelines discussed in Section 20 below.

³⁴² Compare the information sheet required in the Construction and Arbitration List: PD 6.1/9 and App. A.

defendants' responses, he ought to modify any of his own estimates or proposals before filing the questionnaire in court. Relatively short time-limits for each of these steps should be provided.

375. Unrepresented litigants ought to be given suitable latitude. While they should be encouraged, if possible, to complete the questionnaire, it may be appropriate in some cases to require such a litigant only to provide information about his case (as to how many documents he has and how many witnesses he is likely to call, etc), relaxing the requirement regarding the proposal of directions and a timetable, leaving such matters to be formulated by the court on all the available information. A case management conference is likely to be needed in such cases, with the court providing procedural guidance to the unrepresented litigant.
376. The court would consider the questionnaire and decide what directions are needed and what the timetable should be. It would give great weight to agreed directions and time-limits put forward by the parties, although it would retain a discretion to override the agreement where it considers the directions and time-limits agreed to be unreasonable. The court could, if it thinks fit, make orders *nisi* on the basis of the questionnaire so that a hearing of the summons for directions could be dispensed with if the parties, seeing those orders *nisi*, decide to accept them. If, on the other hand, a party were to object to all or some of the orders *nisi*, the summons for directions would be called on for hearing.

13.6 The benefits of a questionnaire

377. The proposed changes do not involve imposing any radically new duties on the parties or conferring much wider powers on the courts. Thus, under the RHC as they stand :-

- (a) a party can take out a summons for directions at any time after a defendant has given notice of intention to defend, so as to establish an early timetable;³⁴³
- (b) the court is required to secure that the parties “make all admissions and all agreements as to the conduct of the proceedings which ought reasonably to be made by them” and has power to make adverse costs orders penalising refusal to cooperate;³⁴⁴
- (c) the parties are under a duty “to give all such information and produce all such documents on any hearing of the summons as the Court may reasonably require for the purpose of enabling it properly to deal with the summons;”³⁴⁵ and,
- (d) the court has power to give such further directions and orders on its own motion as may, in the circumstances, be appropriate.³⁴⁶

378. The questionnaire aims at a more focussed exercise of such powers and observance of such duties. The Working Party believes that a questionnaire would be beneficial and promote cost-effectiveness in the litigation.

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³⁴³ Under O 25 r 1(7) – a power in practice never used, perhaps because no one has the information needed to seek or give directions at the very early stages. In specialist lists, express power is given to take out a summons for directions before the pleadings are deemed to be closed: O 72 r 8(1).

³⁴⁴ O 25 r 4.

³⁴⁵ O 25 r 6(1). The questionnaire makes this more systematic and enables the court at the hearing to consider relevant information already to hand, rather than to have to ask for the information and adjourn the hearing to allow it to be obtained.

³⁴⁶ O 25 r 9.

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.

13.7 Milestones and flexibility

379. The benefits of having a firm timetable are obvious. It would set the pace at which the parties and their legal advisers need to work and make deliberate procrastination more difficult. Everyone would be able to assess the progress of the case and to plan and prepare for the next phase. The parties

would be better able to consider settlement, knowing where they have got to, how much further there is to go and when the next major tranche of litigation costs has to be incurred. The court would be able to deploy judicial resources more efficiently.

380. If these benefits are to be enjoyed, the court must be resolute in holding the parties to the essentials of the timetable, anchored by the trial date or trial period, which are not to be moved save in very exceptional circumstances. This is not to say that the Working Party rejects the need for flexibility. On the contrary, the Working Party fully accepts the need to avoid an excessively rigid approach. However, the flexibility allowed must be such as to enable the essential discipline of the timetable to be retained.

381. The aim of achieving a firm timetable which allows the flexibility needed requires a number of objectives to be pursued concurrently. The reforms should (i) seek to enhance the realism and appropriateness of the timetable which is set; (ii) build into the timetable mechanisms giving the parties and the court flexibility to react to developments while maintaining the essentials of the timetable; and (iii) develop supporting reforms which will help to minimise disruption to the timetable.

(a) Starting with a realistic timetable

382. The timetable as initially set should, so far as possible, be realistic and workable so that the parties can reasonably be held to its deadlines. The Working Party believes that this can be achieved, bearing in mind the following matters :-

(a) It will only be at the close of pleadings that the parties will have to work out the directions needed and their associated timetable to be

entered in the questionnaire. They will be assisted in this task by having to hand the pleadings – duly verified by statements of truth³⁴⁷ – setting out each side’s case and identifying the disputed issues with some precision.

- (b) Sanctioned offers of settlement may well also have been made by then, accompanied by a sufficient disclosure of the offeror’s case to support the financial consequences of the offer,³⁴⁸ again contributing to a clear understanding of the case.
- (c) The questionnaire, containing each party’s information and estimates as to the needs of the case, together with their proposals for directions and a timetable, further ensures that both sides and the court will have a comprehensive understanding of the issues and procedural needs of the case.
- (d) In making their timetabling proposals, the parties can be expected to have made allowances for contingencies and aimed to give themselves ample time to meet the time-limits – an approach which the court would be happy to accept subject only to its having a discretion to override manifestly unreasonable estimates and proposals.

(b) Case management and the milestones

383. While milestone dates, once set, should largely be immovable, case management in the selection of milestones and of the proceedings between milestones allows for substantial flexibility.

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³⁴⁷ See Section 9 above.

³⁴⁸ See Section 11 above.

(i) Case management conferences

384. At the summons for directions stage, equipped with the pleadings and the questionnaire, the court would have the flexibility to decide whether a case management conference is required. If so, it would give directions and set a timetable which runs in the first place only up to the case management conference as the first milestone, with further timetabling to be done at that conference. If a case management conference is not considered necessary, the court would give directions setting a time-table with the date of the pre-trial review as the first milestone and the trial date or trial period as the second and final milestone.
385. A court might order a case management conference where the case is heavy and procedural complications are likely to arise, for instance, where strongly contested interlocutory applications or interlocutory appeals are intended or pending (as disclosed in the questionnaire) making it difficult to fix a realistic trial date or trial period at the summons for directions stage.
- (a) The court might in such cases fix a case management conference for a time when it is envisaged that most of the outstanding pending interlocutory disputes would have been dealt with, giving directions only up to that stage.
 - (b) The case management conference would be used to clear any still outstanding interlocutory questions and then to fix a timetable for the further progress of the case, including dates for the pre-trial review and the trial (or the trial period).
 - (c) By fixing the milestones progressively in this way, flexibility would be preserved, allowing the state of progress to be taken into account at the stage of the case management conference.

- (d) As indicated above, a case management conference might also be useful in relation to proceedings brought by or against unrepresented litigants.

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.

(ii) Pre-trial reviews, trial dates and trial periods

386. In many if not most cases, a case management conference would not be needed. On the basis of the questionnaire and with input from the parties, the court should often be able to decide what directions are needed and to fix a timetable up to and including the date for the pre-trial review and the trial date. This would often be the preferable course. If this is not possible, a trial period should be fixed.
387. A trial period would be a period of say, four to six weeks during which the trial is to commence, the precise starting date being fixed at the pre-trial review scheduled to be held, if possible, two to three months before the start of the trial period. By fixing a trial period and holding the parties to that period as a milestone, some firmness and predictability would be achieved. At the same time, the judge or master at the pre-trial review would have the flexibility to vary the start date for the trial within the trial period, for instance, to suit the availability of preferred counsel or of witnesses resident

abroad. It would also allow the court greater flexibility in the allocation of judicial resources.

388. The pre-trial review should be fixed to occur after completion of discovery, exchange of expert reports and witness statements. It should be listed to take place two to three months before the trial date or the start of the trial period. At the pre-trial review, the judge or master would :-

- (a) fix the starting date for the trial if a trial period has been fixed at the summons for directions or case management conference stage;
- (b) confirm or vary the estimated length of the trial in the light of completed interlocutory steps;
- (c) give any further directions needed (including any needed extensions of time for interlocutory tasks not yet completed, on any appropriate “unless order” terms or terms as to costs) provided that such directions will not impinge upon the trial date.

389. As with other listing arrangements, the fixing of trial periods at the summons for directions stage, the fixing of pre-trial reviews and finalising the start dates for the trial at the pre-trial review are all matters of court management and administration which are not susceptible to detailed regulation in rules of court. Such arrangements will need to undergo a process of consultation and adjustment with experience under the supervision of the Chief Judge of the High Court.

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.

(iii) *Time-limits between milestones*

390. As suggested in *Proposal 19*, the parties should be allowed a great deal of flexibility to vary time-limits by agreement for events falling between milestones (without the need for applying to the court), so long as the milestone dates themselves are not affected. A party needing more time for a particular intermediate step, could agree an extension, but would then have to accelerate work on the next phase of the case so as to make up for lost time before arrival of the next milestone date.

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.

391. As will be apparent from the foregoing discussion of milestone dates, the milestone which is fundamental to the entire timetable is the trial date (and the trial period prior to fixing the trial date). While the dates set for the case management conference (if any) and for the pre-trial review are milestones and are dates which should generally not be subject to change, it is not intended that at those hearings, the court should rigidly refuse extensions of time to parties who have missed time-limits expiring prior to such hearings if prompt compliance is shown to be possible. Provided that a party satisfies the court that it would be able to comply with an extension without

impinging on the trial date, the court would normally be prepared to grant such an extension on suitably stringent terms.

392. Accordingly, where agreement cannot be reached between the parties for extension of an intermediate time-limit, the party seeking a time-extension would have to apply to the court for the necessary indulgence, having done everything possible to show that he would be able to comply swiftly and that an extension would not threaten the trial date. A practice direction should make it clear that such applications will not be granted as a matter of course, but only on sufficient grounds being shown and only granted, if at all, on the basis of an immediate “unless order” prescribing a suitable automatic sanction³⁴⁹ should there be any further non-compliance, always providing that full compliance can realistically be achieved without threatening the trial 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.

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³⁴⁹ It is desirable, whether or not strictly necessary, to spell out the court’s power to make orders with automatic sanctions along the lines of CPR 3.1(3)(b) and CPR 3.8. See *Recommendations 83 and 84*.

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.

(c) Other reforms in support

393. The establishment of an effective court-determined timetable benefits from the support of other procedural reforms such as those involving pleadings verified by statements of truth and disclosures accompanying sanctioned offers of settlement, as mentioned above. The maintenance of timetables and the prevention of their disruption call for similar support.
394. Two important sources of potential timetable disruption involve the proliferation of interlocutory applications and interlocutory appeals. These are dealt with separately below.³⁵⁰ Measures proposed for countering such threats of disruption include suitably stringent costs orders, involving summary assessment and immediate payment, against unwarranted or over-prolific interlocutory applications, as well as orders for the payment of costs by the lawyers personally in suitable cases. Unwarranted interlocutory appeals ought to be excluded or much reduced by the introduction of a leave requirement, coupled with costs sanctions.

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³⁵⁰ Sections 17 and 22 below.

(d) When cases “go to sleep”

395. In many cases, after an initial flurry of activity, steps in the action cease and the case is said to have “gone to sleep”. This may, for example, be because the plaintiff has lost his resolve to pursue the claim, or has run out of funds to finance it or because the parties have come to a settlement without telling the court that this has happened. Where there has not been a settlement but no progress is made by the plaintiff, the defendant is often content to let sleeping dogs lie. The defendant may hope that the case will be allowed to die a natural death or, if not, that a build up of a period of inordinate and inexcusable delay, coupled with prejudice to the defendant, may lead to the action, if revived later, being dismissed for want of prosecution.
396. What should the court’s attitude be to cases going to sleep in the framework of milestone dates and court-supervised timetables? In the Working Party’s view, a balance should be struck between (i) not forcing parties who are not minded to continue the litigation to fight it against their will or better judgment; and (ii) maintaining the discipline of the timetable set by the court.
397. A difference should be drawn between cases which go to sleep prior to the parties filing the questionnaire, so that no milestone dates have been set by the court, and cases where milestone dates have been set. In the former category, the court should not take the initiative to compel the setting of a timetable in order to avoid forcing litigation upon the parties.
398. Where the parties have obtained a timetable set by the court, the milestone dates should be enforced. With reference to milestone dates prior to trial, the court’s computer system should automatically send out a notice reminding the parties of its approach, asking to be informed if the case has

settled, and warning that the action will be struck out if the milestone is ignored. Thereafter, if, at the time reserved for the hearing, no one appears, the case should be ordered to be struck out provisionally, allowing the plaintiff a grace period of say, 3 months from the missed milestone to apply to reinstate the action for good reason. In default of such an application, the action should stand dismissed and the defendant automatically entitled to the costs. If the parties do not appear at the trial, even after a pre-trial review has been held, the trial judge may deal with the action under O 35 r 1. In cases where the defendant has filed a counterclaim, he should have an additional grace period of 3 months from the expiry of the plaintiff's grace period to apply to reinstate his counterclaim. Failure to do so should lead to the automatic dismissal of the counterclaim with no order as to costs.

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.

13.8 Running List for trials

399. In the present system, cases are set down for trial either on the Running List or the Fixture List.³⁵¹ All specialist list cases are fixtures. Otherwise, unless some reason exists for doing otherwise (eg, where there are foreign witnesses), cases where the trial is estimated to last for 6 days or less are placed on the Running List.³⁵² A case set down for trial on the Running List is not given any trial date. Instead, parties have to check the Running List as it is published to see how their case is progressing towards trial – something which depends on how quickly or slowly the cases listed ahead of their case are disposed of, either by trial or settlement.

- (a) At the end of each month, some Running List cases are promoted to what is called the “Pending List”, that is, cases which are expected to be tried during the next succeeding month.
- (b) As the cases ahead of it are disposed of, the case comes into the “Warned List”. This is published each Wednesday, identifying those actions on the Pending List which are expected to be tried during the next succeeding week.
- (c) If the estimates prove wrong and the list moves more slowly than expected, then a case placed on the Pending List will not in fact come on during the next succeeding month, or if on the Warned List, will not in fact come on during the next succeeding week.

Notes

³⁵¹ PD 7.1.1.

³⁵² PD 5.1.7. The Running List is divided into two parts, the first where trial is estimated to last for 3 days or less and the second, where trial is estimated to last from 4 to 6 days. Longer cases are placed on the Fixture List.

(d) It is not until the case is actually listed for hearing on the following day, something that occurs each day, not later than 4 pm, that the parties can be sure that their trial is to come on for hearing.³⁵³

400. The Running List has an important function. It provides a reserve pool of work to be placed before a court which finds a fixture date vacated at the last moment (whether due to the parties settling or the case having to be adjourned or for some other reason). The judge can then be given a Warned List case instead, avoiding the possibility that he would otherwise find himself unoccupied or under-employed.

401. Ideally, one would prefer not to have a Running List at all since it can be an inconvenient arrangement for the parties, their legal representatives, the witnesses and also for the judges who have to try the case.

(a) The uncertain rate of progress of the Running List sometimes catches solicitors by surprise, particularly when it runs faster than anticipated (say, where there is a string of settlements) so that they find themselves not ready for the trial when their case swiftly enters the Warned List.

(b) On the other hand, solicitors may have prepared properly and briefed preferred counsel, only to find that, because of the slow movement of the List, the barrister concerned is not available when the case actually comes on for trial. Different, less preferred, counsel may have to be instructed, involving duplication of effort and often some duplication of expense and a rushed preparation for trial.

Notes

³⁵³ The running of the Running List as described above is provided for by PD 7.1.3.

- (c) Parties and their witnesses are alerted to hold themselves ready to give evidence without knowing exactly when they have to come to court, causing inconvenience.
- (d) The judge assigned to try the case is likely to have less prior knowledge of the case as he will have had less time to read into it before the start of the trial.

402. It is therefore perhaps not surprising that a number of respondents³⁵⁴ argued for abolition of the Running List. The Working Party's view is that, given the changes being proposed for the way in which cases should be listed for trial, the need for a Running List should progressively diminish. As the proposed reforms gain familiarity amongst legal practitioners and the court, ways to use vacated time slots without resorting to a Running List are likely increasingly to be found without significant periods of unused judicial time ensuing.

- (a) Thus, at present cases often settle without the court being notified of settlement. But the setting of a pre-trial review as a milestone will help to ensure that the court is made aware of any prior settlements. Setting the pre-trial review two or three months before trial or the start of the trial period would give the court some leeway to fix alternative trials or hearings for the period vacated by the settlement.
- (b) Any diary vacancy should be filled flexibly, channelling into that vacancy cases from areas where delays are building up. For instance, if it is taking a long time to get dates for interlocutory hearings or for interlocutory appeals to be heard, the vacated dates should be used to

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³⁵⁴ Including the Law Society, a set of barristers' chambers and an individual barrister.

deal with these matters. This could be done not merely by making horizontal adjustments in diary commitments among judges sitting at the same level, but also vertically. Where, for instance, “special chambers” interlocutory hearings are building up before the masters, hearings to be fixed or already fixed for hearing before the master could be directed to be heard directly by the judge who finds himself with some spare capacity.

- (c) Thought should also be given to publishing on a regular, perhaps daily, basis the availability of vacated slots on the Judiciary’s website inviting parties with urgent applications to bid for a hearing in such slots, either as a fresh application or, by consent, with a view to bringing forward a hearing date previously fixed.

403. Taking everything stated above into account, it is the Working Party’s view that it would be unwise to recommend total abolition of the Running List immediately for all cases across the board. It will take some time for the proposed new timetabling system to work smoothly and for the flexible filling of vacated dates without recourse to a Running List to be efficiently operated. While the Running List can and should be replaced by court-directed timetabling in most cases, it may be wise initially to retain a Running List for all or some cases in a particular specialist list, such as the Personal Injuries list, in order to have in reserve, a pool of pending trial work to take up any slack in a judge’s diary resulting from late settlements or adjournments.

404. Different considerations apply to interlocutory applications. There may be much to be said for the establishment of a running list for interlocutory applications or interlocutory appeals. Such hearings generally do not involve witnesses or experts or the parties, so that they are not

inconvenienced by being kept “on hold” when the application is warned. Such hearings are also less complex than trials and so more easily mastered by fresh counsel who may be asked to take on the hearing where counsel originally instructed is not free when the application is called on. They are also more easily mastered by the judge and less dependent on either prior knowledge of the case or on specialist knowledge since the points tend to be procedural.

405. In the Working Party’s view, while endorsing as the ultimate aim, the maximum use of milestone dates and the progressive diminution of cases on the Running List, how, when and the extent to which that aim should be implemented raises pre-eminently practical and administrative issues which should be left to be worked out by the Chief Judge of the High Court and the court administration in consultation with members of the profession and other interested parties.

Recommendation 61: Flexible measures, including the possible establishment of a running list for interlocutory matters, should be adopted to permit any vacated dates in judicial diaries to be used efficiently. While the aim should be to maximise use of fixed milestone dates and progressively to diminish reliance on a Running List, how, when and the extent to which that aim should be implemented should be worked out by the Chief Judge of the High Court and the court administration in consultation with members of the profession and other interested parties.

13.9 Specialist Lists

406. In the Interim Report, it was suggested that a significant degree of procedural autonomy ought to be preserved for the operation of specialist lists. The Working Party agrees with the views expressed in the consultation³⁵⁵ that this ought to apply to timetabling.
407. Accordingly, the Working Party is of the view that its general recommendations in respect of timetables and milestones should not apply to cases in the specialist lists save to the extent that the courts in charge of such lists should choose to adopt them in a particular case or in general by issuing appropriate practice directions,³⁵⁶ and subject to what has been said above regarding the retention of a Running List.

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.

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³⁵⁵ Particularly by the HKMLA and the WB/LAD.

³⁵⁶ In accordance with O 72.

Section 14: Docket system, specialist lists and vexatious litigants

Proposals 20 to 22

Proposal 20

As an alternative to Proposals 18 and 19, the possible adoption of case management by a docket system should be explored for use either generally or in connection with particular classes of proceedings.

Interim Report paras 359-370

14.1 A docket system

408. The weight of opinion was much against the proposal that a docket system be adopted as the means for managing cases across the board.³⁵⁷ A notable exception was the Law Society which favoured using such a system, but with the qualification that significant resources would have to be devoted to training and improving the case management capabilities of the Judiciary and its staff.³⁵⁸ It was, for instance, suggested that listing clerks ought to be legally-qualified persons.

409. Other respondents gave limited support to the use of a docket, such as for complex and large-scale cases³⁵⁹ or for unrepresented litigants placed in a

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³⁵⁷ Shared by the Bar Association, the BSCPI, the DOJ, the APAA, several judges, masters, court administrators and a firm of solicitors.

³⁵⁸ The BCC was also on balance in favour of a docket system.

³⁵⁹ The DOJ.

newly-created list.³⁶⁰ Others³⁶¹ pointed out that docket systems are *de facto* in place in most of the specialist lists.

410. As indicated in the preceding Section, the Working Party recommends adoption of *Proposals 18 and 19* for general application, subject to the modifications already discussed. The Working Party therefore does not recommend adoption of a docket system for application across the board.

411. It is however recognized that the specialist lists operate very much along docket lines, often with a single judge given charge of all cases on the list and with all contested interlocutory applications as well as the trial being dealt with by the same judge. The continuation of this docket-type system is supported by the Working Party in relation to specialist lists, as expanded upon below.

412. The Working Party also notes (as pointed out by the DOJ), that pursuant to the Practice Direction on “Long Cases”,³⁶² where a case is likely to last for 15 days or longer or “where by reason of the complexity of the case or otherwise” the judge considers such course advantageous to the proper conduct of the proceedings, he may assign the case to a judge designated as the trial judge. Where this is done, the designated judge will hold a preliminary hearing to give directions (the parties having discussed appropriate directions beforehand), make orders for any needed pre-trial hearings and deal with all the interlocutory applications. In effect, this allows parties engaged in a heavy or complex case to seek a direction for it

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³⁶⁰ The judges and masters of the District Court, pointing to an unofficial list and docket of this nature currently being operated in that court.

³⁶¹ The HKMLA.

³⁶² PD 5.7.

to be given docket treatment. The Working Party supports the continuation of this practice.

Recommendation 63: The Working Party does not recommend adopting a docket system generally for managing cases in Hong Kong. However, it supports the continued use of effectively a docket system in accordance with specialist list procedures or pursuant to applications made under PD 5.7 in respect of cases thought appropriate for management by a docket system.

Proposal 21

Specialist lists should be preserved and Specialist Courts permitted to publish procedural guides modifying the application of the general body of rules to cases in such specialist lists.

Interim Report paras 371-375

14.2 Specialist lists and procedural autonomy

413. By O 1 r 2, the RHC are made applicable to all proceedings in the High Court save for proceedings in seven specified classes³⁶³ which are governed by their own legislation. However, Order 72 gives the Chief Justice power

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³⁶³ Bankruptcy, winding-up, non-contentious probate, Prize Court, matrimonial, adoption and domestic violence proceedings.

to make provision for certain classes of cases to be separately listed, with a judge placed in charge of a particular list.³⁶⁴

414. Where this occurs, O 72 r 2(3) provides that the judge in question “shall have control of the proceedings in his particular list” and, subject to any directions he may give, hear all chambers applications himself. This in practice means that the specialist list judge has a high degree of procedural autonomy enabling him (often with the assistance of a consultative group of court users) to propose and develop procedures designed to take into account the peculiar needs of cases of the kind dealt with on the list. To this end, the application of particular provisions of the RHC may be excluded or varied by practice direction applicable to the specialist list generally or by specific order in relation to a particular case.
415. Currently, four specialist lists have been designated pursuant to O 72: the Commercial; Personal Injury; Construction and Arbitration; and Constitutional and Administrative Law Lists, respectively. The Commercial List is the longest established and models its practice along the well-documented lines of the practice of the Commercial Court in London. This tends to involve a robust style of case management which demands a degree of competence among the legal advisers who frequent the court. Guidance has also been given locally in judicial pronouncements in reported cases.³⁶⁵ This approach has been adopted in the Construction and Arbitration List.³⁶⁶

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³⁶⁴ O 72 rr 1 and 2.

³⁶⁵ See a summary of the approach of judges in the Commercial List at HKCP 2002, 72/2/10.

³⁶⁶ Thus, PD 6.1.10(j) requires users to note the practice and procedure set out in the Guide To Commercial Court Practice on matters not expressly regulated in the List’s standard directions or the court’s orders.

Although, it has been pointed out that the “Admiralty List” is not strictly an Order 72 list,³⁶⁷ it is in practice treated as a list run on the same lines as the Commercial List.

416. Procedural autonomy is perhaps most well-developed in the Personal Injury List which has established a sophisticated practice direction³⁶⁸ which, in certain respects, already puts into operation some of the reforms discussed in the Interim Report.

- (a) Thus, a pre-action protocol is in effect already in place, with the plaintiff being required to send a letter before action conveying essential information about the claim and the claimant³⁶⁹ no later than four months before issuing the writ, there being potentially adverse costs consequences if this is ignored.³⁷⁰
- (b) The potential defendant is likewise required to respond constructively and, if liability is denied, to give reasons.³⁷¹
- (c) A “cards on the table” approach is very much adopted in relation to the pleadings, with the practice direction requiring documents which bear on both liability and quantum to be served with the pleadings.³⁷²
- (d) Measures are taken to discourage unnecessary interlocutory applications and to monitor costs, discouraging the incurring of

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³⁶⁷ HKCP 2002, 72/1/3.

³⁶⁸ PD 18.1. A well-developed practice direction (PD 6.1) has also been established in the Construction and Arbitration List.

³⁶⁹ A prescribed form is at HKCP 2002, PD18.1/20.

³⁷⁰ PD 18.1.2.1 and PD 18.1.2.2.

³⁷¹ PD 18.1.2.3.

³⁷² PD 18.1.5 and 18.1.6.

unwarranted or disproportionate costs. Thus, at the conclusion of interlocutory hearings, the parties are required to supply “a short statement as to the costs of and occasioned by the application so that the Master or Judge may make an order for assessed costs, payable forthwith.”³⁷³

(a) *Procedural autonomy should be retained*

417. There was near-universal support for continuing the present system of conferring a high degree of procedural autonomy on judges in charge of specialist lists. The Working Party shares this sentiment.

418. The practice directions which already exist illustrate how special procedures need to be developed, for particular types of proceedings. To take the Admiralty Jurisdiction as an example, PD 1.1 makes provision for a preliminary hearing to be held before certain interlocutory applications. This would not make sense in the general run of cases. However, in Admiralty, where the key (and hard-fought) battles often occur at the very start of the proceedings – where Hong Kong jurisdiction, whether *in personam* or *in rem*, is challenged or an arrest of a vessel is sought to be set aside, etc – such a hearing is often highly desirable.

419. While the RHC, as provided for by O 1 r 2, should generally apply to all proceedings, including those in the specialist lists, the power to dis-apply certain rules and to add or subtract procedural requirements with a view to meeting the peculiar needs of specialist list cases should be maintained.

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³⁷³ PD 18.1.8.3. By PD 18.1.12, the judge or master may make similar costs orders where there has been undue delay, default, unnecessary applications, and vexatious, frivolous or unmeritorious opposition to applications.

Such procedural differences should be formulated as practice directions to provide a published procedural guide to users and the general public. Where practice directions have proliferated, these should be consolidated (as has occurred in the Personal Injury List with publication of PD 18.1).

Recommendation 64: The procedural autonomy currently conferred on judges in charge of specialist lists should be maintained and any special practices adopted should be published as practice directions.

(b) Pre-action protocols and specialist lists

420. One particular area where specialist lists may profitably exercise procedural autonomy is in respect of the adoption of pre-action protocols. As discussed previously,³⁷⁴ the Working Party has decided against recommending the introduction of pre-action protocols generally. However, in the light of the responses received, there is much to recommend permitting such protocols to be introduced where and to the extent that this is thought appropriate in specialist lists, in consultation with users of those lists.
421. Many respondents to the consultation favoured having pre-action protocols for specified kinds of cases.³⁷⁵ Inevitably, there is room for debate as to where and to what extent such protocols should be introduced. Thus, the Bar Association suggested that the problem of front-loaded costs may be

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³⁷⁴ Section 5 above.

³⁷⁵ They included the Bar Association, the Law Society, the LAD, the HA, the DOJ, the APAA, the SCLHK, the HKRRLS, three firms of solicitors and the High Court and District Court masters.

less acute in the personal injury context since the majority of the parties are likely to be either legally-aided or insured. However, the BSCPI expressed reservations regarding the pre-action requirements of PD 18.1 in Personal Injury List cases, questioning its effectiveness and worrying about front-loaded costs. On the other hand, the LAD, the High Court and District Court masters, the HKFI as well as a firm of solicitors all reported that those provisions of PD 18.1 were generally working well. The Hospital Authority and the LAD went on to argue in favour of introducing a pre-action protocol along the lines of the clinical negligence protocol in force in England and Wales, with suitable adaptations for Hong Kong.

422. There was also strong support from the Society of Construction Law Hong Kong and a firm of solicitors for the introduction of a pre-action protocol in relation to at least some, if not all, construction and engineering cases in Hong Kong.

Recommendation 65: Judges in charge of specialist lists, in consultation with users of that list, ought to give consideration to the possible development and introduction, with the agreement of the Chief Judge of the High Court, of suitable pre-action protocols for some or all cases in that list.

Proposal 22

Consideration should be given to establishing additional specialist lists in areas likely to benefit, including lists for complex cases, for cases involving unrepresented litigants and cases where group litigation orders (if introduced) have been made.

Interim Report paras 371-376

(c) *New specialist lists*

423. The creation of a new specialist list itself carries a cost. It means an increased complexity by introducing special rules and practices in relation to a particular group of cases. The creation of a new specialist list therefore can only be justified if it can be shown that it would lead to real benefits in terms of better furthering the ends of justice or increasing the cost-effectiveness of litigation. Such benefits may accrue, for instance, where the group of cases involves a degree of specialist knowledge and would be better handled by a tribunal which has expertise or gains experience in the field.

424. One suggestion³⁷⁶ which, in the Working Party's view, may meet these criteria involves the creation of a specialist list to deal with intellectual property and information technology cases, an "IP/IT" specialist list. Plainly, increasing specialisation by the court is likely to be an asset in this area. It is notable, for instance, that in England and Wales, specialist treatment is envisaged for both areas of practice.

(a) Provision has been made by CPR 49, by practice direction³⁷⁷ and by publication of a Patents Court Guide³⁷⁸ to deal with intellectual property proceedings.

(b) Separately, provision has been made for "technology claims", but in a practice direction also dealing with construction cases (rather than

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³⁷⁶ Made by the Law Society, APAA and the HKRRLS.

³⁷⁷ White Book, Vol 2, 2D-1.

³⁷⁸ *Ibid*, 2D-28 *et seq.*

intellectual property).³⁷⁹ The Technology and Construction Court (TCC) is empowered to take on cases triable by the Queen’s Bench and Chancery Divisions, and is intended to take on cases which involve issues or questions “which are technically complex or for which a trial by a judge of a TCC is for any other reason desirable.”³⁸⁰

425. Whether an IP/IT specialist list would be justified has of course to be studied in consultation with the legal profession and other interested parties. The Working Party recommends that such consultation be pursued.
426. The Law Society also suggested creating specialist lists for company, “media” and “real estate” cases. The Working Party does not consider that any case can be made out in respect of “media” and “real estate” cases.
427. As to company cases, a Companies List is already operated by the Bankruptcy and Winding-up Judge, operating under the Winding-up and Bankruptcy Rules respectively, with practice directions³⁸¹ already in place. The Judge also commonly deals with shareholder disputes brought under s 168A of the Companies Ordinance. The Working Party accordingly considers that this is an area sufficiently well served by specialised treatment.
428. A suggestion was also made by the Registrar of Companies that a Companies Tribunal should be set up to facilitate quick and simple treatment of smaller and more straightforward minority shareholder claims and claims by unrepresented litigants, as well as matters such as share

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³⁷⁹ *Ibid*, 2C-9 *et seq*.

³⁸⁰ White Book 2C-11.

³⁸¹ PD 3.1.

valuations, section 168A share purchase orders, capital restructuring and the like. This may have merit, but was not a suggestion canvassed in the Interim Report and so did not attract other comment. It would not be appropriate to take this further in this Final Report.

429. The question whether a specialist list ought to be set up for proceedings involving unrepresented litigants had mixed responses.³⁸² The Working Party is not in favour of a specialist list for unrepresented litigants. Such litigants are not a homogenous group and may crop up at any point in the entire spectrum of cases dealt with by the courts. The idea that they should all be referred to a particular specialist list, whatever the subject-matter of the case may be, does not commend itself. It would be preferable to have the case dealt with either as a general High Court Action or in any specialist list in which it may fall by virtue of its subject-matter, with the court in each instance being conscious of the need for case management which is sensitive to the difficulties faced by such litigants (and their represented opponents).

Recommendation 66: Consideration should be given to the establishment of an IP/IT specialist list pursuant to Order 72, in consultation with the legal profession and other interested parties.

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³⁸² The Law Society was in favour, as were the judges and masters of the District Court who pointed out that there was a *de facto* specialist list and docket system operated in that court for litigants in person. However, the JCGWG, who have a great deal of contact with unrepresented litigants, were not in favour. Nor were some solicitors' firms.

14.3 Vexatious litigants

430. The Interim Report³⁸³ noted the problems caused by certain litigants who abuse the system and the demands that such abuse makes on judicial resources, resulting in delay for legitimate court users. While it did not put forward a formal Proposal on this topic, the Interim Report pointed to the limitations of our present legislation for the control of vexatious litigants and suggested that consideration be given to legislative reform. Having further explored the position, the Working Party is of the view that certain legislative changes should be recommended.

(a) The present legislation

431. Section 27 of the HCO³⁸⁴ is the provision presently dealing with vexatious litigants. It bristles with safeguards against the danger of unjustifiably depriving someone of the right to approach the seat of justice. Thus :-

- (a) the application can only be made by the Secretary for Justice;
- (b) the court must give the person involved an opportunity of being heard; and,

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³⁸³ At §§184-187.

³⁸⁴ Which provides: (1) If, on an application made by the Secretary for Justice under this section, the Court of First Instance is satisfied that any person has habitually and persistently and without any reasonable ground instituted vexatious legal proceedings, whether in the Court of First Instance or in any inferior court, and whether against the same person or against different persons, the Court of First Instance may, after hearing that person or giving him an opportunity of being heard, order that no legal proceedings shall, without the leave of the Court of First Instance be instituted by him in any court and that any proceedings instituted by him in any court before the making of the order shall not be continued by him without such leave and such leave shall not be given unless the Court of First Instance is satisfied that the proceedings are not an abuse of the process of the Court and that there is prima facie ground for the proceedings. (2) A copy of any order made under subsection (1) shall be published in the Gazette.

- (c) the court must be satisfied that such person has instituted a series of actions or other proceedings (and not just applications within a single action) such that he can be said to have “habitually and persistently and without any reasonable ground instituted vexatious legal proceedings;”

before the court can make an order that no legal proceedings shall be instituted by him without the court’s leave, which leave is not to be given unless the proceedings are not an abuse of its process and there is prima facie ground for the proceedings.

432. While the section correctly recognizes the importance of such safeguards, there is much force in the criticism that it lacks the flexibility needed to tackle vexatious litigants.

- (a) It may, for instance, be thought unnecessary to have the double layer of safeguards involving both the Secretary for Justice and the court.³⁸⁵
- (b) Moreover, leaving it to the Secretary for Justice may be ineffectual. Vexatious litigants are often persons obsessed, quite capable of issuing numerous proceedings and numerous applications within each proceeding, forcing the various defendants to incur significant effort and expense and cluttering the court’s diary, before the Secretary for Justice can be expected to intervene. The other parties are often most directly affected by the litigant’s oppressive behaviour, but section 27 makes no provision for them to apply for protection.

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³⁸⁵ For a discussion of the role of the Attorney-General in relation to vexatious litigants in England and Wales, see *AG v Covey*; *AG v Mathews* [2001] EWCA Civ 254, 19 February 2001, per Lord Woolf CJ, at §48.

(c) The section's exclusive focus on the habitual and persistent institution of groundless and vexatious legal proceedings fails to take into account the fact that abuse can and often does come in other forms and not merely by starting multiple proceedings. Thus, there have been cases where the vexatious litigant has issued a single action but has progressively applied to join a series of well-known personalities as parties. It is also common for such litigants to issue a large number of unwarranted summonses within an existing case, each of which has to be dealt with by the court and by the other party. One comes across litigants who refuse to accept that they have lost a case and who therefore make repeated unsuccessful attempts to set aside the relevant judgment or otherwise to re-open a particular set of proceedings.

433. The position can be frustrating for the courts. For example, *Mui Po Chu v Moi Oak-wah*, (Unreported) CACV 85 of 1998, 26 June 1998, was a case involving an appellant said by Mortimer, V-P to be “regrettably well-known to this Court and to other courts in this building”, who had “brought a multiplicity of proceedings, most of which have failed” but who seemed “unable to resist bringing proceedings”. Although the Court plainly thought her a vexatious litigant who had to be stopped, it observed that its powers to take action were dependent upon application by others. As Godfrey JA put it :-

“I must say with regret that, in my judgment, the time has come for steps to be taken which will ensure that the defendant is not troubled with any further process by the plaintiff other than in accordance with the provisions of our order of 24 February 1998. But it is not for us to take steps to declare the plaintiff a

vexatious litigant. Those matters must be left to the defendant and/or to the Secretary of Justice.³⁸⁶

434. The Department of Justice has informed the Working Party that between 1994 and April 2003, the Attorney-General or Secretary for Justice made applications under section 27 only twice. An order was not made on the first occasion because, despite findings by various courts and tribunals that previous actions by the respondent against her husband had been unmeritorious, the court was not satisfied that the only live action was itself frivolous and vexatious or that the respondent would persist in bringing further actions. A vexatious litigant order was made in the second case where the respondent had issued a large number of identical and groundless writs against different departments.

(b) The position in England and Wales

435. Section 27 is closely based on section 51 of the Supreme Court of Judicature (Consolidation) Act 1925 in England and Wales. Section 51 was replaced in that jurisdiction by section 42 of the Supreme Court Act 1981 which introduces a number of changes :-

- (a) It adds as grounds for a vexatious litigant order, the making of vexatious *applications* in any civil proceedings in any court (whether

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³⁸⁶ It is unclear what the learned judge had in mind as action to be taken by the defendant. See also *Chan Sai Lun Henry v Chan Wai Wah, Lily Ann*, HCA014052/1999, 10 November 2000, where Yam J was driven in his judgment to making a request that the Secretary for Justice consider applying to the court for a vexatious litigant order against the defendant.

instituted by him or another) and also the bringing of vexatious criminal prosecutions.³⁸⁷

- (b) It allows a vexatious litigant to be restrained from making any application (other than one for leave under section 42) in any civil proceedings instituted in any court by any person, without the court's leave.
- (c) It raises the threshold for granting a vexatious litigant leave to issue fresh proceedings or for making a fresh application, requiring the court to be satisfied that the proceedings or application are not an abuse of the process and that there are *reasonable* – not just *prima facie* – grounds for the proceedings or application.
- (d) It makes it clear that such orders can either be made for specific periods or remain in force indefinitely.
- (e) It also makes it clear that there is no appeal against a refusal of leave under the section.

436. These are all plainly desirable amendments. The law in England and Wales has, however, been developed even further by the judges.

(c) *Development of the Grepe v Loam jurisdiction*

437. The 1981 Act has retained the requirement that application for a vexatious litigant order has to be made by the Attorney-General. However, basing itself on the decision in *J S Grepe v Loam* (1887) 37 Ch D 168, the English Court of Appeal in *Ebert v Venvil* [2000] Ch 484, has asserted the existence

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³⁸⁷ Further discussion of such vexatious criminal prosecutions is not required in the present context.

of a power, said to reside in the Supreme Court's inherent jurisdiction, quite separate from the jurisdiction conferred by the Act and without the Attorney-General's intervention, to prevent a person from initiating civil proceedings which are likely to constitute an abuse of the process of the court.

438. It is the Working Party's view that such a power is highly desirable. Indeed, the English Court of Appeal's lead has been taken up by the Hong Kong courts.³⁸⁸ However, the Working Party is concerned, with respect, as to the adequacy of the legal foundations of the new doctrine both as a matter of common law and under the Basic Law. It is therefore necessary to examine the basis of what has become known as the "extended *Grepe v Loam* order".
439. The report of the decision in *J S Grepe v Loam* (1887) 37 Ch D 168, contains no discussion of principle. It occupies less than a page in the Law Reports. The applicants in two actions concerning the same property had made repeated unsuccessful attempts to set aside judgments obtained against them after trial. After the Court of Appeal dismissed the latest attempt as "wholly unfounded", Counsel asked for an order preventing repetition of such applications without leave of the court. After referring to an unreported case³⁸⁹ where such an order had been made, the court duly made an order in the following terms :-

"That the said Applicants or any of them be not allowed to make any further applications in these actions or either of them to this Court or to the Court below

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³⁸⁸ *Tse Jeekeen v HK Alliance in Support of Patriotic Democratic Movement of China* [2000] 2 HKC 339; upheld in the Court of Appeal: (Unreported) CACV246/2000, 27 October 2000; *Chan Wai Wah, Lily Ann v Chan Sai Lun, Henry et al*, (Unreported) HCMP2921/2001, 31 July 2001; *Ng Yat Chi v Max Share* [2002] 3 HKLRD 735.

³⁸⁹ *Suir v Newton*, 9 June 1886.

without the leave of this Court being first obtained. And if notice of any such application shall be given without such leave being obtained, the Respondents shall not be required to appear upon such application, and it shall be dismissed without being heard.”

440. It is to be noted that each of the applicants in *Grepe v Loam* had enjoyed access to the court and indeed, had been through a full trial. The order was one which restrained further applications in actions which had already been tried.

441. By the turn of the twentieth century, the power to make such orders was well-established. In *Lord Kinnaird v Field* [1905] 2 Ch 306, a case providing a good illustration of how vexatious litigants can have a disastrous impact on the other parties and on the system,³⁹⁰ Vaughan Williams LJ stated: “No question can possibly be raised as to the jurisdiction of the learned judge to make (such an order).”³⁹¹ Stirling LJ explained that the order “is really an example of the mode in which the Court interferes to prevent abuse of its process”.³⁹²

442. It has since been widely accepted that such orders are soundly based. The court plainly has an inherent jurisdiction to prevent abuse of its process in

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³⁹⁰ “The defendant had made some twenty-nine interlocutory applications with reference to pleadings, discovery, and the like; he had moved to strike out the statement of claim on the grounds (1) that the words ‘Delivered the day of’ appeared at the end instead of the beginning; (2) that the claim was printed with a margin of an inch and a half instead of two inches; and (3) because the number of folios was printed at the top instead of at the side. He had also made applications for particulars covering almost every paragraph of the statement of claim. In eighteen cases the defendant had been ordered to pay the costs; in four cases the plaintiffs were to have their costs in any event; and the remaining seven cases proved abortive, either because the notice of motion was irregular or given for a wrong day, or because the defendant did not appear when the time for making the motion or supporting his application arrived. None of the costs he had been ordered to pay had been paid by the defendant.....” (at 306)

³⁹¹ At 309.

³⁹² *Ibid.*

relation to a case of which it is seised. This is reflected, for instance in O 18 r 19 and the inherent jurisdiction familiarly invoked for striking out proceedings which are an abuse of the process. The availability of *Grepe v Loam* orders has supplied the absence of jurisdiction to react to vexatious applications (as opposed to the vexatious institution of proceedings) not provided for by section 27.

443. The difficulty concerns the recent case-law, led by Lord Woolf in *Ebert v Venvil* [2000] Ch 484, which relies on *Grepe v Loam* to justify restraining persons from instituting *new proceedings*. In *Ebert v Venvil*, the plaintiff was a bankrupt who had commenced a series of vexatious proceedings in the High Court against his trustee in bankruptcy, the bankruptcy petitioner and a bank. Having already made a *Grepe v Loam* order against him in one action, the judge proceeded to make an order prohibiting the plaintiff from issuing any new proceedings in the High Court or in any county court against the bank or its legal representatives concerning any matters involving or relating to the bankruptcy proceedings.
444. On appeal,³⁹³ Lord Woolf MR, delivering the judgment of the court, upheld the judge. His Lordship noted that the *Grepe v Loam* jurisdiction to restrain abusive applications was clearly established and saw the question posed as “whether the court has jurisdiction in appropriate circumstances to make *Grepe v Loam* orders prohibiting new proceedings being commenced without the leave of the court ” Noting that the order made was narrower in scope than an order imposing blanket restrictions on instituting any proceedings capable of being made under section 42 and also noting

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³⁹³ Proceedings for a vexatious litigant order under section 42 of the 1981 Act, taken out by the Attorney-General, were pending.

that there were New Zealand and Australian cases holding that the jurisdiction did not exist, his Lordship stated :-

“We prefer to approach the issues from a standpoint of principle. Doing so, the starting point must be the extensive nature of the inherent jurisdiction of any court to prevent its procedure being abused. We see no reason why, absent the intervention of a statute cutting down the jurisdiction, that jurisdiction should apply only in relation to existing proceedings and not to vexatious proceedings which are manifestly threatened but not yet initiated.” (at 496)

445. Lord Woolf concluded that, in line with the court’s “general approach in recent years not to restrict the inherent jurisdiction of the court but to adopt a broad approach where this is appropriate,” jurisdiction to extend *Grepe v Loam* orders to restraining the institution of proceedings ought to be asserted. In so doing, he rejected the argument that this approach might offend against Art 6 of the ECHR, stating :-

“Article 6 does no more than reflect the approach of the common law indicated by Laws J in *Reg v Lord Chancellor, Ex parte Witham* [1998] QB 575. As long as the inherent power is exercised only when it is appropriate for it to be exercised, no contravention of article 6 or common law principle is involved.” (at 497)

(d) *The difficulties*

446. In the passage cited above, Lord Woolf’s approach was that inherent jurisdiction to restrain the institution of vexatious proceedings exists “absent the intervention of a statute cutting down the jurisdiction”. However, the authorities have taken a contrary position. Declaring that access to the court is a constitutional right, they have held that express statutory authority is required if it is to be restricted on any grounds.

447. In *In re Bernard Boaler* [1915] 1 KB 21 at 36, Scrutton J put the need for clear statutory authority to intervene, even when faced with cases of abuse, in the following terms :-

“One of the valuable rights of every subject of the King is to appeal to the King in his Courts if he alleges that a civil wrong has been done to him, or if he alleges that a wrong punishable criminally has been done to him, or has been committed by another subject of the King. This right is sometimes abused and it is, of course, quite competent to Parliament to deprive any subject of the King of it either absolutely or in part. But the language of any such statute should be jealously watched by the Courts, and should not be extended beyond its least onerous meaning unless clear words are used to justify such extension.”

448. Viscount Simonds in *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1960] AC 260, put it concisely :-

“It is a principle not by any means to be whittled down that the subject’s recourse to Her Majesty’s courts for the determination of his rights is not to be excluded except by clear words.” (at 286)

449. In *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation Ltd* [1981] AC 909 at 977, in the context of justifying the court’s inherent power to dismiss a pending action for want of prosecution, Lord Diplock stressed the constitutional nature of the right of access to the court at common law as follows :-

“Every civilised system of government requires that the state should make available to all its citizens a means for the just and peaceful settlement of disputes between them as to their respective legal rights. The means provided are courts of justice to which every citizen has a constitutional right of access in the role of plaintiff to obtain the remedy to which he claims to be entitled in consequence of an alleged breach of his legal or equitable rights by some other citizen, the defendant.”

450. In *Raymond v Honey* [1983] 1 AC 1, 13, Lord Wilberforce pointed out that interference with this common law constitutional right was in principle capable of amounting to a contempt.³⁹⁴

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³⁹⁴ See also *Reg v Secretary of State for the Home Department, Ex parte Leech* [1994] QB 198 at 210, per Steyn LJ: “It is a principle of our law that every citizen has a right of unimpeded access to a court. In *Raymond v Honey* [1983] 1 AC 1, 13, Lord Wilberforce
cont’d

451. Unfortunately, this line of cases does not appear to have been considered in *Ebert v Venvil*. Although Brooke LJ, applying *Ebert v Venvil* in *Paragon Finance plc v Noueiri (Practice Note)* [2001] 1 WLR 2357, did mention the *Bremer Vulkan* case, the difficulty was not discussed.
452. As Lord Woolf noted, New Zealand and Australian authority is firmly against the existence of any “extended” *Grepe v Loam* jurisdiction. Thus, in *Commonwealth Trading Bank v Inglis* (1974) 131 CLR 311, the applicant sought an order “pursuant to the inherent jurisdiction” of the Court that no legal proceedings should be instituted or applications in existing proceedings made or appeals lodged by the respondents or either of them without leave of a justice of the Court on the grounds of previous vexatious conduct. Barwick CJ³⁹⁵ held that in the absence of statutory power to make such an order, the court had no jurisdiction. Cases dealing with abuse of the process at the interlocutory stages had to be distinguished. As his Honour pointed out :-

“..... the making of unwarranted and vexatious applications in an action which is pending in the Court is, in our opinion, a matter over which there is an inherent power in the Court to exercise control. There is an essential difference, in our opinion, between regulating the conduct of such an action so as to prevent the Court’s process from being abused, on the one hand, and impeding a particular person in the exercise of a right of access to the Court, on the other hand.”³⁹⁶

His Honour concluded that while such a power might be justifiable “as a proper safeguard against abuse of the Court’s process”, it was apparent :-

“ that the Courts, both in England and in this country, have declined to regard themselves as having power to do so, except where such power has been

..... cont’d

described it as a ‘basic right.’ Even in our unwritten constitution it must rank as a constitutional right.”

³⁹⁵ Sitting with McTiernan J.

³⁹⁶ At 319.

conferred upon them by an Act of Parliament or by Rules promulgated under statutory authority.³⁹⁷

453. In New Zealand, Fell J in *Stewart v Auckland Transport Board* [1951] NZLR 576 at 578, distinguished *Grepe v Loam* on the basis that it had involved interlocutory applications and concluded that there was no inherent jurisdiction to stop the plaintiff issuing fresh proceedings “without some special authority”. As the court explained in *AG v Reid* [2000] 2 NZLR 377 at §10, the New Zealand provision dealing with vexatious litigants (section 88A of the Judicature Act in 1965), had been inserted as a result of the decision in *Stewart v Auckland Transport Board* that the court “had no power under its inherent jurisdiction to make an order that a party should not be permitted to commence proceedings without leave of the Court.”

(e) *A new statutory basis for vexatious litigant orders and constitutional requirements*

454. In Hong Kong, as discussed in Section 3 above, constitutional protection of the right of access to the courts and to a fair and public hearing is given potency by BL 35 and BOR 10. Furthermore, BL 39 stipulates that “the rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law.” Accordingly, given the abovementioned doubts as to the legal foundations of the “extended *Grepe v Loam* order”, it is the Working Party’s view that we should ensure that the innovations of *Ebert v Venvil* are secured by a clearly-defined statutory rule specifically

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³⁹⁷ At 315. A similar approach was adopted in the Australian High Court in *Jones v Skyring* (1992) 109 A.L.R. 303. The argument there focussed on whether a rule of court (O 63 r6(1)) applied and whether it was intra vires the rule-making power and therefore able to support an order requiring applicants to seek leave before starting fresh actions, appeals or other proceedings. There was no question of such an order being justified as within the court’s inherent jurisdiction.

empowering the courts to stop threatened abuse in the form of new proceedings without the need for intervention by the Secretary for Justice.

455. It is true that Lord Woolf in *Ebert v Venvil* discounted any possible inconsistency between extended *Grepe v Loam* orders and Art 6(1) of the ECHR (our equivalent being BOR 10) on the ground that “Article 6 does no more than reflect the approach of the common law indicated by Laws J in *Reg v Lord Chancellor, Ex parte Witham* [1998] QB 575.” However, the analysis in *Ex p Witham* proceeds explicitly on the orthodox basis that access to the courts is a constitutional right at common law which can only be abrogated by the legislature. That was the basis on which Laws J commented that the common law provides no lesser protection of access to the courts. Thus, Laws J stated (at 581) :-

“In the unwritten legal order of the British state, at a time when the common law continues to accord a legislative supremacy to Parliament, the notion of a constitutional right can in my judgment inhere only in this proposition, that the right in question cannot be abrogated by the state save by specific provision in an Act of Parliament, or by regulations whose vires in main legislation specifically confers the power to abrogate. General words will not suffice. And any such rights will be creatures of the common law, since their existence would not be the consequence of the democratic political process but would be logically prior to it.”

His Lordship continued (at 585) :-

“It seems to me, from all the authorities to which I have referred, that the common law has clearly given special weight to the citizen’s right of access to the courts. It has been described as a constitutional right, though the cases do not explain what that means. In this whole argument, nothing to my mind has been shown to displace the proposition that the executive cannot in law abrogate the right of access to justice, unless it is specifically so permitted by Parliament; and this is the meaning of the constitutional right.”

456. Orders having the same effect as *Grepe v Loam* orders would be placed on a secure constitutional footing if authorised by Ordinance in materially the same terms as section 42 of the Supreme Court Act 1981, with the

additional provision that applications for vexatious litigant orders can be made, not only by the Secretary for Justice, but also by persons made parties to vexatious proceedings or subjected to vexatious applications.

457. In *Ebert v Official Receiver* [2002] 1 WLR 320, Buxton LJ analysed the relevant European jurisprudence and concluded that the system for controlling vexatious litigants under section 42 was in principle in conformity with the ECHR. His Lordship noted that :-

“..... in an early and classic case on that subject, *Golder v UK* (1975) 1 EHRR 524, the European Commission of Human Rights observed, in the course of a general survey of the subject, that in the case of the United Kingdom vexatious litigant provisions: ‘The control of vexatious litigants is entirely in the hands of the courts . . . Such control must be considered an acceptable form of judicial proceedings.’”

Moreover, he pointed out that in *H v UK* (1985) 45 DR 281, the Commission referred to the principle declared both in the *Golder* case and in *Ashingdane v UK* (1985) 7 EHRR 528, that the right of access to a court was not absolute, and stated (at 285) that vexatious litigant orders made pursuant to section 42 :-

“did not limit the applicant’s access to court completely, but provided for a review by a senior judge . . . of any case the applicant wished to bring. The Commission considers that such a review is not such as to deny the essence of the right of access to court; indeed, some form of regulation of access to court is necessary in the interests of the proper administration of justice and must therefore be regarded as a legitimate aim . . .”

458. Buxton LJ commented that such conclusion was unsurprising, adding (at §9) :-

“The detailed and elaborate procedures operated under s 42 of the 1981 Act respect the important convention values that procedures relating to the assertion of rights should be under judicial rather than administrative control; that an order inhibiting a citizen’s freedoms should not be made without detailed inquiry; that the citizen should be able to revisit the issue in the context of new facts and of new complaints that he wishes to make; and that each step should be the subject of a separate judicial decision. The procedures also respect proportionality in the

general access to public resources, in that they seek to prevent the monopolisation of court services by a few litigants; an aim, and the national arrangements to implement it, that the Strasbourg organs, applying the doctrine of the margin of appreciation, are likely to respect.”

459. It is accordingly clear that section 42 of the 1981 Act, with all its safeguards, is capable of being operated compatibly with Art 6 of the ECHR. Indeed, as Lord Woolf CJ pointed out in *AG v Covey; AG v Mathews* [2001] EWCA Civ 254, 19 February 2001, at §47 :-

“There is no doubt that it is necessary for the court to ensure that before any s 42 order is made, art 6(1) is complied with.”

460. In the Working Party’s view, if our system for controlling vexatious litigants were placed on the same footing, but with the addition that affected parties are authorised to make applications for vexatious litigant orders, it would be a system which would continue to operate in conformity with access and hearing rights deriving from BL 35 and BOR 10.

461. In each case where a vexatious litigant order is sought, the court would exercise its discretion, guided by the principles developed in the international jurisprudence discussed in Section 14 above. Thus, in general, it will plainly be legitimate to regulate the conduct of vexatious litigants pursuant to a clear statutory rule which authorises appropriate and proportionate limitations to the right of access to the court, importing mechanisms for judicial scrutiny to ensure that the litigant will not be shut out from bringing legitimate proceedings or making reasonable applications. One could expect the courts to tailor restrictions to the vexatious conduct in question, for instance, by imposing a leave requirement only in respect of instituting proceedings relating to a particular transaction or business, rather than a blanket restriction against starting any proceedings whatsoever.

462. The right of access to the court is not a right to abuse its process and the measured prevention of such abuse does not negate the essence of the right. Thus, in *M v United Kingdom*, Application No. 12040/86, the Commission pointed out that in most of the contracting states, the right of access to court is regulated in respect of vexatious litigants (among others) and that “such regulations are not in principle contrary to Article 6, where the aim pursued is legitimate and the means employed to achieve the aim is proportionate.”

(f) Recommendations

463. In the light of the foregoing discussion, the Working Party is of the view (i) that the provisions of section 27 of the HCO should be updated to include enhancements equivalent to those introduced by section 42 of the Supreme Court Act 1981 in England and Wales; and (ii) that the court should be given an additional statutory power to control vexatious litigants upon the application of any person directly affected by the vexatious conduct. All applications for vexatious litigant orders should be made directly to a judge in chambers and not to the master.

<p>Recommendation 67: Section 27 of the HCO should be amended to introduce enhancements equivalent to those introduced by section 42 of the Supreme Court Act 1981 in England and Wales.</p>

Recommendation 68: The HCO should furthermore make provision for vexatious litigant orders to be made not only on the application of the Secretary for Justice but also on the application of any person who is or has been party to vexatious proceedings presently instituted by or with the participation of the respondent or who has directly suffered adverse consequences resulting from such proceedings or from vexatious applications made by the respondent in such proceedings.

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

Section 15: Multi-party litigation and derivative actions

Proposals 23 and 24

Proposal 23

A procedural scheme to deal with multi-party litigation should be adopted in principle, subject to further investigation of schemes implemented in other jurisdictions which may be suitable for the HKSAR.

Interim Report paras 377-402

15.1 Multi-party litigation

464. This Proposal was generally supported.³⁹⁸ The Consumer Council and the BSCPI felt there was a pressing need for such a scheme. The former also suggested that the Consumer Council should be given standing to sue in public-interest cases.³⁹⁹ Some respondents pointed to particular schemes as possible models, including those found in Victoria and in the Federal Courts of Australia.⁴⁰⁰ One judge⁴⁰¹ suggested that, rather than wait, the Group Litigation Order scheme in place in England and Wales⁴⁰² should be adopted.

465. The Working Party recommends that a system for enabling and managing multi-party litigation should in principle be introduced. It remains of the

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³⁹⁸ Among those in favour were the Bar Association, the BSCPI, the Law Society, the Consumer Council, the DOJ, HKRRLS, a firm of solicitors and the BCC.

³⁹⁹ A similar suggestion was made by the Hon Ms Audrey Eu SC, speaking in Legco.

⁴⁰⁰ Including a firm of solicitors

⁴⁰¹ Mr Justice Litton NPJ.

⁴⁰² Under CPR 19.10 to CPR 19.15 and practice direction.

view that a specific study should be made of systems operating in other jurisdictions with a view to identifying a model suitable to the needs of Hong Kong. While the GLO scheme in England and Wales has been put into operation, the rules and the practice direction do not address a number of key questions, with the scheme relying to a very high degree on the discretion of the judge in the individual case. While that is a model which deserves close study, it would be premature to opt for that approach. It may be appropriate for the Chief Justice or the Secretary for Justice to refer the topic of multi-party proceedings to the Law Reform Commission of Hong Kong.

Recommendation 70: In principle, a scheme for multi-party litigation should be adopted. Schemes implemented in comparable jurisdictions should be studied by a working group with a view to recommending a suitable model for Hong Kong.

15.2 Derivative actions

Proposal 24

A provision regulating derivative actions should be adopted.

Interim Report para 403

466. *Proposal 24* sought consultees' views on whether rules of court along the lines of RSC O 15 r 12A ought to be introduced to regulate applications for leave to commence derivative actions on behalf of companies.

467. This proposal has now been overtaken by events. On 25 June 2003, the Companies (Amendment) Bill 2003 was introduced into Legco. It proposes to add a Part IVAA to the Companies Ordinance whereby members of a “specified corporation” (which includes a Hong Kong as well as a non-Hong Kong company) are to be allowed to bring derivative actions on behalf of the company without leave of the court and may be given leave to intervene to take over proceedings to which the company is a party.⁴⁰³ The court is to be empowered, on the application of any party to proceedings brought by such a member, to strike out the proceedings on specified grounds, ie, that the proceedings are not in the best interests of the company or have not been brought in good faith or where service of prior written notice has not been effected.⁴⁰⁴
468. On the assumption that the Bill becomes law, the Proposal becomes redundant. The new arrangements ought, however, to be monitored in case they give rise to any procedural problems of their own.

Recommendation 71: On the assumption that Part IVAA of the Companies (Amendment) Bill 2003 becomes law, Proposal 24 (for the introduction of a procedural scheme for the bringing of derivative actions) will have been overtaken and should not be adopted.

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⁴⁰³ Section 168BB.

⁴⁰⁴ Section 168BD.

Section 16: Discovery

Proposals 25 to 29

16.1 Modifying the basic discovery obligations

Proposal 25

Automatic discovery should be retained, but the Peruvian Guano test of relevance should no longer be the primary measure of parties' discovery obligations. Subject to the parties' agreeing otherwise, a primary test restricted to directly relevant documents, namely, those relied on by the parties themselves, those adversely affecting each party's case and those supporting the opponents' case, should be adopted instead.

Interim Report paras 404-425

Proposal 26

In making disclosure, the parties should be free to reach agreement as to the scope and manner of making discovery. Where no agreement is reached, they should be obliged to disclose only those documents required under the primary test, ascertainable after a reasonable search, the reasonableness of such search being related to the number of documents involved, the nature and complexity of the proceedings, how easily documents may be retrieved and the significance of any document to be searched for.

Interim Report paras 404-425

469. *Proposals 25 and 26 sought consultees' views as to whether the current far-reaching discovery obligations based on the Peruvian Guano decision*⁴⁰⁵

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⁴⁰⁵ See Interim Report §§406-407.

ought to be replaced by the narrower “standard discovery” obligations adopted by the CPR.

470. The standard discovery obligations are narrower in two main aspects :-

- (a) First, the classes of documents which the parties’ are obliged to disclose are limited to those which are “directly relevant” as described in *Proposal 25*.⁴⁰⁶
- (b) Secondly, the parties are only obliged to make a reasonable search for such documents, reasonableness being judged by the factors mentioned in *Proposal 26*.⁴⁰⁷

471. If adopted, parties would not be required (unless ordered to do so by the court) to disclose documents which may be broadly relevant as “background” to the matters in issue, but which cannot be said to advance or damage any party’s case. Nor would they have to list “train of inquiry” documents.⁴⁰⁸

(a) *The consultation response*

472. The weight of opinion among respondents to the consultation was significantly against adopting either of these Proposals and in favour of retaining the *Peruvian Guano* principles.⁴⁰⁹

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⁴⁰⁶ As per CPR 31.6.

⁴⁰⁷ As per CPR 31.7(2).

⁴⁰⁸ See Interim Report §406-§409.

⁴⁰⁹ This view was shared, for instance, by the Bar Association, the BSCPI, the Law Society, the HKMLA, the Hon Ms Miriam Lau speaking in Legco, the BCC, the JCGWG, a set of barristers’ chambers and two firms of solicitors.

473. The premise of these two Proposals is that the *Peruvian Guano* obligations cast their net too widely, resulting in the parties making excessive disclosure, unnecessarily adding to the cost and complexity of the proceedings. Many of the practitioners argued that this does not hold good in Hong Kong where the problem encountered is said to involve insufficient compliance rather than excessive disclosure. The narrower obligations were thought likely to facilitate the unscrupulous hiding of material documents.
474. Others opposing these Proposals thought that they might increase costs or at least would not achieve any savings in costs. This was because the narrowing of the obligation would require more senior (and so more expensive) lawyers to be deployed in the discovery process and also because more interlocutory applications might result from discovery which may be arguably insufficient. Another view, advanced by the Academy of Experts, was that the attempt at limiting disclosure has been “perceived to have been one of the least successful aspects of the Woolf reforms” since disclosure “has continued to be relatively detailed” in any event.⁴¹⁰
475. Those favouring the Proposals⁴¹¹ tended to do so subject to the rider that the court should exercise flexible case management powers to fit the discovery regime to the needs of any particular case (as per *Proposal 29*). Indeed, active case management in respect of discovery was also generally subscribed to by those who favour keeping to the *Peruvian Guano* principles. Such respondents saw case management as the preferable way of tempering possible *Peruvian Guano* excesses, for instance, with the court

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⁴¹⁰ AE Response, p 17 §6.3 iii) c).

⁴¹¹ Including the DOJ, the APAA, the HKFLA, the High Court and District Court masters, a firm of solicitors, and an individual respondent.

directing, where appropriate, that discovery should take place in stages or in relation to particular issues first; or that it should be limited to particular classes of documents; or that documents need not be listed individually but by bundle or by file in certain categories, and so forth.

476. Accordingly, the judicious control of discovery using case management powers is a concept which bridges, to a large extent, the gap between those in favour and those against adoption of *Proposals 25 and 26*.

477. In fact, the RHC already contain provisions enabling most of the suggested modifications to full, automatic *Peruvian Guano* discovery to be made in particular cases. They can all be agreed between the parties and, in default of agreement, can be directed by the court on application :-

- (a) Order 24 r 1(2) allows the parties to dispense with or limit discovery in any way by agreement.
- (b) By O 24 r 2(5), a party can apply for an order limiting discovery to specified issues; or, where discovery is not necessary, or not necessary at that stage of the action, for an order dispensing with discovery entirely or at that stage.
- (c) Order 24 r 4 allows a court dealing with a discovery application to require any particular issue to be determined before any discovery is made.
- (d) Where little benefit derives from describing documents of the same kind individually (eg, in relation to inter partes correspondence or routinely generated invoices or other business records), O 24 r 5 allows listing to be by bundles, sufficiently described to allow each bundle to be identified. This can be done without application to the court.

- (e) O 24 r 8 and O 24 r 13 require the court to refuse further discovery or inspection where they are not necessary either for disposing fairly of the cause or matter or for saving costs, thereby introducing procedural economy as a key discretionary consideration.
- (f) O 24 r 16 gives the court complete discretion as to how compliance with discovery obligations should be enforced.

(b) Recommendations

478. In the light of the responses received and given the case management powers already contained in the RHC, the Working Party recommends against adopting *Proposals 25 and 26*. Practitioners and the courts should instead be encouraged to use existing RHC powers to fashion a discovery regime suitable to the needs of the particular case – preferably by agreement, but otherwise by order. Instead of cases being routinely allowed to proceed to full automatic *Peruvian Guano* discovery, it ought to become standard practice to consider whether any economising modifications should be made to the scope and manner of meeting the parties’ discovery obligations. A practice direction in suitable terms should be issued and a question prompting such economies should be included in the timetabling questionnaire.⁴¹²

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⁴¹² See *Recommendation 53*.

Recommendation 72: Proposal 25 (for adopting “standard discovery”) and Proposal 26 (for prescribing a “reasonable search” standard) should not be adopted, retaining the existing *Peruvian Guano* principles as the primary measure of the parties’ discovery obligations.

Recommendation 73: A practice direction should be issued and the timetabling questionnaire designed with a view to encouraging the parties to achieve economies in the discovery process by agreement; and to encouraging the courts, in appropriate cases, to give directions with the same aim.

16.2 Discovery by request

Proposal 27

In the alternative to Proposals 25 and 26, discovery should not be automatic but should be subject to an inter partes request, with further discovery requiring the court’s order, along the lines of the system adopted in New South Wales.

Interim Report paras 404-425

479. This alternative Proposal attracted little support, with respondents to the consultation preferring either to retain the *Peruvian Guano* principles or to adopt the CPR standard discovery approach. It was pointed out that under O 24 r 10, parties already have the right to require early inspection of

documents referred to in pleadings, affidavits and witness statements. A number thought that this alternative approach was likely to lead to interlocutory applications and higher costs.

Recommendation 74: Proposal 27 (for adopting a system of discovery based on disclosure of the documents referred to by the parties plus a limited number of requested documents) should not be adopted.

16.3 Pre-action and non-party disclosure

Proposal 28

Parties should be empowered to seek discovery before commencing proceedings and discovery from non-parties along the lines provided for by the CPR.

Interim Report paras 404-425

(a) Pre-action disclosure

(i) The present position

480. The law is generally cautious about ordering disclosure of documents by someone who is merely a potential defendant to an action which has not yet been commenced. A plaintiff is expected to know what case he has against a defendant before he starts the proceedings. The discovery he gets is bounded by the pleaded issues. He is not permitted to “fish” for a case by first getting a potential defendant to disclose documents so that he can see if he has a viable claim. If orders for pre-action disclosures were too readily

available, persons and corporations might find themselves harassed by fishing applications. On the other hand, it is undoubtedly true that in some cases, a plaintiff with a potentially meritorious claim may be shut out from asserting it in a sustainable form without pre-action disclosure of key documents.

481. Section 41 of the HCO presently provides for pre-action disclosure in cases where the plaintiff is suing for personal injury or in respect of someone's death. The section gives the court power to order disclosure and production of documents to the applicant (and his expert and professional advisers) where:-

- (a) the applicant appears likely to be a party to subsequent proceedings in which a claim in respect of a personal injury or death will be made;
- (b) the person against whom the order is sought is likely to be made a party to such proceedings; and,
- (c) that potential defendant is likely to have or to have had in his possession, custody or power documents relevant to that claim.

482. Such applications are made by originating summons supported by an affidavit setting out the grounds for saying that the respondent is likely to be a party to such proceedings, why he is thought to have the documents and why they are relevant to issues in that action.⁴¹³

(ii) *The position under the CPR*

483. In England and Wales, the power to order pre-action disclosure is no longer limited to personal injury and death cases. CPR 31.16 now permits such

Notes

⁴¹³ O 24 r 7A.

orders to be made in all kinds of cases in respect of specified documents or classes of documents, provided they are documents which (if proceedings were started) would come within the respondent's duty to give standard disclosure.

484. As pointed out by Hollander and Adam, this broadening of pre-action disclosure is closely linked to the introduction of pre-action protocols and the prominence now given to facilitating settlement as an objective of civil procedure in England and Wales.⁴¹⁴ Thus, CPR 31.16(3)(d) lists as discretionary factors in favour of ordering disclosure before proceedings, not only that such disclosure is desirable in order to dispose fairly of the anticipated proceedings or to save costs, but also in order to “assist the dispute to be resolved without proceedings”. As H&A indicate, this is intended to promote Lord Woolf's “cards on the table” approach to dispute resolution, so that inclusion of this factor is likely to increase the range of cases where pre-action disclosure might be ordered: disclosure which is not justified on the traditional grounds may be ordered where the court believes that the revelation of key documents would be conducive to settlement.

(iii) Consultation response

485. By *Proposal 28*, consultees were asked whether we should similarly widen the scope of pre-action disclosures in Hong Kong. The respondents were generally in favour of doing so.⁴¹⁵ However, the support in some cases was

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⁴¹⁴ H&A, §2-04.

⁴¹⁵ Those in favour included the Bar Association, the BSCPI, the Law Society, the DOJ, a set of barristers' chambers, three firms of solicitors, District Court masters and judges, the HKFLA and the JCGWG. Only the APAA was unqualifiedly against the Proposal, being concerned about harassment and front-loaded costs.

expressed on the footing that the widening would operate in tandem with the introduction of pre-action protocols. Since such protocols have not been recommended for general introduction in Hong Kong,⁴¹⁶ such support must be regarded as qualified. A number of those in support stressed the need for clearly defined rules as to when an order should be granted and clear limits regarding the documents to be disclosed.

(iv) *Recommendations*

486. In the Working Party's view :-

- (a) The jurisdiction of the court to order disclosure before commencement of proceedings should be widened to apply in all types of cases (and not merely in relation to personal injury and death claims). This would require primary legislation to amend section 41 of the HCO.
- (b) Such jurisdiction should be exercisable where it is shown by the applicant that he and the respondent are both likely to be parties to anticipated proceedings and that disclosure before the proceedings have been started is necessary to dispose fairly of the anticipated proceedings or to save costs.
- (c) Any order granted should relate to disclosure⁴¹⁷ and inspection of specific documents or classes of documents which are "directly relevant" to the issues in the anticipated proceedings, namely, documents which would be relied on by the parties themselves and documents which affect adversely or support any party's case in the

Notes

⁴¹⁶ See *Recommendation 5*.

⁴¹⁷ As provided for under O 24 r 7A(5) and (6).

anticipated proceedings. It should not extend to “background” documents or possible “train of inquiry” documents.

- (d) Applications should be made by originating summons supported by necessary affidavits and otherwise in accordance with the provisions of O 24 r 7A, with any necessary modifications.

487. It is considered that such a rule strikes a reasonable balance between the need to protect against harassment and fishing applications on the one hand and the need to enable a potentially meritorious plaintiff to bring a claim which could not effectively otherwise be brought.

488. Since pre-action protocols have not been recommended for general adoption in Hong Kong, it is not proposed to specify as a discretionary factor, the desirability of pre-action disclosure in aid of early settlement.

Recommendation 75: The HCO should be amended to broaden the jurisdiction of the court under section 41 to order disclosure before commencement of proceedings to encompass all types of cases (and not merely cases involving personal injury and death claims).

Recommendation 76: Such jurisdiction should be exercisable where it is shown by the applicant that he and the respondent are both likely to be parties to the anticipated proceedings and that disclosure before the proceedings have been started is necessary to dispose fairly of the anticipated proceedings or to save costs.

Recommendation 77: Orders for pre-action disclosure should relate to disclosure and inspection of specific documents or classes of documents which are “directly relevant” to the issues in the anticipated proceedings, being documents which would be likely to be relied on by the parties themselves or documents directly affecting adversely or directly supporting any party’s case in the anticipated proceedings, the procedure for such applications being that prescribed by O 24 r 7A, subject to any necessary modifications.

(b) *Non-party pre-trial disclosure*

(i) *The present position*

489. The traditional view has been that the law enables non-party documents to be obtained prior to trial only in very limited circumstances.

- (a) By section 42(1) of the HCO, such disclosure has been provided for in connection with personal injury and death claims. In such cases, after commencement of the proceedings but before the trial, disclosure may be ordered against someone who appears likely to have or to have had in his possession, custody or power any documents which are relevant to an issue arising out of the claim.

- (b) The *Norwich Pharmacal* jurisdiction⁴¹⁸ may also be regarded as an exceptional instance of the court ordering non-party disclosure. While on one view, such claims represent independent proceedings based upon the suit for discovery in equity, functionally, it involves the court ordering a person who innocently facilitated or became “mixed up in” a tort to give disclosure with a view to enabling a potential plaintiff to identify and sue the wrongdoer in question. So viewed, the jurisdiction involves a potential plaintiff obtaining non-party disclosure prior to starting proceedings against the potential defendant.
- (c) Another specialised form of non-party disclosure may be obtained against non-parties, usually banks, on the *Banker’s Trust* line of cases in aid of a proprietary claim and/or in aid of *Mareva* or *Anton Piller* relief.⁴¹⁹
- (d) One might add to this list the court’s power to authorise parties to obtain entries of bank records under section 21 of the Evidence Ordinance, Cap 8, generally referred to as the “bankers’ books” jurisdiction.⁴²⁰

490. To obtain pre-trial non-party disclosure pursuant to these exceptions, the plaintiff has to meet the peculiar requirements of each category, there being no general jurisdiction to order such disclosure.

Notes

⁴¹⁸ *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133; See generally HA §4-11 to §4-18.

⁴¹⁹ *Bankers Trust Co v Shapira* [1980] 1 WLR 1274, CA. See generally HA §4-19 to §4-21.

⁴²⁰ See HKCP 2002, 38/13/2-8.

491. In contrast, there *is* a general power to compel the attendance of non-party witnesses to produce specific documents *at the trial* by having the court issue a subpoena *duces tecum* ordering such attendance. Should it not be possible generally to obtain disclosure of such documents *before* the trial?
492. Judicial opinion has been much in favour of permitting such disclosure. Thus, in *O’Sullivan v Herdmans Ltd* [1987] 1 WLR 1047 at 1056, Lord Mackay (with whom the other members of the House of Lords agreed) pointed to the unsatisfactory aspects of having to wait until the relevant witness could be called to answer his subpoena *duces tecum* and to the merits of allowing the parties access to the document beforehand :-

“To force the defendants to refuse to deploy their full position in cross-examination until the stage is reached at which these documents would be available to them under a subpoena *duces tecum* would not be in any way in the interests of justice. Further the early production of these documents may well affect the course of the litigation before the trial. It may lead the defendants to consider a settlement of the action and it certainly will enable the medical advisers and the legal advisers of the defendants to appreciate the real issues in the case when they are preparing for trial. The interests of justice are, in my opinion, served by the promotion of settlements rather than the prolongation of litigation and by the possibility of early, complete preparation for both parties to a trial rather than by obliging one party to delay its full preparation until after the trial has actually started.”

493. However, under the rules as they stand, a subpoena *duces tecum* must be issued in one of two prescribed forms.⁴²¹ These forms require the witness to attend and bring the documents for production “on the day fixed for the trial” or on the day fixed for giving evidence. There is no provision for an earlier return date and so no obligation to attend in advance of the trial.

Notes

⁴²¹ O 38 r 14, requiring use of Forms 28 or 29 in Appendix A.

494. The courts have nonetheless managed to improvise a way to use the subpoena *duces tecum* to secure pre-trial non-party disclosure in some cases. This has been done by directing that the return day for the subpoena should be treated as the day when the trial begins, with the business of that day being limited to the reception of documents produced under the subpoena. This approach was first suggested by Lord Donaldson MR in *Williams v Williams* [1988] QB 161 at 169, and fully analysed and established by Sir Donald Nicholls V-C in *Khanna v Lovell White Durrant* [1995] 1 WLR 121. As part of the court's power to case manage a trial, it can order the trial to be split with particular issues to be tried first. It can accordingly order the receipt of documents produced in response to the subpoena to be dealt with in advance of everything else falling to be dealt with at the trial. It can also direct, if appropriate, that a different judge from the judge conducting the main trial may be responsible for this first part of the trial.⁴²²

(ii) *The consultation response*

495. *Proposal 28* also sought consultees' views on widening the availability of post-commencement, pre-trial, non-party disclosures. The response⁴²³ was very much in favour of both proposals, with some qualifications, particularly the need to define clearly the scope of the power.

(iii) *Recommendations*

496. Despite his conclusions in the *Khanna* case, the (then) Vice-Chancellor stated that the question of non-party pre-trial disclosure would merit further

Notes

⁴²² *Khanna v Lovell White Durrant*, at p 125.

⁴²³ The respondents were mostly the same as in relation to pre-action disclosures. Additionally, the High Court masters were expressly in favour of non-party pre-trial disclosures.

consideration by the Supreme Court Procedure Committee and by the Rules Committee.⁴²⁴ The improvised application of the subpoena *duces tecum* procedure, while helpful, does not provide express guidance as to the principles governing such disclosure or proper procedural safeguards for the person served.

497. The Working Party recommends that section 42(1) of the HCO be amended to widen the scope of such disclosure to encompass all types of cases (and not merely personal injury and death claims). The procedure to be followed when seeking such orders should be as laid down by O 24 r 7A in respect of section 42(1) orders, with any necessary or desirable modifications. Order 24 r 13, which provides that the order shall not be made unless the court is satisfied that the order is necessary either for disposing fairly of the cause or matter or for saving costs, would apply.
498. In relation to applications for pre-commencement disclosure against potential defendants, the Working Party has recommended⁴²⁵ that disclosable documents should be limited to those “directly relevant” with a view to discouraging speculative “fishing expeditions”. The Working Party is of the view that a less restrictive and a more flexible approach appears warranted in relation to disclosures sought (by either plaintiff or defendant) before trial from non-parties who are not themselves potentially to be made

Notes

⁴²⁴ The court rejected the submission that the position is already covered by O 38 r 13 which empowers the court to order any person, including a non-party, to ‘attend any proceedings in the cause or matter,’ and produce documents which appear to the court to be necessary ‘for the purpose of that proceeding.’ The scope of the rule was held to be confined to documents necessary for the purpose of the particular interlocutory or other proceeding at which the person was required to attend and so inapplicable for production in advance for use at the trial.

⁴²⁵ *Recommendation 77* above.

defendants or third parties. The issues will generally be defined with some clarity in the pleadings and other filed documents so that the relevance of and need for the documents sought will be evident. A flexible approach to relevance, as adopted in relation to issuing a subpoena *duces tecum*, should be adopted.

499. Accordingly, in the present context, it would be appropriate to apply the qualifying conditions presently defined in O 24 r 7A in respect of disclosures in personal injury and death claims under section 42(1), namely, that the documents be shown to be (i) likely to be in the possession, custody or power of the person subpoenaed; (ii) relevant to an issue arising out of the claim in question; and (iii) by virtue of O 24 r 13, necessary either for disposing fairly of the cause or matter or for saving costs.

Recommendation 78: Section 42(1) of the HCO should be amended so that the court's jurisdiction to order post-commencement, pre-trial disclosure from persons who are not parties to the proceedings applies to all types of cases (and not merely to personal injury and death claims).

Recommendation 79: The requirements to be met and procedure to be followed when seeking orders referred to in Recommendation 78 should be as laid down by O 24 r 7A in respect of section 42(1) orders and by O 24 r 13, with any necessary or desirable modifications.

16.4 Case managing discovery

Proposal 29

The court should be expected to exercise its case management powers with a view to tailoring an appropriate discovery regime for the case at hand. It should have a residual discretion both to direct what discovery is required – to narrow or widen the scope of discovery required, to include, if necessary and proportionate, full Peruvian Guano style discovery – and in what way discovery is to be given.

Interim Report paras 404-425

500. As indicated in the discussion of *Proposals 25 and 26* above, there was a broad consensus that the excesses of discovery ought to be tackled by appropriate case management by the courts. The balance of opinion favoured taking full *Peruvian Guano* discovery as the starting point, to be narrowed by appropriate case management, rather than (as *Proposal 29* suggests) starting from “standard discovery” and deciding when to widen its scope. No further discussion is called for in the light of the foregoing Recommendations.

Recommendation 80: Proposal 29 (for the case management of discovery by the courts) should be adopted, but with *Peruvian Guano* principles as the primary measure of discovery, taken as the starting-point for such case management.

Section 17: Interlocutory applications and summary assessment of costs

Proposals 30 to 32

Proposal 30

The rules should pursue the objective of reducing the need for interlocutory applications by adopting one or more of the following strategies, namely :-

- *Encouraging the parties to cooperate with each other and to agree procedural arrangements (subject to the court's residual jurisdiction to set aside or vary those arrangements).*
- *Authorising the court, in appropriate cases, to act on its own initiative in giving procedural directions, without hearing any party before so acting (subject to affected persons thereafter having a right to apply for orders so made to be set aside or varied).*
- *Making orders which specify the automatic consequences of non-compliance and placing the onus on the party guilty of non-compliance to seek relief from those consequences, such relief to be granted at the court's discretion.*

Interim Report paras 426-441

501. Respondents to the consultation generally agreed that the need for interlocutory applications should be minimised and measures taken to discourage unnecessary applications.

17.1 Encourage cooperation by the parties

502. There was general support for the first strategy mentioned in *Proposal 30*.⁴²⁶ The parties should be encouraged to agree a reasonable procedural scheme of their own to be endorsed by the court. It has to be read together with *Recommendations 52 and 57* and the associated discussion of timetabling and milestone dates.⁴²⁷
503. As indicated above, the Working Party's recommendation is for the parties to complete a questionnaire containing information about the case and proposals for the directions to be given. Based on this questionnaire, on the summons for directions, the court should map out the progress of the litigation up to and including commencement of the trial. The parties are encouraged to put forward agreed directions and an agreed timetable.
504. It is envisaged that these directions will in all cases include a date for a pre-trial review and for the start of the trial or of a trial period (during which the trial is to commence), these being treated as milestone dates. Where desirable, a preliminary milestone date involving a case management conference may also be set. While milestone dates are intended to be largely immovable, the parties are again encouraged to cooperate by agreeing any needed variations to the directions and time-limits set on the summons for directions without application to the court, provided that such variations do not ultimately imperil the trial date or trial period.

Notes

⁴²⁶ Including from the Bar Association, the BSCPI, the Law Society, two sets of barristers' chambers, two firms of solicitors, the High Court masters, the District Court judges and two individual respondents.

⁴²⁷ See Section 13 above.

505. Cooperation therefore involves first trying to reach agreement. But even where the parties cannot agree, mutual cooperation is demanded in the management of contentious issues, for instance, by arranging for all unresolved interlocutory questions to be dealt with at the same hearing to keep costs down and to avoid proliferation of interlocutory hearings. Where costs have unnecessarily been incurred due to one party's unreasonable refusal to cooperate, this should be taken into account in making relevant costs orders.

Recommendation 81: The parties should be encouraged by rule and practice direction, backed by costs sanctions, to adopt a reasonable and cooperative attitude in relation to all procedural issues.

17.2 Court making procedural orders nisi

506. The second strategy referred to in *Proposal 30* also received support.⁴²⁸ However, the High Court masters queried how the court would find itself in a position to take the initiative unless it was generally seized of a case under a docket system. Some respondents stressed that the circumstances in which the court could take the initiative ought to be clearly defined.

507. As indicated in the Interim Report, what is envisaged here is the court exercising a power to make an order of its own motion when such order

Notes

⁴²⁸ From respondents including the Bar Association, the BSCPI, two sets of barristers' chambers, two firms of solicitors and an individual respondent.

appears to be “plainly needed and unlikely to lead to a contentious hearing”.⁴²⁹ Hence the words “in appropriate cases” in *Proposal 30*.

508. For example, the parties may have agreed a series of directions which the court is happy to make, but omitted to include a direction which is unlikely to be controversial but which the court considers necessary or desirable for disposing fairly of the matter or saving costs. Instead of calling the parties to a hearing regarding such a direction, the court ought to be able to give the relevant direction by way of an order *nisi*, allowing any party who objects to apply for it not to be made absolute. If the power is used properly, such applications are likely to be very rare and a hearing will usually have been avoided as a result of the court taking the initiative. In the Working Party’s view, so understood, this aspect of *Proposal 30* should be adopted.

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.

Notes

⁴²⁹ At §435.

17.3 Self-executing orders

509. The respondents to the consultation referred to above also supported the introduction of self-executing orders. It is clearly desirable that there should be a shift from requiring the innocent party to enforce compliance to placing the burden on the errant party to seek relief. However, in cases where no interlocutory applications have arisen prior to the summons for directions, a question which arises is whether that shift should take place by having each direction given at the summons for directions carry a self-executing sanction, or whether that shift should come into play only in respect of any specific non-compliance and upon application by the party complaining of such non-compliance.
510. In deciding which approach to take, it is important to bear in mind the existence of other proposed reforms aimed at reducing the incidence of interlocutory applications. If self-executing sanctions were to be prescribed on the summons for directions, this could well discourage agreements by the parties to vary non-milestone time-limits by agreement and without application to the court. With a self-executing order already in place, the innocent party may find it hard to see why he should, as it were, “let the other side off the hook”. He is likely to feel that he cannot be criticised for allowing the self-executing order to run its pre-ordained course. Making self-executing orders on the summons for directions could therefore be counter-productive, leading to less cooperation and so to *more* interlocutory applications for relief from the self-executing sanctions.
511. Accordingly, in the Working Party’s view, in cases where no prior interlocutory application has taken place, self-executing orders should not be made on the summons for directions but only upon an application complaining of non-compliance. Where there is a failure to comply with a

direction (which the parties have not agreed to vary), the other party ought to be able to apply for, and the court should normally make, a self-executing or “unless” order in relation to that direction. Should there be non-compliance with that order, the burden would shift to the party in default to obtain relief from the prescribed sanction, failing which, that sanction would automatically take effect.⁴³⁰

512. Where interlocutory applications are taken out before reaching the summons for directions stage, for example, applications to challenge jurisdiction or to set aside a default judgment or for summary judgment or to strike out an action, self-executing orders may, if appropriate, be made when giving directions consequential on the disposal of such applications. If, after such disposal, the cause or matter is to proceed to the questionnaire and summons for directions stage, any self-executing orders made earlier would be taken into account when completing the questionnaire and when giving the further directions required on the summons for directions (which further directions would not carry automatic sanctions for the reasons mentioned above).
513. As indicated in the Interim Report, the sanction prescribed in a self-executing order should be proportionate to the non-compliance in question. Where the non-compliance is such as to make a fair trial impossible, the claim or defence may be struck out. However, that should be a last resort. As Lord Woolf MR pointed out in *Biguzzi v Rank Leisure Plc* [1999] 1 WLR 1926, other sanctions often enable a case to be dealt with justly without the draconian step of striking the case out.

Notes

⁴³⁰ Pursuant to rules along the lines of CPR 3.1(3)(b) and CPR 3.8.

514. Some sanctions will naturally suggest themselves. Thus, failure to serve ordered particulars of a pleaded paragraph may carry the natural consequence of that paragraph being struck out. Failure to serve a witness statement or expert report in time might naturally lead to the exclusion of the evidence of that witness or that expert at the trial. Other less obvious sanctions might include orders for costs to be paid forthwith; for costs to be paid on a special basis; for subsequently depriving a successful plaintiff of interest or part of the interest otherwise payable; for awarding interest at a higher rate against a defendant subsequently found liable; and for money to be paid into court. The need to tailor the sanction to fit the relevant default is another argument against making “standard” self-executing orders at the summons for directions stage.
515. Relief should not automatically be granted upon a defaulting party’s application. A reasonable explanation for non-compliance should be required and consideration given to the extent of prejudice to the innocent party if relief is granted. Any relief should generally be ordered on suitable terms as to costs, putting up security, and so forth, with a view to deterring non-compliance.

Recommendation 83: When disposing of interlocutory applications after the summons for directions, the court should normally make orders which specify the automatic consequences of non-compliance appropriate and proportionate to the non-compliance in question. Orders specifying such consequences may, if appropriate, also be made where the interlocutory application is heard before the summons for directions. However, the directions given on the summons for directions itself should generally not specify any such consequences.

Recommendation 84: While it would be open to a party who has failed to comply with a self-executing order to seek relief from the prescribed consequences of his non-compliance, such relief should not be automatic and, if granted, should generally be granted on suitable terms as to costs and otherwise.

Proposal 31

Rules should be adopted with a view to streamlining interlocutory applications including rules which :-

- *Permit applications to be dealt with on paper and without a hearing.*
- *Eliminate hearings before the master where the matter is contested and may be likely to proceed on appeal to the judge in any event.*

- *Make provision for dispensing with attendance and for use of modern means of communication for hearings where costs may be saved.*

Interim Report paras 426-429, 442-450

17.4 Applications dealt with on the papers

516. There was general support⁴³¹ for more interlocutory matters to be dealt with on the papers and without a hearing.

517. Two qualifications were mentioned. First, it was questioned whether this proposal might fall foul of Article 10 of the Bill of Rights. Secondly, it was suggested by one individual that this proposal might place unrepresented litigants in difficulty.

518. The Working Party is confident that this aspect of *Proposal 31* involves no inconsistency with the right to “a fair and public hearing” protected by Article 10 of the Bill of Rights. As previously discussed, the European jurisprudence relating to a similar right protected by Article 6(1) of the ECHR is likely to be adopted in construing BOR 10. It is clear from that jurisprudence that the right to a public hearing concerns proceedings which are decisive of a person’s substantive rights. That right is not engaged in relation to a determination of purely procedural or case management issues

Notes

⁴³¹ Including from the Bar Association, the BSCPI, the Law Society, the HKMLA, the High Court masters, the District Court judges, the BCC, two sets of barristers’ chambers, two firms of solicitors and an individual respondent.

such as those under discussion.⁴³² There is support for that conclusion in a Determination of the Appeal Committee of the Court of Final Appeal.⁴³³

519. Significant savings in time and costs may be achievable in many cases by having applications dealt with on paper by the master or sent by the master directly to the judge (canvassed as the second aspect of *Proposal 31*). It should be noted that the applications being discussed here are applications for fresh interlocutory orders and exclude applications for relief from automatic sanctions previously ordered.
520. What is envisaged is that the master should be given a discretion either to determine the application on the papers without a hearing (making all necessary orders, including a summary assessment as to costs if appropriate, discussed below) or to adjourn the application for an oral hearing before a master or directly before a judge.⁴³⁴
521. To enable the master to decide which course to adopt, he must have before him the evidence relied on by the applicant and the respondent, the skeleton arguments and any authorities. From such materials, it ought to be clear in many cases that the matter can and should be dealt with there and then.

Notes

⁴³² See Section 3.

⁴³³ *Chow Shun Yung v Wei Pih Stella & Anr* (Unreported) FAMV No 2 of 2003, 14 May 2003, §37.

⁴³⁴ Masters of the High Court presently refer certain interlocutory matters for hearing to the judge in chambers. Statistics indicate that the interlocutory matters not referred to the judge but which require a contested hearing before the master number some 250 every month. About 10% of these are appealed to the judge.

- (a) Thus, it will often be clear that a respondent to an O 14 summons should be given unconditional leave to defend or that a striking out application should fail.
- (b) Conversely, it may be clear that the matters raised by the defendant provide no defence against the O 14 claim, or that the basis for resisting an O 18 r 19 striking out application is misconceived.
- (c) It may also be plain that a default judgment was obtained irregularly and has to be set aside.
- (d) The papers relevant to an application for further and better particulars or for leave to amend pleadings frequently enable the master to make up his mind without hearing oral argument.

522. These are all examples where oral submissions are most unlikely to add to what is evident on the papers so that the master can safely deal with the matter there and then. The master may of course be mistaken. The safeguard against this is an appeal to the judge in chambers as of right.⁴³⁵ However, an unwarranted interlocutory appeal would be met with appropriate costs and other sanctions. If, on a cursory examination, the application appears complex or likely to benefit from a hearing, the master should fix it for a hearing either before a judge or a master without expending further time on the papers.

523. For this approach to be adopted, the way that interlocutory applications are listed and managed would have to be changed.

Notes

⁴³⁵ See the discussion of *Proposal 42* in Section 22 below.

- (a) The applicant would be required to issue and serve the summons seeking the relevant interlocutory order, accompanied by any evidence relied on. From this point onwards, automatic directions laid down in the rules and practice directions should apply, subject to the parties agreeing to adopt a different timetable.
- (b) The applicant would not be given a return day in the present sense since the application may not require an oral hearing. Instead, a date which we might call for present purposes “an order date” would be given instead. This is the date when the master will either hand down the orders made, having determined the summons without a hearing, or hand down an order that the summons be adjourned for an oral hearing on a specified date before either a master or a judge in chambers.
- (c) The order date will be set to accommodate automatic directions applicable to interlocutory applications which will be laid down in rules and practice directions. The periods allowed for the filing of evidence, skeleton arguments, costs statements, etc, will be provided for after consultation with the legal profession and interested parties. The periods eventually fixed may obviously differ, but for illustrative purposes, the automatic directions might allow say, 14 days from service of the summons for evidence to be filed by the respondent; say, another 14 days for any evidence from the applicant in reply; perhaps a further 7 days each to allow the parties to put in sequential skeleton arguments and costs statements (to permit a possible summary assessment of costs). On this example, the order date fixed on the issuing of the summons would fall shortly after 42 days from the date of issue to allow for the aforesaid steps to be taken. In some

cases, the directions may require a shorter overall period, eg, where no evidence needs to be filed.

- (d) It should be open to the parties, up to a reasonable time (to be fixed in rules or practice directions) prior to the order date, to agree to modified dates, leading (subject to the court's discretion) to a revised order date. If no agreement is reached, the order date should be retained unless a master can be convinced on a time summons that there are compelling reasons for moving it. Such time summonses would have to be dealt with promptly (as discussed further below).
- (e) On the order date, the master would decide what order to make on the interlocutory application on the basis of the materials before him. If, for instance, the respondent has failed to put in any materials or submissions in time and no extension for filing such evidence has been given, the master would make his decision based on the applicant's evidence and submissions.
- (f) Where the matter is likely to go to the judge in any event, the master has a discretion to order that the summons be referred to the judge. Any request by the parties for such a reference would be given substantial weight, but the decision would lie in the master's discretion.
- (g) The rules ought to make it clear that, save in the most exceptional cases,⁴³⁶ further evidence will not be admitted in the event of the

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⁴³⁶ Such exceptions perhaps being defined along the lines laid down in *Ladd v Marshall* [1954] 1 WLR 1489.

summons being adjourned for argument or in the event of an appeal to the judge after determination on the papers by the master.⁴³⁷

524. This system is likely to lead to earlier hearings in most cases. Presently, when an applicant takes out a summons, he is given a “3 minute hearing” about 10 days later. At that hearing, the summons is adjourned for an oral hearing before the master on a date to be fixed, often two months later, with directions given for filing evidence before then. On the proposed system, many applications will have been decided on the papers or referred upwards to the next level of court some time before the oral hearing before the master would arrive under the present system.
525. Time summonses require particular treatment. Under the present system where actions proceed without the framework of milestone dates or court-directed timetables, a very large number of time summonses are taken out and need to be dealt with. Parties sometimes take out several time summonses in respect of a single step in the action. It is intended that this will significantly change under the proposed system.
- (a) As discussed above, where a self-executing order has been made, there will be no question of time summonses being taken out to extend time to complete the step in question. Failure to take it in time carries a pre-determined sanction which might be avoided only if relief is granted to the party at fault – by no means a routine occurrence.

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⁴³⁷ This was favoured by the Law Society which suggested that similar tests to those adopted in the Court of Appeal for the admission of fresh evidence be applicable to determine whether further evidence should be admitted.

- (b) Secondly, again as previously mentioned, save in the most exceptional circumstances, applications for time extensions requiring or probably requiring a milestone date to be moved will not be entertained.
- (c) Thirdly, the court will expect the parties to reach sensible agreements as to workable time extensions which do not threaten milestone dates and is likely to penalise in costs unnecessary applications by way of time summons.
- (d) If none of the above categories applies and if the parties are unable to reach agreement on a time extension, the application would have to be dealt with promptly by the court, the master having a discretion whether it is best dealt with on a short hearing or on paper. A practice direction will be needed to set out an appropriately simplified procedure for such applications.

526. The Working Party acknowledges that in some cases, unrepresented litigants may find it difficult to formulate their submissions on paper. Where this is likely to be so, the master ought to exercise his discretion against dealing with the matter purely on paper.

Recommendation 85: All interlocutory applications (other than applications for relief against the implementation of sanctions imposed by self-executing orders previously made and subject to special arrangements being made for time summonses) 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.

17.5 *Skipping the hearing before the master*

527. This aspect of *Proposal 31* has already been discussed above. It should be in the discretion of the master whether to direct that the summons be placed directly before a judge, giving substantial weight to any representations made by the parties in favour of adopting that course. In exercising his discretion, the master should be entitled to take into account any possible

congestion in interlocutory appeals or hearings listed before the judge in chambers.

17.6 Hearings without attending at court

528. Most of the respondents commenting on *Proposal 31* were in principle in favour of exploring ways to enable hearings to be held by telephone or video conference. Such conferencing would, however, only be viable if enough lawyers and other interested parties were interested in using such a system. Bearing in mind that the savings achievable, if any, would be relatively slight in a geographically small jurisdiction like Hong Kong and (as the Bar Association pointed out) that certain resources would be needed for this proposal to be put into effect, there is reason to doubt whether sufficient interest exists to make pursuit of this suggestion worthwhile. The Working Party accordingly does not recommend taking this suggestion any further.

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.

Proposal 32

The court should be encouraged to make, whenever possible, summary assessments of costs at the conclusion of interlocutory applications.

Interim Report paras 426-429, 451-462

17.7 The nature of a summary assessment of costs

529. A summary assessment of costs on the disposal of an interlocutory application has two main features :-

- (a) The first involves immediacy of payment. The costs order most commonly made at present is for the party losing the interlocutory application to pay the costs of that application “in any event”, that is, at the end of the proceedings, whoever wins the case. Where there is a summary assessment of costs the party against whom the order is made is generally required to pay promptly, within a period such as 14 days after the order.
- (b) The second involves an assessment of the sum of costs payable in a summary and broad-brush way, rather than through a process of taxation whereby every item in the receiving party’s bill of costs is potentially subject to challenge. A summary assessment of costs occurs in lieu of a taxation and finally determines the amount of costs payable and receivable in respect of the application or matter in question.

530. The first feature is important because experience in other jurisdictions indicates that it is an effective means of discouraging unnecessary and disproportionate interlocutory applications. As discussed in the Interim Report,⁴³⁸ the lack of immediacy of orders to pay costs “in the cause” or “in any event” weakens costs as a sanction against unwarranted applications or resistance. An order made in response to an interlocutory application which ought not to have been brought or resisted, requiring the losing party to pay

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⁴³⁸ Interim Report §§456-9.

at once the costs of that application summarily assessed, regardless of the eventual outcome of the case as a whole, gives the costs order a real impact.

531. The second feature is aimed at enabling prompt payment to be exacted and avoiding the costs of a detailed taxation.

532. Of course, not every case demands a summary assessment of costs. There will be interlocutory applications where the appropriate order would be for the costs to be “in the cause” or “in any event” or “reserved”. In other cases, the costs may be substantial and complex, making them unsuitable for final assessment summarily. And as discussed below, it may in some cases be appropriate to undertake a provisional summary assessment, ordering the assessed costs to be paid promptly while reserving to any party who feels aggrieved by the amount summarily assessed the right to seek a taxation and an adjustment of the sum payable or receivable at the end of the proceedings.

17.8 The consultation response

533. With a few exceptions,⁴³⁹ the respondents to the consultation supported using the summary assessment of costs as a means of managing interlocutory applications.⁴⁴⁰ However, this was subject to some important

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⁴³⁹ Including a judge who thought such assessments would be an unwelcome burden.

⁴⁴⁰ They included the Bar Association, the BSCPI, the Law Society, two sets of barristers’ chambers, one firm of solicitors, the High Court masters, the District Court judges and masters, two individual respondents and the BCC.

qualifications, the most frequently voiced being the danger of inconsistency among assessments and of arbitrary and excessive reductions.⁴⁴¹

534. There was also concern from certain solicitors' firms that it would require more judges, that the judges would need to be trained, that producing a costs statement in advance might cause problems (so that such statements should only have to be handed up at the hearing)⁴⁴² and that the summary assessment process should not be tied to benchmark costs.⁴⁴³

17.9 The Working Party's view

535. In the Working Party's view, introduction of the summary assessment of costs by judges and masters is an essential part of the package of reforms aimed at minimising interlocutory applications and discouraging unwarranted applications. The proposal is not in fact a radical one since under the present rules, the court already has power to make a gross sum assessment of costs in lieu of having the costs taxed. Order 62 r 9(4)(b) provides : -

“The Court in awarding costs to any person may direct that, instead of taxed costs, that person shall be entitled to a gross sum so specified in lieu of taxed costs, but where the person entitled to such a gross sum is a litigant in person, rule 28A shall apply with the necessary modifications to the assessment of the gross sum as it applies to the taxation of the costs of a litigant in person.”

536. At the same time, the Working Party acknowledges the concerns voiced in the consultation. We believe, however, that appropriate measures addressing such concerns can be put in place. In so doing, the presently

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⁴⁴¹ Including the Bar Association, the BSCPI, one set of barristers' chambers, two firms of solicitors, the DOJ and the APIL.

⁴⁴² The HKMLA.

⁴⁴³ The High Court masters and masters and judges of the District Court.

uneven application of Order 62 r 9(4)(b)⁴⁴⁴ would give way to a more systematic and better-informed process of summary assessment.

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.

17.10 Features of the rules envisaged

537. The rules envisaged are based on the relevant provisions of CPR 43 and CPR 44 and on the material parts of the accompanying practice direction,⁴⁴⁵ modified to meet local concerns. They include rules and practice directions :-

- (a) preserving the parties' right to agree the amount of costs to be paid and to have such costs dealt with by a consent order;⁴⁴⁶
- (b) defining a summary assessment of costs and distinguishing it from a taxation of costs;⁴⁴⁷

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⁴⁴⁴ See Interim Report §452.

⁴⁴⁵ 44PD.7. Also helpful is the commentary by the Editors of the White Book at Vol. 1, §48.11 *et seq* "General Principles and Case Law Relation to Costs and their Assessment", distilling current approaches to reasonableness and proportionality.

⁴⁴⁶ 44PD.7 §13.13(a).

⁴⁴⁷ CPR 43.3.

- (c) empowering the court when disposing of an interlocutory application⁴⁴⁸ to undertake a summary assessment of costs, or a provisional summary assessment (discussed further below) or to order a taxation at the end of the proceedings;⁴⁴⁹
- (d) requiring the court to consider and to give preference to the first two of the three options just mentioned, unless there is good reason not to do so;⁴⁵⁰
- (e) empowering the court on a summary assessment, if appropriate, to allow the whole of the sums claimed by the receiving party; but requiring it to disallow such costs as may be disproportionate and unreasonable (while taking into account and giving substantial weight to the fact, if it be the case, that no challenge to such costs has been made by the paying party);⁴⁵¹
- (f) providing for payment of the costs ordered within 14 days of the date of the order unless the court orders otherwise;⁴⁵²

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⁴⁴⁸ Under the CPR, the general rule is that the court should undertake a summary assessment of costs where the hearing has lasted not more than one day. The Working Party's view is that in Hong Kong, the court should have a discretion as to whether to do so even where a hearing lasts for longer. While in most cases the hearing will involve an interlocutory application, the court should have power to opt, if practicable, for a summary assessment of the entire costs where the hearing disposes of the matter entirely.

⁴⁴⁹ *Cf* CPR 44.7.

⁴⁵⁰ 44PD.7 §13(3)

⁴⁵¹ 44PD.7 §13.13. In practice, this is likely to mean that the court would generally not intervene to disallow unchallenged items unless they are seriously disproportionate and unreasonable: §13.13(b). Factors relevant to reasonableness and proportionality are discussed in the White Book §48.20.

⁴⁵² CPR 44.8.

- (g) placing a duty on the parties and their legal representatives to assist the court in making any summary assessment of costs;⁴⁵³
- (h) requiring each party to an interlocutory application before the master to file statements of costs (setting out the costs so far incurred in respect of such application) in accordance with the automatic directions discussed in the preceding part of this Section,⁴⁵⁴ enabling the master, where appropriate, to dispose of the application without a hearing and simultaneously to make a summary assessment of costs in respect thereof;
- (i) where the application is heard orally before the master or the judge, requiring each party to prepare and have available at the hearing, a written statement (signed by the party or his solicitor) of the amounts he would claim if awarded costs, showing separately in the form of a schedule :-
 - (i) the number of hours to be claimed,
 - (ii) the hourly rate to be claimed,
 - (iii) the grade of fee earner;
 - (iv) the amount and nature of any disbursement to be claimed other than counsel's fee for appearing at the hearing,
 - (v) the amount of solicitor's costs to be claimed for attending or appearing at the hearing; and,

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⁴⁵³ 44PD.7 §13.5(1).

⁴⁵⁴ Section 17.4.

- (vi) the fees of counsel to be claimed in respect of the hearing;⁴⁵⁵
- (j) providing for the consequences of a party not having such a statement ready;⁴⁵⁶
- (k) empowering the court, where a summary assessment is appropriate but cannot be done on the day the hearing concludes, to direct that there be a further hearing for the purpose of an assessment before the same judge;⁴⁵⁷
- (l) to exempt from the power to make a summary assessment of costs any classes of litigant where such assessment may be inappropriate and to make provision for calculating the quantum of costs assessed in favour of an unrepresented litigant;⁴⁵⁸ and,
- (m) requiring a solicitor to notify his client in writing of any adverse costs order within 7 days of the making of that order.⁴⁵⁹

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 assessments of costs.

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⁴⁵⁵ 44PD.7 §13.5(2) and (3).

⁴⁵⁶ 44PD.7 §13.6.

⁴⁵⁷ 44PD.7 §13.8.

⁴⁵⁸ Presently, the calculation of costs payable on taxation to a litigant in person is governed by O 62 r 28A. Such costs are allowed at the rate of \$200 per hour for the time reasonably spent where no pecuniary loss is suffered by the unrepresented litigant. Where there is such loss, costs are capped at $\frac{2}{3}$ of what would have been allowed for the services of a solicitor.

⁴⁵⁹ CPR 44.2 (1).

17.11 Inconsistent assessments and excessive reductions

538. The Working Party recognizes that steps should be taken to minimise the risk of inconsistency and excessive reductions resulting from summary assessments of costs. It agrees in principle with the comment made by the Editors of the White Book that :-

“Solicitors are not required to conduct litigation at rates which are uneconomic. Thus in a modest claim the proportion of costs is likely to be higher than in a large claim and may even equal or possibly exceed the amount in dispute.”⁴⁶⁰

539. The court should accordingly be provided with reliable information as to realistic levels of fees and charges.

- (a) A working group should be set up by the Judiciary to collect and publish data including information derived from taxations conducted by the taxing masters, tabulated according to criteria material to assessment (such as seniority of the lawyers involved, complexity of the application and any special features of the case).
- (b) It would be very much in the interests of the two branches of the profession to provide their input to ensure that the data published realistically reflect sums which should properly be allowable on taxation. It is therefore to be hoped that the cooperation of the Bar Association and the Law Society would be forthcoming.⁴⁶¹

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⁴⁶⁰ White Book §48.20.15(ii).

⁴⁶¹ The unfortunate inability of the Bar Council to secure majority acceptance by members of the Bar Association of a relaxation in the Bar Code to permit voluntary disclosures of charging rates and levels may however cause difficulty here. This is discussed further later in this Final Report: see Section 25.

- (c) In any particular case, the court should have to hand the costs statements of each of the parties to the application. While there may be instances where one side will justifiably have spent a great deal more than the other in preparing for and arguing the application, what the paying party has itself spent on costs will often be a helpful indicator of the reasonableness of the costs claimed by the receiving party.
 - (d) Where appropriate, courts making summary assessments may wish to give short reasons for their assessment with a view to providing guidance and promoting subsequent consistency of approach.
540. Training will be important. All judges likely to be involved in the summary assessment of costs, should be required to undergo training in the assessment of costs before the power is introduced. They should thereafter be required periodically to attend conferences (similar to sentencing conferences) conducted by the Judicial Studies Board to keep themselves informed of currently acceptable charging rates and to promote consistency of approach.
541. While the Working Party generally discourages interlocutory appeals and recommends that a requirement be introduced for there to be leave to appeal from the single judge to the Court of Appeal in respect of all interlocutory matters,⁴⁶² leave to appeal should, and no doubt would, be granted if inconsistent approaches to the summary assessment of costs should develop. The Court of Appeal could then resolve any such inconsistency.

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⁴⁶² See Section 22.

Recommendation 90: All available reliable information bearing on current levels of professional fees and charges should be collected and made available to the court with a view to promoting consistency and realism in the court's approach to the summary assessment of 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.

17.12 Provisional summary assessments

542. In cases where the court considers a summary assessment appropriate but wishes to provide a safeguard against any possible injustice or inconsistency resulting from its assessment, a procedure ought to exist enabling it to make a provisional summary assessment which requires prompt payment of the sum assessed but nevertheless preserves for either party the right, at the end of the proceedings, to insist on a taxation of the costs of the hearing where the provisional summary assessment was made, with a view to adjusting the quantum of the sum assessed.
543. If, at such taxation, the party seeking the taxation should succeed in having the sum assessed adjusted in his favour (either, by having to pay less if he is

the paying party, or being awarded a higher amount, if the receiving party) he should be entitled to have the summary assessment and consequent payment adjusted accordingly. However, if he fails to achieve a favourable adjustment or if the adjustment is not significant so that the costs of the full taxation are disproportionate to the benefits gained, a special order as to the costs of the full taxation and any other order appropriate in the circumstances should be made against him.

544. It is likely that sanctioned offers to be made in respect of the costs of taxation as recommended in this Final Report⁴⁶³ would play a large role in this context, so that taxations after a provisional summary assessment are likely to be rare and likely to occur only where the affected party considers the provisional summary assessment seriously wrong, and not made good by the sanctioned offer.
545. The introduction of provisional summary assessments requires an addition to the RHC. Presently, under O 62 r 9A, the court has the power to make an interim award of costs payable forthwith, but the terms of this rule are not designed to serve the envisaged purpose of a provisional summary assessment :-
- (a) The power under O 62 r 9A is only exercisable where the application or resistance to the application is frivolous or vexatious or for some other reason makes the order just in the circumstances. The power to make a provisional summary assessment ought to cover all such cases, but should be wider and more general, enabling the court to

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⁴⁶³ See Section 27.

make a provisional summary assessment where appropriate, for instance, where this is likely to save costs.

- (b) An interim order is made under O 62 r 9A on the assumption that there will be a full taxation at the end. A provisional summary assessment should be made on the basis that a taxation should not follow unless a significant difference of award is thought likely to result, with sanctions prescribed to discourage challenges unless they are likely to yield proportionate benefits to the challenger.

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.

Section 18: Wasted costs

Proposals 33 and 34

Proposal 33

In place of the powers currently conferred on the court by RHC Order 62 r 8(1), the court's power to make wasted costs orders against solicitors should be exercisable where the wasted costs are incurred as a result of any improper, unreasonable or negligent act or omission on the part of a solicitor or any employee of such solicitor; or which costs, in the light of any such act or omission occurring after they were incurred, the court considers it unreasonable to expect that party to pay.

Interim Report paras 463-467

Proposal 34

The court's power to make wasted costs orders against solicitors should be extended to cover barristers.

Interim Report paras 463-468

546. The court's jurisdiction to make wasted costs orders is presently contained in O 62 r 8 which materially provides as follows :-

- “(1) Subject to the following provisions of this rule, where in any proceedings costs are incurred improperly or without reasonable cause or are wasted by undue delay or by any other misconduct or default, the Court may make against any solicitor whom it considers to be responsible whether personally or through a servant or agent an order -
- (a) disallowing the costs as between the solicitor and his client; and
 - (b) directing the solicitor to repay to his client costs which the client has been ordered to pay to other parties to the proceedings; or
 - (c) directing the solicitor personally to indemnify such other parties against costs payable by them.

- (2) No order under this rule shall be made against a solicitor unless he has been given a reasonable opportunity to appear before the Court and show cause why the order should not be made [with certain exceptions].”

547. It seems clear that the words “by *any other* misconduct or default” in O 62 r 8(1) indicate that the impropriety, unreasonableness or delay required to trigger a wasted costs liability must be such as to amount to misconduct. Thus, Sir Thomas Bingham MR, giving the judgment of the English Court of Appeal in the leading case of *Ridehalgh v Horsefield* [1994] Ch 205, explained the meaning which the concepts of “improper” and “unreasonable” have traditionally been given in this context as follows :-

“‘Improper’ means what it has been understood to mean in this context for at least half a century. The adjective covers, but is not confined to, conduct which would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalty. It covers any significant breach of a substantial duty imposed by a relevant code of professional conduct. But it is not in our judgment limited to that. Conduct which would be regarded as improper according to the consensus of professional (including judicial) opinion can be fairly stigmatised as such whether or not it violates the letter of a professional code.

‘Unreasonable’ also means what it has been understood to mean in this context for at least half a century. The expression aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner’s judgment, but it is not unreasonable.”⁴⁶⁴

548. *Proposals 33 and 34* raised for consultation the possibility of extending liability for wasted costs in two ways :-

- (a) by lowering the threshold for liability to encompass cases where wasted costs are incurred as a result of negligence which does not itself amount to a species of misconduct, along the lines adopted in England and Wales;⁴⁶⁵ and,
- (b) by making barristers also liable for wasted costs.

549. There is no doubt that including cases of negligence which do not involve misconduct within the wasted costs jurisdiction would involve a significant extension of liability. Explaining “negligence” within the context of the English statute, Sir Thomas Bingham MR rejected the submission that an actionable breach of the legal representative’s duty to his own client had to be shown, stating :-

“..... we are clear that ‘negligent’ should be understood in an untechnical way to denote failure to act with the competence reasonably to be expected of ordinary members of the profession.”⁴⁶⁶

The negligence in question has, however, to be of the kind that would support an action for negligence and so would involve :-

“..... advice, acts or omissions in the course of their professional work which no member of the profession who was reasonably well-informed and competent would have given or done or omitted to do;” or an error “such as no reasonably well-informed and competent member of that profession could have made.”⁴⁶⁷

Nonetheless, it is clear that this head of liability casts its net more widely than the present grounds involving impropriety or unreasonableness in the nature of misconduct.

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⁴⁶⁵ In the Supreme Court Act 1981 s 51(6) as amended by the Courts and Legal Services Act 1996, s 4 and CPR 48.7.

⁴⁶⁶ *Ridehalgh v Horsefield* (supra) at 233.

⁴⁶⁷ *Saif Ali v Sydney Mitchell & Co* [1980] AC 198, 218, 220, per Lord Diplock.

18.1 The consultation response

550. The lowering of the threshold canvassed in *Proposal 33* attracted little support. While stating that the proposal was not necessarily opposed in principle, the Bar Association pointed to complications being encountered in the developing case-law in England and Wales. The Law Society was in favour of a greater use of disciplinary costs orders where there was misconduct or “sharp practice”, but it is not clear that they supported liability based on negligence. One set of chambers objected to *Proposal 33* on the ground that it was inextricably linked to important issues of substantive law which had not yet been settled, making it undesirable to extend liability in an uncertain context. The BSCPI thought that any such extension of liability should be deferred until the reforms being proposed had bedded down. A certain solicitors’ firm pointed out that extended liability for wasted costs could lead to raised professional indemnity premiums and higher costs. A number of other respondents⁴⁶⁸ considered the O 62 r 8 scheme sufficient. The DOJ supported the extension, but thought it should not extend to cover “improper” conduct which it took as entailing too great a lowering of the threshold.

551. In contrast, the suggestion in *Proposal 34* that barristers should also be liable for wasted costs received support from most quarters on the basis that different treatment of solicitors and barristers in this context could not be justified.⁴⁶⁹ However, the Bar Association stressed the need always to bear in mind the duty of the barrister fearlessly to uphold the interests of the

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⁴⁶⁸ Including two firms of solicitors and the HKMLA.

⁴⁶⁹ Including the Bar Association, the Law Society, the DOJ, the HKMLA, one set of barristers’ chambers, the BCC and two firms of solicitors.

client, to accept instructions on the cab rank principle, and so forth. The BSCPI was opposed to the proposed extension.

18.2 *The Working Party's view*

552. In the light of the responses received and for the reasons set out below, the Working Party's view is that the threshold for making wasted costs orders should not be lowered to include negligence not amounting to misconduct, but that the jurisdiction should be extended to cover barristers. It recommends rejection of *Proposal 33* but adoption of *Proposal 34*.

553. It is necessary for the court to have power to make wasted costs orders against legal representatives who, due to their misconduct in the course of proceedings, cause unnecessary costs to be incurred. Where this happens, it would be unfair to have the blameless client foot the bill for the costs awarded to the other party or, indeed, to require him to pay his own lawyers for such unwanted "services". The Working Party is therefore entirely in favour of retaining the power presently found in O 62 r 8.

554. However, it must be recognized that potential dangers may attend the invocation and exercise of this power, particularly in relation to wasted costs orders sought by a party against the lawyers acting for an opposing party in the litigation. First, as the English courts have noted, litigation over such wasted costs has threatened in recent years to become "a new and costly form of satellite litigation."⁴⁷⁰ Secondly, there is a risk of the wasted costs jurisdiction being misused for the purpose of putting pressure on the other sides' legal representatives, a situation which is made more

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⁴⁷⁰ *Ridehalgh v Horsefield* [1994] Ch 205 at 239.

complicated where privilege is not waived by their client. An important reason for not lowering the threshold to embrace negligence *simpliciter* is that such extension of liability would be likely to exacerbate the dangers mentioned above. It is in any event desirable, while maintaining the O 62 r 8 regime, to consider steps which may be taken with a view to protecting against such threats.

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

18.3 *Satellite litigation on wasted costs*

555. The risk of disproportionate satellite litigation being spawned by the wasted costs jurisdiction is real. In *Ridehalgh v Horsefield*, the English Court of Appeal noted that the number and value of wasted costs orders applied for, and the costs of litigating them, had risen sharply, warning that “the remedy should not grow unchecked to become more damaging than the disease.”⁴⁷¹

556. Eight years later, in *Medcalf v Mardell* [2002] 1 AC 120, when in the House of Lords, Lord Bingham lamented that :-

“..... the clear warnings given in that [1994] case have not proved sufficient to deter parties from incurring large and disproportionate sums of costs in pursuing protracted claims for wasted costs, many of which have proved unsuccessful.”⁴⁷²

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⁴⁷¹ [1994] Ch 205 at 225-6.

⁴⁷² At 129 §13.

Research cited by the House of Lords showed that some wasted costs hearings lasted much longer than the original litigation and ran up costs overshadowing the costs said to have been wasted. It was also found that most wasted costs applications failed and that those that succeeded often involved disproportionate costs.⁴⁷³

557. Two principles laid down in the case-law to guide the court's exercise of discretion are important in this context and provide the basis for procedural enhancements to address the risk of disproportionate satellite litigation.

558. As explained in *Ridehalgh v Horsefield*, the court exercises its discretion at two stages :-

“..... the jurisdiction to make a wasted costs order is dependent at two stages on the discretion of the court. The first is at the stage of initial application, when the court is invited to give the legal representative an opportunity to show cause. This is not something to be done automatically or without careful appraisal of the relevant circumstances. *The costs of the inquiry as compared with the costs claimed will always be one relevant consideration.* This is a discretion, like any other, to be exercised judicially, but judges may not infrequently decide that further proceedings are not likely to be justified. The second discretion arises at the final stage. Even if the court is satisfied that a legal representative has acted improperly, unreasonably or negligently and that such conduct has caused the other side to incur an identifiable sum of wasted costs, it is not bound to make an order, but in that situation it would of course have to give sustainable reasons for exercising its discretion against making an order.”⁴⁷⁴ (Italics supplied)

559. The first principle, reflected in the italicised words, is that any risk of a wasted costs claim being disproportionately costly should be treated as an important negative factor in the court's first stage decision as to whether the lawyer in question should be invited to “show cause” under O 62 r 8(2).

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⁴⁷³ Hugh Evans, “*The Wasted Costs Jurisdiction*” (2001) 64 MLR 51.

⁴⁷⁴ *Ridehalgh v Horsefield* (*supra*) at 239.

560. Secondly, the cases have stressed that the wasted costs jurisdiction should only be invoked and orders made in clear cases.

(a) As Lord Woolf stated in *Wall v Lefever* [1998] 1 FCR 605: “It must be used as a remedy in cases where the need for a wasted costs order is reasonably obvious.” It is a summary remedy and only to be used where there is “a clear picture” of the fault of the legal representative.⁴⁷⁵

(b) The need to restrict the exercise of such power to cases capable of summary treatment was also emphasised in *Harley v McDonald* [2001] 2 AC 678, in relation to the New Zealand courts’ inherent jurisdiction to order barristers and solicitors to pay costs unnecessarily incurred. The Privy Council commented :-

“As a general rule allegations of breach of duty relating to the conduct of the case by a barrister or solicitor with a view to the making of a costs order should be confined strictly to questions which are apt for summary disposal by the court. Failures to appear, conduct which leads to an otherwise avoidable step in the proceedings or the prolongation of a hearing by gross repetition or extreme slowness in the presentation of evidence or argument are typical examples. The factual basis for the exercise of the jurisdiction in such circumstances is likely to be found in facts which are within judicial knowledge because the relevant events took place in court or are facts that can easily be verified. Wasting the time of the court or an abuse of its processes which results in excessive or unnecessary cost to litigants can thus be dealt with summarily on agreed facts or after a brief inquiry if the facts are not all agreed.”⁴⁷⁶

561. In the Working Party’s view, this approach should be adopted when an application is made under O 62 r 8. The court should refuse to invite the lawyer in question to “show cause” unless on the material before it there is a

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⁴⁷⁵ See also *Tolstoy-Miloslavsky v Aldington* [1996] 1 WLR 736 at 747 and *Fletamentos Maritimos SA v Effjohn International BV* (Unreported, English Court of Appeal, 10 December 1997).

⁴⁷⁶ At 703, §50.

clear case which, if unanswered, would justify a wasted costs order. Nebulous or highly arguable allegations likely to lead to disproportionate satellite litigation should not be accepted as a basis for a wasted costs application.

562. These principles should be incorporated in rules of court or practice directions. Paragraphs 53.4, 53.5 and 53.6 of the CPR's Practice Direction on Costs,⁴⁷⁷ provide a useful model which should be adopted with suitable adaptations, including elimination of references to liability on the basis of negligence. Those paragraphs (set out without modification) provide as follows :-

“53.4 It is appropriate for the court to make a wasted costs order against a legal representative, 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.

53.5 The court will give directions about the procedure that will be followed in each case in order to ensure that the issues are dealt with in a way which is fair and as simple and summary as the circumstances permit.

53.6 As a general rule the court will consider whether to make a wasted costs order in two stages-

- (1) in the first stage, the court must be satisfied-
 - (a) that it has before it evidence or other material which, if unanswered, would be likely to lead to a wasted costs order being made; and
 - (b) the wasted costs proceedings are justified notwithstanding the likely costs involved.

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⁴⁷⁷ 48PD.4.

- (2) at the second stage (even if the court is satisfied under paragraph (1)) the court will consider, after giving the legal representative an opportunity to give reasons why the court should not make a wasted costs order, whether it is appropriate to make a wasted costs order in accordance with paragraph 53.4 above.”

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 discretion and discouraging disproportionate satellite litigation in relation to wasted costs orders.

18.4 Pressurising the opposition

563. The foregoing discussion has proceeded on the assumption that a party may obtain a wasted costs order not merely against his own lawyers, but against those acting for the other side in the proceedings. Applications to that end have generally been the focus of concern regarding satellite litigation. There is no doubt that the court has jurisdiction to make such orders. Such power was held to exist as part of the inherent jurisdiction of the court: *Myers v Elman* [1940] AC 282. Order 62 r 8(1)(c) expressly empowers the court to direct the solicitor personally to indemnify other parties to the litigation against costs payable by them. And the power has recently been confirmed in the context of the English rules and statute in *Medcalf v Mardell* [2002] 1 AC 120.
564. The existence of such a jurisdiction will inevitably tempt some litigants to invoke or threaten to invoke it without proper foundation with the intention of pressurising or intimidating the lawyers on the other side. This would

obviously be wrong, as recognized by the English Court of Appeal in *Orchard v South Eastern Electricity Board* [1987] QB 565, where Sir John Donaldson MR stated :-

“Whilst there can be no objection to an application under Ord 62, r 8 at the conclusion of a hearing, given appropriate facts, it is quite another matter where such an application is threatened during or prior to the hearing. Objectivity is a vital requirement of professional advisers. Hence, for example, the rejection of contingency fees and the impropriety of a solicitor acting for co-defendants. Threats to apply on the basis that the proceedings must fail not only make the solicitor something in the nature of a co-defendant, but they may well, and rightly, make him all the more determined not to abandon his client, thereby losing a measure of objectivity.”⁴⁷⁸

565. This was supported by the Court of Appeal in *Ridehalgh v Horsefield* while drawing a distinction between intended intimidation and giving fair warning :-

“We entirely agree with the view expressed by this court in *Orchard v South Eastern Electricity Board* [1987] QB 565 that the threat of proposed applications should not be used as a means of intimidation. On the other hand, if one side considers that the conduct of the other is improper, unreasonable or negligent and likely to cause a waste of costs we do not consider it objectionable to alert the other side to that view; the other side can then consider its position and perhaps mend its ways. Drawing the distinction between unacceptable intimidation and acceptable notice must depend on the professional judgment of those involved.”⁴⁷⁹

566. The court in *Ridehalgh v Horsefield* also agreed that applications should generally only be made at the end of the proceedings, pointing to the opposite danger to that mentioned by Sir John Donaldson, namely, that an application at the interlocutory stage might cause the lawyers concerned to

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⁴⁷⁸ At 577-8.

⁴⁷⁹ [1994] Ch 205 at 237-8.

stop acting in the matter, depriving their client of the representation of his choice.⁴⁸⁰

567. In the Working Party's view, appropriate measures aimed at preventing intimidatory misuse of the wasted costs jurisdiction should be adopted in rules of court or practice directions. This arises both in relation to the making of an application to the court for wasted costs proceedings to be started against the other side's lawyers and to threatening wasted costs proceedings beforehand.
568. In relation to the making of applications to the court, adoption of *Recommendation 94* should go a long way towards excluding unfounded or poorly particularised applications made with a view to intimidation. The court would give such applications short shrift (and order suitable penalties against the applicants) where the applications are plainly made without evidence or other material which, if unanswered, would be likely to lead to a wasted costs order being made.
569. Additionally, in line with the *dicta* cited above, it ought to be laid down as a general rule that applications for wasted costs orders against lawyers for opposing parties should not be made until the conclusion of the relevant proceedings.
570. As to the threatening of such proceedings, a rule should make it clear (i) that it is improper to threaten wasted costs proceedings with a view to pressurising 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

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⁴⁸⁰ At 238.

claim for wasted costs against them should refrain from doing so unless he is able, when doing so, to particularise the misconduct of such lawyers which is alleged to be causing him to incur wasted costs and to identify the evidence or other materials relied on in support.

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 pressurising 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 particularise 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.

18.5 *Where privilege is not waived*

571. The threat of wasted costs proceedings by one party against another party's lawyers is potentially especially serious where justification of the respondent lawyer's conduct cannot be given because his own client's privilege has not been waived. As Lord Steyn pointed out in *Medcalf v*

Mardell,⁴⁸¹ the decision of the House of Lords in *R v Derby Magistrates' Court, Ex p B* [1996] AC 487 at 507, ascribed to legal professional privilege an absolute character and appears to pre-empt the creation of exceptions in the interests of justice. Accordingly, since the privilege is the client's and not the barrister's or solicitor's to waive, the difficulty the lawyers face if they are unable to rebut the suggestion of misconduct by divulging their instructions or advice to their client is obvious.

572. The House of Lords has recognized this difficulty and conferred substantial protection on legal representatives who find themselves in that position. Lord Bingham stated the proper approach as follows :-

“Where a wasted costs order is sought against a practitioner precluded by legal professional privilege from giving his full answer to the application, the court should not make an order unless, proceeding with extreme care, it is (a) satisfied that there is nothing the practitioner could say, if unconstrained, to resist the order and (b) that it is in all the circumstances fair to make the order.”⁴⁸²

This approach would almost certainly also be adopted in Hong Kong.

18.6 *Extending liability to barristers*

573. Important public policy considerations have been relied on as grounds for resisting the imposition of liability for wasted costs on barristers. Similar grounds have been advanced for upholding barristers' immunity from suit (which a liability for wasted costs encroaches upon). Such grounds were enumerated in *Ridehalgh v Horsefield* (at 235) as including :-

“..... the requirement that advocates should be free to conduct cases in court fearlessly, independently and without looking over their shoulders; the need for

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⁴⁸¹ [2003] 1 AC 120 at 138 §30.

⁴⁸² At 136, §23.

finality, so that cases are not endlessly relitigated with the risk of inconsistent decisions; the advocate's duty to the court and to the administration of justice; the barrister's duty to act for a client, however unsavoury; the general immunity accorded to those taking part in court proceedings; the unique role of the advocate; and the subjection of advocates to the discipline of their professional bodies.”

574. The Working Party recognizes the importance of these considerations. However, it does not follow that they justify the total exemption of barristers from any possible liability for wasted costs incurred as a result of their misconduct. The proper approach is (as the Bar Association evidently accepts) for these considerations to be given weight when deciding whether there has been any misconduct and in deciding how the court's discretion ought to be exercised in any particular case. Sir Thomas Bingham MR put it as follows :-

“Although we are satisfied that the intention of this legislation is to encroach on the traditional immunity of the advocate by subjecting him to the wasted costs jurisdiction if he causes a waste of costs by improper, unreasonable or negligent conduct, it does not follow that we regard the public interest considerations on which the immunity is founded as being irrelevant or lacking weight in this context. Far from it. Any judge who is invited to make or contemplates making an order arising out of an advocate's conduct of court proceedings must make full allowance for the fact that an advocate in court, like a commander in battle, often has to make decisions quickly and under pressure, in the fog of war and ignorant of developments on the other side of the hill. Mistakes will inevitably be made, things done which the outcome shows to have been unwise. But advocacy is more an art than a science. It cannot be conducted according to formulae. Individuals differ in their style and approach. It is only when, with all allowances made, an advocate's conduct of court proceedings is quite plainly unjustifiable that it can be appropriate to make a wasted costs order against him.”⁴⁸³

Recommendation 97: Barristers should be made subject to liability for wasted costs under O 62 r 8.

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⁴⁸³ *Ridehalgh v Horsefield (supra)* at 236.

Section 19: Witness statements and evidence

Proposals 35 to 37

Proposal 35

A rule should be adopted giving the court express powers to exercise control over the evidence to be adduced by the parties by giving directions as to the issues on which it requires evidence; the nature of the evidence which it requires to decide those issues; and the way in which the evidence is to be placed before the Court., Such power extends to powers to exclude evidence that would otherwise be admissible and to the limiting of cross-examination.

Interim Report paras 469-479

Proposal 36

For the avoidance of doubt, the High Court Ordinance should be amended to provide an express rule-making power permitting the court to restrict the use of relevant evidence in furtherance of the overriding objective.

Interim Report paras 469-479

Proposal 37

A rule should be adopted to promote flexibility in the court's treatment of witness statements, by expressly catering for reasonable applications for witnesses to be allowed to amplify or to add to their statements.

Interim Report paras 480-483

575. In relation to the evidence of witnesses of fact (as opposed to expert witnesses), the Interim Report identified as an increasingly serious problem the practice – especially in heavy cases – of the parties overloading the evidence and investing disproportionate effort and expenditure in the

preparation of witness statements. It noted that in England and Wales, three strategies had been adopted in answer, namely: (i) giving the court greater powers to limit the evidence adduced; (ii) introducing greater flexibility in allowing witness statements to be supplemented; and (iii) deterring over-elaboration with adverse costs orders.

19.1 Consultation response to Proposals 35 and 36

576. *Proposals 35 and 36* address the first strategy and were based upon CPR 32.1 which provides as follows :-

- “(1) The court may control the evidence by giving directions as to –
 - (a) the issues on which it requires evidence;
 - (b) the nature of the evidence which it requires to decide those issues; and
 - (c) the way in which the evidence is to be placed before the court.
- (2) The court may use its power under this rule to exclude evidence that would otherwise be admissible.
- (3) The court may limit cross-examination.”

577. The Interim Report noted that such a rule was potentially controversial. And so it proved to be. While recognizing that excesses relating to witness statements and evidence had to be curbed, respondents to the consultation generally felt that CPR 32.1 goes much too far.⁴⁸⁴ There was strong objection to the court excluding evidence which is admissible. The general view was that the court ought instead to use its case management powers and costs sanctions to deter prolixity rather than attempt to exclude

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⁴⁸⁴ Those objecting to *Proposals 35 and 36* included the Bar Association, the BSCPI, the Law Society, the LAD, the BCC, the Hon Ms Miriam Lau, speaking in Legco and three firms of solicitors.

evidence. The few who thought the Proposals acceptable in principle⁴⁸⁵ did so with important qualifications.

578. The Bar Association pointed to the fundamental common law principle in civil cases that the parties may adduce relevant factual evidence and, in doing so, may decide what witnesses to call and in what order,⁴⁸⁶ the judge having no power to call witnesses of his own motion, without the consent of the parties.⁴⁸⁷ They argued that a rule like CPR 32.1 would make great inroads on this principle and would place heavy burdens on the judge, requiring him to descend into the arena and giving rise to a grave danger of perceived partiality. Other reforms suggested in the Interim Report supported by the Bar Association were thought sufficient to ensure that the issues would be more clearly brought out so that relevance could more easily be determined. Taken together with the “considerable moral authority” which the court already can exercise to determine the course of the trial,⁴⁸⁸ such inroads were said to be unnecessary and dangerous.

579. Other points of significance were raised by other respondents. Some questioned the practicality of a procedure for the court to exclude or limit

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⁴⁸⁵ Including a set of barristers’ chambers (who thought the power should be restricted to clearly defined categories of cases); the High Court masters (who thought it would be necessary to link the power to a docket system); the District Court masters and judges (who thought persuasive reasons for exclusion would have to be given to prevent a sense of grievance) and an individual respondent (basing his comments on practice in arbitrations).

⁴⁸⁶ Citing *Bradford CC v K (Minors)* [1990] Fam 140 at 153-4; *D v NSPCC* [1978] AC 171 at 239; *Briscoe v Briscoe* [1968] P 501.

⁴⁸⁷ Citing *Re Enoch and Zaretsky, Bok & Co’s Arbitration* [1910] 1 KB 327; *Kesse v Secretary of State for the Home Department* (Unreported, English Court of Appeal, 7 February 2001) and *Jones v NCB* [1957] 2 QB 55.

⁴⁸⁸ As pointed out by Lord Simon in *D v NSPCC* [1978] AC 171 at 239.

evidence either in advance or in some other manner that would achieve savings in time. How could the court be sure that the evidence was of such marginal relevance that it deserved to be excluded unless it had heard it and was able to weigh it? This was the LAD's view and lay behind the High Court masters' suggestion that the power should be linked to a docket system. It also appears to underpin the suggestion that the rule be confined to specific categories of evidence, such as witnesses giving repetitive evidence. The Hon Ms Miriam Lau, speaking in Legco, similarly suggested that control should be exerted by setting time-limits rather than excluding evidence in particular areas.

19.2 The Working Party's view

580. The Working Party agrees with the predominant view that the high level of judicial proactivity required to operate a rule along the lines of CPR 32.1 does not appear necessary or desirable in the circumstances of Hong Kong. Given the reforms proposed, including those relating to verified pleadings, a questionnaire at the stage of the summons for directions, tighter case management and a pre-trial review, the issues between the parties and the relevance or otherwise of evidence ought generally to be clear. In such a context, the existing powers of the court are likely to be sufficient, particularly if more effectively exercised, to keep out irrelevant evidence and to discourage prolixity.
581. As discussed in greater detail in connection with *Proposal 41* below, the court should exercise general overall control against undue prolixity at the trial by giving directions setting broad time-limits for each segment of the trial (for opening and closing submissions and each witness to be called) at the pre-trial review, but leaving it to the parties to decide which witnesses

and what evidence to call in the time available, subject to a power to limit the number of witnesses called on a particular issue.⁴⁸⁹

582. If, despite such precautions and despite discouragement from the bench, one of the parties nevertheless persists in an unduly prolix investigation of quite marginal issues, the case might (as the Bar Association pointed out) justify the exclusion of such evidence as “insufficiently relevant”, adopting the approach taken by Hoffmann LJ in the English Court of Appeal in *Vernon v Bosley* [1994] PIQR 337. While upholding the general common law proposition that a judge has no discretion to exclude admissible evidence in a civil case, his Lordship stated as follows :-

“The cardinal principle of admissibility is relevance. But relevance is always a matter of degree. How relevant must evidence be in order to be admissible? Ordinarily, the threshold is very low. It is an important aspect of an adversary system of justice that a party should so far as possible be allowed to decide how to present his case. If he or his counsel thinks that an item of evidence or a line of cross-examination may be relevant, the court is generally very reluctant to shut it out. He should not be left with a feeling that he might have won if only he had been allowed to adduce evidence or ask questions which the judge refused to hear. Nor should he be unnecessarily controlled or directed in the way he conducts his presentation of evidence or cross-examination. Particularly if he is represented by a professional advocate on whose sense of responsibility the court can rely. The judgment of Denning LJ in *Jones v National Coal Board* [1957] 2 QB 55 is a classic statement of the case for judicial abstention.

But there are limits to the extent to which the parties can be allowed free rein. A party’s right to choose how to present his case may have to be balanced against other legitimate public or private interests. For example, both the opposing party and the general public have an interest in keeping down the length and cost of litigation. On this ground, the judge will sometimes rule inadmissible the exploration of side-issues which, though possibly having some potential relevance, do not appear sufficiently relevant to justify the time and expense which would be required to investigate them.”⁴⁹⁰

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⁴⁸⁹ See the discussion of O 34 5A of the Western Australian Supreme Court Rules in Section 21 below.

⁴⁹⁰ [1994] PIQR 337 at 339.

The operation of this principle was illustrated by the exclusion of similar fact evidence in civil cases which :-

“..... shows that the degree of relevance needed for admissibility is not some fixed point on a scale, but will vary according to the nature of the evidence and in particular the inconvenience, expense, delay or oppression which would attend its reception. Similar fact evidence is an obvious case in which the prospect of having to investigate collateral issues makes it impossible for the court to take the relaxed attitude to relevance which it would ordinarily prefer.”⁴⁹¹

His Lordship summarised the approach as follows :-

“It therefore seems to me that although a judge has no discretion to exclude admissible evidence, his ruling on admissibility may involve a balancing of the degree of relevance of the evidence against other considerations which is in practice indistinguishable from the exercise of a discretion. It is in my view essential, if judges are to be able to keep the length of trials within bounds and conduct the proceedings with due sensitivity to the interests of third parties and the wider public interest, that they should have the same latitude in deciding how the balance should be struck as this court would accord to the exercise of a discretion.”⁴⁹²

583. Such a power may usefully be kept in reserve to be used, for instance, to stop what has been demonstrated to be an unjustifiably prolix examination or cross-examination of a witness. While the evidence might initially have been relevant and admissible, repetitions and reiterations may take further evidence along the same lines across the “insufficiently relevant” line and justify intervention by the court. Such an approach would be consonant with existing principle and authority and would be reactive rather than proactive. It would not involve the court in any attempt at delimiting beforehand the issues on which it requires evidence, the nature of the evidence required, or how it is to be placed before the court. A practice

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⁴⁹¹ At 340.

⁴⁹² *Ibid.*

direction giving notice of the court's intention to adopt this approach should be issued.

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.

584. The foregoing discussion and Recommendations are also relevant to *Proposal 41*, set out below.

19.3 Consultation response to Proposal 37

585. This proposal addressed the second strategy mentioned above, namely, that of introducing greater flexibility by allowing witness statements to be supplemented orally with a view to discouraging the over-working of witness statements. It attracted general support.⁴⁹³

586. A number of respondents added the rider that such flexibility should not be secured at the cost of allowing the other party to be taken by surprise.

19.4 The Working Party's view

587. As indicated in the Interim Report, the present rule, O 38 r 2A(7)(b), permits a witness statement to be supplemented in testimony in very limited circumstances. A witness is generally only allowed to give evidence the substance of which has been included in the witness statement. He is allowed to go further only if the other parties consent; or if the court had previously directed that the witness statement should be limited to stated issues; or if the additional evidence relates to matters which have arisen since serving the witness statement.

588. The Working Party favours replacing that rule with a rule along the lines of CPR 32.5(3) and (4) as canvassed in the Interim Report. They state as follows :-

“(3) A witness giving oral evidence at trial may with the permission of the court –

(a) amplify his witness statement; and

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⁴⁹³ Including from the Bar Association, the BSCPI, the Law Society, the LAD, the High Court masters, the masters and judges of the District Court, one set of barristers' chambers and a firm of solicitors.

(b) give evidence in relation to new matters which have arisen since the witness statement was served on the other parties.

(4) The court will give permission under paragraph (3) only if it considers that there is good reason not to confine the evidence of the witness to the contents of his witness statement.”

589. This maintains the basic position that a witness is generally to be confined to the contents of his witness statement. However, the court has a general discretion to allow him to go beyond such contents if there is “good reason” to do so. The court’s discretion would no longer be restricted to the narrow categories set out in O 38 r 2A(7)(b). Where, for instance, the amplifying or supplementary evidence would take the other side by surprise, the court could be expected to disallow it unless there was good reason to do otherwise, in which case it would be likely to let in the evidence on terms designed to avoid prejudice to the other side.

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).

590. Little needs to be said about the third strategy mentioned above. The court has ample power to require a party who has been prolix or who has unnecessarily prolonged a hearing to compensate the other party in costs. The use of this power to deter over-elaboration of witness statements and evidence was generally supported.

Section 20: Expert evidence

Proposals 38 to 40

Proposal 38

Provisions aimed at countering the inappropriate and excessive use of expert witnesses should be adopted, giving the court control of the scope and use of expert evidence to be adduced.

Interim Report paras 485-493, 518

591. The Interim Report identified two major problems concerning expert evidence in the existing civil justice system :-

- (a) the inappropriate or excessive use of experts, which increases costs, the duration of proceedings and their complexity; and,
- (b) partisanship and a lack of independence amongst experts, devaluing their role in the judicial process.

592. *Proposal 38* seeks to address the first of these problems, canvassing the introduction of a rule along the lines of CPR 35.4 which would give the court a discretion to exclude proposed expert evidence. CPR 35.4 provides that “No party may call an expert or put in evidence an expert’s report without the court’s permission.”

20.1 The consultation response

593. The response was mixed. The proposal was supported by a number of respondents,⁴⁹⁴ but the weight of opinion was against such a change. Thus, the Bar Association was not in favour of the court having power to “exclude altogether relevant and admissible expert evidence” and favoured retaining the existing regime for regulating expert evidence. This view was shared by the Law Society, the LAD, the DOJ, the HKMLA, the BCC, the SCLHK and a firm of solicitors, several of them commenting that use of costs sanctions would suffice. In a valuable submission from the Academy of Experts, a professional association of expert witnesses based in London but with Hong Kong members and a Hong Kong Committee, commented that in England :-

“There is a perception that the power to refuse permission for expert evidence was over-used in its first year of introduction in England. Indeed many believe that it is still being used inappropriately.”

20.2 The court’s present powers to control expert evidence

594. Expert evidence is treated differently from purely factual evidence. With the abolition in 1999 of hearsay as a general ground of inadmissibility in civil cases,⁴⁹⁵ the main basis upon which factual evidence is presently excluded as inadmissible, is lack of relevance. The Working Party has recommended⁴⁹⁶ against the court taking up powers to exclude relevant and

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⁴⁹⁴ Those in favour included the APAA, the High Court masters, the HKIS, two firms of solicitors and a set of barristers’ chambers. Another firm of solicitors thought it might only suit smaller cases and the BSCPI thought it would be acceptable only if the courts were not over-zealous in excluding the evidence.

⁴⁹⁵ By s 47 of the Evidence Ordinance, Cap 8.

⁴⁹⁶ *Recommendations 98 and 99.*

admissible factual evidence and has instead proposed that the court should adopt a more stringent approach to relevance, viewed as a matter of degree, and to limit its control of prolix evidence to the setting of time-limits for witnesses and limiting the number of witnesses one may call on a particular issue.⁴⁹⁷

595. Expert evidence has always been, and still is, subject to much greater control by the court. This is reflected in section 58(1) of the Evidence Ordinance, which states :-

“Subject to any rules, where a person is called as a witness in any civil proceedings, his opinion on any relevant matter on which he is qualified to give expert evidence shall be admissible in evidence.”

596. While the section is framed in terms declaring in principle the admissibility of expert opinion evidence, it makes it clear (confirming the common law position) that such admissibility is dependent upon certain conditions being satisfied. In particular :-

- (a) the subject matter of the opinion must fall within an area in which expert evidence may properly be given;
- (b) the witness must be qualified as an expert to give the evidence of the type in question; and,
- (c) his evidence must be relevant to the issues being litigated.

The first two of these admissibility conditions relate to the witness and the evidence *qualifying* for expert status and the third concerns *relevance*. In *R*

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⁴⁹⁷ See the discussion of *Proposal 41* in Section 21 below.

v Bonython [1984] SASR 45 at 46,⁴⁹⁸ King CJ explained the court's approach to the first two conditions as follows :-

“Before admitting the opinion of a witness into evidence as expert testimony, the judge must consider and decide two questions. The first is whether the subject matter of the opinion falls within the class of subjects upon which expert testimony is permissible. This first question may be divided into two parts: (a) whether the subject matter of the opinion is such that a person without instruction or experience in the area of knowledge or human experience would be able to form a sound judgment on the matter without the assistance of witnesses possessing special knowledge or experience in the area and (b) whether the subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience, a special acquaintance with which of the witness would render his opinion of assistance to the court. The second question is whether the witness has acquired by study or experience sufficient knowledge of the subject to render his opinion of value in resolving the issue before the court.”

597. The requirement of “relevance” is approached broadly. It has been explained by Evans-Lombe J as “meaning ‘helpful’ to the Court in arriving at its conclusions.”⁴⁹⁹ His Lordship added that where the evidence and the witness met the “qualifying” conditions, the evidence :-

“..... can still be excluded by the Court if the Court takes the view that calling it will not be helpful to the Court in resolving any issue in the case justly. Such evidence will not be helpful where the issue to be decided is one of law or is otherwise one on which the Court is able to come to a fully informed decision without hearing such evidence.”⁵⁰⁰

598. If the court considers that the evidence sought to be adduced as expert evidence fails to satisfy one or more of the three conditions mentioned above, it may exclude it as inadmissible. However, as pointed out by Butler-Sloss LJ in *Re M and R (minors)* [1996] 4 All ER 239, it may not be

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⁴⁹⁸ Cited with approval in *The Ardent* [1997] 2 Lloyd's Rep 547 at 597; and in *Barings plc (in liquidation) v Coopers & Lybrand, et al* (Unreported) Lexis transcript 9 February 2001, Evans-Lombe J at §35.

⁴⁹⁹ *Barings plc (in liquidation) v Coopers & Lybrand, et al (supra)*, at §23.

⁵⁰⁰ At §45.

necessary for the court to engage itself in detailed arguments as to admissibility at the trial since it can deal with evidence of contested relevance by assigning it such weight as it deserves :-

“If the expert’s opinion is clearly irrelevant, [the Judge] will say so. But if arguably relevant but in his view ultimately unhelpful, he can generally prevent its reception by indicating that the expert’s answer to the question would carry little weight with him. The modern view is to regulate such matters by way of weight, rather than admissibility.”⁵⁰¹

599. There may of course be challenges to proposed expert evidence mounted prior to the trial, when questions of admissibility would have to be confronted. There was at one time doubt whether there was jurisdiction to entertain a pre-trial challenge since questions of admissibility were thought to lie within the exclusive province of the trial judge.⁵⁰² However, this approach has since been rejected and admissibility can and often is determined before the trial.⁵⁰³ As Chu J puts it :-

“[The] modern judicial approach has moved away from leaving all matters to be resolved by the trial judge at the trial to an emphasis on effective pre-trial case management. The court is prepared at an interlocutory stage to exercise its discretion to exclude evidence, including expert evidence, which it perceives to be plainly irrelevant : see for instance the judgment of Rogers JA in *Ying Ho Company Limited & Ors v The Secretary of Justice* (Unreported) CACV 365/1999. The advantages of such an approach in reducing the costs and the length of trial are obvious and need no elaboration.”⁵⁰⁴

600. Additionally, section 58(1) provides that admissibility shall be “subject to any rules.” “Rules” are defined in section 60(2) as “the Rules of the High

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⁵⁰¹ At 254.

⁵⁰² *Sullivan v West Yorkshire Passenger Transport Executive* [1985] 2 All ER 134.

⁵⁰³ *Woodford and Ackroyd v Burgess* [2000] CP Report 79; *Ko Chi Keung v Lee Ping Yan Andrew* [2001] 1 HKLRD 829.

⁵⁰⁴ *Annabell Kin Yee Lee v Lee Wing Kim (May Lee)* (Unreported) HCA 9522/1997, 22 November 2001, at §15.

Court made under section 54 of the High Court Ordinance, Cap 4.” Rules have indeed been made which restrict the introduction of expert evidence in two important ways.

(a) First, O 38 r 4 provides :-

“The Court may, at or before the trial of any action, order that the number of medical or other expert witnesses who may be called at the trial shall be limited as specified by the order.”

(b) Secondly, O 38 r 36 provides that, except with the court’s leave or the consent of all parties, no expert evidence may be adduced at the trial or hearing unless the party seeking to adduce the evidence has first sought and complied with directions of the court concerning pre-trial disclosure of the substance of the expert evidence sought to be relied on. Such disclosure is generally ordered⁵⁰⁵ by means of disclosing or exchanging expert reports.

601. Order 38 r 4 is obviously a useful weapon to deploy against attempts to call several experts where one would do. Order 38 r 36 is not so much an attempt at keeping the amount of expert evidence within bounds as a rule designed “to put an end to the laying of expert ambushes; to the springing upon a party of oral expert evidence with which he and his counsel are quite unable to deal.” In other words, its purpose “is to prevent surprise and to enable cross-examining counsel to be properly prepared at the trial.”⁵⁰⁶ Pre-trial disclosure of an expert report may of course result in a challenge to its admissibility before or at the trial.

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⁵⁰⁵ O 38 r 37. In personal injury cases, disclosure is catered for in automatic directions under the RHC: O 25 r 8(1)(b) and (c).

⁵⁰⁶ Both quotations are from *Herman Iskandar v Bonardy Leo* [1988] 1 HKLR 583, per Hunter JA at 605.

20.3 The effect of Proposal 38 and the Working Party's view

602. It will be evident from the foregoing discussion that the court already enjoys considerable powers to exclude inappropriate or excessive use of expert evidence. If the evidence sought to be adduced involves subject-matter not properly susceptible to expert evidence, or if the witness is not qualified as an expert in the field, or if the evidence is not relevant, it may be excluded as inadmissible. If a party is inclined to call a string of experts where this is not justified, O 38 r 4 allows the court to restrict him to the appropriate number. Parties are not permitted to adduce expert evidence unless its substance has first been the subject of pre-trial disclosure. The existing rules are therefore quite apt to filter out expert evidence which is inappropriate or excessive. The problem appears to be that the existing rules are not sufficiently invoked by the parties or applied by the courts.
603. If the existing rules were to be applied more assiduously, it is difficult to see what useful role there would be for a general discretionary power to exclude expert evidence in respect of evidence which has not been excluded under the present rules. Such evidence would have met the qualifying and relevance conditions and would be tendered by a duly limited number of experts, the gist of whose evidence has previously been disclosed to the other parties. In what circumstances would one wish to exclude some or all of such evidence? It is possible that one may be faced with experts on either side who (although duly limited in number) file expert reports which are too numerous and too elaborate, thereby vastly over-complicating the issues. However, the court has various means available for coping with such a case. It could, for instance, require the evidence to be simplified, ordering the experts to meet pursuant to O 38 r 38, with a view to identifying areas of common ground and isolating the issues on which they differ. Costs

sanctions for unnecessarily elaborate reports could be applied. Indeed, if the expert evidence were to become so over-complicated that it hindered rather than helped the court, it would run the risk of being held inadmissible as irrelevant, in that it was not helpful to the court's decision of the issues in the case. As with factual evidence, the relevance of expert evidence should be regarded as a matter of degree.

604. For the foregoing reasons and in the light of consultees' responses, the Working Party considers a more general power to exclude expert evidence unnecessary and recommends against adoption of *Proposal 38*.

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

605. In the Interim Report,⁵⁰⁷ mention was also made of possible benefits to be derived from adopting certain ancillary rules. These included :-
- (a) CPR 35.4(4), giving the court power to cap recoverable expert fees;
 - (b) CPR 35.6, allowing a party one chance to put written questions to an expert to clarify his report; and,
 - (c) CPR 35.9 enabling a party access to information held by the other side but not reasonably available to himself.

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⁵⁰⁷ At §493.

606. In its submission, the AE indicated that the experience in England and Wales is that :-

- (a) CPR 35.4(4) is not used in practice;
- (b) CPR 35.6 is “a useful power which, when properly used, can be of significant benefit saving both time and costs.” However, they caution that it is often misused and indeed “abused by what is perceived to be a significant proportion of parties.” In particular, questions which plainly go way beyond “clarification” are sometimes put months after the report was issued; and,
- (c) CPR 35.9 is rarely used since the information needed is generally obtained through discovery.

In the light of these comments, the Working Party considers that adoption of such rules is not advisable.

Proposal 39

Measures aimed at countering lack of independence and impartiality among expert witnesses should be adopted :-

- (a) *Declaring the supremacy of the expert’s duty to assist the court over his duty to the client or the person paying his fees.*
- (b) *Emphasising the impartiality and independence of expert witnesses and the inappropriateness of experts acting as advocates for a particular party.*
- (c) *Annexing a code of conduct for expert witnesses and requiring experts to acknowledge their paramount duty to the court and a willingness to adhere to the code of conduct as a condition for allowing expert reports or evidence to be received.*
- (d) *Requiring expert reports prepared for use by the court to state the substance of all material instructions conveyed in any form, on the*

basis of which the report was prepared, abrogating to the extent necessary, any legal professional privilege attaching to such instructions, but subject to reasonable restrictions on further disclosure of communications between the party and such expert.

- (e) *Permitting experts to approach the court in their own names and capacity for directions without notice to the parties, at the expense of one or all of the parties, as directed by the court.*

Interim Report paras 494-506, 518

607. *Proposal 39* addresses the other major concern, namely that of partisan experts. Five particular measures, listed as *Proposals 39 (a) to 39(e)* above, were floated for consultation.

20.4 Proposal 39(a) to (c)

608. There was overwhelming support for the first three measures proposed.⁵⁰⁸ The principles which underlie them are well-known and established in law.⁵⁰⁹ It was, however, generally accepted that it would be beneficial for these principles to be given more prominence and to be brought home individually to each expert every time an expert report is issued or expert testimony given. The AE described the declaration envisaged in *Proposal 39(c)* as “an immensely important provision” which “is part of the reason for the change in mind-set” regarding expert witnesses amongst the legal profession and experts alike. In the light of the consultation response, the

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⁵⁰⁸ Supporters included the Bar Association, the BSCPI, the Law Society, the AE, the LAD, the DOJ, the APAA, the HKMLA, the HKIA, the HKIS, three firms of solicitors, one set of barristers’ chambers, an academic from the Hong Kong Polytechnic University and two individual respondents. The BCC was however opposed to this Proposal.

⁵⁰⁹ Summarised in *The Ikarian Reefer* [1993] 2 Lloyds Rep 68 and still applicable after introduction of the CPR: *Stevens v Gullis* [2000] 1 All ER 527.

Working Party recommends that *Proposals 39(a) to (c)* should be implemented.

609. *Proposal 39(a)* is reflected in CPR 35.3 which is headed “Experts – overriding duty to the court” and states :-

- “(1) It is the duty of an expert to help the court on the matters within his expertise.
- (2) This duty overrides any obligation to the person from whom he has received instructions or by whom he is paid.”

610. CPR 35.10(2) reflects *Proposal 39(b)* and provides :-

“At the end of an expert’s report there must be a statement that—

- (a) the expert understands his duty to the court; and
- (b) he has complied with that duty.”

Moreover, as pointed out in the practice direction at 35PD2.3, an expert report must be verified by a statement of truth.

611. *Proposal 39(c)* finds a precedent in Part 39 of the NSW rules which provides that an expert report shall not be admitted into evidence unless it contains an acknowledgment by the expert that he or she has read the relevant code of conduct and agrees to be bound by it. Similarly, the rule provides that oral expert evidence cannot be received without such an acknowledgement in writing.

612. Implementing a rule along the lines of the NSW rule would require adoption of a code of conduct for expert witnesses in this jurisdiction approved by the court. The precise terms of such a code should be determined after consulting all interested parties. As a starting point, the Working Party recommends that a draft Code and a draft Declaration to be made by expert witnesses be prepared. Appropriately adapted, the AE’s *Code of Practice*;

its *Code of Practice for Experts within Europe* and its *Expert's Declaration* would provide a suitable basis for such consultation.⁵¹⁰ The (unadapted) terms of these documents are set out in *Appendix 3* to this Final Report. In due course, the Hong Kong Committee of the AE or some other suitable body could no doubt prepare guidance notes for Hong Kong expert witnesses similar to the AE's *CPR Code of Guidance For Experts and those Instructing them*⁵¹¹ providing professional experts with practical guidance on the legal framework.

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.

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⁵¹⁰ In its submission, the AE kindly offered to help adapt their Code for Hong Kong use.

⁵¹¹ Available at www.academy-experts.org.

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.

20.5 *Proposal 39(d)*

613. *Proposal 39(d)*, for requiring experts to disclose the substance of the instructions upon which their report is based, received a mixed reaction. Those in support⁵¹² tended to accept that the content of an expert report could well be influenced or “steered” by the instructions given so that a rule requiring disclosure was needed to enable reports to be properly assessed. The AE pointed out that it has for many years been best practice to summarise the instructions received in the expert’s report :-

“Over ten years ago the Academy’s Judicial Committee, then under the Chairmanship of The Rt Hon The Lord Slynn of Hadley PC produced the Model Form of Expert’s Report which has been in use ever since and has effectively been adopted by CPR. At that time their lordships decided that in order to properly evaluate an Expert’s Report it was necessary to know what they were instructed to do. Indeed most experts would acknowledge that the opinion expressed in a report may appear dramatically different with different instructions.

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⁵¹² Including the Bar Association (subject to further consultation), the LAD, the DOJ, the APAA (if a code was established), the HKIA, one set of barristers’ chambers, a solicitors’ firm and an individual respondent.

Accordingly it has been the practice for there to be a section in a good expert report in which the instructions were summarised.”

614. The AE is therefore in principle in favour of disclosure but it acknowledges that important practical problems remain unresolved. In particular, parties may have obtained privileged expert advice before the proceedings. If, however, the expert were to be used as an expert witness in the litigation, the loss of privilege in relation to the report prepared as such witness may undermine the confidentiality of the earlier advice, placing pressures on the necessarily confidential relationship between a party, his lawyers and the expert. To avoid this, parties may feel driven to incur the additional expense of instructing a different set of experts to act as witnesses while retaining as advisers, their original experts whose instructions would remain protected from disclosure. Uncertainties also remain as to the extent to which opposing parties may be allowed to probe instructions where expert reports are said to be suspect, leading to a significant number of applications for cross-examination, disclosure and so forth.
615. Such concerns were in the forefront of the reasons put forward by those opposing *Proposal 39(d)*.⁵¹³ The abrogation of legal professional privilege was opposed in principle and the likelihood of parties having to incur the expense of a second set of experts was thought by many to be a crucial flaw in the proposal. Some argued that such a rule was unnecessary since adoption of *Proposals 39(a) to (c)* would make it difficult or impossible for a respectable expert to make the required declaration or to verify the report where his opinion had been subverted by instructions intended to result in a misleading report.

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⁵¹³ Including the Law Society, the BSCPI, the HKMLA, the BCC, the HKIS and three firms of solicitors.

616. A Basic Law concern was also raised by some respondents. Article 35 relevantly provides :-

“Hong Kong residents shall have the right to *confidential legal advice*, access to the courts, choice of lawyers for timely protection of their lawful rights and interests or for representation in the courts, and to judicial remedies” (italics supplied)

Would a rule contemplated by *Proposal 39(d)* violate BL 35 and so be unconstitutional?

617. It appears to the Working Party that the question is arguable. A rule of the kind envisaged by *Proposal 39* (similar to CPR 35.10), would prima facie restrict the right to confidential legal advice (instructing experts and obtaining their advice and evidence being part of the process of obtaining such legal advice). However, as previously discussed, the BL 35 rights are not absolute but may be subject to appropriate restriction. A restriction would be valid provided that :-

- (a) it pursues a legitimate aim;
- (b) there is a reasonable proportionality between the means employed and the aim sought to be achieved; and,
- (c) the restriction is not such as to impair the very essence of the right.⁵¹⁴

618. It is arguable whether a rule of the type envisaged by *Proposal 39* would satisfy these conditions and so constitute a valid restriction.

619. There is plainly a respectable case for contending that such a rule would be valid or could be drawn up in terms aimed at ensuring validity. This accords with the view expressed in the textbook *Human Rights and Civil*

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⁵¹⁴ Section 3 above.

Practice, discussing the impact of Articles 6 and 8 of the ECHR on CPR 35.10, as follows :-

“CPR 35.10(3) provides that an expert’s report must state the substance of all material instructions, whether written or oral, on the basis of which the report was written. CPR35.10(4) provides that these instructions ‘shall not be privileged against disclosure’. The court will not, however, order disclosure of specific documents or cross-examination of the expert in relation to his instructions, unless it is satisfied that there are reasonable grounds to consider the statement of instructions to be inaccurate or incomplete. The purpose of the provision is to avoid pressure being put on an expert to come to or change a specific opinion leading to suppression of material opinions or material which is adverse to the party instructing that expert. It is intended that this provision will bolster the independence of the expert, who might otherwise be inclined to modify his opinion in order to assist the party who is actually paying him. This is clearly a legitimate reason for the rule that increases the fairness to the other parties to the litigation and does not affect lawyer-client confidentiality, though it does narrow the scope of litigation privilege to some extent. Provided that CPR 35.10(4) is interpreted narrowly and privilege is only overridden where there are clearly reasonable grounds to suppose that the statement of instructions is inaccurate or incomplete, it is unlikely that the rule will violate the Convention.”⁵¹⁵

620. On the other hand, the original CPR 48.7(3) which gave the court express power, when making wasted costs orders to “direct that privileged orders are to be disclosed to the court, and if the court so directs, to the other party to the application for an order” was held⁵¹⁶ to contravene the ECHR provisions and was subsequently revoked. One might add that in relation to civil proceedings, the constitutional protection afforded to confidential legal advice by BL 35 is rather more specific than the general rights to a fair trial and privacy conferred by ECHR 6 and ECHR 8. Even accepting (for the reasons which attracted those in support of *Proposal 39(d)*) that such a rule pursues a legitimate purpose, there would appear to be room for argument as to whether such a measure is reasonably proportionate to that purpose and

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⁵¹⁵ LAM, §11.72.

⁵¹⁶ *General Mediterranean Holdings v Patel* [2001] WLR 272.

as to the extent of impairment to the essence of the right to confidential legal advice.

621. The Working Party does not seek to resolve those questions. However, the arguable constitutionality of the proposed rule, taken together with the points made in opposition to such a rule have led the Working Party to conclude that *Proposal 39(d)* should not be adopted.

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.

20.6 *Proposal 39(e)*

622. With few exceptions,⁵¹⁷ the respondents to the consultation were opposed to *Proposal 39(e)*.⁵¹⁸ The proposal was thought objectionable because :-

- (a) it would inject distrust between a party and his lawyers on the one hand and the experts on the other, exacerbated by making the parties bear the costs of the expert's approach to the court;

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⁵¹⁷ The APAA (if a code was established), the HKIA and a firm of solicitors.

⁵¹⁸ Those expressing opposition included the Bar Association, the BSCPI, the Law Society, the AE, the LAD, the HKMLA, the BCC, the HKIS, one set of barristers' chambers, a solicitors' firm and an individual respondent.

- (b) it espouses a procedure that is not transparent and prevents impartial justice from being seen to be done;
- (c) it is likely to erode legal professional privilege;
- (d) it would promote the use (and expense) of a second set of advisers to monitor the expert engaged in the court proceedings;
- (e) professional experts would in any event be reluctant to take the step in question as they might never be instructed again;
- (f) it is in any event an unnecessary procedure since an expert in a difficult position could simply raise the point with the party or his legal advisers and have them, if necessary, approach the court for directions, resigning or threatening resignation if they refuse to address the difficulty.

623. The AE pointed out that CPR 35.14 initially provided that an expert could request directions from the court without giving notice to any party and that this was considered particularly objectionable. This was changed to require an expert contemplating this route, unless the court otherwise directs, first to serve a copy of his proposed request for directions on the parties. This improves the procedure's transparency. Nonetheless, the AE reports :-

“The opportunity given for the expert to ask the Court for Directions effectively on his own motion has not been widely used. It does not appear to be much to the liking of either Judges or Experts. Solicitors appear to positively dislike it. Although the right is useful we believe it is very much a measure of last resort. This comment applies whether the expert is a Single Joint or a Party Appointed Expert. With the court having to give permission for a named expert to give evidence the (threat of) resignation is very serious and normally has the desired effect of removing the necessity for the expert to approach the court directly. Similarly we recommend the practice advocated in the *‘CPR Code of Guidance for Experts and those who instruct them’* of requesting the instructing solicitor(s) to resolve the matter and if unable to do so for them to apply to the court for Directions.”

624. The Working Party considers that the disadvantages of such a rule considerably outweigh its advantages and recommends against adoption of *Proposal 39(e)*.

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

Proposal 40

That a procedure be adopted permitting the court to direct the parties to cause single joint experts to be engaged at the expense of the parties and that appropriate rules be adopted to govern the rights, duties and functions of such single joint experts.

Interim Report paras 507-518

20.7 The consultation response

625. Most respondents to the consultation were not opposed to *Proposal 40* as such but expressed concern that orders might be made requiring the parties to appoint a single joint expert (“SJE”) in unsuitable cases, with highly counter-productive results.

626. Plainly (as recognized in the Interim Report), if a SJE were to be inappropriately imposed in a case, numerous difficulties are likely to arise.

- (a) Where the expert issues are contentious, justice may be best served by the court sampling a range of expert opinions rather than being confined to the views of a SJE.

- (b) In contentious cases, the parties may well feel driven to appointing their own “shadow experts” to monitor and, if necessary, to challenge or make representations to the SJE, thereby increasing costs.⁵¹⁹
- (c) Where the SJE direction is made after a party has already instructed and had advice from “his own” expert, that direction is likely to be very unwelcome. As the AE puts it :-

“Generally the last thing that many parties want to do when they have had the involvement of their ‘own’ expert is to appoint a new SJE. In addition to the perceived cost implications, parties may feel that to do so gives them less control and reduces their ability to influence the result of the case in their favour.”

- (d) The parties may find it very difficult to agree who should be appointed and what instructions and information the SJE should be given.⁵²⁰
- (e) The SJE may be found wanting, or an unanticipated point of controversy may emerge, giving rise to a need for further party-appointed experts (“PAEs”) to be brought into the case, increasing costs.⁵²¹

627. Many respondents⁵²² proposed (as had been suggested by Lord Woolf and in the Interim Report) that SJE orders should only be made where the relevant

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⁵¹⁹ A concern voiced by many respondents including the Bar Association, the BSCPI, the Law Society, the HKMLA and the BCC.

⁵²⁰ A concern adverted to by the AE, the LAD, the APAA, the SCLHK and two firms of solicitors, among others.

⁵²¹ As in *Daniels v Walker* [2000] 1 WLR 1382.

⁵²² Including the Bar Association, the Law Society, the LAD, the HKMLA, the HA (which favoured SJE orders in relation to disputes on quantum), the JCGWG and the Hon Ms Miriam Lau speaking in Legco.

issues require expert evidence but are essentially straightforward and unlikely to provoke controversy.

628. Some also suggested⁵²³ that SJE orders might appropriately be made in “low-value” disputes, presumably on the footing that incurring two sets of expert costs would be disproportionate in such cases in any event, making it easier to accept the desirability of a SJE.⁵²⁴
629. The AE’s view was on similar lines. Summarising the experience in England and Wales, it stated :-

“The most likely appropriate case for the appointment of an SJE is a low value and/or low complexity case where it is in any event possible that the expert will not need to be called at all and his report should be accepted as written evidence without the need for cross-examination. In these cases the use of the SJE has been largely successful.”

20.8 The Working Party’s view

630. It appears clear that SJE orders might be a bad idea in many cases. At the same time, in suitable cases, all the parties and the court may benefit significantly from the services of a well-chosen and intelligently employed SJE. The appointment of SJE, even if only in a minority of cases, may place a professional premium on impartiality and so generally raise expert standards.
631. It is the Working Party’s view that the court ought to have power to order the parties to appoint a SJE, but that this power should be subject to clear

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⁵²³ Among others, by the LAD, the HKMLA, the SCLHK, the HA, the JCGWG, the Hon Ms Miriam Lau speaking in Legco, a solicitors’ firm and an individual respondent.

⁵²⁴ In England and Wales, the Woolf Network 4th survey showed that some 82% of the respondents thought single joint experts appropriate for smaller cases on the “fast track” but only 54% thought them appropriate for larger, “multi-track” cases.

guidelines, written into the rules, designed to ensure that orders are not made in unsuitable cases and designed to take into account the main concerns discussed above.

632. Such guidelines might, for instance, state that the court should not exercise its power to order appointment of a SJE unless :-

- (a) at least one party applies for such an order; and,
- (b) the court is satisfied that a refusal by the other parties to agree to a SJE would in all the circumstances be unreasonable, taking into account in particular :-
 - (i) whether the issues requiring expert evidence in the case can confidently be identified in advance;
 - (ii) the nature of those issues and the likely degree of controversy attaching to the expert evidence in question;
 - (iii) the value and importance to the parties of the claim, as compared with the cost of employing separate PAEs;
 - (iv) whether any party has already incurred expenses instructing an expert who may be asked to give evidence as an expert witness in the case;
 - (v) whether any significant difficulties are likely to arise in relation to choosing the SJE, drawing up his instructions or providing him with the information and other facilities needed to perform his duties.

633. It is likely that the application of such guidelines would result in SJE orders being confined to the category of “low value, low complexity” cases where no reasons militate against use of a SJE, and that such cases would represent

a relatively small minority. The Working Party does not consider such an outcome objectionable if savings and benefits can nonetheless be achieved in those cases while avoiding the counter-productive effects of SJE orders made inappropriately. As pointed out in the Interim Report (at §516), where an order for a SJE proves to have been made inappropriately, the Court may direct that the parties be allowed to call their own experts.⁵²⁵

634. Where a court is in doubt as to the benefits of making a SJE order, it may wish to encourage the parties to consider such an appointment by consent (if necessary, choosing the relevant expert with the help of professional bodies such as the AE). It may be helpful if the questionnaire forming part of the summons for directions procedure recommended above⁵²⁶ were to require the parties to state whether they consider appointing a SJE appropriate in the case and if not, why not.

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 SJE is unreasonable in the circumstances.

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⁵²⁵ As occurred in *Daniels v Walker* [2000] 1 WLR 1382.

⁵²⁶ Section 13.5

Section 21: Case managing trials

Proposal 41

Proposal 41

Rules conferring express powers on the court to case manage trials, including powers to exclude otherwise admissible evidence and to limit cross-examination and submissions by counsel should be adopted, with the proviso that the exercise of such powers is subject to the parties' entitlement to receive a fair trial and a reasonable opportunity to lead evidence, cross-examine and make submissions.

Interim Report paras 519-528

635. The two main problems identified in the Interim Report in the context of managing trials were prolixity and unpredictability (especially of the length of time needed for the trial). These are problems which are obviously closely related to each other.
636. One proposed measure aimed at curbing prolixity involved giving to the court power to exclude otherwise relevant and admissible evidence which contributes to such prolixity. As with *Proposal 35*, there was general resistance to this idea. Consistently with *Recommendation 98* and for the reasons there discussed, the Working Party recommends against adopting a rule permitting exclusion of such evidence in the trial context. Respondents to the consultation favoured instead a more stringent approach to what is relevant, an approach adopted by the Working Party in *Recommendation 99* and equally applicable in the present context.
637. A second measure, aimed both at curbing prolixity and increasing the accuracy of trial time estimates, was to emphasise and enhance the court's case management powers appropriate to these purposes. There was general

support for such case management,⁵²⁷ with many of the respondents to the consultation stressing that this should primarily be done before the start of the trial rather than involving a trial judge cutting short submissions or evidence during the trial.

638. This is an approach endorsed by the Working Party. One model highlighted in the Interim Report was from Western Australia, where O 34 r 5A of the Supreme Court Rules provides :-

- “(1) A Judge may at any time by direction –
- (a) limit the time to be taken in examining, cross-examining or re-examining a witness;
 - (b) limit the number of witnesses (including expert witnesses) that a party may call on a particular issue;
 - (c) limit the time to be taken in making any oral submission;
 - (d) limit the time to be taken by a party in presenting its case;
 - (e) limit the time to be taken by the trial;
 - (f) amend any such limitation;
- (2) In deciding whether to make any such direction, a Judge shall have regard to these matters in addition to any other matters that may be relevant :-
- (a) the time limited for a trial must be reasonable;
 - (b) any such direction must not detract from the principle that each party is entitled to a fair trial;
 - (c) any such direction must not detract from the principle that each party must be given a reasonable opportunity to lead evidence and cross-examine witnesses;
 - (d) the complexity or simplicity of the case;
 - (e) the number of witnesses to be called by the parties;

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⁵²⁷ Including from the Bar Association, the BSCPI, the Law Society, one set of barristers' chambers and two firms of solicitors.

- (f) the volume and character of the evidence to be led;
- (g) the state of the Court lists;
- (h) the time expected to be taken for the trial; and
- (i) the importance of the issues and the case as a whole.”

639. In the Working Party’s view, directions of the kind envisaged in the foregoing rule ought routinely to be given at the pre-trial review.⁵²⁸ At that stage, the court ought to be in a good position to make an assessment of the needs of the trial. With the parties’ cooperation, it ought to be possible to arrive at a reasonably accurate estimate of the time needed for each element of the trial – the opening and closing submissions, the time needed to deal with each side’s witnesses, and so forth – and so arriving at the time needed for the trial as a whole. To have such directions beforehand would enable better planning and resource allocation for the trial. Knowing what periods of time have been allotted for each task, counsel would be able to plan their submissions and examination and cross-examination accordingly. This would promote fairness in the distribution of trial time between the parties, avoiding the common situation of one party taking up more than his fair share of the time allotted and forcing the other party to rush through his part of the case.

640. While it is likely that the court already has ample case management powers to give such directions, it would be desirable to have a rule specifically setting out these powers along the lines of the Western Australian model.

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⁵²⁸ This accords with the view of the BSCPI which urged adoption of this model to be applied at “..... a pre-trial conference with the designated trial judge to work out the schedule of witnesses and the points to be pursued. The parties would then have an opportunity of persuading the Judge as to why certain evidence needs to be called and a more accurate estimate of the time needed for the trial can then be made.”

While the powers should generally be exercised at the pre-trial review (as should be made clear in a practice direction), the rule itself should, as with the Western Australian model, give the court flexibility to exercise the powers “at any time” and to amend such trial management directions previously given.

641. As such a rule would not involve giving the court a general power to exclude relevant and admissible evidence or to exercise the wide-ranging powers envisaged in CPR 32.1, the need for primary legislation mentioned in the Interim Report does not arise. Such a rule would fall within the general rule-making power in section 54 of the HCO.
642. Rule 1(b), giving the court power “to limit the number of witnesses (including expert witnesses) that a party may call on a particular issue” should perhaps be discussed briefly. It may be objected that this rule would involve the court trespassing into the area of excluding relevant and admissible evidence. However, the Working Party considers this an invalid objection.
- (a) In the first place, the proposed rule does not permit the court to exclude evidence altogether on any particular issue. It requires the party concerned to avoid spending excessive time adducing evidence on the issues, echoing the approach to relevance as a matter of degree, reflected in *Recommendation 99* above.
- (b) Secondly, the proposal requires the power to limit witnesses to be exercised subject to the constraints of Rule 2 (b) (not detracting from the principle that each party is entitled to a fair trial) and Rule 2(c) (ensuring that each party is given a reasonable opportunity to lead evidence and cross-examine witnesses). Taking these matters into

account, a restriction on the number of witnesses of fact called on a particular issue would not impose any unwarranted restriction on a party's freedom to call needed evidence. It enables the court to arrest repetitive and unhelpful testimony which does no more than prolong the trial.

- (c) As previously noted, the court already has power under O 38 r 4, to limit the number of expert witnesses who may be called at the trial.

Recommendation 108: A rule along the lines of O 34 r 5A of the Western Australian Rules of the Supreme Court should be adopted, setting out the court's powers of case management in relation to trials, together with a practice direction providing that such powers should primarily be exercised at the pre-trial review.

Section 22: Leave to appeal

Proposals 42 to 47

Proposal 42

A requirement that interlocutory appeals to the Court of Appeal be brought only with leave of the Court of First Instance or the Court of Appeal should be introduced.

Interim Report paras 529-532

22.1 Leave requirement for interlocutory appeals

643. As the Interim Report pointed out, where there is satellite litigation on interlocutory issues (which are often of only marginal significance to the outcome of the litigation) major delay and expense is likely to be incurred. This was generally acknowledged in the consultation exercise and virtually all those responding supported the proposal to introduce a requirement for leave to appeal in respect of interlocutory appeals.⁵²⁹ This was not a radical suggestion since many jurisdictions, including England and Wales prior to adoption of the Woolf reforms, have for many years made interlocutory appeals subject to the grant of leave.

644. However, certain reservations were expressed. It was said, for instance, that judges would have to strive to achieve consistency in deciding whether to grant leave to appeal or else there would be dissatisfaction. A number of

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⁵²⁹ Supporters included the Bar Association, the BSCPI, the Law Society, the LAD, the APAA, the HKMLA, the High Court masters, the JCGWG, the BCC, one set of barristers' chambers, two firms of solicitors and an individual respondent.

respondents also argued for an initially liberal approach to the granting of leave since it would take time for the proposed reforms to bed down. Indeed, some respondents suggested, for the same reason, that the introduction of the requirement for leave to appeal should be deferred until some time after introduction of the reforms. Another important concern was that the leave requirement should not cause costs to increase by introducing the need to have court hearings on leave applications.

645. Bearing these concerns in mind, the Working Party's view (supported by the judges of the Court of Appeal) is that *Proposal 42* should be adopted⁵³⁰ with the following elaboration⁵³¹ :-

- (a) The leave requirement to be introduced should relate only to appeals from the CFI judge to the Court of Appeal (but should not affect cases where leave to appeal is already regulated by statute⁵³²).
- (b) As previously discussed,⁵³³ appeals from the master to the judge (whether from the master's decision on the papers or after a contested hearing) should remain available as of right but subject to a rule precluding, save in exceptional circumstances,⁵³⁴ the introduction of fresh evidence on the appeal.

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⁵³⁰ Requiring amendment to section 14 of the HCO.

⁵³¹ Leave requirements concerning appeals from the Court of Appeal to the Court of Final Appeal are already laid down in the Hong Kong Court of Final Appeal Ordinance, Cap 484 and do not call for further consideration here.

⁵³² As in the case of the Labour Tribunal Ordinance, Cap 25, ss 32 and 35A and the Small Claims Tribunal Ordinance, Cap 338, ss 28 and 29A.

⁵³³ Section 17.4 above.

⁵³⁴ Such as the circumstances laid down in *Ladd v Marshall* [1954] 1 WLR 1489.

- (c) Where a judgment deciding the substantive rights of a party is obtained through a summary process, by way of exception, there should be an appeal as of right notwithstanding the interlocutory nature of that decision. Thus, where summary judgment (whether final or for damages to be assessed) is obtained against a defendant under O 14 or O 86, or where a plaintiff's action is dismissed under O 18 r 19 or the inherent jurisdiction, an appeal to the Court of Appeal should lie as of right. For the avoidance of doubt, it ought to be made clear⁵³⁵ that the same applies to a determination of a question of law pursuant to O 14A or determination of a preliminary issue under O 33.
- (d) Where an application to strike out or an application for summary judgment fails (in the latter case, whether leave to defend is conditional or unconditional), since no substantive rights are determined, the exception should not apply. In such cases, any appeal, like other interlocutory appeals, should require the court's leave.
- (e) Parties bringing unwarranted appeals as of right should expect to incur appropriate costs sanctions. The respondent may also, as at present,⁵³⁶ apply for security for the costs of such appeals.
- (f) Certain other CFI decisions should also expressly be exempted from the leave requirement because of the subject-matter of the decision.

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⁵³⁵ It should be noted that section 14(4) of the HCO specifically provides that rules made under section 54 may provide "for orders or judgments of any prescribed description to be treated for any prescribed purpose connected with appeals to the Court of Appeal as final or as interlocutory."

⁵³⁶ See HKCP 2002, 59/10/28-38.

Examples are decisions committing a person to prison for contempt and decisions refusing habeas corpus. Appeals as of right should also be available in relation to judicial review decisions, including the decision to refuse leave to apply for judicial review and the substantive decision.

- (g) 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.⁵³⁷

646. A procedure designed to avoid, so far as possible, separate oral hearings of applications for leave to appeal should be adopted. The approach outlined below has the support of the judges of the Court of Appeal.

- (a) The question of leave to appeal, like costs, should routinely be addressed whenever a judge hears an interlocutory application. If the application is disposed of *ex tempore*, the judge ought to decide there and then whether to grant leave to appeal after hearing the parties on that subject.
- (b) If the judge is to hand his decision down later, he should invite the parties to address him in advance on whether leave should be granted whether the application succeeds or fails (without necessarily having decided whether to appeal if the decision goes against them). He should then deal with leave to appeal in the decision handed down without further submissions. If the lateness of the day makes it inconvenient to enter into a discussion of leave to appeal at the end of

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⁵³⁷ A similar power exists under CPR 52.3(7). See White Book 52PD.11.

the argument and the decision is to be handed down, the judge might invite the parties to file written submissions on this question. Having just heard the application, the judge ought to be well placed to make a decision without much further assistance.

- (c) Adopting the foregoing procedure, a fresh hearing to apply for leave to appeal before the CFI judge should hardly ever be needed.
- (d) Where the CFI refuses leave, the applicant should be entitled to apply in writing to the Court of Appeal which should generally deal with the leave application on the papers and without an oral hearing. The application for leave should be accompanied by the applicant's brief written submissions setting out the grounds for seeking leave and, within a specified time after being served with the papers, the respondent should file any brief submissions he wishes to make resisting leave.
- (e) When dealing with such leave applications on the papers, the Court of Appeal would be duly constituted by two Justices of Appeal, as provided for by section 34B(4)(a) of the HCO.
- (f) The Court of Appeal ought to have powers either (i) to grant leave; (ii) to refuse leave; or exceptionally (iii) to summon the parties for an oral hearing on the question of leave either before the two judges who have considered the papers or before a panel of three judges (for example, where the two judges are unable to agree). It may, of course, be the better course simply to grant leave where there is no agreement between the two judges originally seised of the matter.
- (g) Where the Court of Appeal refuses leave, it should not be required to give reasons beyond stating in the order dismissing the application the ground upon which leave is refused (eg, subject to the discussion

which follows, that the application has no reasonable prospects of success, or that it has been made out of time, and so forth).

647. The Court of Appeal's refusal of leave ought to be final, without any right to apply, either to the Court of Appeal or to the Appeal Committee of the Court of Final Appeal for leave to appeal to the Court of Final Appeal.

648. In taking the above approach the Working Party has taken account of the recent decision of the Court of Final Appeal in *A Solicitor v The Law Society of Hong Kong* (presently Unreported, FACV No 7 of 2003, 19 December 2003) laying down the approach to determining the validity of statutory provisions which seek to accord finality to decisions of courts other than the CFA. It was there held that :-

- (a) where the legislature seeks to limit the Court of Final Appeal's power of final adjudication, the legislative provision is reviewable for consistency with Art 82 of the Basic Law (which vests such power in the CFA);
- (b) the limiting provision cannot be imposed arbitrarily, but will be upheld if it pursues a legitimate purpose and if a reasonable proportionality exists between the limitation and the purpose sought to be achieved;
- (c) to identify the purpose of the limitation with a view to determining whether it is legitimate, the CFA will look at the subject-matter of the disputes in question:

“..... whether it concerns fact or law, whether it relates to substantive rights and obligations or only procedural matters, what is at stake, the need for speedy resolution and the cost implications of dispute resolution, including any possible appeals, will have to be considered. The legitimacy of any proposal will depend on whether it is consistent with the public interest, which of course has many

facets, including the proper administration of justice. Then, in considering whether the limitation is reasonably proportionate to the legitimate purpose, it will be necessary to examine the nature and extent of the limitation.” (at para 33)

649. The proposed limitation of rights to appeal under discussion relates to purely interlocutory questions which have already been considered by a master and a judge at first instance and which are considered by at least two Justices of Appeal to lack any reasonable prospect of success on appeal. Making a refusal of leave to appeal final in such circumstances would, in the Working Party’s view, be valid. The decision sought to be appealed does not involve substantive rights and the objective of the limitation is the legitimate and proportional promotion of cost-effective and speedy dispute resolution.
650. Where the Court of Appeal grants leave to appeal and determines the interlocutory appeal, it would remain open to the losing party to apply for leave to appeal to the Court of Final Appeal pursuant to section 22(1)(b) of the Hong Kong Court of Final Appeal Ordinance. If he is able to satisfy the Court of Appeal or the Appeal Committee “that the question involved in the appeal is one which, by reason of its great general or public importance, or otherwise, ought to be submitted to the Court for decision” the matter may properly proceed for determination at the highest level.

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.

Proposal 43

All appeals from the Court of First Instance to the Court of Appeal (and not merely interlocutory appeals as proposed in Proposal 42) should be subject to a requirement of leave.

Interim Report paras 533-534

22.2 A leave requirement for final appeals

651. There was significant opposition⁵³⁸ to the introduction of a requirement for leave to appeal in relation to final appeals. Several, including the Bar Association, argued that the right of appeal to the Court of Appeal is a necessary safeguard against judicial fallibility and the vicissitudes of litigation. One respondent, made the point that an incompetent appeal or

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⁵³⁸ From, among others, the Bar Association, the BSCPI, the Law Society and a set of barristers' chambers.

one which is frivolous, vexatious or an abuse of the process could be struck out in the inherent jurisdiction of the Court of Appeal.⁵³⁹

652. The Working Party considers it a desirable safeguard that a party should have at least one opportunity to appeal an adverse final judgment as of right to a higher court.

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

Proposal 44

Leave to appeal should only be granted where the court considers that the appeal would have a real prospect of success or that there is some other compelling reason why the appeal should be heard.

Interim Report paras 535-539

Proposal 45

Leave to appeal from case management decisions should generally not be granted unless the case raises a point of principle of sufficient significance to justify the adverse procedural and costs consequences of permitting the appeal to proceed.

Interim Report paras 535-539

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⁵³⁹ HKCP 2002, 59/3/6.

22.3 Threshold test for granting leave

653. Assuming that a leave requirement is to be introduced, the threshold test for obtaining leave must be established. Since the Working Party has recommended that the leave condition should only apply to interlocutory appeals, the focus is on the test to be met before an interlocutory appeal from a CFI judge is allowed to go forward to the Court of Appeal.
654. The respondents to the consultation were generally agreed that some criterion or criteria for the grant of leave to appeal ought to be spelt out in the rules. However, there were varying views as to how high the threshold should be and what words should be used to express the test.
655. *Proposal 44* canvasses a test requiring the court to be satisfied that the appeal would have “a real prospect of success.”⁵⁴⁰ The Bar Association and the Law Society, and a number of the other respondents,⁵⁴¹ expressed support for that formula. However, given its ambiguity and the uncertainty of how it would operate in practice (previously discussed in relation to the summary disposal of proceedings⁵⁴²), it is not surprising that these respondents were not necessarily all attributing the same meaning to the phrase.
- (a) As previously pointed out, in England and Wales it has been taken to mean the opposite of “fanciful”, which, if adopted in the leave to appeal context, would import a very low threshold for the grant of

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⁵⁴⁰ The other criterion, namely, that there should be “some other compelling reason why the appeal should be heard” involves separate considerations not under discussion.

⁵⁴¹ Including, the APAA, the HKMLA, the BCC, one set of barristers’ chambers and one firm of solicitors.

⁵⁴² Section 10.2 above.

leave. An appeal while not “fanciful” may be little more than just arguable and quite likely to fail.

- (b) On the other hand, some respondents⁵⁴³ appear to have thought that “a real prospect of success” meant something like “a real *likelihood* of success” and so suggested that this was too high a threshold.

656. In the Working Party’s view, the test should be more stringent than merely having to show that the appeal is arguable and “not fanciful”, but considerably less stringent than having to show a “probability” of success. Although similar problems could arise with the parties attributing different meanings to any phrase chosen, the Working Party considers it desirable to adopt as the test for granting leave a requirement “*that the appeal has reasonable prospects of success*”. It is hoped that this would convey the notion that the prospects of succeeding in the appeal must be “reasonable” and therefore more than “not fanciful”, without having to be “probable” – just “reasonable”. As pointed out in the Interim Report, this was the sense attributed to the phrase “reasonable prospects of success” in the Court of Appeal cases discussing the differences, if any, between the test for refusing summary judgment and for setting aside a default judgment.⁵⁴⁴

657. It appears to the Working Party that such a threshold would be fair. If an applicant cannot show that the proposed interlocutory appeal has reasonable prospects of success, a refusal of leave does him no injustice. Most interlocutory decisions are discretionary and it is well-established that an

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⁵⁴³ Possibly the LAD and a firm of solicitors.

⁵⁴⁴ See *Yeu Shing Construction Co Ltd v Pioneer Concrete (HK) Ltd* [1987] 2 HKC 187 at 191, per Silke VP; and *Premier Fashion Wears Ltd v Li Hing-chung* [1994] 1 HKLR 377 at 383, per Godfrey JA.

appellate tribunal will not interfere with a discretionary decision of the court below unless it is wrong in principle or is plainly wrong, even if the appellate court might itself have made a different decision.⁵⁴⁵ Accordingly, a refusal of leave to appeal where there are no reasonable prospects of success will often be a kindness to the applicant, saving him the costs of arriving at the same result after a full hearing of the appeal.

658. There should also be a discretion to grant leave to appeal for cases which may not pass the reasonable prospects of success test but where “there is some other compelling reason why the appeal should be heard”. For instance, the Court of Appeal may wish to take the opportunity to provide much needed clarification in an area of the law or to entertain an argument that the law ought to be changed, even though it is questionable whether the appellant has less than reasonable prospects of success.

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.

22.4 Case management decisions and leave to appeal

659. If the “reasonable prospects of success” test is adopted in relation to interlocutory appeals, it becomes unnecessary in practice to adopt *Proposal*

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⁵⁴⁵ See HKCP 2002, 59/1/49.

45. The Court of Appeal has repeatedly made it clear that case management decisions of the first instance judge are matters within his discretion and that it will not interfere with that discretion in the absence of plain error.⁵⁴⁶ As Bokhary JA put it in *Cheung Yee-mong v So Kwok-yan* [1996] 2 HKLR 48 at 51 :-

“Case management is pre-eminently within the province of the trial judge. And it is only in wholly exceptional circumstances that we will interfere.”

660. Often cited is the dictum of Asquith LJ in *Bellenden (formerly Satterthwaite) v Satterthwaite* [1948] 1 All ER 343 at 345, dealing generally with appeals against the exercise of discretion, as follows :-

“We are here concerned with a judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong, that an appellate body is entitled to interfere”.

661. Accordingly, where a CFI judge makes a case management decision which is not wrong in principle and which does not “exceed the generous ambit within which reasonable disagreement is possible”, it would not be regarded as appealable on the proposed test and leave would be refused. On the other hand, a case management decision which raises a significant point of principle would necessarily enable the aggrieved party to contend that the judge had erred in principle in the exercise of his discretion so that, assuming the appeal had reasonable prospects of success, it would qualify for leave on the test proposed above. Indeed, even if it is questionable whether the appeal has reasonable prospects of success, the fact that it raises a significant point of principle may suffice to justify the grant of leave on

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⁵⁴⁶ See, eg, *Carrion Investments Limited (In Liquidation) v Price Waterhouse International* [1994] 1 HKLR 150 at 153 and 154.

the basis that it provides “some other compelling reason why the appeal should be heard”.

662. As two of the respondents⁵⁴⁷ to the consultation pointed out, adopting *Proposal 45* might have negative consequences. It may be difficult to distinguish between “pure case management” decisions and other interlocutory decisions and so may lead to much sterile argument on the distinction.

663. For the foregoing reasons, the Working Party recommends against adopting *Proposal 45*.

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.

Proposal 46

Leave to appeal from a decision itself given on appeal should generally not be granted unless the case raises an important point of principle or practice or some other compelling reason exists for the grant of leave.

Interim Report paras 535-539

22.5 *Tiers of appeals*

664. The intention of *Proposal 46* is to exclude second appeals to a third-tier of court unless the case raises important points of principle. The substantial

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⁵⁴⁷ The BSCPI and a set of barristers’ chambers.

impact of such a rule (introduced in England and Wales by section 55(1) of the Access to Justice Act 1999) was described by Brooke LJ in *Tanfern Ltd v Cameron-MacDonald (Practice Note)* [2000] 1 WLR 1311 at 1319 §42, as follows :-

“This reform introduces a major change to our appeal procedures. It will no longer be possible to pursue a second appeal to the Court of Appeal merely because the appeal is "properly arguable" or "because it has a real prospect of success." The tougher rules introduced by a recent Court of Appeal practice direction for "second tier appeals" related only to cases where a would-be appellant had already lost twice in the courts below: see *Practice Direction (Court of Appeal (Civil Division))* [1999] 1 WLR 1027, 1036, para 2.19.1. The new statutory provision is even tougher - the relevant point of principle or practice must be an important one - and it has effect even if the would-be appellant won in the lower court before losing in the appeal court. The decision of the first appeal court is now to be given primacy unless the Court of Appeal itself considers that the appeal would raise an important point of principle or practice, or that there is some other compelling reason for it to hear this second appeal.”

665. In Hong Kong, where the third tier of court is the Court of Final Appeal, the principle already operates in respect of appeals requiring leave, both from interlocutory and final judgments of the Court of Appeal.⁵⁴⁸ *Proposal 46* therefore does not need to concern itself with the Court of Final Appeal.
666. The Court of Appeal is potentially a third-tier tribunal on a second appeal if a matter was first decided on the merits by the master, then appealed to the judge and then taken on further appeal to the Court of Appeal. The effect of *Proposal 46* would therefore be to restrict the right of appeal from the judge to the Court of Appeal in cases where the application had first been decided by a master.

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⁵⁴⁸ Hong Kong Court of Final Appeal Ordinance, Cap 484, section 22.

667. This Proposal must be assessed in the context of the Working Party's recommendations :-

- (a) that masters should have a discretion to deal with interlocutory applications on the papers, to refer them for hearing to the judge or to a master;⁵⁴⁹ and,
- (b) that an appeal from the master to the judge should be available as of right.⁵⁵⁰

668. The Working Party considers that in this context, it would be undesirable to adopt *Proposal 46*. A party's chances of securing leave to appeal to the Court of Appeal should not be dependent upon how a master exercised his discretion as to whether the interlocutory application should be dealt with by a master or be sent directly to a judge. The master should exercise his discretion freely and should not be inhibited from dealing with a case which merits immediate disposal on the papers or from directing a hearing before the master, for fear of depriving the parties of a hearing before the Court of Appeal.

669. The "reasonable prospects of success" test ought to provide a sufficient filter, and costs orders a sufficient deterrent, against unwarranted interlocutory appeals to the Court of Appeal without also adopting a "third-tier" basis of exclusion. The Working Party accordingly recommends against adoption of *Proposal 46*.

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⁵⁴⁹ Recommendation 85.

⁵⁵⁰ Recommendation 109.

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

Proposal 47

If a requirement of leave for appeals to the Court of Appeal is introduced, the Court of Appeal should have power, in relation to applications for leave which are wholly unmeritorious and tantamount to an abuse of its process, to dismiss such applications without an oral hearing, subject to the applicant being given one final opportunity to show cause in writing why the application should not be so dismissed.

Interim Report paras 540-541

670. *Proposal 47* would be of considerable importance if a requirement for leave to appeal were introduced for appeals from final judgments at first instance. However, since the Working Party has recommended against such a requirement⁵⁵¹ and since it has recommended that the Court of Appeal should deal with applications for leave to appeal on the papers and without an oral hearing,⁵⁵² *Proposal 47* no longer has a role to play.

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.

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⁵⁵¹ *Recommendation 114.*

⁵⁵² *Recommendation 112.*

Section 23: Appeals

Proposals 48 to 50

Proposal 48

Rules designed to enable the substantive hearing of appeals to be dealt with efficiently, including rules enabling the Court of Appeal to give directions case managing the hearing, should be adopted.

Interim Report paras 540, 542-543

671. *Proposal 48* canvasses the adoption of a procedure similar to that used under the CPR to facilitate the case management of appeals: when the parties are given notice of the hearing date they receive from the court a questionnaire requiring them to provide information about the appeal and its state of preparation, including time estimates from the respective advocates who are to conduct the appeal.
672. Another procedure mentioned for consideration is sometimes used where judgment is reserved and where consequential orders will need to be addressed when judgment is delivered. The relevant practice direction⁵⁵³ provides that a copy of the judgment may be given to the legal advisers “by 4 pm on the second working day before judgment is due to be pronounced on the condition that the contents are not communicated to the parties themselves until one hour before the listed time for pronouncement of judgment.” This is done with the intention of enabling the advocates to deal efficiently with any consequential orders when the court re-convenes.

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⁵⁵³ 52PD §15.12-15.14.

23.1 Case management provisions presently applicable

673. Order 59 r 9(3) provides for the pre-hearing case management of appeals to the Court of Appeal as follows :-

“At any time after an appeal has been set down in accordance with rule 5 the Registrar may give such directions in relation to the documents to be produced at the appeal, and the manner in which they are to be presented, and as to other matters incidental to the conduct of the appeal, as appear best adapted to secure the just, expeditious and economical disposal of the appeal.”

674. It is supplemented by the Practice Direction on Civil Appeals 4.1/6 §§23-26 in the following terms :-

- “23. The Registrar of Civil Appeals may, at any stage after an appeal has been set down, consider whether to exercise the powers conferred on the Registrar by O 59 r 9(3) and (4) of the Rules of the High Court to give such directions in relation to the documents to be produced at the appeal, and the manner in which they are required to be produced and as to other matters incidental to the conduct of the appeal, as appear best adapted to secure the just, expeditious and economical disposal of the appeal.
24. Before giving any such directions the Registrar of Civil Appeals may consult the Vice-President or Justice of Appeal who is expected to preside at the hearing of the appeal.
25. Such directions may be communicated to the parties either on paper or at a hearing and any hearing will, if appropriate, be held before the Registrar of Civil Appeals or that Vice-President or Justice of Appeal.
26. The directions to be given may include appropriate directions as to length of time to be allowed to each party for oral argument.”

675. Additionally, the Court of Appeal has all the powers of case management exercisable by the CFI⁵⁵⁴ and sometimes holds directions hearings, usually conducted by the single judge, in advance of particularly long or complex appeals.

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⁵⁵⁴ O 59 r 10.

23.2 *The consultation response*

676. There was a mixed response to this proposal. Some respondents, including the Bar Association and the BSCPI, thought it might be worthwhile, subject to further consultation, to introduce a questionnaire and for there to be some pre-hearing case management as a matter of course.⁵⁵⁵ The High Court masters were in favour, commenting that there is presently much unnecessary correspondence between the court and parties over time estimates, fixing dates and preparation of appeal bundles. One respondent supported a rule or practice direction requiring skeleton arguments to be filed with the Notice of Appeal, arguing that this would be “more time-efficient from the practitioners’ point of view, and less costly for the client”.
677. However, the others who responded⁵⁵⁶ – and crucially the great majority of the judges of the Court of Appeal – considered the proposed reform unnecessary and undesirable. Their view was that only a few appeals require pre-hearing case management and that the system is well capable of identifying these, enabling the court or the Registrar to take the necessary steps. To require another form to be filled in and processed for every appeal would be an unnecessary chore.
678. However, all the judges of the Court of Appeal considered it desirable as a matter of case management, that applications which are interlocutory to pending appeals (eg, for a stay of execution or for security for the costs of

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⁵⁵⁵ The Law Society’s position is not clear. At p 69 of its Report, it supports *Proposal 48*. However, at p 18 of *Appendix 2*, it rejects the proposal and suggests that it is “premised on a misunderstanding of solicitor/client relationship”. It may be that it was in favour of the questionnaire but against advance, embargoed judgments.

⁵⁵⁶ Including the BCC and a firm of solicitors.

the appeal) should, as with the proposed applications for leave to appeal, 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.

679. These decisions are generally in the nature of case management decisions and therefore are likely to be final in practice. However, since they will have involved only one tier of adjudication, we do not consider it necessary to recommend that they be made final by statutory provision or rule. Of course, any appeal would require leave pursuant to section 22(1)(b) of the Hong Kong Court of Final Appeal Ordinance and therefore a requirement to show that the question raised is one which, by reason of its great general or public importance, or otherwise, ought to be submitted to the Court for decision.
680. The proposal for release of embargoed judgments in advance to legal representatives did not attract much comment. As footnoted above, it may be that the Law Society (whose position was not made clear) was in fact against this proposal on the basis that it does not favour a duty to keep matters confidential (even if only temporarily) from the client.
681. Taking account of the responses received, it is the Working Party's view that the Court of Appeal already has sufficient powers of case management. If it was thought desirable to develop practices along the lines mentioned, appropriate additions to the Practice Direction could subsequently be made. Accordingly, *Proposal 48* should not be adopted.

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).

Proposal 49

Appeals should be limited to a review of the decision of the lower court, subject to the appellate court having a discretion to treat the appeal as a re-hearing if the circumstances merit such an approach.

Interim Report paras 544-551

Proposal 50

The principles upon which appeals are determined should apply uniformly to the Court of First Instance and the Court of Appeal.

Interim Report paras 544-551

682. *Proposal 49* addresses a possible change to the nature of the appellate process undertaken by the Court of Appeal and *Proposal 50* canvasses applying the same approach to all appeals.

23.3 The present appellate approach

683. Appeals conducted by the Court of Appeal are at present “by way of rehearing”. The relevant rules provide as follows :-

“O 59 r 3

An appeal to the Court of Appeal shall be by way of rehearing

O 59 r 10

- (1) In relation to an appeal the Court of Appeal shall have all the powers and duties as to amendment and otherwise of the Court of First Instance.
- (2) The Court of Appeal shall have power to receive further evidence on questions of fact, either by oral examination in court, by affidavit, or by deposition taken before an examiner, but, in the case of an appeal from a judgment after trial or hearing of any cause or matter on the merits, no such further evidence (other than evidence as to matters which have occurred after the date of the trial or hearing) shall be admitted except on special grounds.
- (3) The Court of Appeal shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been given or made, and to make such further or other order as the case may require.”

684. Features of the present procedure for appeals to be by way of rehearing include the following :-

- (a) As appears from the first three sub-rules of O 59 r 10, it is open to the Court of Appeal to re-assess the facts, albeit generally only on the basis of the documentary record rather than by hearing the oral evidence afresh. This contrasts, for example, with the role played by the Court of Appeal on a statutory appeal by way of case stated,

where it has a power of review, limited to questions of jurisdiction and error of law.⁵⁵⁷

- (b) The Court of Appeal has a discretion, reflected in O 59 r 10(2), to admit fresh evidence which was not before the court below,⁵⁵⁸ but it does so only on “special grounds”. Those “special grounds”, set out in *Ladd v Marshall* [1954] 1 WLR 1489 and applied ever since, were explained by Denning LJ as follows :-

“To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.”⁵⁵⁹

- (c) The Court of Appeal has power to set aside the order of the judge below and to substitute for it the order which it considers the judge ought to have made. Indeed, by virtue of O 59 r 10(3), it can go beyond what would have been open to the judge and make “such further or other order as the case may require”.⁵⁶⁰

23.4 The CPR approach

685. CPR 52.11 provides for the scope of appeals to be limited to a review of the lower court’s decision rather than a re-hearing. It provides :-

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⁵⁵⁷ *Powell v Streatham Manor Nursing Home* [1935] AC 243 at 263 *et seq.*

⁵⁵⁸ *Attorney-General v Birmingham Tame & Rea District Drainage Board* [1912] AC 788 at 801-802.

⁵⁵⁹ At 1491.

⁵⁶⁰ *New Brunswick Ry Co v British and French Trust Corp* [1939] AC 1 at 32-33.

- “(1) Every appeal will be limited to a review of the decision of the lower court unless—
- (a) a practice direction makes different provision for a particular category of appeal; or
 - (b) the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing.
- (2) Unless it orders otherwise, the appeal court will not receive—
- (a) oral evidence; or
 - (b) evidence which was not before the lower court.
- (3) The appeal court will allow an appeal where the decision of the lower court was—
- (a) wrong; or
 - (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court.
- (4) The appeal court may draw any inference of fact which it considers justified on the evidence.
- (5) At the hearing of the appeal a party may not rely on a matter not contained in his appeal notice unless the appeal court gives permission.”

686. The migration from re-hearing to review under CPR 52.11 has not been absolute. Thus, sub-rule (1) itself preserves re-hearings where required by the interests of justice or provided for by practice direction.⁵⁶¹ Sub-rule (4) allows the appellate court to re-assess the lower court’s treatment of the evidence to the extent of drawing inferences from the findings below. And while Sub-rule (2) provides that fresh evidence is generally not received, the

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⁵⁶¹ So far the only relevant practice direction is 52 PD s9.1 which provides for re-hearings where the appeal is from a minister, person or other body who “(1) did not hold a hearing to come to that decision; or (2) held a hearing to come to that decision, but the procedure adopted did not provide for the consideration of evidence”.

courts have in practice given great weight to the *Ladd v Marshall* principles as a basis for exercising the discretion to admit such fresh evidence.⁵⁶²

687. Nevertheless, important differences have been introduced. As Brooke LJ pointed out in *Tanfern Ltd v Cameron-MacDonald (Practice Note)* [2000] 1 WLR 1311 at 1317, §§30-31, CPR 52.11(3) means that :-

“The appeal court will only allow an appeal where the decision of the lower court was wrong, or where it was unjust because of a serious procedural or other irregularity in the proceedings in the lower court

As his Lordship commented, the application of this approach to all appeals, including appeals from masters’ decisions, marks a significant change :-

“This marks a significant change in practice, in relation to what used to be called ‘interlocutory appeals’ from district judges or masters. Under the old practice, the appeal to a judge was a rehearing in the fullest sense of the word, and the judge exercised his/her discretion afresh, while giving appropriate weight to the way the lower court had exercised its discretion in the matter. Under the new practice, the decision of the lower court will attract much greater significance. The appeal court’s duty is now limited to a review of that decision, and it may only interfere in the quite limited circumstances set out in CPR 52.11(3).”

23.5 *The consultation response*

688. With a few exceptions,⁵⁶³ the reaction to these two proposals was negative. Most respondents were not persuaded that any change was warranted and preferred to allow the Court of Appeal full re-hearing powers.⁵⁶⁴ There was a fear, expressed by the DOJ, that limiting the Court of Appeal to powers of

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⁵⁶² *Hertfordshire Investments Ltd v Bubb* [2000] 1 WLR 2318 at 2325; *Hamilton v Al Fayed* (Unreported) English Court of Appeal, December 21, 2000.

⁵⁶³ The APAA and a firm of solicitors.

⁵⁶⁴ Including the Bar Association, the BSCPI, the DOJ, most Justices of Appeal and a set of barristers’ chambers. The Law Society did not expressly address the question. The BCC opposed the proposals but on the (unexplained) ground that it “could lead to the flood-gates on appeals being opened.”

review might prevent it from doing justice in some cases. Most appeal court judges were against a change.

689. In the light of the consultation response and of the recommendations made by the Working Party concerning hearings before and appeals from the masters and the introduction of a requirement for leave to appeal from the judge to the Court of Appeal on interlocutory matters, the Working Party is of the view that *Proposals 49 and 50* should not be adopted.

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.

Section 24: General approach to inter-party costs

Proposal 51

Proposal 51

A general rule should be adopted requiring the court to take into account the reasonableness or otherwise of the parties' conduct in the light of the overriding objective in relation to the economic conduct or disposal of the claim before and during the proceedings when exercising its discretion in relation to costs.

Interim Report paras 552-557

24.1 The present approach

690. In the present context, we are concerned with two main principles which inform the court's discretion as to when one party should be ordered to pay another party's costs.

691. The first is that the winning party should be able to shift the burden of his legal costs (subject to taxation) to the other party. This "cost-shifting" principle or the principle that "costs normally follow the event" is applied both in relation to a party who ultimately wins the action (in which case he gets the costs of the action and of any interlocutory applications where costs were ordered to be "in the cause") as well as to a party who succeeds in a particular interlocutory application (the "event" being such success and the costs awarded being the costs of that application).

692. This approach is made the dominant, usually applicable, principle by O 62 r 3(2) which provides :-

"If the Court in the exercise of its discretion sees fit to make any order as to the costs of or incidental to any proceedings, the Court shall, subject to this Order,

order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs.”

693. Order 62 r 3 recognizes that in certain circumstances the “follow the event” principle should not apply. It lists particular exceptions, for instance, the costs of amendments without leave (where the amending party pays), the costs of time extensions (where the party seeking the extension pays), the costs of proving facts or documents where a notice to admit those facts or documents has not led to an admission, the costs where a defendant has discontinued his counterclaim without leave, and so forth.

694. The other main principle is that costs orders should be used to deter unwarranted steps in the proceedings and to compensate a party who has had to incur costs as a result of the other party taking such steps. This is reflected in O 62 r 7 which materially provides as follows :-

- “(1) Where in any cause or matter any thing is done or omission is made improperly or unnecessarily by or on behalf of a party, the Court may direct that any costs to that party in respect of it shall not be allowed to him and that any costs occasioned by it to other parties shall be paid by him to them.
- (2) Without prejudice to the generality of paragraph (1), the Court shall for the purpose of that paragraph have regard in particular to the following matters, that is to say—
 - (a) the omission to do any thing the doing of which would have been calculated to save costs;
 - (b) the doing of any thing calculated to occasion, or in a manner or at a time calculated to occasion, unnecessary costs;
 - (c) any unnecessary delay in the proceedings.”

695. *Proposal 51* canvasses a modification of these rules in three main respects, namely, that :-

- (a) The “follow the event” principle should no longer be dominant, but merely one principle which may be applied, if appropriate, in a particular case.
- (b) The reasonableness or otherwise of the parties’ conduct should be expressly linked to the “overriding objective” canvassed in *Proposal 1* and should be made the basis for making interlocutory costs orders.
- (c) Costs orders should be made in respect of the parties’ conduct before as well as during the proceedings.

24.2 The consultation response

696. As discussed in relation to *Proposal 32* concerning the summary assessment of costs, respondents to the consultation were generally supportive of employing immediate costs sanctions to deter and compensate against unreasonable interlocutory behaviour. *Proposal 51* received support on a similar basis.⁵⁶⁵ However, several respondents were worried that a rule linking adverse costs orders to procedural misbehaviour might encourage self-serving complaints, petty attempts at point-scoring and satellite litigation over costs.

- (a) Thus, while the Bar Association and the BSCPI supported “an approach whereby specific costs rules are formulated or re-formulated so as to deter unmeritorious applications”, they were worried that *Proposal 51* might result in “litanies of fault inveighed by one party against the other” and that the parties might “paper the file with

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⁵⁶⁵ Among others, by the Law Society, the BCC, one set of barristers’ chambers and two firms of solicitors.

correspondence to lay the ground for complaints to be made at the time for submissions of costs about an opposing party's conduct."⁵⁶⁶

- (b) Other respondents⁵⁶⁷ emphasised the need for judicial acuity in correctly assessing the reasonableness or otherwise of interlocutory conduct and applying the rule with consistency.
- (c) The support of one of the firms of solicitors was subject to the qualification that it should not be tied to the overriding objective.

24.3 The Working Party's view

697. It is the Working Party's view that *Proposal 51* should be adopted subject to certain qualifications. The concerns voiced are legitimate and judicial training for case management should address those concerns. Judges should be encouraged to see through self-serving correspondence and petty point-scoring exercises, treating such conduct as itself objectionable.

698. The principle that costs may be ordered to "follow the event" should accordingly remain the usual approach when dealing with the costs of an action. The winner of the action should generally get the costs of the action, including the costs of any interlocutory applications ordered to be "in the cause". The "follow the event" principle should also remain an important basis for dealing with interlocutory costs but should not be accorded dominant status as the normal order. The use of costs orders to deter unreasonable interlocutory behaviour ought to be given equal, if not greater, prominence.

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⁵⁶⁶ A similar concern was expressed by a set of barristers' chambers.

⁵⁶⁷ Including two firms of solicitors.

699. Using costs orders as a primary means of discouraging unreasonable procedural conduct at the interlocutory stages, whichever party ultimately wins the case, is an important feature of the reforms proposed and has the general support of those consulted. This underlies the summary assessment of costs upon disposal of each interlocutory application instead of waiting for an overall accounting at the end of the proceedings. Appropriately stringent costs orders have been recommended above, in relation to inappropriately verified pleadings, over-elaborate witness statements and expert reports, unnecessary interlocutory applications or appeals, seeking relief from self-executing sanctions, unnecessarily insisting on oral hearings to challenge decisions taken on the papers, and so forth.
700. Order 62 r 3 should accordingly be amended to distinguish between the costs of the action as a whole and interlocutory costs, so that it no longer provides that an order for interlocutory costs to follow the event should be made in default of the court ordering otherwise. The list of exceptions presently set out in O 62 r 3 should also be re-examined. Order 62 r 7 is probably already in sufficiently wide terms to accommodate the costs sanctions to be prescribed in support of reforms such as those mentioned above. It should, however, be amended so that the court is required to have regard to the underlying objectives mentioned in relation to *Recommendation 2* as well as to the matters referred to in paragraph (2)(a) to (c).
701. Furthermore, in line with the Working Party's policy of avoiding front-loaded costs where possible, the court should not assume the power to make adverse costs orders in respect of the reasonableness of the parties' pre-commencement conduct, except in cases covered by an applicable pre-action protocol and in accordance with the terms of such protocol.

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.

Section 25: Costs transparency

Proposals 52, 53, 55 and 56

Proposal 52

Rules should be adopted requiring solicitors and barristers (i) to disclose to their clients full information as to the basis on which they will be charged fees; (ii) to provide them with the best available estimates as to the amount of fees they are likely to be charged for the litigation in question, by reference to stages of the proceedings and overall (in the case of barristers, assuming that they continue to be instructed by the solicitors in the case); and (iii) to update or revise such information and estimates as and when they may change, with reasons given for any such changes.

Interim Report paras 558-573

Proposal 53

Steps should be taken, including the promotion of legislation if necessary, to ensure that the public is given access to information regarding barristers and solicitors relevant to a choice of legal representation in connection with litigation or possible litigation, including information concerning fees, expertise and experience to be made available by the professional associations concerned or in some other appropriate manner.

Interim Report paras 574-575

Proposal 55

Steps should be taken to compile benchmark costs for use in Hong Kong.

Interim Report paras 584-598

Proposal 56

Provision should be made in Hong Kong to require the parties, periodically and as ordered, to disclose to the court and to each other best available estimates of costs already incurred and likely to be incurred in the case.

Interim Report paras 599-604

25.1 The context of these Proposals

702. The Interim Report pointed to three broad factors which have a substantial impact on the costs of litigation: the complexity of the case, the number of court events in the case and the charging practices of the legal profession.
703. Most of the reforms discussed in this Final Report address the first two factors, seeking to change the rules with a view to lessening complexity, reducing the number of court events and increasing the system's cost-effectiveness in dealing with the procedures that remain. *Proposals 52-53 and 55-56* deal with the third factor: the relationship between costs and the charging practices of the legal profession.
704. The Interim Report acknowledged⁵⁶⁸ that changing the rules will not in itself necessarily result in reducing costs or achieving costs proportionality. Thus, while statistics are not available, it seems clear that adverse economic conditions in Hong Kong in recent years have markedly reduced the level of economic activity and therefore the need for legal services. This is thought to have led to increased competition among legal firms vying for a slice of the smaller cake and to have resulted in lower fees. This was perhaps felt more immediately and directly by the conveyancing and commercial

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⁵⁶⁸ At §558 and §561.

departments of solicitors' firms. However, there has also been a substantial reduction in the number of writs issued,⁵⁶⁹ suggesting that there has also been a shrinkage in the demand for litigation services and some reduction in fees.

25.2 Higher rights of audience and conditional fees

705. Quite apart from such general economic considerations, the Interim Report also acknowledged that other structural features of our civil justice system might have an important impact on costs. We stated :-

“Issues such as the extent to which foreign-qualified lawyers are admitted to appear before the local courts; how far rights of audience may be extended; the availability of conditional or contingency fee arrangements and the scope of legal aid, among others, are all questions with a possibly significant impact on litigation costs. However, such questions fall outside the Working Party's remit.”

706. The Interim Report pointed out that such matters fell outside the Working Party's remit, but this did not deter a number of respondents from suggesting that conditional fees⁵⁷⁰ (or in some cases, contingency fees⁵⁷¹) and higher rights of audience for solicitors⁵⁷² ought to be considered by the Working Party.⁵⁷³ The Law Society went so far as to suggest that failure to deal with these matters detracted intellectually from the Interim Report, stating :-

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⁵⁶⁹ See *Appendix 4*.

⁵⁷⁰ Including the Hongkong Civic Association, the Hon Mr Andrew Cheng speaking in Legco, the BCC and a firm of solicitors.

⁵⁷¹ Including the BCC and two individual respondents.

⁵⁷² The BCC, two firms of solicitors and an individual respondent.

⁵⁷³ The DOJ pointed to the possible relevance of conditional fees but indicated that it was itself studying the matter. As indicated below, a reference has now been made to the Law Reform Commission. The Consumer Council supported such a study by the government.

“The most patent omission in the CJR is that of higher rights of audience of solicitors in the High Court. The failure to consider this topic — an expedient way to reduce costs in civil litigation — detracts intellectually from the CJR. The public should be apprised of the reasons why this is not addressed in the CJR. Legal services, like any other industry, has to provide a good service at reasonable cost. It has to keep abreast of the demands of contemporary society. This will not be achieved unless the debate is objective and comprehensive and the omission of considered debate of higher rights and other matters, such as conditional/contingency fees, prevents the CJR from meeting this criterion.”

707. The Working Party rejects this criticism. Reforming the system of procedural rules and practices with a view to enhancing its cost-effectiveness is a key component of any attempt at tackling the problems of cost, complexity and delays. It is a large subject, as the length of the Interim Report and this Final Report testify, which lends itself to, and indeed, demands, independent study. The fact that other matters may also have a bearing on these problems does not mean that they all can, let alone must, be crammed into the same study and examined by this particular Working Party.
708. In fact, the question of conditional fees has recently been referred by the Chief Justice and the Secretary for Justice to the Law Reform Commission, a body obviously well-placed to undertake the study.⁵⁷⁴
709. Admissions of overseas practitioners and ad hoc rights of audience for overseas lawyers have recently been dealt with by legislation.⁵⁷⁵

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⁵⁷⁴ “The Commission has been asked to consider whether conditional fee arrangements (not contingency fees) would be feasible and should be permitted in Hong Kong for civil cases and, if so, to what extent (including for what types of cases and the features and limitations of any such arrangements).” LRC website: www.info.gov.hk/hkreform.

⁵⁷⁵ By the new section 27(1) of the Legal Practitioners Ordinance, Cap 159 (brought into operation by LN 87 of 2003), overseas lawyers can qualify for admission as barristers after taking requisite examinations, widening the range of persons eligible to join the

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710. The question of higher rights of audience for solicitors is controversial and has far-reaching implications for the long-term status of the Bar and the legal system as a whole. It is a subject which plainly requires dialogue between the two branches of the profession which appears so far not to have taken place. This was recognized by the Hon Ms Margaret Ng, the Legislative Council member for the Legal Functional Constituency, stating that her “preferred option” was that “legislation to provide for higher rights of audience for solicitors should follow from amicable discussion between both branches with the involvement of the bench”.⁵⁷⁶ The Bar’s own position is apparently in the course of being worked out. The Bar Chairman announced in May 2002 that the Bar’s Special Committee on Higher Rights of Audience and its Special Committee on Practice Reform and Development would be preparing an Interim Report and Consultation Paper with a view to starting a consultation process within the Bar.⁵⁷⁷ That consultation process was reported to have been initiated in April 2003.⁵⁷⁸ Consideration of higher rights of audience is therefore following its own course.

711. In the meantime, solicitors’ rights of audience were effectively widened in September 2000 when the general civil jurisdiction of the District Court (where they enjoy full rights of audience) was increased to cover claims worth \$600,000, the previous limit having been set at \$120,000. It was

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Hong Kong Bar. By section 27(4), the range of advocates eligible for ad hoc admissions has also been widened to take in advocates beyond those from the United Kingdom.

⁵⁷⁶ Letter to Law Society dated 3 May 2002 published in Newsletter 13 May 2002. See www.margaretnng.com.

⁵⁷⁷ Speech delivered at the ceremony for admission of new silks on May 11, 2002, Bar Association website: www.hkba.org.

⁵⁷⁸ SCMP 19 April 2003.

further widened when the District Court's general civil jurisdiction was increased to cover claims for up to \$1,000,000 with effect from 1 December 2003. It is, however, uncertain to what extent solicitors have availed or will avail themselves of these greater rights of audience.

712. There is a further, and possibly more fundamental, objection to the abovementioned criticism. The notion that either higher rights of audience or conditional fees represents “an expedient way to reduce costs in civil litigation” is a gross over-simplification. This is illustrated by two recent English decisions.
713. In the first of these cases, *Protea Leasing Ltd v Royal Air Cambodge Co Ltd* (Unreported) QBD (Comm Ct), 7th March 2000, Timothy Walker J, discusses a summary assessment of costs at the end of the judgment. The claimant was represented by a well-known City firm of solicitors who instructed senior leading counsel and specialist aviation junior counsel. Their bill came to £70,949.81, described by the judge as “a healthy enough sum in all conscience”. However, his Lordship commented that it paled into insignificance compared to the bill for the other side. The defendant was represented by another well-known City firm which did not instruct counsel, but did the case on their own. Their bill came to £149,577 – more than twice that of the claimant – for a one day case. Plainly, the fact that a solicitor does the advocacy in place of a barrister is no guarantee that what the client ends up paying will be less than if a barrister had been instructed. It simply does not follow that giving solicitors higher rights of audience is “an expedient way to reduce costs in civil litigation”.
714. In relation to conditional fees, the House of Lords decision in *Callery v Gray* [2002] 1 WLR 2000, is instructive. It throws light on the impact of

conditional fees on costs and shows that it is quite fallacious to suggest, as some respondents to the consultation have, that conditional fee arrangements reduce litigation costs. To appreciate the true position, one must have a grasp of how conditional fee arrangements work.

- (a) The intention of a conditional fee arrangement is to enable a plaintiff with a viable case but without the means to pay for legal representation, to bring an action represented by lawyers. The lawyers' costs are ultimately to be paid out of the anticipated award against the defendants, but the lawyers must take on the risk that, if, contrary to expectation, the plaintiff fails and nothing is recovered, their source of remuneration will not materialise. Hence, these are called "no-win, no pay" agreements.
- (b) Where the plaintiff wins, the lawyers are entitled to an "uplift" in their fees (or "success fee"). In other words, they charge a certain amount more (usually measured as a percentage of their usual fee up to a prescribed maximum percentage) than they would have charged if they had been acting without any conditional fee agreement, to compensate them for the risk taken.
- (c) However, in a system like ours, where a defendant who wins is generally entitled to costs against the losing plaintiff, the plaintiff faces a potential liability beyond having to pay his own lawyers' fees. While his lawyers may be prepared to appear on a no-win, no-fee basis, they would hardly be prepared to shoulder liability for the winning defendant's fees under the costs-shifting rule.
- (d) To cover that liability, "after the event" or "ATE" insurance has been introduced in England and Wales. An insurer agrees to insure the plaintiff against an order to pay the defendant's costs if the defendant

should win the case. As the plaintiff generally will not have the means to pay the premium for such cover, the ATE insurer does not collect it from the plaintiff in advance, but seeks to recover it (and so to make his profits) out of the anticipated award against the defendant.

- (e) This of course only works where the plaintiff's lawyers and ATE insurers have assessed the risk of losing as small and acceptable. Therefore a plaintiff with less than a clear case is likely to find it difficult to fund his action through a conditional fee agreement. Moreover, it can only work in some types of cases. Thus, in run-down or industrial accident cases, the defendant is covered by compulsory insurance so that the plaintiff who wins will not be left with an empty judgment. The same may be true where the defendant is a substantial company or institution which has ample assets and poses no risk of absconding. But the risk attaching to less substantial defendants may make conditional fee agreements unattractive and unworkable.
- (f) Where the plaintiffs' team correctly assesses the risk, the defendant, or more probably, his insurers, have to meet the bill for the plaintiff's costs and disbursements, including the success fee and the ATE premium. The defendant's liability insurers in turn pass on those costs to those purchasing motor, accident or some other relevant insurance policies.

715. As pointed out in *Callery v Gray* this kind of arrangement has a serious effect on costs.

- (a) Lord Nicholls, summarising submissions made in the appeal, described the impact of the system as follows :-

“The consequence, it was said, of these arrangements, hugely attractive to claimants, is that claimants are entering into conditional fee agreements, and after the event insurance, at an inappropriately early stage. They have every incentive to do so, and no financial interest in doing otherwise. Moreover, in entering into conditional fee agreements and insurance arrangements they have no financial interest in keeping down their solicitors’ fees or the amount of the uplift or the amount of the policy premiums. Further, they have no financial incentive to accept reasonable offers or payments into court: come what may, their solicitors’ bills will be met by others. So will the other side’s legal costs.

As a result, it was said, the new arrangements, as they are currently working, are unbalanced and unfairly prejudicial to liability insurers and the general body of motorists whose insurance policy premiums provide the money with which liability insurers meet these personal injuries claims and costs.”⁵⁷⁹

His Lordship commented that :-

“..... the criticisms outlined above give cause for serious concern. It is imperative that these aspects of the new funding system should be watched closely as the system develops and matures.”⁵⁸⁰

- (b) As Lord Hoffmann noted, the role of the costs judge or taxing master becomes crucial. Judicial taxation of fees and disbursements becomes the sole means of trying to hold costs in check⁵⁸¹ :-

“The transaction lacks the features of a normal insurance, in which the transaction takes place against the background of an insurance market in which the economically rational client or his broker will choose the cheapest insurance suited to his needs. Since the client will in no event be paying the success fee out of his pocket or his damages, he is not concerned with economic rationality. He has no interest in what the fee is. The only persons who have such an interest are the solicitor on the one hand and the liability insurer who will be called upon to pay it on the other. And their interest centres entirely upon whether the agreed success fee will or will not exceed what the costs judge is willing to allow.”⁵⁸²

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⁵⁷⁹ [2002] 1 WLR 2000 at 2006 §§14-15.

⁵⁸⁰ *Ibid*, §16

⁵⁸¹ Judicial fixing of success fees is controversial. See *Halloran v Delaney* [2003] 1 WLR 28, where the English Court of Appeal gave guidance suggesting that success fees in simple, easily settleable, cases should be limited to 5%. See the comments of Professor Zander, “*Is this the end of conditional fees?*” *The Times*, October 1 2002.

⁵⁸² At 2008 §25.

Lord Hoffmann was prompted to state :-

“.....I feel considerable unease about the present state of the law. In this respect I do not think that I am alone. There seems to be widespread recognition among those involved in personal injury litigation that costs, particularly in relation to small claims, are getting out of hand. They are excessive in relation to the amounts at stake (contrary to the principle of proportionality), some elements (such as after the event insurance premiums) lack transparency and, perhaps in consequence, too much time, money and court resources are spent in disputes over costs.”⁵⁸³

(c) Lord Hope cautioned :-

“..... unless the new regime is controlled very carefully, its effect may be to benefit ATE insurance providers unreasonably and to place a burden on liability insurers which is disproportionate. It may lead to a culture of incurring additional costs which lacks any incentive on claimants to keep costs down.”⁵⁸⁴

716. It should be emphasised that in the foregoing discussion, the Working Party is not seeking to express a view on the desirability or otherwise of either higher rights of audience for solicitors or for the introduction of conditional fees.⁵⁸⁵ On conditional fees, the Law Reform Commission will make recommendations after it surveys relevant opinion and completes its study of what is undoubtedly a complex subject. The point of relevance for present purposes is that it should not be assumed that such mechanisms necessarily result in reducing litigation costs, a matter of direct concern to the present Report. Plainly, the opposite may sometimes be the case. It may be worth noting that in the 5th survey conducted by the English Law Society’s Woolf Network in December 2002, 75% of respondents said that they did not consider conditional fee agreements to be working.

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⁵⁸³ At 2006 §18.

⁵⁸⁴ At 2015 §54.

⁵⁸⁵ Contingency fees whereby the lawyers take a percentage of the award, are not contemplated.

25.3 These Proposals

717. Returning to *Proposals 52-53 and 55-56*, the focus of the discussion is on reforms aimed at increasing costs transparency as between client and solicitor, as between the parties to the litigation and vis-à-vis the court and the public at large.
718. Why should one seek to increase such transparency? The answer is in the underlying assumption, generally accepted, including by the Working Party, that the overall level of fees and costs should in principle be determined by the market – and not by official regulation (save for the prevention of abuse).
719. For the legal services market to operate freely and efficiently, consumers of such services need relevant information about the cost and quality of those services. Such information is presently very limited and unevenly distributed. Large institutional plaintiffs or defendants who engage repeatedly in litigation are usually well-informed, but other litigants tend to have little reliable information. This impedes their ability to make an informed choice of the lawyers to instruct, to negotiate fees meaningfully and to assess exposure to costs, both their own and the other side's costs, if they should lose. Such uncertainty is likely to cause some parties not to sue at all or to reach an unsatisfactory settlement. Lack of information as to going rates also hampers the court in arriving at fair summary assessments of costs or when taxing a bill.

25.4 The consultation response and the Working Party's views

(a) Proposal 52: costs-related disclosures to the client

720. This proposal, aimed at making it the duty of solicitors and barristers to disclose to their client the basis on which he will be charged and to provide him with a regularly updated statement of costs and disbursements incurred as well as estimates of future costs, with an explanation for any changes to the estimates, received support from the great majority of respondents to the consultation.⁵⁸⁶

721. The attitude of the Law Society to *Proposal 52* is, however, not entirely clear. Chapter 4 of the Law Society's *Guide to Professional Conduct* presently contains non-mandatory guidelines for providing relevant information to the client. In the body of its report, the Law Society's Working Party supports a mandatory duty to provide such information by way of a professional obligation, stating : -

“The LSWP has recommended that the Law Society promulgate a mandatory retainer letter for use in litigation covering fees, estimates and updates, as well as other standard advice. However, the obligation should not be too onerous. The information should be based on information which the solicitor can provide ‘as far as practicable’. Barristers must disclose the basis of their fees to solicitors.”⁵⁸⁷

However, in *Appendix 2*, in relation to *Proposal 52*, the report states that the Law Society “does not go so far as to impose mandatory requirement” [sic] and that the Law Society is “to provide guidance on retainer letter

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⁵⁸⁶ Including the Bar Association, the APAA, the HKMLA, the Consumer Council, the DOJ (with the qualification that the government should be exempted), the BCC, the Hon Ms Audrey Eu SC, the Hon Mr Andrew Cheng, the Hon Mr Ip Kwok Him (delivering the speech of the Hon Mr Jasper Tsang) all speaking in Legco and three firms of solicitors. The BSCPI was against this proposal, arguing that it should be left to solicitors to estimate costs for the client.

⁵⁸⁷ Law Society report, p 59.

722. The Working Party (except for one member, whose reservations are set out below) is of the view that, subject to what is said below as to barristers, *Proposal 52* should be adopted in principle. However, there should be further consultation before deciding on the manner of its implementation. Various approaches are possible.

- (a) The Interim Report referred, for example, to the approach in New South Wales, involving a statutory duty on barristers and solicitors to disclose specified matters to the client and, in default of disclosure, relieving the client of any obligation to pay the bill until after it has been through a special taxation process, the cost of which is to be borne by the defaulting lawyers. Additionally, failure to make the necessary disclosures is deemed “capable of being unsatisfactory professional conduct or professional misconduct”.
- (b) The Interim Report also mentioned the approach in England and Wales, where the Solicitors’ Practice Rules place an obligation on solicitors to provide information to clients in accordance with a professional code laid down by the Law Society with the concurrence of the Master of the Rolls.
- (c) Other mechanisms for implementation, and a combination of various approaches, could also be considered. For instance, a rule of court might provide that within say, 7 days of coming onto the record in any case, solicitors would have to file a certificate, countersigned by the client, declaring that specified fee-related information and estimates had been given to the client and would be regularly updated. Failure to provide the required information could be a matter taken into account in an appropriate manner in any solicitor and own client taxation.

723. The present focus of the Bar Code is on the agreeing of fees between solicitor and barrister. It requires barristers to be separately instructed and remunerated by a separate fee for each item of work undertaken.⁵⁸⁸ It deals with such matters as marking the fee and refreshers on the brief, what the brief is deemed to cover, and so forth. The solicitor undertakes a professional obligation to be personally responsible for the barrister's fees whether or not he receives payment from the client – a rule reflecting the historical incapacity of the barrister to sue the client or the solicitor for his fees.⁵⁸⁹ A solicitor is also free to withdraw instructions from any particular barrister. Accordingly, it is understandable that the Bar Code makes no provision for disclosures or other fee-related dealings as between the barrister and the client. So long as this arrangement continues, the duty to provide the client with the relevant information must fall primarily on solicitors. It will be up to them to negotiate barristers' fees on a satisfactory basis and to explain that basis to the client.
724. Nonetheless, notwithstanding the relationship among barristers, solicitors and clients, it is necessary to recognize the commercial reality that (save in exceptional cases where the solicitor is left to foot the bill) it is the client who pays the barrister's fees. Accordingly, barristers should be obliged to explain the basis on which their fees are charged and to provide estimates of future fees (assuming that they remain instructed) with a view to this information being incorporated into the material provided by the solicitor to

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⁵⁸⁸ Bar Code §120.

⁵⁸⁹ Guide to Professional Conduct §12.04: "In the absence of reasonable excuse a solicitor is personally liable as a matter of professional conduct for the payment of a barrister's proper fees. Failure to obtain funds on account of a barrister's fees shall not of itself constitute reasonable excuse."

the client. Such information should cover not only traditional briefs and refreshers but also advisory and drafting work undertaken by barristers. Instructions to advise, for example, as to whether proceedings should be instituted, may be given orally and followed by a letter rather than a formal brief. Some documents may be delivered for perusal, followed by an initial conference and perhaps delivery of further documents, then legal research, followed by advice in writing or in conference, and, if warranted, by settling pleadings and so forth. In practice, briefs may not be delivered for each of these stages in the work. Instead, a fee-note may be sent out by the barrister when a natural point in the advisory or pre-trial process has been reached. A client ought to be informed through the solicitor at the outset as to whether, for instance, the barrister intends to charge for such work on an hourly basis and if so, what his hourly rate is and the number of hours estimated to be required up to a stated point in the advisory or litigation process, perhaps agreeing a cap on the fees to be incurred up to that point. The barrister ought to be obliged promptly to furnish the solicitor with such information and estimates upon request by the solicitor or the client and to keep such information and estimates up to date, taking account of any changes.

725. Which of the abovementioned approaches, or what combination of such approaches, should be adopted, ought to be determined after consultation with the two branches of the legal profession.

Recommendation 123: Solicitors should be obliged to provide their clients with (i) full information as to the basis on which fees and disbursements (including any barristers' fees) will be charged; (ii) their best estimates of the costs to cover various stages of the litigation process; and (iii) updated or revised information and estimates as and when the circumstances require, with reasons for any such changes.

Recommendation 124: Barristers should be obliged, upon request, to provide to their clients, via the solicitors (i) full information as to the basis on which their fees will be charged; (ii) their best estimates of the fees they would be likely to charge for specified stages of the litigation process; and (iii) updated or revised information and estimates as and when the circumstances require, with reasons for any such changes.

Recommendation 125: There should be further consultation as to the manner in which Recommendations 123 and 124 should be implemented.

726. As indicated above, one member expressed reservations about *Recommendation 124* in the following terms :-

- “1. I have reservations about this Recommendation.
2. The stated objective of enabling the lay client through the solicitor to be informed of the barrister’s charges in advance can be achieved under the present system. What is required is for the solicitor to ascertain in advance the barrister’s hourly rate and his estimate of the charges to be incurred for any particular piece of work.
3. With the implementation of *Recommendation 123*, it should be expected that any solicitor intending to instruct a barrister will almost as a matter of course obtain the necessary information from the barrister before instructions are given.
4. There is no suggestion that unless an obligation contained in this Recommendation is imposed on the barrister, the present system is unworkable.
5. As a matter of common sense, I cannot imagine that any barrister will be so foolish as to refuse to provide the information upon request. He runs the risk of not only losing the piece of work but the goodwill altogether. It is simply not in his interest to do so.
6. To the suggestion that a barrister may refuse to provide the information as a way to decline instructions (e.g. unpopular briefs): First, there is no evidence to suggest that this is a cause for concern under the present system/practice, or that such behaviour is likely to become prevalent in future. Secondly, such behaviour is likely to fall foul of the spirit of the cab-rank principle and is likely to ground disciplinary action against the barrister concerned.
7. In my view, the stated objective of ensuring adequate information be provided to lay client can be achieved under the present system (when it is expected that there will be more negotiations and agreements between solicitors and barristers before instructions are given). There is no necessity for the creation of a further obligation as suggested in *Recommendation 124*.”

(b) *Proposal 53: voluntary publication of professionally relevant information*

727. It was argued in the Interim Report (at §§574-575) that it is in the public interest that consumers of legal services should have information as to the quality and cost of such services to enable them to make a reasonably informed choice of solicitor or barrister and to negotiate the fees charged with some idea of what other firms and barristers might charge for the same work. It was also argued that the court also has an interest in the availability of fee information to assist judges and masters to make fair and reasonable costs awards, an objective which it was also considered to be in the legal profession's interest to promote.

728. The Interim Report stated :-

“..... where professional rules prevent dissemination of such information, the professional associations should be persuaded to change them. In default, consideration should be given to amending the Legal Practitioners Ordinance to allow and regulate publication of relevant information by the professional associations or in some other appropriate manner. Readers are consulted as to whether appropriate steps, including, if necessary, legislation, should be taken to enable lawyers' professional associations to provide to the public reasonable information as to lawyers' fees, claimed expertise and experience.....”⁵⁹⁰

729. This Proposal is directed at barristers since solicitors are already permitted to publish relevant information in accordance with the *Solicitors' Practice Promotion Code*.⁵⁹¹ Under paragraphs 100-109 of the Bar Code, publication of information about a barrister's practice, the fees normally charged, his experience or expertise, would be prohibited as touting or advertising.

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⁵⁹⁰ At §575.

⁵⁹¹ Promulgated by the Law Society Council with the prior approval of the Chief Justice under rule 2AA of the Solicitors' Practice Rules, effective 20.3.92.

730. The Interim Report was not suggesting that disclosures should be made mandatory. What was canvassed was the removal of restrictive rules which prevent publication by those barristers who may wish to publish such information in a seemly and properly regulated manner.

731. In the Bar Association's response to the Interim Report, its position was consistent with that taken in the Interim Report. It stated that "The Bar fully supports transparency in the fees charged by its members (especially the basis upon which fees are charged for work done)," while being against compulsory disclosure. Other respondents to the consultation were generally also in favour of such information being published.⁵⁹²

732. The Bar Council was hopeful of introducing changes to the Bar Code to enable relevant information to be published, stating :-

"The Bar is currently looking into the revision of the rules in the Code of Conduct restricting members' ability to disclose their fees. It is anticipated that the Bar Council will be putting forward proposals allowing disclosure of fees to a vote by its membership at the end of 2002. In the event that the proposals are approved, the public will have general access to information about barristers' fees. There will be no need for legislation to achieve the same end."

733. A Special Committee on Practice Reforms and Development produced reports including a Final Report⁵⁹³ which argued in favour of permitting barristers to state their academic qualifications, the nature and extent of their practice and experience, their fees and methods of charging and to publish a

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⁵⁹² Including the Law Society, the DOJ, the APAA, the HKMLA (which thought this more relevant to non-Commercial List parties), the Consumer Council, the High Court masters and the Hon Mr Andrew Cheng, the Hon Mr Ip Kwok Him (delivering the speech of the Hon Mr Jasper Tsang) all speaking in Legco, one set of barristers' chambers and a solicitors' firm. The BCC thought that clients did not need such information and one firm of solicitors thought that such information may lead to inflexible bases of charging rather than a more flexible approach to charges for each case.

⁵⁹³ A copy of which was kindly supplied by the Bar Chairman to the Chief Justice.

recent photograph in print or on a website. However, such information was to be provided only passively, with active dissemination prohibited. The Special Committee's report provided a template for websites and printed publications and also draft amendments to the Code.

734. The recommendations of its Special Committee were put forward by the Bar Council to the membership at an EGM held on 5 December 2002. However, despite efforts by the Chairman and Bar Council in support of such changes, the resolution was rejected. This had also been the fate of two previous attempts in January and November 2000 by the Bar Council to persuade members to accept varying degrees of relaxation in the rules against touting and advertising. While each of these three votes went against relaxation of the rules, a substantial percentage of those voting (exceeding 40% in each case) did cast their votes in favour of change.

735. The Bar Council has power to make the relevant rules under section 72AA(a) of the Legal Practitioners Ordinance, Cap 159 which states :-

“Subject to the prior approval of the Chief Justice, the Bar Council may make rules in respect of the professional practice, conduct and discipline of barristers and pupils

However, in the light of three failed attempts at persuasion, the Bar Council cannot be expected to persist in its initiative.

736. In such circumstances, *Proposal 53* envisaged a recommendation for steps to be taken, including legislation, to enable willing barristers to provide the public with the relevant information. However, the Working Party's views were divided as to whether legislation should now be recommended.

737. In view of the strongly held divergent views of some of the members, the majority of members of the Working Party considered it inappropriate to

reach a concluded view at the present stage. No one disputed that transparency was desirable in relation to how fees were charged by barristers and as to the services provided by them. However, the Working Party (except two members) considered that the better course was for the Working Party to recommend that further consultation should be undertaken by the Chief Justice as to whether rules should be introduced to permit the publication by barristers of information relating to their fees, leaving all options open for the present.

738. The two members were opposed to any consultation which contemplated change by way of legislation, arguing that professional autonomy had to be respected and preserved.

Recommendation 126: There should be further consultation by the Chief Justice as to whether rules should be introduced to permit publication by barristers of information relating to their fees.

(c) *Proposal 55: Benchmark costs*⁵⁹⁴

739. In Lord Woolf’s Final Report,⁵⁹⁵ it was suggested that proceedings “which have a limited and fairly constant procedure” might be susceptible, “with the assistance of user groups and the information available to the SCTO [Supreme Court Taxing Office],” to the production over time of “figures indicating a standard or guideline cost or a range of costs for a class of

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⁵⁹⁴ *Proposal 54* is dealt with below.

⁵⁹⁵ Chapter 7, p 86, §§35-37.

proceedings.” Once established, the benchmarks would provide guidance in various contexts. A party would, for instance, “have to justify seeking to recover from the other side more than the published benchmark cost.” Or again, his Lordship suggested, “Where a lawyer proposed to charge his client more than the guideline figure, the Law Society could require a written agreement to be entered into which would set out the client’s acceptance of the increase.” *Proposal 54* drew on these suggestions.

740. Since then, events in England and Wales, have shown that the development of benchmark costs is much more complex and difficult than may initially have been anticipated. Benchmark costs would only be acceptable as a guide for the purposes envisaged if they give a fair representation of the costs that ought to be allowed for a particular matter. To be able to set such benchmark costs one has to have empirical information regarding costs for relevant types of cases, taking into account any important variables that may apply.

741. The initial difficulty, acknowledged by the LCD in its first Civil Justice Reform Evaluation exercise published in March 2001, was a lack of such information. It was found that “court systems held little useful data about costs and that the validity of any benchmark derived from existing data would be questionable.”⁵⁹⁶ To address this difficulty, Senior Costs Judge Hurst set to work to collect and assess such materials. He conducted two major consultations and, in October 2001, produced a Report to the Master of the Rolls on benchmark costs.⁵⁹⁷

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⁵⁹⁶ LCD-EF §7.11.

⁵⁹⁷ Available at <http://www.lawonline.cc/locked/cpr/scco/bm.htm>.

742. A perusal of that Report reveals the inherent complexity of any attempt to set benchmark costs. First, the procedures that are susceptible to published benchmarks have to be identified. Then the assumptions which are to be used in calculating each benchmark have to be settled. What level of seniority should one assume for the solicitor in charge? If one were to place legal advisers into grades of seniority, how would one define those grades and what hourly rates should one attribute to each grade? Should one assume use of a large city firm or a small country firm? How much chargeable preparation time should one assume? Should one assume use of counsel and if so, of what seniority and at what charging rates? What about waiting time at court? Special considerations would have to enter into particular types of cases, such as insolvency and family cases. In short, benchmark costs have to cope with numerous variables relating to the type of matter being costed and to the experience and expertise of the legal advisers engaged.
743. It appears that even now, no benchmark costs have been settled in England and Wales. In the latest instalment of the LCD's continuing evaluation of the civil justice reforms published in August 2002, no mention is made of any progress on benchmark costs.⁵⁹⁸ In a recent article, Professor Peysner indicates that after a "somewhat tortuous history" the work continues and that "the emphasis has latterly switched from classes of proceedings to specific stages in proceedings. By adding building blocks of predictable costs the idea is that the total cost becomes more predictable."⁵⁹⁹

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⁵⁹⁸ LCD-FF.

⁵⁹⁹ *Costs in Personal Injury Cases – Searching for predictable costs* [2002] JPIL 166 at 170.

744. There are lessons to be drawn from these difficulties. In Hong Kong, fewer variables may arise, for example in relation to regional variations in fees. Nonetheless, it is equally clear that for benchmark costs to command acceptance here as a fair and cost-saving means of fixing costs awards, they would have to be firmly grounded in regularly-updated empirical evidence of reasonable charging rates in relation to well-defined classes of proceedings or stages of proceedings. Such information does not presently exist and its collection and the subsequent development, based on such evidence, of definitions and underlying assumptions for calculating each set of benchmark costs would inevitably pose problems.
745. Most of the respondents to the consultation were alive to the difficulty of compiling fair and reasonable benchmarks. Some thought them a potentially attractive mechanism to increase predictability and consistency in costs awards, but expressing reservations as to whether it would be possible to arrive at realistic benchmarks.⁶⁰⁰ Other respondents thought the Proposal objectionable because benchmark costs were likely to interfere with market forces.⁶⁰¹
746. The difficulties in compiling benchmark costs for general use are therefore daunting. Moreover, some members of the Working Party considered use of the words “benchmark costs” was undesirable as it might encourage lawyers to regard stated levels of costs as a minimum. It was agreed that use of the term “costs indications” was preferable. Accordingly, where the

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⁶⁰⁰ These included the Bar Association, the Law Society, the DOJ, the APAA, one set of barristers’ chambers and a solicitors’ firm. The High Court masters and the District Court judges thought the idea workable, as did the BCC and the HKFI.

⁶⁰¹ Including the Consumer Council (with whom the Hon Mr Andrew Cheng agreed), the HKMLA and two firms of solicitors.

compilation and use of costs indications may be feasible, for instance, in the context of a specialist list in relation to well-understood and frequently recurring events in the operation of that list, such compilation and use should be attempted. This accords with the BSCPI's response in relation to personal injury cases, where, it was stated that a similar approach has in fact already been adopted in that context:-

“The most practical approach was proposed and agreed and tabulated from material supplied in relation to standard or ordinary straightforward PI cases from PI practitioners at the Bar, Law Society, Department of Justice and Legal Aid Department in an extensive consultation exercise in 1999. These were tabulated by Mr Justice Peter Cheung under cover of his letter of 22nd July 1999. There was a considerable measure of agreement between the practitioners as to the appropriate level of fees. It is thought this could save costs and time in taxation in future. Market rates could be updated by regular reviews between practitioners in the relevant field.”

747. The Working Party would therefore encourage the development of costs indications as a mechanism for fixing or providing guidance as to costs in relation to particular procedures within the relevant specialist list as part of the procedural autonomy accorded to such lists.
748. Indeed, with a view to assisting the courts to arrive at consistent and fair summary assessments of costs and to tax bills accurately, all available reliable information as to fees and costs should be collected, tabulated and published regularly by the judiciary, based on costs awards made by the taxing masters and other suitable sources with a view to developing costs indications for general use. Such published information might also assist parties in the negotiation of fees and in settling disputes as to costs.

Recommendation 127: Proposal 55 (relating to benchmark costs, as outlined in the Interim Report) should not be adopted, without prejudice to the adoption, where thought appropriate, of costs indications compiled from available reliable costs information, for fixing costs in specialist lists and for guidance generally.

Recommendation 128: The Judiciary should compile and publish information as to costs derived from the decisions of taxing masters and other reliable sources to promote consistency, accuracy and fairness in judicial awards of costs and to assist parties in the negotiation of legal fees and in settling disputes as to costs.

(d) Proposal 56: Disclosure of costs between the parties and to the court

749. This proposal was strongly opposed. The main concern was that a rule requiring parties to disclose to each other what costs had already been incurred and estimated future costs would result in legal professional privilege being compromised.⁶⁰² Certainly, if disclosures in the detail

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⁶⁰² Opponents of the Proposal included the Bar Association, the BSCPI, the HKMLA, the DOJ and three firms of solicitors. Other respondents, including the APAA and a set of barristers' chambers expressed support only provided that privilege was not impaired. The Law Society's position is unclear. Doubts and qualifications on *Proposal 56* were expressed in the body of their report (at p 59), but Annex 2 states that *Proposal 56* was "not considered" by the Law Society.

envisaged under the CPR⁶⁰³ were to be made, excessively revealing inferences could be drawn in some cases. The suggestion that disclosure might be by stating lump-sum amounts without a breakdown faced the criticism that this would lead to unwelcome tactical manoeuvre.⁶⁰⁴ Parties may, for instance, be tempted to over-state their costs as scare tactics. Or they might over-state them for fear of an under-estimate causing them problems at a later taxation. There was also concern that disclosure to the court might lead to excessively proactive judicial intervention with a view to reducing expenditure by the parties.

750. The principal aim underlying the Proposal, namely, to permit parties to assess the extent of their contingent liability for the costs of the other side, is worthwhile. However, in the Working Party's view, taking into account the strong opposition to the proposal, the benefits of such disclosure are outweighed by the desirability of maintaining legal professional privilege.⁶⁰⁵

Recommendation 129: Proposal 56 (for disclosure of costs between the parties and to the court) should not be adopted.

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⁶⁰³ See Precedent H of the Costs Precedents scheduled to the Costs Practice Direction. This gives a breakdown, among other things, of the number of hours engaged with witnesses of fact, expert witnesses and the client.

⁶⁰⁴ A view expressed by the Bar Association, the BSCPI, the DOJ and the Consumer Council.

⁶⁰⁵ It may be noted, however, that a pilot scheme that includes mutual costs disclosures between the parties in relation to ancillary relief claims in matrimonial proceedings has been introduced. Different considerations may apply to such proceedings where the costs being incurred are likely to be met from the same pool of family assets.

Section 26: Challenging one's own lawyer's bill

Proposal 54

Proposal 54

Procedures should be adopted to make challenges by clients to their lawyers' charges subject to a test whereby the necessity for the work done, the manner in which it was done and the fairness and reasonableness of the amount of the costs in relation to that work, are all subject to assessment without any presumption that such costs are reasonable.

Interim Report paras 576-583

751. *Proposal 54* addresses the situation where a party's solicitors render their costs bill after having done the relevant litigation work and the client wishes to challenge that bill as excessive. The procedure for such a challenge is a "solicitor and own client taxation" of the bill before a master. What should the criteria be for a successful challenge?
752. The current rules (which are examined more closely below) provide that "all costs shall be allowed except in so far as they are of an unreasonable amount or have been unreasonably incurred."⁶⁰⁶ The criterion is, in other words, that of unreasonableness. It is presently buttressed by presumptions: one conclusively in favour⁶⁰⁷ and one rebuttably against⁶⁰⁸ reasonableness.

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⁶⁰⁶ O 62 r 29(1).

⁶⁰⁷ O 62 r 29(2): "For the purposes of paragraph (1), all costs incurred with the express or implied approval of the client shall, subject to paragraph (3), be conclusively presumed to have been reasonably incurred and, where the amount thereof has been expressly or impliedly approved by the client, to have been reasonable in amount."

⁶⁰⁸ O 62 r 29(3): "For the purposes of paragraph (1), any costs which in the circumstances of the case are of an unusual nature and such that they would not be allowed on a taxation

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Proposal 54 canvasses replacing these rules with a rule which dispenses with such presumptions and allows a taxing master to examine at large the need for the work done, how it was done and the fairness and reasonableness of the amount of the costs in relation to that work.⁶⁰⁹

26.1 *The consultation response*

753. The predominant response was one opposed to *Proposal 54*.

754. Barristers contended⁶¹⁰ that such a rule has no place in relation to fees agreed between a barrister and his instructing solicitors.

(a) As required by the Bar Code,⁶¹¹ barristers are generally instructed and remunerated by a separate fee agreed in advance for each item of work undertaken. The solicitor, it was said, could be expected to reach an agreement acceptable to the client and to obtain the actual or implied consent of his client before doing so. It was argued that it would be most unfair to allow such an agreement to be open to challenge *at large* after the barrister has done the work in accordance with what was agreed.

(b) One set of chambers argued that such a rule would also be undesirable as it would be likely to be abused, particularly in relation to younger, less well-established barristers with a view to forcing them to discount agreed fees.

..... *cont'd*

of costs in a case to which rule 28(2) applies, shall, unless the solicitor expressly informed his client before they were incurred that they might not be so allowed, be presumed, until the contrary is shown, to have been unreasonably incurred.”

⁶⁰⁹ Similar to rules found in the New South Wales Legal Profession Act 1987.

⁶¹⁰ By the Bar Association, the BSCPI and a set of barristers' chambers.

⁶¹¹ §120.

(c) It was furthermore argued that such a rule is unnecessary in relation to barristers' fees. The general rule is for agreement in advance. If an agreement involved hourly charges, a cap on the fees chargeable could be agreed in advance. If any dispute arose as to whether the amount of work done or the charges put forward were justified, this could be referred to a "grey areas committee" jointly set up by the Bar Association and the Law Society to rule on such disputes.

755. Solicitors' views were divided. The Law Society expressed support for the proposal on condition that there should not be any presumption, either in favour of or against, reasonableness. However, all the other firms and some specialist associations responding⁶¹² were against the proposal.

26.2 The Working Party's view

756. Solicitor and own client taxations are presently governed by O 62 r 29 which materially states as follows :-

- “(1) On the taxation of a solicitor's bill to his own client (except a bill to be paid out pursuant to section 27 of the Legal Aid Ordinance (Cap 91), or a bill with respect to non-contentious business) all costs shall be allowed except in so far as they are of an unreasonable amount or have been unreasonably incurred.
- (2) For the purposes of paragraph (1), all costs incurred with the express or implied approval of the client shall, subject to paragraph (3), be conclusively presumed to have been reasonably incurred and, where the amount thereof has been expressly or impliedly approved by the client, to have been reasonable in amount.
- (3) For the purposes of paragraph (1), any costs which in the circumstances of the case are of an unusual nature and such that they would not be allowed on a taxation of costs in a case to which rule 28(2) applies, shall, unless the solicitor expressly informed his client before they were incurred that

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⁶¹² Including the HKMLA, the HKFLA and three firms of solicitors.

they might not be so allowed, be presumed, until the contrary is shown, to have been unreasonably incurred

757. By O 62 r 1, “costs” are defined to include “fees, charges, disbursements, expenses and remuneration” and so would include, for instance, fees to be paid by the solicitor to the barrister.

758. Order 62 r 28(2), which is referred to in O 62 r 29(3) above provides as follows :-

“Subject to the following provisions of this rule, costs to which this rule applies shall be taxed on the party and party basis, and on a taxation on that basis there shall be allowed all such costs as were necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being taxed.”

759. The effect of these rules may be summarised as follows :-

- (a) A challenge by a client to his own solicitor's bill can only succeed in relation to costs which “are of an unreasonable amount or have been unreasonably incurred.”⁶¹³
- (b) If the costs under challenge are “of an unusual nature” and such that they would not be allowed on a “party and party” taxation under O 62 r 28(2), that is, if such costs are not, or exceed what is, “necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being taxed” then the costs are presumed unreasonable and for the solicitor to maintain such costs, he must show either that he had expressly informed his client before they

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⁶¹³ O 62 r 29(1).

were incurred that they might not be recoverable on a party and party taxation or that such costs were not unreasonably incurred.⁶¹⁴

- (c) If, however, the costs in question are not unusual and not such as would be disallowed on a party and party taxation – in other words, they are necessary or proper for the attainment of justice or for enforcing or defending the client's rights – then, if the client has expressly or impliedly approved incurring such costs and their amount, he is precluded from challenging the bill for such costs. Even if he could show that such costs were incurred or were in an amount not expressly or impliedly approved by him, his challenge would only succeed if such costs or their quantum were found to be unreasonable. This would obviously be unlikely since the costs would, *ex hypothesi*, be necessary or proper for the attainment of justice or for enforcing or defending the client's rights.

760. Three key concepts emerge from an examination of the abovementioned rules.

- (a) First, the basic criterion for allowing a client to tax down his solicitor's bill is unreasonableness in relation to incurring the costs or their quantum.
- (b) Secondly, consideration of what would be recoverable from the other side on a party and party taxation is an important determinant of reasonableness or unreasonableness. If the costs would be allowable on such a taxation, they are costs which were necessary or proper for the attainment of justice or for enforcing or defending the client's

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⁶¹⁴ O 62 r 29(3).

rights and so would generally be reasonable. Indeed, in most cases costs which pass those tests might be thought, in the absence of some contrary indication, to be impliedly approved by the client.

- (c) Approval by the client is the third important concept. Where a client has expressly or impliedly given his approval beforehand for the incurring of the costs in the amounts in question, it would generally be reasonable (in the absence of special circumstances) to hold the client to that approval. It would generally be unfair, for instance, to disallow a solicitor's recovery of disbursements made (to a barrister or otherwise) made with the client's prior approval.

761. Similar concepts, especially involving prior express approval of a barrister's fees by a solicitor taken to be acting with the client's authority, underlie the Bar's opposition to adopting a rule of the kind canvassed in *Proposal 54*. Moreover, it is provided in a Schedule to Order 62 that :-

“Except in the case of taxation under the Legal Aid Ordinance (Cap 91) and taxations of fees payable by the [Government], no fee to counsel shall be allowed unless (a) before taxation its amount has been agreed by the solicitor instructing counsel; and (b) before the taxing master issues his certificate a receipt for the fees signed by counsel is produced to him.”⁶¹⁵

762. The Working Party sees the force of the Bar's opposition to a new rule permitting fees previously agreed between solicitor and barrister to be challenged as to fairness and reasonableness at large. That is, of course, not to say that as between solicitor and client, the disbursement of counsel's fees cannot be taxed off or taxed down, applying the tests in O 62 r 29. Where, for instance, the solicitor has, without his client's express or implied approval, agreed counsel's fees which are unusually high and such as to

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⁶¹⁵ O 62, 1st Schd, Pt II, para 2(1).

exceed what would be recoverable on a party and party taxation, such costs would be presumed to be unreasonable and the client may well succeed in challenging that disbursement. Since solicitors, by their professional code, would be bound to pay the barrister in any event, they would obviously be well-advised not to place themselves in such an unhappy situation and always to seek their client's prior authorization before agreeing counsel's fees.

763. It is the Working Party's view that the concepts currently applicable to solicitor and own client taxations reflect considerations of elementary fairness as between a solicitor and his client. The Working Party would not be in favour of introducing a rule allowing a solicitor's bill to be challengeable at large on "fairness and reasonableness" grounds if such a rule meant that factors of the type described above would not be given substantial and often decisive weight. If, on the other hand, such a new rule would continue to accord such weight to those factors, its introduction would be unnecessary. The Working Party accordingly recommends against adoption of *Proposal 54*.

Recommendation 130: Proposal 54 (for introducing a new test for use in solicitor and own client taxations) should not be adopted.

Section 27: Taxing the other side's costs

Proposals 57 to 61

Proposal 57

The exceptional treatment given to counsel's fees on party and party taxations, as provided for by para 2(5) of Pt II of the 1st Schedule to Order 62 of the RHC should be deleted.

Interim Report paras 605-607

764. Where a party (“the paying party”) who is ordered to pay the costs of the other party (“the receiving party”) seeks to challenge the incurring or the amount of particular items in the receiving party’s bill of costs, he may seek a taxation of those costs before the taxing master.
765. The criteria used by the taxing master to tax down the receiving party’s costs depends on the nature of the costs order made by the court. Three “bases” of taxation exist, namely, the “party and party”, “common fund” and “indemnity” bases. The usual order is for party and party costs. Common fund and indemnity costs each allow for a more generous basis of taxation vis-à-vis the receiving party, as set out in the Table below.
766. However, para 2(5) of Pt II of the 1st Schedule to Order 62 (“para 2(5)”) lays down a special criterion for the taxation of counsel’s fees. It provides :-

“Every fee paid to counsel shall be allowed in full on taxation, unless the taxing master is satisfied that the same is excessive and unreasonable”

If the fees are found to be excessive and unreasonable, the taxing master is to exercise his discretion having regard to all the relevant circumstances,

particularly certain discretionary factors set out in paragraph 1(2) of the same Schedule.

767. The criteria employed when applying the various bases of taxation may be compared with the criteria prescribed by para 2(5) as set out in the following Table :-

<i>Rule</i>	<i>Basis</i>	<i>Criteria</i>
O 62 r 28(2)	party and party	there shall be allowed all such costs as were necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being taxed
O 62 r 28(4)	common fund	being a more generous basis than that provided for by paragraph (2), there shall be allowed a reasonable amount in respect of all costs reasonably incurred, and paragraph (2) shall not apply.....
O 62 r 28(4A)	indemnity basis	all costs shall be allowed except in so far as they are of an unreasonable amount or have been unreasonably incurred and any doubts which the taxing master may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the receiving party
O 62 r 29	solicitor and own client	<p>(1) all costs shall be allowed except in so far as they are of an unreasonable amount or have been unreasonably incurred.</p> <p>(2) all costs incurred with the express or implied approval of the client shall, subject to paragraph (3), be conclusively presumed to have been reasonably incurred and, where the amount thereof has been expressly or impliedly approved by the client, to have been reasonable in amount.</p> <p>(3) any costs which in the circumstances of the case are of an unusual nature and such that they would not be allowed on a taxation of costs in a case to which rule 28(2) applies, shall, unless the solicitor expressly informed his client before they were incurred that they might not be so allowed, be presumed, until the contrary is shown, to have been unreasonably incurred.</p>
O 62 Schd 1 Pt 2 §2(5)	counsel's fees	allowed in full on taxation, unless the taxing master is satisfied that the same is excessive and unreasonable

768. It is obvious that para 2(5) sets a more generous standard for allowing counsel's fees than the party and party basis. Such fees need not pass the "necessary or proper" test, but must only avoid being "excessive and unreasonable." Indeed, para 2(5) appears to be at least as generous as the common fund and solicitor and own client bases of taxation. It was suggested in the Interim Report that this exceptional treatment of counsel's fees might be difficult to justify and consultees were asked for their views.

The consultation response

769. There was general support⁶¹⁶ for *Proposal 57*, including from the Bar Association, and the Working Party recommends its adoption.

770. The only resistance came from the BSCPI which sought to rely on the same arguments as those advanced against *Proposal 54* as justifying retention of the para 2(5) rule. The Working Party does not accept the applicability of those arguments in the context of *Proposal 57*.

- (a) At the heart of the Bar's opposition to *Proposal 54* (and the Working Party's decision to recommend against its adoption) is the principle that a solicitor's prior agreement of fees with a barrister ought, in the absence of exceptional circumstances, to be upheld and treated as the solicitor's (and through him, the client's) recognition of the reasonableness of such fees.⁶¹⁷

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⁶¹⁶ Supporters included the Bar Association, the Law Society, the DOJ, the APAA, the HKFLA, the HKMLA, the BCC, the JCGWG, the High Court masters, one set of barristers' chambers and two solicitors' firms.

⁶¹⁷ Subject, of course, as discussed in relation to *Proposal 54*, of the client's right to challenge the solicitor's disbursement of such fees applying the principles set out in O 62 r 29.

- (b) *Proposal 57* is concerned with taxation of the fees of the other side's counsel. Obviously neither the paying party nor his solicitors made any prior agreement with the other side's counsel as to the incurring of such fees or their amount. The Working Party can see no reason why this should be judged other than according to the usual principles applicable to *inter partes* taxations.

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

Proposal 58

A rule should be introduced to enable offers similar to Part 36 offers under the CPR to be made in the context of the taxation of costs.

Interim Report paras 610-612

771. The aims of sanctioned offers and payments discussed above in the context of *Proposal 15*, leading to *Recommendations 38 to 43*, are equally applicable to pending taxations. As the Interim Report pointed out,⁶¹⁸ the cost of taxations is often disproportionate. It follows that a mechanism which enables either party to make a sanctioned payment or offer which forces the other party to give serious thought to settling a dispute as to costs and to avoiding an expensive hearing ought to be promoted.

772. The contemplated mechanism is a sanctioned payment into court in the case of the paying party and a sanctioned offer in the case of the receiving party.

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⁶¹⁸ At §608.

Thus, if the sanctioned payment is not less than the sum ultimately recovered by the receiving party after taxation, the receiving party might be ordered to bear the entire costs of the taxation from the time the sanctioned payment was made, possibly on a higher than party and party basis. And where the receiving party has made a sanctioned offer to accept a sum smaller than the sum eventually awarded to him after the taxation, the paying party should have to pay not only the costs of the taxation (themselves taxed on a suitable basis) but also interest on the sum of costs awarded at a suitably enhanced interest rate (as with sanctioned offers generally).

773. This proposal received general support.⁶¹⁹ However, the Legal Aid Department suggested, and the Working Party agrees, that this proposal should not apply to legally-aided parties who are subject to a different regime for the control of costs.

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

Proposal 59

Conditional upon benchmark costs being adopted, such benchmark costs should be taken to represent the presumptive amounts allowable in a taxation of costs and pursuit of a taxation process by a party who subsequently fails to secure an award

Notes

⁶¹⁹ Including from the Bar Association (subject to further consultation), the BSCPI, the Law Society, the HKFLA, the HKMLA, the JCGWG, the High Court masters, one set of barristers' chambers and two firms of solicitors.

for a higher amount in respect of an item covered by a costs benchmark should be taken into account in determining the incidence and quantum of the costs of the taxation process.

Interim Report paras 613-615

774. This proposal is expressed to be conditional on the adoption of benchmark costs. As indicated in *Recommendation 127*, the Working Party has decided against adoption of *Proposal 55* for compiling benchmark costs as understood in the Interim Report for general use.

775. The Working Party therefore recommends against accepting *Proposal 59*. However, as stated in *Recommendation 128*, the Judiciary should compile and publish costs indications derived from decisions of the taxing masters and other reliable sources to be used as a guide to judges and masters making costs awards and to parties negotiating fees or wishing to settle costs disputes. Such figures would provide guidance, but would not purport to set any presumptive benchmarks.

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.

Proposal 60

A procedure should be introduced to enable provisional taxations to be conducted on the papers, at the court's discretion, subject to a party dissatisfied with any such provisional taxation being entitled to require an oral hearing, but subject to possible costs sanctions if he fails to do better at the hearing.

Interim Report paras 616-617

776. There is a considerable demand for taxations. Order 62 r 21(4) currently allows provisional taxations to be effected on the papers and without a hearing where the bill of costs does not exceed \$100,000. In the 12 month period between April 2001 and March 2002 in the High Court, almost 2,000 taxations were sought, of which slightly less than half were dealt with by provisional taxation.

	Taxation hearings	Provisional taxations	Total
Apr 2001	79	66	145
May 2001	107	87	194
Jun 2001	109	85	194
Jul 2001	99	79	178
Aug 2001	96	122	218
Sep 2001	84	84	168
Oct 2001	77	65	142
Nov 2001	71	84	155
Dec 2001	73	58	131
Jan 2002	76	80	156
Feb 2002	59	58	117
Mar 2002	80	74	154
12 months total	1010	942	1952

777. *Proposal 60* canvasses giving the court a discretion to adopt the provisional taxation procedure in relation to bills exceeding \$100,000, while giving any party unhappy with the result a right to require an oral hearing, subject to possible costs sanctions where nothing significant is achieved at such

hearing. There was general support⁶²⁰ for this suggestion, with some pointing out that the discretion should obviously not be exercised in relation to complex taxations after long cases.

778. The Working Party accordingly recommends adoption of *Proposal 60*. However, some thought will be required to harmonise the provisional taxation procedure with sanctioned payments and offers in relation to pending taxations. The outline of a possible approach may be as follows :-

- (a) A paying party may demand a taxation while making a sanctioned payment or may meet with a sanctioned offer from the receiving party. If neither payment nor offer is accepted, the matter proceeds to the taxing master who may decide to conduct a provisional taxation.
- (b) The taxing master should not have information about the sanctioned payment or offer when conducting the provisional taxation. In making his award, two contingencies should be catered for, namely, (i) that one or other of the parties may require an oral hearing; and (ii) that the order for the costs of the provisional taxation may have to take into account a sanctioned payment or offer.
- (c) Accordingly, the orders made on the provisional taxation, both as to the costs awarded and the costs of the taxation itself, should be orders nisi. In relation to the costs of the taxation, the taxing master's discretion is likely to turn at this stage on the extent to which the

Notes

⁶²⁰ Including from the Bar Association, the BSCPI, the Law Society, the High Court masters, the DOJ, the JCGWG, the HKFLA, the Consumer Council, the APAA, the HKMLA, one set of barristers' chambers and two solicitors' firms.

taxation resulted in the receiving party's bill being reduced and on other general discretionary considerations.⁶²¹

- (d) The parties should thereafter have the opportunity within a stated period, to seek an oral hearing. If such a hearing is held, all questions of costs, including the effect of any sanctioned payment or offer, can be dealt with at that hearing. However if, after expiry of the stated period, no oral hearing is sought, the parties ought to be allowed, within a further stated period, to apply in writing to vary the costs order nisi on any grounds, including the existence of an effective sanctioned payment or order. A party opposing variation should so submit in writing. The order absolute for the costs of the taxation should also be handed down without a hearing so as not to nullify the benefits of a provisional taxation.

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.

Proposal 61

Rules, backed by costs sanctions, 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

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⁶²¹ See the discussion of *Proposal 61* below, regarding rules along the lines of CPR 44.14 and CPR 47.18.

clearly stated grounds, using where applicable, prescribed court forms and precedents.

Interim Report paras 618-619

779. A properly drawn up and cross-referenced bill of costs, together with clearly stated objections, would greatly increase the efficiency of the taxation process, whether on a provisional taxation or at a full hearing.
780. *Proposal 61*, which is aimed at promoting such efficiency, was generally supported,⁶²² with some respondents advancing particular suggestions for improvement. Thus, the High Court masters commented that the present format of bills leaves much to be desired :-

“The present format has fragmented each event and makes it difficult to apprehend its significance in the course of litigation relative to costs. The same event appears in different taxation items scattered all over the bill. It is very repetitious and tedious: the same event appears again and again under different heads of the bill.”

The Law Society agreed that the format of the bill of costs requires an overhaul and put forward various other suggestions for reforming the procedure and practice of taxations. The Legal Aid Department suggested that more efficient ways could be found for dealing with mechanical costs items (which generally attract little objection) and routine correspondence.

781. *Proposal 61* should plainly be adopted with a view to streamlining the process of taxation. The exact changes needed in practice ought to be determined after consultation with all interested parties. When more

Notes

⁶²² Including by the High Court masters, the Law Society, the LAD, the Bar Association, the BSCPI, the JCGWG, the APAA, the HKFLA, the HKMLA, the Consumer Council, one set of barristers' chambers and three firms of solicitors.

rational and efficient court forms are developed, their proper use and the proper preparation of the papers for use in taxations should be enforced with appropriate costs sanctions.

782. In this connection, a flexible approach is needed. The present approach of taxing masters is largely to proceed on the assumption that the paying party should pay the receiving party's costs of the taxation. While this should remain the prima facie position, it ought to be displaced where grounds exist for making a different order.
783. Thus, if the recommendations in this Final Report are accepted, it would be displaced where the paying party made a successful sanctioned payment or where the receiving party insisted on an oral hearing after a provisional taxation, without positive result. Equally, if a receiving party has unjustifiably inflated his bill or has filed a poorly prepared bill which makes a provisional taxation impossible or which prolongs the oral hearing, he should be deprived of some or all of his costs or ordered to pay some of the paying party's costs or disallowed some of the costs awarded on the taxation.
784. As indicated in the Interim Report, rules guiding the exercise of discretion in relation to taxation hearings (called "detailed assessments") have been introduced as part of the CPR. Rules along the following lines ought to be adopted in Hong Kong, with suitable changes :-

"CPR 44.14 Court's powers in relation to misconduct

- (1) The court may make an order under this rule where—
- (a) a party or his legal representative, in connection with a summary or detailed assessment, fails to comply with a rule, practice direction or court order; or

- (b) it appears to the court that the conduct of a party or his legal representative, before or during the proceedings which gave rise to the assessment proceedings, was unreasonable or improper.
- (2) Where paragraph (1) applies, the court may—
- (a) disallow all or part of the costs which are being assessed; or
 - (b) order the party at fault or his legal representative to pay costs which he has caused any other party to incur.

CPR 47.18 Liability for costs of detailed assessment proceedings

- (1) The receiving party is entitled to his costs of the detailed assessment proceedings except where—
- (a) the provisions of any Act, any of these Rules or any relevant practice direction provide otherwise; or
 - (b) the court makes some other order in relation to all or part of the costs of the detailed assessment proceedings.
- (2) In deciding whether to make some other order, the court must have regard to all the circumstances, including—
- (a) the conduct of all the parties;
 - (b) the amount, if any, by which the bill of costs has been reduced; and
 - (c) whether it was reasonable for a party to claim the costs of a particular item or to dispute that item.

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.

Section 28: CPR Schedule

Proposal 62

Proposal 62

Rules similar to those listed in Schedule 1 to the CPR should be retained in the RHC with only such changes as may be necessitated by changes to other parts of the RHC.

Interim Report paras 620-622

785. Schedule 1 to the CPR contains those Orders of the Rules of the Supreme Court which were retained notwithstanding introduction of the CPR. If the Working Party had recommended adopting the CPR as a whole, *Proposal 62* would be a relevant recommendation for consideration. Since, however, the Working Party has not recommended such adoption of the CPR, *Proposal 62* is otiose.

<p>Recommendation 137: Proposal 62 (relating to the Rules of the Supreme Court retained after introduction of the CPR) should not be adopted.</p>
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Section 29: Alternative Dispute Resolution

Proposals 63 to 68

Proposal 63

Rules making mediation mandatory in defined classes of case, unless exempted by court order, should be adopted.

Interim Report paras 623-643

Proposal 64

A rule should be adopted conferring a discretionary power on the judge to require parties to resort to a stated mode or modes of ADR, staying the proceedings in the meantime.

Interim Report paras 644-645

Proposal 65

A statutory scheme should be promoted to enable one party to litigation to compel all the other parties to resort to mediation or some other form of ADR, staying the proceedings in the meantime.

Interim Report paras 646-651

Proposal 66

Legislation should be introduced giving the Director of Legal Aid power to make resort to ADR a condition of granting legal aid in appropriate types of cases.

Interim Report paras 652-654

Proposal 67

Rules should be adopted making it clear that where ADR is voluntary, an unreasonable refusal of ADR or uncooperativeness during the ADR process places the party guilty of the unreasonable conduct at risk of a costs sanction.

Interim Report paras 655-661

Proposal 68

A scheme should be introduced for the court to provide litigants with information about and facilities for mediation on a purely voluntary basis, enlisting the support of professional associations and other institutions.

Interim Report paras 662-672

29.1 The Proposals

786. The Interim Report describes existing facilities for ADR in some detail. Parties to any dispute can of course engage in ADR by agreement. What the Interim Report raises for consultation is the extent to which ADR procedures, particularly mediation,⁶²³ should be brought into the formal civil justice system. *Proposals 63 to 68* outline a range of possibilities, involving varying modes and degrees of such integration into the legal system, namely, schemes in which :-

- (a) a statutory rule makes ADR compulsory for particular types of cases;
- (b) the parties are directed by court order to engage in ADR;

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⁶²³ For reasons given below, this Final Report focuses on mediation by a neutral aimed at assisting the parties to arrive at a contractually binding settlement. This should however be understood to include, where appropriate, the whole range of consensual ADR techniques referred to in the Interim Report: see §§625, 627-628.

- (c) ADR is made compulsory where one party elects for ADR;
- (d) legal aid is initially limited, making ADR a condition of any further legal aid;
- (e) an unreasonable refusal of ADR or uncooperativeness in the ADR process provides a basis for making an adverse costs order; and,
- (f) the court's role is limited to encouraging and facilitating purely voluntary ADR.

787. The decision to canvass possible adoption of some form of court-annexed ADR was inspired by the positive results reported by ADR (and particularly mediation) schemes abroad. Current reports indicate that such schemes have increasingly become an accepted feature of the civil justice system, enjoying impressive success rates.

788. To take one example from the United Kingdom, The Centre for Effective Dispute Resolution reported that in 2002/2003, some 516 commercial cases were mediated (an overall 22% increase over 2001/2002)⁶²⁴ with a settlement rate of 78%,⁶²⁵ the major proportion of such cases settling on the day of the mediation, and with 95% of all cases conducted in one day (388 cases). As to subject-matter, the five largest categories of dispute were sale/supply of goods (18%), finance (15%), professional negligence (15%), construction and engineering (9%) and property (9%). The value of the disputes was reported to have remained the same as for the previous year in which 26% of case values were in excess of £1 million, with the others

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⁶²⁴ Some mediations being judicially directed or derived from court-based schemes and others being purely voluntary.

⁶²⁵ About the same settlement rate for court-annexed mediation was reported for Singapore: see Interim Report at §671. Other schemes report similar rates of success.

evenly split across a median value of £150,000. The 22% growth in mediation cases involved values ranging from £50,000 to £1 million.⁶²⁶

789. The success and cost-effectiveness of such mediation schemes has led to strong government support in the UK. In March 2001, the Lord Chancellor's Department announced that all government departments would seek to avoid litigation by using mediation and other neutral-assisted dispute resolution procedures. Subsequently, local authorities were told that they too were expected to consider using mediation where appropriate.⁶²⁷

790. Acceptance of the value of such schemes can also be seen in a string of judicial decisions discussed below. Lightman J described the current position in England and Wales in the following terms :-

“Mediation is not in law compulsory, (but) alternative dispute resolution is at the heart of today's civil justice system, and any unjustified failure to give proper attention to the opportunities afforded by mediation, and in particular in any case where mediation affords a realistic prospect of resolution of dispute, there must be anticipated as a real possibility that adverse consequences may be attracted.”⁶²⁸

791. CEDR points out that :-

“The power of mediation can be witnessed by its success - despite the fact that most negotiations which come to mediation are in total deadlock, CEDR achieves a settlement in around 80 per cent of cases. In those that do not settle, mediation is still seen as successful as it helps to reduce the issues in conflict thereby paving

Notes

⁶²⁶ *CEDR Solve commercial mediation statistics 2002/3* (May 2003) at www.cedr.co.uk.

⁶²⁷ Eileen Carroll, Deputy Chief Executive of CEDR, *Advances in effective dispute resolution* (February 2003) at www.cedr.co.uk.

⁶²⁸ *Hurst v Leeming* [2003] 1 Lloyd's Rep 379 at 380.

the way for renewed negotiations. Mediation has a proven track record in a number of business sectors. It has also proved successful in family mediation.”⁶²⁹

792. There has been similar success in the pilot scheme for family mediation in Hong Kong, as mentioned in the Interim Report.⁶³⁰ On 12 April 2002, the Hong Kong Polytechnic University, commissioned by the Judiciary to evaluate that scheme, published its Interim Report.⁶³¹ Of 458 cases where mediation was completed (the cases, requiring the parties’ consent and having first been assessed for suitability for mediation) in the period between May 2000 and November 2001, 71.4% reached full agreement and another 8.5% partial agreement. On average, it took 10.18 hours to reach a full, 14.35 hours to reach a partial, and 6.3 hours to reach no agreement. Almost 80% of the respondents stated that they were “satisfied” or “very much satisfied” with the mediation service received.
793. Approval was given in January 2002 by the Chief Justice for a further pilot scheme to be commenced for the use of new ancillary relief procedures with judicial mediation as an important feature.⁶³²

Notes

⁶²⁹ Karl Mackie Chief Executive, CEDR and Eileen Carroll Deputy Chief Executive, CEDR, *Regulation or positive promotion? How to foster the art of mediation*, March 2003, at www.cedr.co.uk.

⁶³⁰ At §666 and §670. See Practice Direction 15.10.

⁶³¹ www.judiciary.gov.hk/en/publications/hkpu_interimreport.pdf.

⁶³² The scheme is based on the pilot propounded by the Ancillary Relief Working Party chaired by Lord Justice Thorpe in the UK. It involves the judge who case manages the case holding a financial dispute resolution (“FDR”) hearing to explore settlement with the parties, with some other judge hearing the substantive application if the FDR hearing proves fruitless.

29.2 The consultation response

794. The proposals on ADR attracted a very lively response. There was generally much opposition to *Proposal 63*⁶³³ and *Proposal 65*.⁶³⁴ The response to *Proposal 66* was mixed.⁶³⁵ *Proposal 68* was largely uncontroversial and received general support. There was a mixed reception for *Proposal 64*⁶³⁶ and *Proposal 67*.⁶³⁷

795. Five broad concerns or objections emerged, namely, that :-

- (a) the imposition of any requirement to engage in mediation⁶³⁸ as a condition of being allowed to proceed with litigation is inconsistent with the right of access to the courts guaranteed by BL 35 and so is unconstitutional (“the constitutional argument”);

Notes

⁶³³ Including from the Bar Association, the BSCPI, the Law Society, the LAD, HKM Centre, the HKFLA, the SCLHK, the WB/LAD, the HA, the JCGWG, the HKIA, the Registrar of Companies, two sets of barristers’ chambers, two firms of solicitors and two individual respondents. The Proposal was supported by the APAA, the HKMC, the HKFEMC, the HKI Arb and the AE (as a pre-requisite to a hearing). The HKCA favoured mandatory mediation for all cases in the Construction and Arbitration List.

⁶³⁴ Opponents and supporters were much the same as those responding to *Proposal 63*.

⁶³⁵ Opponents included the LAD, the Bar Association, the BSCPI, the Law Society, the JCGWG and one set of barristers’ chambers. It received support from the APAA, the HKMC, the HKM Centre, the HKFLA, the HKI Arb, the HKIA, one firm of solicitors and an individual respondent.

⁶³⁶ Supporters included the Law Society, the APAA, the HKMC, the HKFLA, the SCLHK, the HKI Arb, the HKIA, the AE, the Registrar of Companies and three individual respondents. Opponents included the Bar Association, the BSCPI, the HKM Centre, the WB/LAD, one set of barristers’ chambers and one firm of solicitors.

⁶³⁷ Supporters, some of whom saw difficulties in the proposal, included the Law Society, the APAA, the HKMC, the WB/LAD, the HKFEMC, the HKI Arb, the AE, one firm of solicitors and two individual respondents. The SCLHK’s views were divided. Those against included the Bar Association, the BSCPI, the HKM Centre, the HKFLA, the JCGWG, the LAD, one set of barristers’ chambers and one firm of solicitors.

⁶³⁸ Some respondents extended this argument to include any rule imposing costs penalties for unreasonably rejecting mediation.

- (b) the court should perform its duty to hear cases in the usual way and should not direct or encourage parties to go elsewhere to resolve their dispute (“the duty to entertain litigation point”);
- (c) Hong Kong does not have the necessary infrastructure to adopt a court-annexed ADR or mediation scheme (“the lack of infrastructure point”);
- (d) mediation must, by its nature, be voluntary and mandatory schemes are inherently likely to fail (“the voluntariness objection”); and,
- (e) such schemes are likely often to be counter-productive in that mediation which fails adds to the costs and delays (“the additional costs point”).

796. Additionally, two specific objections (which can be dealt with in the discussion of the proposals concerned) emerged, namely :-

- (a) that *Proposal 66* is objectionable since it is discriminatory against poorer litigants who have to rely on legal aid,⁶³⁹ and,
- (b) that *Proposal 67* suffers from the defect that no workable method of deciding whether a party has acted unreasonably or uncooperatively exists, and moreover, that any attempt to examine why a mediation or other ADR process failed, would impair the confidentiality and without prejudice nature of such processes essential to their success.

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⁶³⁹ *Proposal 66* was also said to be workable only where both sides are legally-aided since otherwise, the legally-aided person, though willing to go to mediation, could not force the other party to agree.

29.3 The Working Party's position generally

797. The Working Party acknowledges that there is substance in the foregoing objections and that it is important for them to be addressed. Indeed, it is important that they should, if possible, be satisfactorily met since there is potentially great value in being able to provide an option within our civil justice system for the parties to resort to ADR (and particularly to mediation⁶⁴⁰).
798. Thus, in suitable cases, mediation may result in very substantial savings in costs. While a mediation itself involves the incurring of costs – and therefore a risk of additional costs should it fail – such costs are likely to be much lower than the costs of pursuing court proceedings to the bitter end. With relatively simple cases, as we have seen, mediation may take no more than a day with the case often settling on the day. Costs savings can be even more dramatic in relation to complex and hard-fought cases. An example of such a case (involving a complex shareholders' dispute resulting in three concurrent actions with multiple parties and with allegations of conspiracy in one action) can be found in the judgment of Arden J in *Guinle v Kirreh* (Unreported, 3 August, 1999):-

“In the course of the hearing, the parties have provided me with estimates of their costs. Taking the share action and the conspiracy action together for this purpose (and on the assumption of a five day trial for the share action), the third, fourth and eighth defendants have incurred some £625,000 worth of costs and expect to incur about a further £820,000. Mr Kirreh, Kinstreet and Interfisa have incurred some £650,000 and their estimated further costs are some £786,000. The ninth defendant has incurred some £132,000 in the conspiracy action and estimates that he will incur a further £421,000 approximately. The costs of ADR are much less.

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⁶⁴⁰ For reasons discussed below, mediation (coupled with any other appropriate consensual forms of ADR) is considered the most suitable form of court-annexed ADR. Accordingly, the focus of the present discussion is on mediation rather than other forms of ADR.

Miss Allan's instructing solicitors estimate that they would incur some £27,500. The costs of the mediator would be some £3,000 per day, together with preparation time. Thus the costs to be saved by mediation, if successful, would be very substantial."

799. The second major reason for regarding a mediation option as valuable is the fact that mediation can produce flexible and constructive outcomes as between the parties which traditional legal remedies cannot offer.

(a) Karl Mackie and Eileen Carroll of CEDR put this as follows :-

"The need for an alternative to litigation, arbitration and tribunals is broadly accepted, particularly because of the problems of time and cost, but also because any adversarial process leaves wounds, which damage, even destroy, relationships. From another perspective, litigation, arbitration and tribunals are inherently unsatisfactory as they look back to the past, and any decision is largely based upon history. In mediation the focus is primarily on the future and on party interests which are not limited to legal issues but take account of the commercial needs of both parties."⁶⁴¹

(b) In *Dunnett v Railtrack plc* [2002] 1 WLR 2434 at §14, Lord Woolf MR gave some examples based on the court's experience :-

"This court has knowledge of cases where intense feelings have arisen, for instance in relation to clinical negligence claims. But when the parties are brought together on neutral soil with a skilled mediator to help them resolve their differences, it may very well be that the mediator is able to achieve a result by which the parties shake hands at the end and feel that they have gone away having settled the dispute on terms with which they are happy to live. A mediator may be able to provide solutions which are beyond the powers of the court to provide. Occasions are known to the court in claims against the police, which can give rise to as much passion as a claim of this kind where a claimant's precious horses are killed on a railway line, by which an apology from a very senior police officer is all that the claimant is really seeking and the money side of the matter falls away."

800. Mediation also provides the chance of a swifter resolution of the dispute in conditions of confidentiality and in an atmosphere where the parties are

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⁶⁴¹ Karl Mackie Chief Executive, CEDR and Eileen Carroll Deputy Chief Executive, CEDR, *Regulation or positive promotion? How to foster the art of mediation*, March 2003, at www.cedr.co.uk.

channelled towards seeking settlement rather than towards inflicting maximum adversarial damage on each other. It is obviously in the interests of justice to promote cost-effective options for satisfactory dispute resolution if this can be done in a manner meeting the substantive objections raised.

29.4 The five broad objections

(a) The constitutional argument

801. If a rule prohibits a person from proceeding with an action without first going through a mediation procedure, the right of access to the courts under BL 35 is prima facie engaged. It is arguable that a rule which visits adverse costs consequences on a party who unreasonably rejects a mediation attempt, does not engage BL 35 at all since he is nonetheless able to press ahead with the litigation, albeit running the costs risk. Nevertheless, for present purposes, let it be assumed that BL 35 is also engaged in such a case.

802. In the Working Party's view, applying the principles discussed in Section 3 above, neither form of rule (nor any intermediate form) would be inconsistent with the requirements of BL 35. As the E Ct HR decided, *inter alia*, in *Ashingdane v UK* (1985) 7 EHRR 528,⁶⁴² the right of access to a court is not absolute. As has repeatedly been held, a limitation on the access rights may be valid provided that :-

- the restriction pursues a legitimate aim;

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⁶⁴² Applied domestically in England and Wales in *Ebert v Official Receiver* [2002] 1 WLR 320.

- there is a reasonable proportionality between the means employed and the aim sought to be achieved; and,
- the restriction is not such as to impair the very essence of the right.

803. In the Interim Report we emphasised that :-

“It is of course not being suggested that the parties should ever be ordered to resort to ADR in lieu of having their case decided as proceedings in court. Such an approach would not only be unacceptable since the courts must in principle be open to all, it would most likely fall foul of Article 35 of the Basic Law which confers on Hong Kong residents, among other things, the right of access to the courts. Accordingly, even in its most stringent form, a requirement that the parties must attempt ADR is a requirement that they make such an attempt before being allowed (if ADR should fail) to proceed in court.”⁶⁴³

804. On the aforementioned basis, any restrictions on access to the courts which would result from rules or court orders based on any of *Proposals 63 to 68* would clearly qualify as valid. It is plainly legitimate for the civil justice system to seek the benefits of mediation described above. The constraints range from the imposition of a temporary incapacity to proceed with an action to a threat of an adverse costs order for rejecting mediation, these being means which are plainly proportionate to the aforesaid aim and which cannot possibly be said to impair the very essence of the access right.

(b) *The duty to entertain litigation point*

805. The argument that court-annexed mediation should be rejected as interference with the parties’ right to litigate amounts to an argument that the civil justice system should limit itself to procedures fostering an unbridled adversarial approach to dispute resolution. Such an argument is not acceptable.

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⁶⁴³ Interim Report §638.

806. Parties in litigation come to the court to seek a fair and satisfactory resolution of their dispute. The introduction of court-annexed mediation enables the civil justice system, in suitable cases, to channel a case to a mediation process as a potentially cost-effective means of achieving that outcome at an early stage of the proceedings. If, with the mediator's help, the parties are able to reach a consensual settlement (a frequent occurrence with mediation schemes elsewhere), it is likely to be a satisfactory outcome arrived at with substantial costs savings, less delay and without the full trauma of the traditional litigation process. If such settlement cannot be reached, the traditional process resumes – often with the issues clarified. It makes little sense to deprive the civil justice system of such an option simply on the basis of a categorical assertion in favour of an undiluted adversarial approach.

(c) The lack of infrastructure point

807. It is plain that for court-annexed mediation to work, the necessary infrastructure must be in place. In particular :-

- (a) One or more institutions able to train and accredit mediators and to establish and develop procedural and ethical rules for mediation have to be available and acceptable to the judiciary.
- (b) There must be enough trained and sufficiently skilled mediators on the ground.
- (c) Lawyers must be educated on the subject so as to be able to advise their clients on and to represent them in court-annexed mediation.
- (d) To the extent that unrepresented litigants are participants in mediation, facilities must exist to provide them with relevant information and education regarding the process.

- (e) Judges must be trained to recognize cases which may benefit from mediation, to case manage litigation accommodating mediation efforts and to administer relevant rules, including any costs sanctions, in an appropriate manner.
 - (f) The courts may need to develop case-law on the application of principles relating to costs sanctions and other aspects of the interaction between the traditional civil justice system and mediation.
808. Such an infrastructure obviously does not come into existence overnight. It has to be established and improved progressively as more people are trained and as experience of the process spreads. Over the longer term, ADR should become part of the standard curriculum in university, professional and continuing legal education programmes. Nevertheless, in Hong Kong, much of the basic infrastructure already exists.
809. The Hong Kong Mediation Council was set up as part of the Hong Kong International Arbitration Centre in 1994.
- (a) It has published the HKIAC Mediation Rules⁶⁴⁴ (discussed further below) which provide a model procedural code that may be adopted for mediations.
 - (b) It has published a General Ethical Code and established Disciplinary Procedures for mediators.
 - (c) It provides the service of appointing mediators⁶⁴⁵ where required and trains and accredits mediators, with published procedures for accreditation. It also collaborates with other groups interested in

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⁶⁴⁴ The current edition having been effective from 1 August 1999, see www.hkiac.org.

⁶⁴⁵ For a fee of \$2,000.

mediation, particularly in the construction, family, insurance, commercial and public sectors.

- (d) Its published panels of accredited mediators include 182 mediators on the general panel, 108 on the family panel and 28 “family supervisors”.
- (e) The mediators on the general panel span a wide range of professions and occupations, and claim expertise in a wide range of subjects. They include quantity surveyors, engineers, architects, project managers, accountants, solicitors,⁶⁴⁶ barristers, construction and shipping experts, loss adjusters and insurance experts, bankers and academics.
- (f) The HKMC made a detailed and helpful submission to the Working Party and has offered assistance towards establishing a scheme of court-annexed mediation, including fee discussions with its accredited mediators and drawing up rules for such a scheme.

810. Government contracts have given rise to another body of mediation experience. The very substantial Airport Core Programme project construction contracts made mediation a contractual obligation and are estimated to have had a settlement rate of about 79%. Other government contracts provide for mediation on a voluntary basis.

811. The Hong Kong Mediation Centre⁶⁴⁷ was set up in 1999 and now has about 120 members. It provides training and accreditation for mediators and

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⁶⁴⁶ The Law Society maintains a panel of mediators. However, it appears that virtually all of them are also listed as accredited mediators on the HKMC panel.

⁶⁴⁷ www.mediationcentre.com.hk.

works in conjunction with local universities and other professional institutions. It also helps with appointments of mediators. In its submission to the Working Party, it stressed the importance of the voluntary nature of mediation and stated its belief that further education on mediation for users of the civil justice system is vital to the further development of mediation in Hong Kong.

812. The Academy of Experts also trains mediators in Hong Kong and is accredited by both the HKMC and the Law Society for this purpose. In its submission, it offered to provide training services, including training sessions for judges.

813. In the Working Party's view, the existing resources provide a basic infrastructure sufficient to support the adoption in principle of an appropriate scheme of court-annexed mediation. If adopted, active steps would have to be taken to provide judges and lawyers with appropriate training in a systematic manner and to promote improvements in the skill and experience of mediators. Consultation involving all interested institutions and parties would also be necessary to establish the detailed framework of such a scheme, as discussed further below. Moreover, any such scheme should be introduced on a pilot basis subject to evaluation after an initial period. Approached in the manner indicated, the Working Party does not accept the lack of infrastructure point as a basis for rejecting court-annexed mediation.

(d) The voluntariness objection

814. A number of respondents argued that an essential aspect of mediation is that it is voluntarily undertaken by the parties and accordingly, that to make the process mandatory or to penalise a refusal to mediate would be

fundamentally inconsistent with mediation. The Working Party fully accepts that mediation must be voluntary in the sense that no attempt should be made to force anyone to settle a case. However, it is not accepted that a procedural requirement for the parties to at least attempt mediation up to a defined stage, or a rule exposing a party who unreasonably refuses to attempt mediation to costs sanctions, would be incompatible with the mediation process. Such procedural requirements can plainly be introduced while preserving court-annexed mediation as a wholly consensual process.

815. When reference is made in this Final Report to a settlement reached after mediation, what is envisaged is a settlement voluntarily agreed to by the parties. This is of the essence of mediation as reflected, for instance, in the HKIAC Mediation Rules.

(a) Thus, Rule 1 provides :-

“Mediation under these Rules is a confidential, voluntary, non-binding and private dispute resolution process in which a neutral person (the mediator) helps the parties to reach a negotiated settlement.”

(b) Moreover, by Rule 11, any party can withdraw at any time, thereby bringing the mediation to an end.

816. The CEDR Model Mediation Procedure and Agreement contains a similar termination rule⁶⁴⁸ and, in relation to settlement, provides⁶⁴⁹:-

“Any settlement reached in the Mediation will not be legally binding until it has been reduced to writing and signed by, or on behalf of, the Parties.”

817. Accordingly, however a party may have been brought into a mediation – whether his attendance is entirely self-motivated, directed by a court or due

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⁶⁴⁸ Clause 14.

⁶⁴⁹ Clause 13.

to an anxiety to avoid possible adverse costs consequences – the dispute resolution process itself remains wholly consensual. The mediator will do his best to facilitate a negotiated settlement agreement. But it is entirely up to the parties whether they settle the whole or part of the dispute or whether they withdraw and so bring the mediation to an end.

818. It is the desirability of such a voluntary and consensual form of ADR⁶⁵⁰ that has led the focus of this Final Report to be on mediation in preference to other forms of ADR. Of course, mediators are generally free to employ (with the consent of the parties) such other consensual ADR techniques (such as obtaining an early neutral evaluation of the case, or getting the parties to commission a neutral expert’s report on certain key facts, etc) as may be appropriate. Such techniques preserve the parties’ unqualified right to decide whether or not to reach settlement. Reference to “mediation” here is not intended to exclude such consensual techniques. The Working Party does not, however, recommend adopting any binding, adjudicatory forms of ADR for annexation by the court.⁶⁵¹
819. While preserving the consensual core of a mediation, a court-annexed scheme may involve rules which make engaging in the mediation process procedurally “mandatory” in varying degrees.
- (a) The court may be given power to order the parties to appoint a mediator (with an accrediting authority appointing one in default) and to proceed with the mediation until it is terminated (usually either by

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⁶⁵⁰ Adjudicatory versus consensual forms of ADR were discussed in the Interim Report at §§625-627.

⁶⁵¹ Subject to what is said below concerning any possible statutory scheme for binding or provisionally binding adjudication in construction cases.

settlement, by the mediator certifying that it has not succeeded or by either party withdrawing).

- (b) Or the court may have power to require the parties to appoint a mediator and to engage to some stated degree in the mediation process.⁶⁵²
- (c) Or the court might only have power to recommend mediation and to impose costs sanctions if no attempt at mediation occurs.

820. The point for present purposes is that, the premise of the voluntariness objection cannot be accepted. Procedural requirements imposed by rules of court such as those mentioned above do not deprive mediation of its essentially voluntary and consensual character and do not make it unworkable.

(e) The additional costs point

821. There is no doubt a risk that a mediation may fail and that this would add to the costs and might possibly delay resolution of the dispute. However, this concern does not justify an out-and-out rejection of court-annexed mediation, at least over an initial trial period.

822. Instead, the focus ought to be on minimising that risk by enhancing the supporting infrastructure, in particular by a programme for the training of judges, lawyers and other referral agencies in the selection of cases suitable

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⁶⁵² In England and Wales, for instance, the Commercial Court Guide contains a draft ADR order requiring an ADR neutral to be appointed and directing the parties “to take such serious steps as they may be advised to resolve their disputes by ADR procedures before the neutral individual or panel so chosen by no later than [a specified date].”

for mediation and for the training of skilled mediators capable of achieving constructive results.

823. The savings and other benefits which are likely to accrue if court-annexed mediation were to succeed are such as to justify assuming the residual risk, certainly at least for an initial trial period.
824. As indicated above, a gradual approach to court-annexed mediation, with an evaluation and review after the initial period, should be prudently adopted. If the scheme was then found to be adding to costs and delays, appropriate steps could be taken.
825. For the foregoing reasons, in the Working Party's view, the five broad grounds for objection do not compel a conclusion against adopting an appropriate form of court-annexed mediation.

29.5 The specific proposals

(a) Proposal 68: Encouraging purely voluntary mediation

826. This proposal was uncontroversial. It involves little more than maintaining the status quo, proposing that the court should take steps to encourage the parties to undertake purely voluntary mediation by, for instance, providing better information on available facilities and requiring the parties to indicate whether they have considered ADR. No element of compulsion to mediate (whether by direction of the court or by any threatened sanction) is envisaged here.
827. The take-up rate for purely voluntary mediations is, however, generally very low and would probably remain insignificant even if greater efforts were made to disseminate information and encourage its use. One reason for this is the well-known reluctance of parties to initiate settlement overtures for

fear of their actions being construed as a sign of weakness. Accordingly, if *Proposal 68* were the only proposal on mediation adopted, it would have little impact on the civil justice system. The Working Party believes that mediation merits a greater role. It is in favour of adopting *Proposal 68* as part of an overall effort to educate all concerned about using mediation, in conjunction with other measures designed to offer mediation as an effective adjunct to traditional court proceedings.

Recommendation 138: Proposal 68 (for the court to provide litigants with better information and support with a view to encouraging greater use of purely voluntary mediation) should be adopted in conjunction with other appropriate measures to promote court-related mediation.

(b) Proposal 63: Mandatory mediation by statutory rule

828. The model envisaged in *Proposal 63* is not suitable for general application. It might arise where, for whatever reasons, there is a demand or perceived need to introduce a statutory rule which automatically imposes a requirement on parties involved in particular types of dispute to attempt mediation. Subject to what is said below concerning statutory adjudication in construction cases, there has been no such demand or perceived need in Hong Kong.

829. Additionally, the *Proposal 63* model has an important drawback. Where a mediation requirement is laid down by an inflexible rule, cases which are patently unsuitable for mediation would inevitably be caught in the net.

This would necessitate a procedure for parties to apply for exemption, with attendant costs and inconvenience. This is likely to cause resentment where the case is obviously not one which ought to have been selected for mediation in the first place. Accordingly, the Working Party does not recommend adoption of *Proposal 63*.

830. A number of respondents involved in the construction industry mentioned statutory adjudication as a mechanism which the Working Party ought to consider in the context of civil justice reform. The procedures in question originated in the Housing Grants, Construction and Regeneration Act 1996 in the UK. By section 108 of that Act, a party to a construction contract is given the right to refer a dispute arising under the contract for adjudication. The prescribed procedure aims at securing a rapid decision, usually on the right of a contractor to payment, which decision is “binding until the dispute is finally determined by legal proceedings, by arbitration or by agreement.” The adjudication is therefore provisionally binding, although the parties are free to accept the decision as finally determining the dispute. It has been reported⁶⁵³ that a decision is typically made within 4 to 6 weeks and that such decisions are in most cases accepted as final.

831. Adjudication has evidently enjoyed considerable success in the UK and is to be encouraged from the point of view of procedural reform. However, whether such a system should be adopted in Hong Kong raises policy questions going beyond issues of civil justice reform. In the context of the construction industry, it involves addressing the countervailing interests of employers, contractors, sub-contractors, professionals and others concerned

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⁶⁵³ Anthony Albertini, *Adjudication five years on – Is there any need for reform?* www.shadboltlaw.co.uk.

in conjunction with general government policy in the field. The Working Party notes that the Report of the Construction Industry Review Committee dated January 2001 recommended that :-

“Proactive and collaborative ways of dispute resolution should be encouraged through the adoption in contracts of provisions which facilitate the resolution of disputes by means of alternative dispute resolution techniques (such as use of a dispute resolution adviser and/or dispute resolution board) in addition to formal and binding adjudication means which will remain necessary, but last resort solution.”

While the Working Party supports such initiatives in principle, the development of specialised construction contract dispute resolution mechanisms must be left to stakeholders in the construction industry.

Recommendation 139: Proposal 63 (for introducing mandatory mediation by statutory rule) should not be adopted, without prejudice to any initiatives within the construction industry for the adoption of statutory adjudication.

(c) *Proposal 65: Mandatory mediation by election of one party*⁶⁵⁴

832. As indicated above, this proposal, like *Proposal 63*, was generally unpopular. To allow any party to force the other, unwilling, party to go to mediation was thought to be a recipe for abuse by parties wishing to delay proceedings and to create obstacles in the way of their resolution. To give one party a power to impose its will in this way – without any judicial control – was also thought likely to worsen the relationship between the

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⁶⁵⁴ *Proposal 64* is dealt with below.

parties, making the chances of success in the mediation more remote. The Working Party agrees and does not recommend adoption of *Proposal 65*.

Recommendation 140: Proposal 65 (for introducing mandatory mediation by election of any party to a dispute) should not be adopted.

(d) *Proposal 66: Mediation as condition of legal aid*

833. The proposal was that in cases judged by the Legal Aid Department to be suitable for mediation, the legal aid certificate should in the first place be limited to funding the mediation, with court proceedings to be funded thereafter if the mediation fails.⁶⁵⁵ In such cases, mediation could be viewed as a condition for the grant of full legal aid, and the proposal was so presented in the Interim Report. This was perhaps an unfortunate way of formulating the option since the proposal is more accurately seen as one for legal aid funding to be made available for mediation both as a likely means of achieving a satisfactory resolution of the parties' dispute and of saving public resources.

834. The main objection raised by several respondents, no doubt influenced by the way in which the option was put in the Interim Report, was that a rule making mediation a condition of legal aid was discriminatory against the poorer litigant.

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⁶⁵⁵ Interim Report §652. The proposal outlined above is clearly preferable to the alternative of making an unfunded mediation a pre-condition of legal aid funding.

835. In their response, the Legal Aid Department, while acknowledging the value of ADR as an alternative or adjunct to legal proceedings, considered it undesirable that the Director should be given power to make participation in ADR a condition of granting legal aid “as this may not be consistent with access to justice”. Noting that the Interim Report had only cited family disputes as a possible area for mediation, in an information paper delivered to the Legco Panel on Administration of Justice and Legal Services in June 2003, the Administration stated that it would study the findings and the final evaluation of the Judiciary’s Family Pilot Mediation Scheme and await the Working Party’s finalized report in considering the proposal’s implications on legal aid services. The Administration also indicated that it would not rule out the need to run a trial scheme in respect of legal aid cases before considering the way forward.
836. In the Working Party’s view, *Proposal 66*, properly apprehended, is not discriminatory. A person who qualifies for legal aid and has an apparently meritorious claim should undoubtedly be given the funding to pursue his claim as provided for by statute. However, there can be no objection to the Director requiring the claim to be pursued in the most cost-effective manner available in order to stretch legal aid resources to enable a larger number of meritorious claimants to be assisted. Thus, under the existing statutory provisions the Director has power to revoke a legal aid certificate where the aided person “has required the proceedings to be conducted unreasonably so as to incur an unjustifiable expense to the Director or has required unreasonably that the proceedings be continued”⁶⁵⁶ or where the Director “considers that the aided person no longer has reasonable grounds for

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⁶⁵⁶ See Legal Aid Ordinance, Cap 91, s 11 and Legal Aid Regulations, reg 8(2)(d).

taking, defending or being a party to the proceedings or, as the case may be, that it is unreasonable in the particular circumstances for him to continue to receive legal aid.”⁶⁵⁷

837. *Proposal 66* (as explained above) should be viewed as justifiable on the grounds which underlie the aforesaid provisions, provided, of course, that the Administration can be satisfied that the proposal would be likely to present an appropriate and a more cost-effective solution in funding legal aid cases and saving public resources.

838. *Proposal 66* should be adopted in principle. The Working Party understands that the Administration may need to conduct its own pilot scheme and satisfy itself as to the cost-effectiveness of the scheme before deciding on the way forward. If the proposal as modified is subsequently implemented, detailed rules as to funding and otherwise should be developed in consultation with the Judiciary, the legal profession, institutions offering mediation services and other interested parties. The contents of such rules would depend in part on the extent to which the court takes up powers to direct mediation or to make adverse costs orders where mediation is unreasonably rejected. The Legal Aid Department would also need to have officers trained to identify cases likely to benefit from mediation.

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⁶⁵⁷ *Ibid*, reg 8(3).

Recommendation 141: The Legal Aid Department should have power in suitable cases, subject to further study by the Administration and consultation with all interested institutions and parties on the development and promulgation of the detailed rules for the implementation of the scheme, to limit its initial funding of persons who qualify for legal aid to the funding of mediation, alongside its power to fund court proceedings where mediation is inappropriate and where mediation has failed.

(e) *Proposal 64: Mediation as a condition for proceeding with the action*

839. *Proposal 64* involves the court in the exercise of a comparatively high degree of compulsion, imposing on the parties a positive duty to engage in mediation, preventing them from proceeding with their action in the meantime. Such an approach would plainly attract many of the objections identified above, especially the voluntariness objection. It is also likely to raise doubts on the basis respectively of the duty to entertain litigation, the lack of infrastructure and the additional costs points.

840. In these circumstances, it is the Working Party's view that *Proposal 64* should not be adopted, at least initially. It may be that after mediators, judges, lawyers and others involved have gained experience and expertise, making mediation a well-accepted option within our civil justice system, rules could be adopted to empower the courts to make more specific and demanding mediation orders.

Recommendation 142: Proposal 64 (for giving the court power to order the parties to engage in mediation) should not be adopted at present.

(f) *Proposal 67: Unreasonable refusal of mediation reflected in costs orders*

841. In the Working Party's view, *Proposal 67* presents the preferable option. It envisages the court endorsing and encouraging mediation in appropriate cases to the extent of making an unreasonable refusal to mediate an important factor in dealing with the costs of the action. The court's intervention would be limited to penalising in costs orders an unreasonable refusal to entertain mediation. For instance, a winning party might be deprived of costs because of an unreasonable refusal of mediation. The need to protect legal professional privilege and to preserve the confidentiality of the mediation process would be respected.

842. The framework for an approach along the lines of *Proposal 67* would require :-

- (a) rules setting out a procedure for requesting mediation thereby constituting a refusal the basis for an adverse costs order if that refusal were later to be found to have been unreasonable ("rules on the request");
- (b) rules identifying what would constitute a sufficient attempt at mediation to eliminate the risk of an adverse costs order ("rules on the response"); and,

- (c) an approach to deciding when a refusal of mediation is or is not unreasonable (“the approach to unreasonableness”).

• *Rules on the request*

843. It is important that the rules leave the parties in no doubt as to when a request for mediation which may operate with adverse costs consequences has been made.

844. In the Working Party’s view, it ought in principle to be possible for :-

- (a) one party to make an operative request for mediation in writing directly to another party; or
- (b) the court, on the application of any party, upon being satisfied that the case is prima facie appropriate for mediation, to make a judicial recommendation that the parties attempt mediation; or
- (c) the court, upon being satisfied that the case is prima facie appropriate for mediation, to make, on its own motion, a judicial recommendation that the parties attempt mediation.

845. Where this has been done and mediation has been refused, the party who requested mediation may be able to contend that such refusal was unreasonable and that the order for the costs of the action should take this into account (in what may even be a decisive manner).

846. It would also be important for the request or recommendation to be reasonably specific as to the mediation sought. If a party were to make an equivocal or ambiguous request for mediation, leaving the other side uncertain as to what was being proposed, it would obviously be unjust for that party to be penalised for a refusal. It would therefore be desirable for it

to be made a requirement that the request or recommendation for mediation specify the (previously judicially approved) institution or rules pursuant to which the requested mediation should take place.⁶⁵⁸

- *Rules on the response*

847. Rules made pursuant to *Proposal 67* should be explicit as to the degree of participation in the mediation attempt necessary to avoid potentially adverse costs consequences. The required participation might, for instance, extend to appointment of a mediator plus attendance at a preliminary session or to the parties progressing to some other stage of the mediation defined by the applicable mediation rules.

848. Clear-cut rules to this effect would meet the anxieties expressed by some respondents to the consultation that inquiries by the court into whether there had been unreasonableness in the course of a mediation would fatally impair the confidential and “without prejudice” nature of mediation, essential for its success. The rules as to what constitutes a sufficient response should make it clear that in any subsequent costs application, the court would not be concerned with inquiring into how or why any attempt at mediation failed, but merely as to whether there was an unreasonable refusal to proceed to the required degree of participation by the party concerned. Privileged and confidential communications arising in any mediation attempt would not be disclosed.

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⁶⁵⁸ *Cable & Wireless PLC v IBM United Kingdom Ltd* [2002] EWHC 2059 (11 October 2002) is instructive by analogy in this context.

- *The approach to unreasonableness*

849. A number of respondents to the consultation doubted whether it would be possible to define satisfactorily “unreasonableness” or “lack of cooperation” in relation to mediation. In the Working Party’s view, given the almost infinite range of circumstances which may bear upon a decision to refuse mediation, the question of what constitutes unreasonableness in the circumstances of a particular case is quintessentially a question which should be left for determination by the courts bearing in mind the underlying objectives referred to in *Recommendation 3* above.

850. Some help is presently available from case-law developments in England and Wales where, in the absence of written rules, the courts have been handing down decisions which illustrate when rejection of mediation may be regarded as unreasonable in relation to cases where there has been an outright refusal to participate.

(a) Thus, in *Dunnett v Railtrack plc* [2002] 1 WLR 2434, the defendant had offered the claimant £2,500 to settle her claim and then succeeded in having both her claim and her appeal dismissed. However, while the appeal was pending, a single judge of the Court of Appeal had suggested that the parties should attempt ADR, a suggestion which the claimant accepted but which the defendant rejected on the ground that it was not willing to offer more than had already been rejected by the claimant. Notwithstanding the defendant’s offer and success in the proceedings, it was deprived of its costs of the appeal because of its “refusal to contemplate alternative dispute resolution at a stage before the costs of this appeal started to flow.”

- (b) In *Hurst v Leeming* [2003] 1 Lloyd's Rep 379, defendants who had successfully defended at trial had also refused mediation requested by the claimant before trial. The defendants argued that such refusal was reasonable, because (i) heavy costs had already been incurred by the time mediation was offered; (ii) allegations of professional negligence had been made against them as solicitors; (iii) they believed that they had a watertight case; and (iv) they had provided a detailed refutation of the claimant's case. While Lightman J considered some of these to be important discretionary factors, he did not think that these reasons singly or cumulatively justified the defendants' refusal of mediation. They were only saved from being deprived of their costs by the peculiar facts (namely, that the defendant had previously started several vexatious actions in the same context), which persuaded the court that there were no reasonable prospects of a successful mediation.
- (c) A decision along the same lines is *Leicester Circuits Limited v Coates Brothers Plc* [2003] EWCA Civ 333, 5 March 2003. Just as the parties were about to embark upon a mediation, the defendants withdrew, having been required to do so by their insurers. Although they won the case, their withdrawal was treated as unexplained and they were deprived of part of their costs. Judge LJ summarised what appears increasingly to be the general approach of the English courts as follows :-

“We do not for one moment assume that the mediation process would have succeeded, but certainly there is a prospect that it would have done if it had been allowed to proceed. That therefore bears on the issue of costs.”⁶⁵⁹

- (d) In *Royal Bank of Canada Trust Corporation Ltd v Secretary of State for Defence*,⁶⁶⁰ a case turning on the construction of a clause in a commercial lease, the court took notice of the government’s pledge to use ADR in all suitable cases wherever the other party accepts it and rejected as unreasonable the defendant’s explanation that, notwithstanding such pledge, it had rejected mediation because the case merely involved a dispute on a point of law. Lewison J deprived the defendant of its costs, holding that the dispute was suitable for ADR “even though the main issue was technically one of law”⁶⁶¹

851. Unsurprisingly, the case-law has not been entirely consistent. Thus, while belief in the strength of one’s own case has been held in the abovementioned cases not to justify a refusal of mediation, the Court of Appeal in *McCook v Lobo* [2002] EWCA Civ 1760, 19 November 2002, appeared to take a different view. There, the claimant wrote suggesting mediation to the defendant but received no reply. The Court of Appeal refused to deprive the defendant of his costs, stating :-

“There were a number of issues before the judge both of fact and of law. The first defendant had a resounding success before the trial judge. He has also had a resounding success before this court. That is not to doubt that there were arguable points which have been raised, and well raised, on behalf of the appellant, but this was not a case, in my judgment, where there was scope for mediation by way, for example, of a number of areas where costs might at least have been reduced by discussion, the issues limited, or where there was sufficient room for manoeuvre

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⁶⁵⁹ At §27.

⁶⁶⁰ [2003] All ER (D) 171 (14 May 2003).

⁶⁶¹ Jane Turley, *The shape of things to come?* (June 2003): www.cedr.co.uk.

to make mediation a venture which might have real prospects of success in achieving compromise.”⁶⁶²

It seems, in other words, that the fact that the issues were narrow and that the defendants had been found to have a strong case leading to “resounding successes” was thought to justify refusal of mediation – a markedly different approach to that adopted in some of the other cases.

852. Notwithstanding inevitable inconsistencies in the case-law, such decisions, applied bearing in mind any material differences in Hong Kong, would plainly be helpful to the local courts when dealing with costs arguments based on unreasonable refusal of mediation.

- *How Proposal 67 should be implemented*

853. Implementation of *Proposal 67* is envisaged as follows :-

(a) Steps should be taken by the Judiciary in conjunction with institutions providing mediation and other ADR services to give litigants more information and assistance regarding use of existing mediation facilities as an alternative to proceedings in court. All litigants should, for instance, be asked whether they have considered mediation or other forms of ADR and, particularly in the case of unrepresented litigants, whether they wish to receive information about such processes, following this up where the response is positive.

(b) Consultations should be started by the judiciary with interested institutions to establish the suitability of such institutions for recommendation under the proposed rules. Steps should be taken to

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⁶⁶² At §34.

ascertain, for instance, what services and facilities could be made available and at what cost, and whether the rules, management structure and ethical standards adopted by each institution under consideration are appropriate.

- (c) Rules of court bearing on costs consequences should be made enabling parties to proceedings to serve on the other party or parties a notice in a prescribed form requesting mediation, or to apply to the court for a mediation recommendation by the court. The court should also have power to recommend mediation of its own motion.
- (d) Where a notice has been served or a recommendation made, a refusal or failure to attempt mediation should expose the party in question to the risk of an adverse costs order at the conclusion of the court proceedings.
- (e) Where the parties do wish to attempt mediation, the court should, so far as possible, ensure that the timetable for the proceedings accommodates the mediation process and enables them to avoid incurring unnecessary parallel costs.
- (f) The rules should make it clear what conduct would constitute a sufficient attempt at mediation. The rules might, for example, specify that the request or recommendation should expressly identify the (previously judicially approved) institution and rules under which the proposed mediation is to take place. They should also specify the minimum extent of participation in the mediation process required to constitute a sufficient attempt.

- (g) It should, however, be fundamental that any settlement is arrived at on a purely consensual basis and does not become binding until a settlement agreement is drawn up and signed by the parties. The parties should be free to withdraw from the mediation without reaching agreement. If such withdrawal occurs after the required stage of participation in mediation has been reached, no adverse costs consequences should follow.
- (h) The court should not have powers to inquire into what occurred during the mediation or to inquire, for instance, into why it failed or whether such failure involved unreasonable conduct on anyone's part. The mediation process should remain confidential and should proceed on a without prejudice basis.
- (i) The proposed costs sanctions rule should only bite (subject to the court's overall discretion) where there has been an unreasonable refusal to engage in the mediation either at all or up to the prescribed stage, these being facts capable of being established without inquiring into any confidential or without prejudice communications. Conversely, where a party can provide a reasonable explanation for non-participation, he should not suffer any adverse costs order.
- (j) What constitutes a reasonable refusal should be determined by the courts, developing standards inductively from the cases and seeking such guidance as may be appropriate from jurisprudence being developed in England and Wales and elsewhere.
- (k) Whether a costs sanction ultimately should be imposed, and if so the nature of that sanction, should be matters in the court's discretion.

- (l) The scheme should be supported by a programme, professionally-devised and designed specifically with the proposed scheme in mind, to provide appropriate training for mediators, judges, lawyers and other interested parties.
- (m) The scheme should be subject to review after a substantial trial run (of several years, to enable experience to be built up), with a view to assessing the scheme's performance in the context of the mediation facilities available in Hong Kong, making such adjustments and changes as may then appear appropriate.
- (n) If, on such a review, the scheme is seen to be performing satisfactorily, it may be appropriate to consider conferring more extensive powers to direct mediation on the court.

Recommendation 143: In accordance with Proposal 67, subject to the adoption (after due consultation) of appropriate rules, the court should have power, after taking into account all relevant circumstances, to make adverse costs orders in cases where mediation has been unreasonably refused after a party has served a notice requesting mediation on the other party or parties; or after mediation has been recommended by the court on the application of a party or of its own motion.

854. While the foregoing discussion and Recommendation focus on mediation, they are in principle equally applicable to other forms of ADR, subject to relevant details being worked out.

Section 30: Unrepresented litigants

855. In the Interim Report,⁶⁶³ the difficulties facing unrepresented litigants trying to navigate the civil justice system were discussed. These include :-

- Lack of knowledge of the rules of procedural and substantive law.
- A lack of knowledge as to how to present their case at the interlocutory stages and at the trial.
- A sense of inequality and being disadvantaged where the other party has legal representation.
- In some cases, a sense of grievance induced by perceived judicial irritation at having to deal with an unrepresented litigant unfamiliar with the law and court procedures.

Some of these difficulties were reflected in the responses submitted by several individuals from the point of view of the litigant in person.⁶⁶⁴

856. As was also noted in the Interim Report, the presence of unrepresented litigants in a case tends to pose problems for the other parties and to increase costs by leading to more court events, by the proceedings suffering from poor definition of the issues and taking longer to deal with evidence and submissions, especially where evidence which is legally irrelevant is tendered.

857. Possible initiatives to ameliorate the position in relation to unrepresented litigants were listed as follows :-

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⁶⁶³ At §§139-183.

⁶⁶⁴ Including 4 individual respondents.

- (a) Getting them representation.
- (b) If not full representation for all aspects of the proceedings, getting them professional legal advice or assistance at key points of the litigation referred to as “unbundled legal assistance”.
- (c) Streaming disputes involving unrepresented litigants to small claims courts or to special court lists.
- (d) Encouraging third parties to provide unrepresented litigants with free legal advice or assistance.
- (e) Getting the court to provide information about court procedures.
- (f) Enhancing all systems for delivering information and assistance by use of audio-visual and information technology.
- (g) Simplifying the rules, procedures and court forms to give litigants a better chance of being able to conduct cases for themselves.
- (h) Diverting unrepresented litigants away from the civil justice system by encouraging or requiring them to use ADR schemes.

858. The Judiciary is able to address (and has already started addressing) some of these possible initiatives both within and outside the context of the reforms being discussed in this Final Report. However, the role of the Judiciary is necessarily limited by the essential requirement that judges must be and be seen to be impartial in the litigation. They cannot become advisers to one side or the other. It follows that various of the abovementioned items need to be addressed by bodies able to extend advice to unrepresented litigants, such as the Legal Aid Department and various organizations offering pro bono legal advice and representation, rather than the Judiciary.

859. Thus, initiatives (a) and (b), to do with getting professional representation or advice for those unable to afford it must primarily be addressed by such non-judicial bodies. However, one reform discussed in this Final Report which may have an impact on getting representation for litigants in person is for the introduction of a multi-party litigation scheme suitable for Hong Kong (see *Recommendation 70*). Such a scheme might make it possible for individuals to instruct lawyers by sharing the cost. Moreover, parties litigating under such a scheme might be more manageably granted legal aid.
860. In this context, it is interesting to note that in a paper dated June 2003 prepared by the Administration Wing of the Chief Secretary for Administration's Office for the LegCo Panel on Administration of Justice and Legal Services ("the AJLS Paper"), the government noted the proposal in the Interim Report that a multi-party litigation scheme appropriate for Hong Kong should be adopted after further study and indicated that the Administration "do not see, at this stage, in-principle objection to provision of legal aid to cover class action proceedings", although this would also require further study.
861. The government also noted the Interim Report's proposal for the provision of "unbundled legal assistance" to unrepresented litigants and stated that the Administration would keep this proposal in view while noting that a degree of government subvention was already being provided to the Duty Lawyer Service in relation to the Legal Advice Scheme being provided to members of the public and the Tel-Law Scheme providing basic information on legal aspects of everyday problems through a free telephone advice service.
862. Additionally, it noted the proposal that legal aid might be made conditional on the recipient first engaging in ADR (a recommendation pursued by the

Working Party in a modified form, see *Recommendation 141*) and stated that it would await this Final Report before considering the way forward.

863. It is to be hoped that some support by way of legal aid can duly be made available in the respects mentioned above.⁶⁶⁵ This would supplement the non-governmental pro bono services which continue to operate in Hong Kong, including the Free Legal Advice Scheme of the Duty Lawyer Service mentioned above and the Bar Free Legal Service Scheme, as well as the proposed Community Legal Services Centre initiated by the Hon Ms Margaret Ng and the Hon Ms Audrey Eu SC.
864. Other measures which the Judiciary can take towards ameliorating the position of unrepresented litigants touch upon initiatives (d), (e), (f), (g) and (h) mentioned above.⁶⁶⁶ Indeed, steps have already been taken to implement some of these initiatives.
- (a) At the Ceremonial Opening of the Legal Year in 2002, the Chief Justice announced the Judiciary's intention to establish a resource centre for unrepresented litigants in civil proceedings in the High Court and District Court.
- (b) A Steering Committee, chaired by Madam Justice Chu, was established for this purpose in February 2002, and held some seven meetings. A survey of court users was conducted in July and August 2002 regarding the services, facilities and assistance to be provided at the resource centre.

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⁶⁶⁵ Extension of legal aid was called for by the Hon Mr Martin Lee SC, the Hon Mr Albert Ho, the Hon Mr Andrew Cheng, and the Hon Ms Audrey Eu SC, all speaking in Legco.

⁶⁶⁶ Initiative (c) for a special court list for unrepresented litigants has been rejected: Section 14, above.

- (c) Thereafter, funding of \$5.7 million was secured in April 2003 and premises in the High Court to house the resource centre were identified. Physical preparations commenced in May 2003. These were completed and the Resource Centre began its operations on 22 December 2003, manned by Judiciary staff who have undergone appropriate training.
- (d) The Resource Centre has its own website and has, at its premises in the High Court Building, enquiries counters, video facilities, computers, a writing area, self-service photocopying machines, services for administering oaths and statutory declarations, brochures and videos on civil proceedings in the High Court and District Court and sample court forms for users' reference. Further details are obtainable at <http://rcul.judiciary.gov.hk/rc/cover.htm>.
- (e) The Steering Committee surveyed existing pro bono legal services (including those mentioned above) and held meetings with representatives of the Bar Association, the Law Society, the Faculty of Law of the University of Hong Kong and the Law School of the City University of Hong Kong to explore possible links between the Resource Centre and possible further pro bono legal services under the auspices of those organizations.
- (f) Separately, the Judiciary is studying the possibility of introducing (by way of pilot scheme) a system for providing unrepresented litigants (and others) with a quick and up-to-date printout of key information about the case in question, including a list of court documents filed, the types of orders made and pending applications. This is intended, if practicable, to help unrepresented litigants to seek legal advice, enabling, for instance, a pro bono legal adviser to obtain an

authoritative and up-to-date overview of what has happened so far and what is about to happen in the case, recognizing that a problem faced by many unrepresented litigants involves their inability accurately to provide such information to a potential adviser.

865. Throughout the discussion of the reforms being considered in this Final Report, it is recognized that a case having one or more unrepresented litigants as parties will have special case management needs calling for sensitivity by the court. The Working Party has sought to reflect this in its recommendations where appropriate. For example, it has recommended that :-

- (a) unrepresented litigants be given latitude in relation to compliance with any applicable pre-action protocols;⁶⁶⁷
- (b) a plaintiff should serve his statement of claim (whether or not endorsed on the writ) accompanied by a form explaining the payment options for a defendant who has no defence but may wish to propose payment by instalments;⁶⁶⁸
- (c) a court should be able to seek clarification of inadequate pleadings of its own motion and should do so where an unrepresented litigant is ill-equipped to seek clarification of the other side's pleadings on his own;⁶⁶⁹

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⁶⁶⁷ Section 5.4.

⁶⁶⁸ Section 8.2.

⁶⁶⁹ Section 9.4.

- (d) unrepresented litigants should be given latitude in responding to the timetabling questionnaire;⁶⁷⁰
- (e) a case management conference should be ordered where this might help in the case management of an action involving an unrepresented litigant;⁶⁷¹
- (f) suitable measures be introduced to deal with vexatious litigation by unrepresented litigants;⁶⁷²
- (g) the discretion to deal with matters on the papers and without a hearing may be declined if one of the parties is an unrepresented litigant who may be ill-equipped to make the appropriate written submissions;⁶⁷³
- (h) specific provision should be made for the summary assessment of costs in favour of unrepresented litigants;⁶⁷⁴
- (i) suitable steps be taken to ensure that unrepresented litigants are given all material information where court-annexed mediation is to be recommended or requested;⁶⁷⁵
- (j) training programmes for judges and court staff should include elements designed to assist them in their handling of unrepresented litigants;⁶⁷⁶ and,

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⁶⁷⁰ Section 13.5.

⁶⁷¹ Section 13.5.

⁶⁷² Section 14.3.

⁶⁷³ Section 17.4.

⁶⁷⁴ Section 17.10.

⁶⁷⁵ Section 29.5

⁶⁷⁶ Section 32.2.

- (k) monitoring of the reforms should be sensitive to the needs of unrepresented litigants and more socio-legal research focussing on their interaction with the civil justice system should be undertaken.⁶⁷⁷

866. While it has to be recognized that an unrepresented litigant will often find it difficult to navigate the complexities of the civil justice system and that the best response is to acquire legal representation for them if possible, it is to be hoped that the measures outlined will go some way towards giving them some genuine assistance in relation to the procedural aspects of the system.

Section 31: Judicial review

Proposals 69 to 73

Proposal 69

Reforms should be adopted to simplify description of the scope of judicial review and to simplify the terminology for forms of judicial review relief.

Interim Report paras 679-683, 692.1

867. The procedural framework of judicial review proceedings in Hong Kong is currently to be found in section 21K of the HCO, Order 53 of the RHC and Practice Direction SL3 (effective 1 September 1998).⁶⁷⁸

868. As was mentioned in the Interim Report,⁶⁷⁹ the procedural and substantive rules of judicial review are intertwined. Substantively, the courts exercise a supervisory jurisdiction by way of review over the decisions of relevant public authorities. They do not entertain appeals from such decisions on their merits. Remedies appropriate for judicial review have accordingly been developed, namely, orders of certiorari, mandamus and prohibition, supplemented by declarations and injunctions. It is perhaps not surprising, that given the characteristic use of such remedies in the field of judicial review, the current approach to identifying the scope of judicial review for procedural purposes, involves rules which focus on such remedies.

869. Thus, section 21K(1) of the HCO, echoed by O 53 r 1(1), lays it down that :-

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⁶⁷⁸ These provisions are based on those introduced in England and Wales in 1977 in place of the technical procedures applicable in relation to the prerogative writs: HKCP 2002, 53/14/1.

⁶⁷⁹ At §679.

“An application to the Court of First Instance for one or more of the following forms of relief—

- (a) an order of mandamus, prohibition or certiorari;
- (b) an injunction under section 21J restraining a person not entitled to do so from acting in an office to which that section applies,

shall be made in accordance with rules of court by a procedure to be known as an application for judicial review.”

In other words, if the remedy sought is one of those remedies, the litigant *must* proceed by way of judicial review.

870. Section 21K(2) (echoed by O 53 r 1(2)) prescribes that where declarations and injunctions are sought in analogous cases, the litigant *may* bring judicial review proceedings where it would be just and convenient for him to do so.

871. The difficulty is that it is sometimes not clear whether the conduct challenged is amenable to judicial review and so capable of resulting in the relevant remedies. The problem is not acute where deciding this very issue would dispose of the complaint altogether. However, where the complaint is plainly capable of being pursued at law in one form or another, the remedy-based approach to deciding whether O 53 proceedings should be instituted is unsatisfactory. It may lead to preliminary litigation which does nothing to advance resolution of the underlying dispute. Thus, there are examples of cases where arguments as to whether proceedings should or should not be taken by way of judicial review have led to full argument and reserved judgments.⁶⁸⁰

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⁶⁸⁰ For example in *Shau Lin Chi v Secretary for the Civil Service* HCAL 4 of 1999, 7 April 2000 (Beeson J) and *Fong Yiu Bun v Commissioner of Police* HCAL 2305 of 2001, 30 May 2002 (Chung J).

872. However, the need to classify cases as appropriate for judicial review proceedings or otherwise remains. The relaxed attitude to the mode of commencing private litigation exhibited by O 2 r 1(3)⁶⁸¹ cannot be fully adopted in this context⁶⁸² if the policy of requiring parties to obtain leave to seek judicial review and to bring such proceedings promptly is to be maintained.⁶⁸³ This policy requires judicial review cases to be set apart from private litigation.
873. The approach adopted by the CPR – and canvassed in *Proposal 69* – involves an attempt at clarifying the classification rules in the hope that this will reduce the scope for argument as to whether O 53 proceedings are appropriate in any particular case.
874. Instead of focussing immediately on the remedy sought, CPR 54.1(2)(a) begins by defining what a claim for judicial review is :-

“In this Section, a ‘claim for judicial review’ means a claim to review the lawfulness of —

- (i) an enactment; or
- (ii) a decision, action or failure to act in relation to the exercise of a public function.”

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⁶⁸¹ O 2 r 1(3): “The Court shall not wholly set aside any proceedings or the writ or other originating process by which they were begun on the ground that the proceedings were required by any of these rules to be begun by an originating process other than the one employed.”

⁶⁸² O 53 r 9(5) does, however, permit the court to direct that certain types of proceedings brought by way of judicial review continue as if begun by writ.

⁶⁸³ O 53 r 4 generally requires the application for leave to move for judicial review to be “made promptly and in any event within three months” when grounds for such application first arose.

875. The rule then goes on⁶⁸⁴ to provide certain other definitions, and adopts a less technical term as an equivalent⁶⁸⁵ for each of the relevant remedies. Relevant definitions include the following :-

- “(b) an order of mandamus is called a ‘mandatory order’;
- (c) an order of prohibition is called a ‘prohibiting order’;
- (d) an order of certiorari is called a ‘quashing order’;
- (e) ‘the judicial review procedure’ means the Part 8 procedure⁶⁸⁶ as modified by this Part;
- (f) ‘interested party’ means any person (other than the claimant and defendant) who is directly affected by the claim

876. CPR 54.2 and CPR 54.3 then go on to state when the judicial review procedure must and may be used respectively. It is at this point that the remedies sought become important.

“CPR 54.2

The judicial review procedure must be used in a claim for judicial review where the claimant is seeking—

- (a) a mandatory order;
- (b) a prohibiting order;
- (c) a quashing order; or
- (d) an injunction under section 30 of the Supreme Court Act 1981 (restraining a person from acting in any office in which he is not entitled to act).⁶⁸⁷

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⁶⁸⁴ CPR 54.1(2)(b) to (f).

⁶⁸⁵ These are merely equivalents, since the traditional terminology continues to be used in ss 29 and 31 of the Supreme Court Act 1981.

⁶⁸⁶ The alternative procedure under CPR 8.

⁶⁸⁷ In Hong Kong, see HCO s 21J.

CPR 54.3

- (1) The judicial review procedure may be used in a claim for judicial review where the claimant is seeking—
 - (a) a declaration; or
 - (b) an injunction.
- (2) A claim for judicial review may include a claim for damages, restitution or the recovery of a sum due but may not seek such a remedy alone.”

877. All those who responded on *Proposal 69* were in favour of such simplification⁶⁸⁸ and the Working Party recommends adoption of rules along the lines of CPR 54.1 to 54.3, suitably adapted, retaining the present terminology, for defining the scope of judicial review proceedings in Hong Kong.

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.

Proposal 70

Provisions should be adopted to facilitate participation in judicial review proceedings by persons interested therein other than the applicant and respondent.

Interim Report paras 679-680, 684, 692.2

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⁶⁸⁸ Those responding in favour included the Bar Association, the DOJ, the APAA, the Hon Ms Margaret Ng, one set of barristers' chambers, two firms of solicitors and two individual respondents. The Law Society stated that it did not consider this Proposal (or any of the other proposals concerning judicial review).

878. A person wishing to apply for leave to move for judicial review must have “a sufficient interest in the matter to which the application relates”.⁶⁸⁹ However, other persons may be affected by such proceedings and might wish to be heard in support of or in opposition to judicial review of the decision or conduct in question.
879. Presently in Hong Kong, the leave application is made *ex parte*⁶⁹⁰ and usually decided without an oral hearing.⁶⁹¹ If the applicant secures leave to appeal, he must issue a notice of motion or originating summons⁶⁹² seeking the relevant judicial review relief and must serve all persons “directly affected.”⁶⁹³ The rules also empower the court to allow persons desiring to be heard “in opposition” and considered “proper persons to be heard”, to be heard at the substantive hearing even though they have not been served with the proceedings.⁶⁹⁴
880. *Proposal 70* canvasses a broadening of the classes of persons permitted to be heard at the substantive hearing to include not merely those seeking to oppose the judicial review, but also those who wish to support it. It received general support from the same respondents who were in favour of *Proposal 69*. There was, however, some concern that intervention by

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⁶⁸⁹ HCO s 21K(3) and O 53 r 3(7).

⁶⁹⁰ O 53 r 3(2).

⁶⁹¹ O 53 r 3(3). There is a right of appeal (to be exercised within 10 days) against refusal of leave or grant of leave subject to terms: O 53 r 3(4).

⁶⁹² For a hearing in open court or in chambers, respectively.

⁶⁹³ O 53 rr 5(3) to 5(7). The motion (or originating summons) and supporting evidence must be served on such persons at least 10 days before the application is due to be heard. The applicant must then file an affidavit informing the court of the persons served, allowing the court to direct other affected persons to be served, if necessary.

⁶⁹⁴ O 53 r 9(1).

numerous persons wishing to be heard might pose a costs risk to the other side, so that the rules should limit costs recoverable to one set of costs in any event.⁶⁹⁵ It was also observed that multi-party litigation orders should nonetheless be pursued for use in the judicial review context.⁶⁹⁶

881. The Working Party favours adopting *Proposal 70* subject to the following comments :-

- (a) While O 53 r 9(1) should be amended to make it clear that the court has power to allow persons to be heard not merely in opposition to, but also in support of, the application for judicial review at the substantive hearing, the court should retain an overall discretion to limit such hearings to persons who appear to the court to be proper persons to be heard.
- (b) In exercising that discretion, the courts should not generally allow such persons to make submissions in support which are merely repetitive of the parties' submissions. It is noteworthy, for instance, that CPR 54.14, dealing with persons who have acknowledged service, envisages that they will be offering support "on additional grounds". This ought generally to be the basis upon which supporting submissions should be entertained.

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⁶⁹⁵ The Bar Association and a firm of solicitors.

⁶⁹⁶ The Hon Ms Margaret Ng and an individual respondent.

- (c) The costs of the hearing should be in the court's discretion, the guiding principle being that generally only one set of costs should be allowed in each interest.⁶⁹⁷
- (d) In a thoughtful submission to the Legco Panel on Administration of Justice and Legal Services dated 25 February 2002, the Bar Association examined the case management of the 5,000 odd claims for judicial review which resulted in 27 representative claims being selected and ultimately decided in *Ng Siu Tung v Director of Immigration* (2002) 5 HKCFAR 1, suggesting that a special judicial review-oriented procedure for multiple claims might be required. The Working Party agrees that if multi-party litigation schemes are to be studied as recommended in *Recommendation 70*, such study should include consideration of the peculiar needs of multi-party litigation in the judicial review context.

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.

Proposal 71

Provisions should be adopted to require claims for judicial review to be served on respondents and on other persons known to be interested in the proceedings.

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⁶⁹⁷ It is notable that the practice direction on judicial review provides that a defendant or interested party who has been served and decides to attend an oral hearing (if one is held) generally cannot make the claimant pay their costs: 54PD8.6.

Interim Report paras 679-680, 684, 692.3

Proposal 72

Provisions should be adopted to require respondents who wish to contest the proceedings to acknowledge service and to summarise the grounds relied on.

Interim Report paras 679-680, 685, 692.4

882. As indicated above, the present arrangement is for an applicant to seek leave to move for judicial review on an entirely *ex parte* basis. Neither the proposed respondent nor any interested party is served with the application or the supporting evidence. They are not brought into the picture unless and until the applicant succeeds in obtaining leave.

883. The CPR have significantly changed this. Both the respondent (called a defendant in the CPR) and interested parties (defined as “any person (other than the claimant and defendant) who is directly affected by the claim”)⁶⁹⁸ are brought in at the very outset.

(a) Pursuant to the pre-action protocol on judicial review, an intending applicant (called a claimant in the CPR) is expected to send a letter before claim to the intended respondent, copying it to all interested parties and, within 14 days, the respondent is expected to reply, with copies to the interested parties.⁶⁹⁹

(b) If the matter is not settled, the applicant serves a claim form (by which permission to seek judicial review is sought) on the respondent

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⁶⁹⁸ CPR 54.1(2)(f).

⁶⁹⁹ Pre-action protocol on judicial review, §§ 11 and 17.

and also on any person considered by the applicant to be an interested party, unless the court directs otherwise.⁷⁰⁰ The procedure for the leave application has therefore become potentially *inter partes*.

- (c) We say “potentially” because the defendant and persons served may, but do not have to, file an acknowledgment of service in response. They are given up to 21 days to do so. If they do decide to acknowledge service, they must, in the acknowledgment, summarise the grounds for contesting the claim (if they intend to contest it) or set out any additional grounds relied on in support of the claim or its opposition.⁷⁰¹
- (d) However, they are under no obligation to acknowledge service. A respondent may choose to leave it to the judge to decide whether to grant leave without any oral hearing⁷⁰² and without any input from the respondent. If the applicant is given leave to proceed, the defendant and interested parties can come in at the stage of the substantive hearing, filing grounds and evidence in support of the position they are taking, pursuant to CPR 54.14.
- (e) Interested parties who have been served but who file neither an acknowledgment of service nor grounds or evidence in relation to the main hearing, can nonetheless apply to the court to be allowed to file evidence and make representations at the hearing pursuant to CPR 54.17.

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⁷⁰⁰ CPR 54.7.

⁷⁰¹ CPR 54.8.

⁷⁰² The usual approach, whether or not an acknowledgment of service is filed: 54PD8.4.

884. *Proposals 71 and 72* sought consultees' views as to whether a similar approach should be adopted in Hong Kong. The response was mixed. The Bar Association and some other respondents⁷⁰³ opposed it, mainly on the grounds that bringing in the respondent and interested parties before leave is granted is unnecessary and likely to add to costs and because this is likely to cause delay, given the need to give such parties time to decide whether to acknowledge service. On the other hand, the DOJ and others,⁷⁰⁴ were in favour of these changes.
885. In the Working Party's view, there is merit in adopting the CPR approach and the concerns of those opposed to these proposals can be met.
886. Dealing with the concern as to costs first, we do not agree that giving a respondent and interested parties the option to acknowledge service would lead to increased costs.
- (a) As stated above, although served with the application for leave, the respondent can still choose not to respond and to wait and see whether the court gives the applicant leave. Thus, a party is free to adopt a course which involves no extra costs. The respondent retains full rights to resist the application at the substantive hearing if leave is granted. Interested parties are in the same position.
- (b) However, the respondent and interested parties are given a choice and can, if they wish, file an acknowledgment of service in which they state their position in summary form. A respondent may choose to

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⁷⁰³ Including some judges and an individual respondent.

⁷⁰⁴ Including the APAA, the HKFLA, the Hon Ms Margaret Ng, one set of barristers' chambers, two firms of solicitors and an individual respondent.

put forward what he considers to be cogent reasons why leave should not be given. Since the procedure will continue generally to involve a determination without any oral hearing, the costs of so doing will not be great and the money may be thought well worth spending if it helps to ensure a refusal of leave.

- (c) From the court's point of view, it will often be helpful to have an indication of the basis of the respondent's resistance to the application when deciding whether to give leave.
- (d) If the applicant seeks and obtains an oral hearing as to leave, it can be made clear (as occurs under the CPR⁷⁰⁵) that the respondent and interested parties need not attend unless directed to do so by the court or unless they should choose to attend. They will therefore be able to opt out of the leave hearing, even if it is conducted orally, and only become involved if the applicant succeeds. But they will also have a choice to get involved at the stage of an oral leave hearing if they so choose.

887. As to delay, it is true that under the revised procedural scheme, the applicant must generally allow the respondent and any interested parties time to decide whether to acknowledge service and if so, to formulate their response. A period of 21 days is allowed by CPR 54.8. However, unless the application is of particular urgency, the interposition of such a period would not normally cause anyone difficulties. It may be noted that CPR 54.8(3) makes it clear that the parties may not extend time limits under the rule by agreement.

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⁷⁰⁵ 54PD8.5.

888. Of course, if an application for judicial review had to be made as a matter of urgency, as with urgent applications in other fields, an application could be made for interim relief on very short notice to the respondent or, if very urgent, on an *ex parte* basis : see, eg, *R v Kensington and Chelsea Royal LBC, ex p Hammell* [1989] 1 QB 518; *M v Home Office* [1994] 1 AC 377.

889. The need for special measures which override normal time limits in urgent cases is recognized under the CPR. For example, the pre-action protocol states :-

“This protocol will not be appropriate in urgent cases, for example, when directions have been set, or are in force, for the claimant’s removal from the UK, or where there is an urgent need for an interim order to compel a public body to act where it has unlawfully refused to do so (for example, the failure of a local housing authority to secure interim accommodation for a homeless claimant) a claim should be made immediately.”

Guidance has also been given in the Practice Statement (Administrative Court: Listing and Urgent Cases) [2002] 1 WLR 810.

890. The perceived difficulties can therefore be met. On the other side of the ledger, adopting the new approach would appear to offer at least two benefits.

(a) As mentioned above, a decision or measure taken by a public authority may affect a number of persons, so that a number of potential applicants for judicial review may exist. Under the present system, an applicant seeks leave *ex parte* and without engaging any other interested parties. If leave is refused, the others are not bound by the ruling and may not be aware of the grounds that had been put forward by the unsuccessful applicant. This may result in a series of leave applications, each made in isolation. An unsatisfactory result could occur where more promising grounds are advanced in one case,

resulting in the grant of leave, but not advanced in other cases, where leave is refused.

- (b) Accordingly, the first benefit of the proposed system is that it alerts other interested parties to, and may engage them in, the application. It encourages all relevant grounds to be pooled and advanced in the same application, reducing the likelihood of inconsistency and of duplication of leave applications.
- (c) Secondly, as previously indicated, the court will often be assisted in coming to a decision as to whether leave should be granted where a respondent acknowledges service and states the grounds for resisting the application. The court may also profit from having before it additional grounds put forward by interested parties.

891. The Working Party accordingly favours moving away from the purely *ex parte* approach and adopting a scheme for serving notice of applications for leave on respondents and interested parties. It is envisaged that by rules of court supplemented, where appropriate, by practice directions :-

- (a) “Interested party” would be defined along the lines of CPR 54.1(2)(f).
- (b) An applicant would serve the leave application (which would state the relief claimed and the grounds relied on) together with all affidavits in support on the intended respondent and on all known interested parties, unless the court otherwise directs,⁷⁰⁶ along the lines of CPR 54.7. Where the applicant seeks dispensation from having to serve all or any of the known interested parties, such dispensation can be

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⁷⁰⁶ Subject to any rules that might be introduced in the context of a scheme for regulating multi-party litigation, one instance where service might be dispensed with involves cases where a very large number of persons are known to be interested.

sought, with reasons, in the leave application itself and dealt with by the court in such manner as it sees fit.

- (c) Each person served would be given 21 days to file an acknowledgment of service, summarising the grounds for resisting the application (if resistance is intended) or the additional grounds for supporting the application and serving the acknowledgment on the applicant and other interested parties along the lines of CPR 54.9.
- (d) Normally, the court would decide the leave application on the papers and without a hearing unless a hearing is requested by the applicant (as currently provided for by O 53 r 3(3)). The respondent and interested parties who acknowledge service would not be expected to attend at any oral hearing, unless directed to do so by the court.
- (e) Where leave is refused, the court would give reasons for such refusal and the right of appeal provided for by O 53 r 3(4) would continue to apply.
- (f) Where leave is granted, directions would be given for the substantive hearing (by orders nisi or after a case management hearing if required) and the order granting leave together with such directions would be served on the respondent (whether or not he has acknowledged service) and on all interested parties who have acknowledged service. Those interested parties who have been served but have not acknowledged service would be assumed not to be interested in participating.
- (g) The respondent (whether or not he has acknowledged service) and all interested parties who have acknowledged service, would be entitled to file grounds and evidence to contest or to support on additional grounds, the claim for judicial review, along the lines of CPR 54.14.

- (h) Where any person, whether or not previously served, desires to file evidence and/or to make representations at the substantive hearing in opposition to or in support, on additional grounds, of the application, he could apply to the court for leave to do so, such leave only being granted where the court is satisfied that he ought properly to be heard.

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.

Proposal 73

Provisions should be adopted spelling out the court's powers on quashing a decision, including a power, subject to statutory limitations, to take the impugned decision itself.

Interim Report paras 679-680, 690-691, 692.5

892. *Proposal 73* canvassed the possible adoption of CPR 54.19 in relation to orders of certiorari (or “quashing orders”) made by the court. CPR 54.19 provides :-

- “(1) This rule applies where the court makes a quashing order in respect of the decision to which the claim relates.
- (2) The court may—
 - (a) remit the matter to the decision-maker; and
 - (b) direct it to reconsider the matter and reach a decision in accordance with the judgment of the court.
- (3) Where the court considers that there is no purpose to be served in remitting the matter to the decision-maker it may, subject to any statutory provision, take the decision itself.

(Where a statutory power is given to a tribunal, person or other body it may be the case that the court cannot take the decision itself)”

893. A number of respondents opposed this, largely on the basis of the principle that judges should not exercise powers given to the executive.⁷⁰⁷ While the DOJ supported the proposal, this was subject to the qualification that the power had to be subject to stringent statutory limitations.⁷⁰⁸
894. As was pointed out in the Interim Report, the utility of such a rule is in doubt. CPR 54.19(2) reflects the court’s general approach on a judicial review and, being well-established in administrative law, is not a necessary rule. However, sub-rule (3) proposes an approach which, save in the rarest of cases, would be inappropriate. As stated in the White Book :-

“Judicial review is primarily concerned with controlling the exercise by public bodies of statutory or other public law powers conferred upon by them. The role of the court is to ensure that those bodies do not exercise those powers unlawfully; it is not the role of the court to determine how those powers should be exercised. Normally, therefore, the courts will not be in a position to determine that there is no purpose to be served in remitting the matter to the decision-maker and taking the decision itself.”⁷⁰⁹

895. There may be cases where a decision has been quashed and where the court or the applicant considers that only one specific decision could reasonably be taken in its place such that, theoretically, any other decision would be

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⁷⁰⁷ Including the Bar Association, one set of barristers’ chambers and one solicitors’ firm.

⁷⁰⁸ Others also supporting it included the APAA, the HKFLA, and the Hon Ms Margaret Ng and a firm of solicitors. An individual respondent supported it “in spite of misgivings”. The Law Society did not consider it.

⁷⁰⁹ White Book 54.19.2.

reviewable by the court as *Wednesbury* unreasonable.⁷¹⁰ It might be thought that in such cases, the rule in CPR 54.19(3) would have a role to play.

896. An argument along the abovementioned lines was in fact advanced in the Court of Final Appeal in *Prem Singh v Director of Immigration* [2003] 1 HKLRD 550 at 580-3, §§96-107. Each of the parties argued that if the decision under judicial review was quashed, only one result could follow. In other words, each was contending that an outcome, diametrically opposed to the other's outcome, was the inevitable result. Perhaps unsurprisingly, both arguments were rejected. The Court held that on the available materials, it was in no position to postulate that any particular result of re-consideration by the Director of Immigration was inevitable.

897. In the Working Party's view, this must generally be the position which faces a court after it quashes a relevant administrative decision. As one judge who responded to *Proposal 73* pointed out, a power like that in CPR 54.19(3) can at best be a reserve power extremely rarely applicable. However, if it is written into the rules, it is likely to encourage advocates to place unwarranted reliance on it. Moreover, as the Bar Association argued, if the correct replacement decision is so starkly clear, there could be little difficulty getting the relevant public authority swiftly to take that decision upon the matter being remitted by the court.

898. In the circumstances, the Working Party is not in favour of adopting *Proposal 73*.

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⁷¹⁰ As May LJ put it in *R (on the application of Dhadly) v London Borough of Greenwich* [2001] EWCA Civ 1822, at §16: "The circumstances in which r 54.19(3) applies are essentially those where there is only one substantive decision that is capable of being made and where it is a waste of time to send the thing back to the decision-making body."

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.

Section 32: Material support for the reforms

Proposals 76 to 80⁷¹¹

Proposal 76

Any reforms to be undertaken must be adequately resourced. In particular, provision must be made to ensure that adequate judicial and court resources are in place to implement comprehensive case management and other functions mandated by the reforms and to accommodate trials in accordance with prescribed timetables.

Interim Report paras 702-707

Proposal 77

An analysis of the system's demands in the light of proposed reforms should be conducted before and after such reforms take effect in order to determine how judges, masters and administrative staff (including staff in any newly defined posts) should best be deployed so as to respond effectively to those demands.

Interim Report paras 708-711

Proposal 78

Training programmes to familiarise judges and other court staff with any reforms adopted, tailored to the knowledge and skills required to implement such reforms, should be established and made compulsory for civil judges, masters and all other relevant court staff.

Interim Report paras 712-715

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⁷¹¹ *Proposals 74 and 75 are discussed in Section 2 above.*

Proposal 79

Steps should be taken to develop the Court's existing computerised system to enable it to facilitate any reforms by being able to accommodate not merely administrative support, but also to perform case-flow management, resource allocation and management statistics functions.

Interim Report paras 716-721 21 Proposals for Consultation

Proposal 80

Research should be commissioned so as to monitor continuously the system's functioning, establishing baselines of performance, guiding the deployment of resources, helping tailor judicial and court staff training and assessing the benefits or disadvantages of particular reforms in practice.

Interim Report paras 722

899. These Proposals address four important aspects of any programme for implementation of the reforms which have been proposed : -

- adequate resources
- training
- continuous monitoring
- supporting use of information technology.

32.1 The consultation response

900. The respondents who addressed the topic⁷¹² unanimously supported these proposals. A number of them laid particular emphasis on training and

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⁷¹² Including the Bar Association, the Law Society, the DOJ, the HKFLA, the HKFI, the APAA, the High Court masters, the District Court judges and masters, the BCC, the
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adequate resources as essential requirements which had to be catered for if large-scale reforms were to go forward at all. To take a few examples :-

- (a) The Bar Association (in relation to the need to train both judges and practitioners) :-

“This is a key element of the reform package. Unless resources are deployed to familiarising judges and their staff on the new reforms, the proposals may easily come to no avail. The Bar would welcome consultation on development of training manuals and other materials on the implementation of the new case management system. Any such material prepared for judges would also be useful for the training of barristers and could be shared with the legal profession generally.”

- (b) The Law Society :-

“It is of paramount importance that the Judiciary are placed in a position whereby their timetable permits them to review Court files, skeleton arguments and authorities prior to hearings and that the Judiciary has ample time (and the resources) to review arguments, authorities, skeletons, etc. in reaching their judicial conclusions whether in terms of a reserved order or judgment. This is not the case at present. Simply there is too much work for too few Judicial Officers.”

They argued that unless properly resourced, the greater levels of case management envisaged in the proposed reforms could not be achieved.

- (c) The Hon Ms Audrey Eu SC speaking in Legco :-

“The legal sector is generally worried whether the existing judges are of the standard required to assume this new role. In particular, if there is too much inappropriate intervention from a judge, such as imposing too many limitations in respect of proof, interrogation and addresses, the various parties in a litigation case may well become unable to adequately present their proof and viewpoints, and legal justice may not necessarily be upheld as a result. This means, therefore, that at present, the most important task of the Judiciary should be to enhance the training for judges. The relevant view of the Bar Association may be referred to in order that a specialist judge system could be implemented, under which judges

..... *cont'd*

JCGWG, the Hon Ms Audrey Eu SC, one set of barristers' chambers, two firms of solicitors and four individual respondents.

are assigned to hear specific categories of cases. And, the enhancement of the case management powers of judges can be tried out for these cases.”

(d) One of the solicitors’ firm :-

“To be successful, active case management by Judges will require significant extra judicial resources. This will also include significant extra IT resources (still as yet to be fully implemented in England). Inadequate judicial training will result in inconsistencies in the exercise of case management powers, thereby resulting in more applications for leave to appeal or to appeals themselves.”

(e) The other firm of solicitors :-

“..... until the judiciary and judicial officers have been trained, and adequate resources are available and being utilised correctly, the reforms should not be brought into force.”

901. The need for training and adequate resources was recognized by many of the judges and masters who responded. For example :-

(a) One judge stated :-

“There is a material disparity of approach by judges to case management and to costs within the present system. The approach ranges from the very lax to the tight. A new system which is administered with the same disparity will not achieve its objective.”

(b) A master commented :-

“The success of any reform depends very much upon the knowledge and willingness of key players to implement the reform. There is no way except training to achieve that goal.”

32.2 The Working Party’s view

902. The Working Party fully accepts the importance of the matters canvassed in the five proposals under discussion. Any reforms implemented must be properly resourced and supported by appropriate training programmes. Where information technology offers efficiencies, enhancements should be implemented if likely to be cost-effective. Reforms introduced should be continuously monitored.

(a) *Training*

903. The Working Party considers proper training for judges, judicial officers (together referred to as “judges”) and court staff essential to the success of the proposed reforms.

- (a) Some such training will be traditional – a matter of ensuring that judges keep up with amendments to well-known rules. This would apply, for instance, to proposed changes to the mode of commencing proceedings, to challenges to jurisdiction, to the scope of *Mareva* injunctions, to changes in the procedure for judicial review, and so on.
- (b) Other changes will require judges to acquaint themselves with new concepts and their underlying principles. Sanctioned offers and payments, verified pleadings and witness statements and interlocutory orders prescribing automatic sanctions, are examples.
- (c) More broadly, there will be a need for training and joint workshops on case management techniques with a view to promoting fairness and consistency in the exercise of discretion. This will be important, for instance, in relation to :-
 - (i) assessing case management needs based on the procedural questionnaire;
 - (ii) fixing and modifying the timetable and dealing with non-compliance with timetable and milestone dates;
 - (iii) recognizing when mediation should be recommended and dealing appropriately with refusals to mediate;
 - (iv) using costs orders to deter unreasonable interlocutory conduct;

- (v) making summary assessments of costs;
- (vi) dealing with non-compliance with proportionate sanctions;
- (vii) giving directions at the pre-trial review for the case management of the trial;
- (viii) dealing with applications for leave to appeal from interlocutory decisions;
- (ix) in specialist courts, exercising procedural autonomy in an appropriate manner, after consultation with the users of such courts;
- (x) in the Court of Appeal, dealing with applications for leave to appeal on the papers.

(d) How unrepresented litigants should be treated both generally and in relation to the procedural changes, would merit special attention as part of the training programme.

904. Much of the abovementioned training would occur as part of an extensive programme implemented as the changes are introduced. Thereafter, training should be routinely conducted by the Judicial Studies Board, to keep judges up to date with further developments and to promote consistent application of discretionary powers.

905. It is, of course, not merely judges and court staff who need to be trained. It is equally important for the success of the reforms that members of the legal profession should receive, on a continuing basis, proper education regarding the changes introduced and the principles which underlie them. Lawyers will also have the responsibility of ensuring that their clients appreciate what is required of them, for instance, in relation to discovery, verified pleadings, witness statements and so forth. Professional associations

involving expert witnesses and other interest groups would be expected to provide relevant training for their members. More broadly, educational efforts should be made towards improving public understanding of the civil justice system.

(b) *Monitoring*

906. How the reforms fare after they are introduced should be continuously kept in view, with a willingness to effect changes where these are desirable. The Judiciary should, of course, maintain a vigil internally and should take the initiative to make adjustments as required.
907. There should also be a body appointed specifically to monitor the performance of the reformed civil justice system, recommending any changes, including broad changes of policy, considered beneficial.⁷¹³ It should be made up of judges, masters and representatives of the legal profession, of interested government departments such as the Legal Aid Department and the Department of Justice and of other, non-governmental court users. It should receive and channel to the Chief Justice feedback on the reforms from professional bodies and associations. Its brief should include reporting on the sufficiency and allocation of resources.
908. Statistics should be systematically collected to assist in the monitoring process and helping comparisons, pre- and post-reform, to be made. The Judiciary should conduct an internal review of the nature and scope of the data presently being entered into the court's computer system with a view to identifying any further items which should be captured. This is not an easy

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⁷¹³ Along the lines of the Civil Justice Council established by the Access to Justice Act 1999, charged, *inter alia*, with keeping the civil justice system under review.

task since it is difficult to predict the questions which may turn out to be relevant to future monitoring activities and, accordingly, what data will be needed for the answers.

909. The monitoring committee may, for example, wish to examine the impact of the requirement for leave to appeal in interlocutory appeals. It may ask: Are most leave applications made to the judge at the original hearing? How many require a further hearing? In what percentage of cases does the CFI judge grant leave? What about the Court of Appeal? How many interlocutory appeals go to the Court of Appeal as of right? And so forth.
910. A cost-effective way of approaching these questions may be to analyse a sample of files where an application for leave to appeal was made. But to identify those files efficiently would require a marker to be input into the court's computer records whenever an application for leave to appeal is made. This would require an entry to be made by the judicial clerk as the application is made, usually orally, at the conclusion of a hearing.
911. It would of course be highly convenient if data items were entered tracking every occurrence in a case, so that the database would show not merely whether the application for leave was made, but whether it was granted and, if not, whether an application was made to the Court of Appeal and what the result was, with what order as to costs, etc. However, this kind of record keeping is not feasible given the available resources. The questions that may be asked in relation to each aspect of each proposed reform are simply too numerous to be anticipated and covered by routine statistics.
912. Other monitoring approaches ought to complement routine data collection by the Judiciary. Where difficulties are found to arise in relation to particular reforms, specific data collection and analysis focussing on the

problem may have to be undertaken. One initiative adopted in England and Wales was to set up what is known as the Law Society Woolf Network, consisting of a group of about 130 solicitors who have agreed to answer a questionnaire (initially twice yearly, later, yearly) on how the reforms are operating in practice.⁷¹⁴ This may be well worth imitating in Hong Kong.

913. The law schools should also be encouraged to become more involved in socio-legal studies bearing on the civil justice system. They could, for example, be encouraged to conduct surveys on the interaction of unrepresented litigants with the system, designed to identify particular points of difficulty and measures which such litigants may find helpful. The impact of court-annexed mediation might also merit study, to assess, for instance, mediation success rates and to describe the courts' responses in terms of costs orders, to rejection of requested or recommended mediation.

(c) *Information technology*

914. The High Court presently operates an automated system for case-flow management and the collection of management statistics. As indicated above, the system of data collection should be examined with a view to enhancing its ability to contribute towards monitoring the performance of the proposed reforms.
915. Since the Interim Report was published, certain IT initiatives have already occurred in relation to the High Court. First, the Technology Court has begun operation.⁷¹⁵ It offers facilities capable of increasing productivity and reducing costs and disbursements, either in relation to entire trials or

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⁷¹⁴ See LCD-FF §2.3.

⁷¹⁵ Governed by PD29 issued on 14 January 2003.

particular segments of trials, as appropriate. Facilities offered which may yield efficiencies in terms of reduced hearing time or reduced disbursements include the following :-

- (a) a video conferencing system;
- (b) facilities for multi-media presentations, enabling evidence to be presented in audio, video, graphics, text, film and computer animation form;
- (c) an electronic documentation and exhibits handling system, enabling large volumes of documents to be indexed, stored and shared,⁷¹⁶ with common documents retrieved and displayed simultaneously on numerous computer monitors for use in the course of a hearing;
- (d) wiring and connections ready for instantaneous court reporting and transcription services;
- (e) personal computers and internet broadband connectivity for computers used by the parties;
- (f) enhanced digital audio recording and transcription services, offering the parties the option of purchasing a CD-ROM record of the proceedings at the end of each day; and,
- (g) enhanced interpretation facilities.⁷¹⁷

Initial reports indicate a firm demand for use of the Technology Court.

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⁷¹⁶ It also caters for private areas on the server for each party's use.

⁷¹⁷ It also offers closed-circuit television facilities for taking evidence from vulnerable witnesses; and enhanced public address and CCTV systems enabling persons outside the confines of the courtroom to follow the proceedings.

916. Secondly, the possible introduction of electronic filing (“e-filing”) is being studied with the aim of launching a pilot scheme involving selected court users. Initial research into the legal implications of such a system has been conducted and the experience of overseas jurisdictions has been studied. Consultations will in due course be held with the legal profession and other potentially interested parties on the introduction of a pilot scheme.
917. Thirdly, arrangements are in hand to make available case extracts providing a quick and up-to-date printout of key information about each case, including a list of documents filed, orders made and pending applications, to those in need of such information. This was an initiative aimed initially at assisting unrepresented litigants to seek legal advice, enabling, for instance, a pro bono legal adviser to obtain an authoritative and up-to-date overview of what has happened so far and what is about to happen in the case. This is thought likely to be helpful since a problem faced by many unrepresented litigants involves their inability accurately to provide such information to an adviser. Such case extracts would also be helpful to solicitors on being instructed or on taking over a case from another firm, as well as to masters and judges taking up a case file before a hearing.
918. More can obviously be done with IT applications, especially, in support of judicial case management. Various measures, tried and tested in other jurisdictions, such as automatically generated notices to the parties and progress reports, can be explored and adopted if found to be cost-effective. The Working Party believes, however, that the basis for IT support for the proposed reforms is already in place and can be further developed progressively as new procedural measures are introduced.

(d) Adequate resources

919. It was pointed out in the Interim Report⁷¹⁸ that adequate resources are essential to the success of the proposed reforms. Such resources may be divided into those which involve a one-off requirement for funding and those which entail recurrent expenditure.
920. One-off costs would have to be incurred in relation to (i) the drafting of amendments to the rules of court; (ii) the initial training of judges and court staff (both in terms of time taken for attending training sessions and of paying for professional trainers, where necessary); (iii) possibly some IT enhancement; and (iv) the general administrative expenses of introducing the changes, including consultation with professional and other groups and publicity for the changes. While essential for the success of the reforms, costs of this kind are likely to be of a relatively insignificant order when compared with the cost of any other major upgrades to our social and economic infrastructure.
921. It is more difficult to predict how much, if any, additional recurrent expenditure the reforms would require. Different features of the reforms trend in opposite directions and may, to some extent, cancel each other out.
922. As many of the respondents to the consultation have pointed out, the general emphasis of the proposed reforms on judicial case management as a response to the excesses of an unbridled adversarial approach, is likely to involve a demand for more judicial resources. For judges to case manage actions effectively, they have to be given sufficient time to read into the case. This is all the more so where the reforms call for decisions to be taken

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⁷¹⁸ At §§702-711.

on the papers. The savings that such decisions aim to achieve would be worse than negated if the judge does not have time properly to consider the papers so that his orders are unsatisfactory and lead to oral hearings or appeals.

923. On the other hand, many of the proposed reforms involve cutting out unnecessary applications, restricting appeals and streamlining procedures. These features could be expected to have an effect in the opposite direction regarding the cost of the proposed reforms. Elimination of any court event removes the demand for judicial services associated with that event, permitting the freed up time of the judge or master to be re-deployed. This is particularly likely to occur if there is a significant drop in interlocutory applications and interlocutory appeals as a result of the proposed reforms.

924. It may accordingly be quite possible that the proposed reforms could be introduced with no significant impact on recurrent expenditure requirements. But, as a matter of prudence, the Working Party considers that provision should be made for some increase in such recurrent expenditure to ensure that the proposed reforms do not fail for lack of judicial manpower. However, any such increase, if required, is unlikely to be large and would, in practice be offset by the increased productivity of our civil justice system, viewed in the broader context of the economic and social well-being of the HKSAR.

925. The Working Party bears in mind the cautionary words of the Chief Justice in his speech delivered at the Ceremonial Opening of the Legal Year 2003. The Chief Justice stated that in the years ahead, budgetary constraints will pose difficult problems for the Judiciary, requiring hard decisions to be made, but without any compromise to the quality of justice. In particular, it

was pointed out that the Judiciary will have to reduce the number of temporary judges at all levels and may have to leave some judicial posts vacant. The Working Party is therefore aware that there may be great difficulty, in the immediate future, finding funds for any additional posts in support of the proposed reforms. Accordingly, reliance would primarily have to be placed on rationalising and redeploying present judicial resources.

926. However, budgetary constraints in the next few years may pose less of a problem than might otherwise have been the case since there has been a marked decline in the number of active cases going through the courts, even as compared with the date when the Interim Report was published. The figures are set out in *Appendix 4* and are no doubt a reflection of prolonged economic recession. Thus, writs commencing ordinary High Court Actions have declined from 22,482 in 1998, to 5,556 in 2001 and 4,865 in 2002. Commercial Actions have declined from 308 in 1998 to 73 in 2001, increasing slightly in 2002 to 91. Similarly, cases in the Admiralty Jurisdiction have gone down from 432 in 1998 to 246 in 2002. It is true that bankruptcies have shot up, going from 1,637 cases in 1998 to 13,191 in 2001 and doubling again to reach 26,920 cases in 2002. Similarly, company liquidations have increased from 942 in 1998 to about 1,400 cases in 2001 and 2002. However, the great mass of individual bankruptcies and corporate liquidations tend to make small demands on judicial resources. The huge call on judicial time arising from the right of abode litigation have now subsided. Cases in the Constitutional and Administrative Law list spiked from 112 and 162 in 1998 and 1999 to 2,767 and 3,869 in 2000 and 2001 respectively, declining to 209 cases in 2002.

927. In brief, the pressures on the Judiciary of the “litigation explosion” which caused great concern at the end of the last century have progressively eased, making it possible to postulate that the proposed reforms can go forward without having to budget for any substantial increase in recurrent expenditure.

Recommendation 150: Proposals 76 to 80, for making it essential that the proposed reforms be supported by the allocation of adequate resources; by proper training for judges and court staff (and members of the legal profession and others concerned); by continuous monitoring and the implementation of adjustments and changes as necessary; and by seeking efficiencies through the use of information technology; should be adopted.

Proposals and Recommendations

Section 1: Introduction

Section 2: A new code or selective amendment

Proposal 74

Assuming that a series of Proposals in this Report are to be recommended by the Working Party, they should be implemented by adopting a new set of rules along the lines of the CPR and of relevant rules from other jurisdictions (with any necessary modifications).

Proposal 75

In the alternative to Proposal 74, recommended Proposals should be implemented by amending, but otherwise retaining, the existing RHC.

Recommendation 1

The proposed reforms recommended for adoption in this Final Report should be implemented by way of amendment to the RHC rather than by adopting an entirely new procedural code along the lines of the CPR.

Section 3: Procedural reform and the Basic Law

Section 4: Overriding objective and case management powers

Proposal 1

Provisions expressly setting out the overriding objectives of the civil justice system should be adopted with a view to establishing fundamental principles to be followed when construing procedural rules and determining procedural questions.

Proposal 2

A rule placing a duty on the Court to manage cases as part of the overriding objective of the procedural system and identifying activities comprised within the concept of case management should be adopted.

Proposal 3

Rules listing the Court's case management powers, including a power to make case management orders of its own initiative should be adopted.

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*.

Section 5: Pre-action protocols

Proposal 4

Steps should be taken, in cooperation with interested business, professional, consumer and other groups, to develop pre-action protocols suitable to Hong Kong conditions with a view to establishing standards of reasonable pre-action conduct in relation to specific types of dispute.

Proposal 5

Rules should be adopted allowing the court to take into account the parties' pre-action conduct when making case management and costs orders and to penalise unreasonable non-compliance with pre-action protocol standards.

Recommendation 5

Pre-action protocols should not be prescribed for cases across the board, whether by a general protocol or by a general practice direction on protocols.

Recommendation 6

It should be open to the courts operating existing as well as any additional specialist lists, subject to the approval of the Chief Judge of the High Court and after due consultation with all relevant persons, to introduce suitable pre-action protocols to be applied to cases brought in those lists.

Recommendation 7

Rules should be introduced enabling the court when exercising any relevant power, in its discretion, to take into account a party's non-compliance with any applicable pre-action protocol in accordance with the terms of the protocol in question.

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.

Recommendation 9

A procedure should be introduced to enable parties who have settled their substantive dispute to bring costs-only proceedings by way of originating summons and subject to practice directions, for a party-and-party taxation of the relevant pre-settlement costs.

Section 6: Commencement of Proceedings

Proposal 6

The way to commence proceedings should be simplified to involve only two forms of commencement, abolishing distinctions between writs, originating summonses, originating motions and petitions.

Recommendation 10

Application of the RHC should continue to be excluded in relation to the classes of proceedings set out in O 1 r 2(2) (“the excluded proceedings”).

Recommendation 11

In so far as appropriate, other specialised types of proceedings governed by their own procedural rules and requirements should be added to the excluded proceedings and special provision should be made in respect of election petitions.

Recommendation 12

The rules of the RHC making it mandatory to commence certain proceedings by writ or, as the case may be, by originating summons, should be abolished.

Recommendation 13

In all cases other than the excluded proceedings, the parties should be permitted to commence proceedings either by writ or by originating summons, with the RHC indicating that a writ is appropriate where a substantial dispute of fact is likely and that an originating summons is appropriate where there is unlikely to be a substantial dispute of fact, such as where the sole or principal issue is one of law or construction.

Recommendation 14

Originating motions and petitions should be abolished (save where they are prescribed for commencing any of the excluded proceedings).

Recommendation 15

Unless the court otherwise directs (in accordance with applicable laws), all hearings of originating summonses should take place in open court.

Recommendation 16

It should continue to be the case that an inappropriate mode of commencement does not invalidate steps taken in the proceedings so commenced and that in such cases, the court should give suitable directions for continuation of the proceedings in an appropriate manner.

Section 7: Disputing Jurisdiction

Proposal 7

Part 11 of the CPR should be adopted to govern applications to challenge the court's jurisdiction or to invite it to decline 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.

Section 8: Default Judgments and Admissions

Proposal 8

Provisions along the lines of Part 14 of the CPR should be adopted to provide a procedure for making admissions and for the defendant to propose terms for satisfying money judgments.

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 instalments) in submitting to entry of judgment by default.

Section 9: Pleadings

Proposal 9

Rules should be adopted aimed at returning pleadings to a simpler form, comprising a concise statement of the nature of the claim and of the facts relied on, together with any relevant point of law.

Recommendation 19

Proposal 9 (for a restatement of what pleadings should contain) not be adopted.

Recommendation 20

We should not adopt the practices of (i) requiring written contracts and documents constituting contracts to be annexed to the pleadings; (ii) permitting other documents to be so annexed; or (iii) permitting intended witnesses to be named in the pleadings.

Recommendation 21

The rule permitting points of law to be raised in the pleadings should remain unchanged.

Proposal 10

Rules be introduced requiring defences to be pleaded substantively, with reasons given for denials and positive cases advanced.

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 has 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.

Recommendation 25

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

Proposal 11

A requirement for all pleadings to be verified by statements of truth should be introduced and the making of a false statement without an honest belief in its truth should be made punishable as a contempt.

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.

Proposal 12

Rules should be adopted to establish a power to require clarification of and information on pleadings, exercisable by the court of its own motion or on application by a party, in accordance with the principles contained in the overriding objective.

Recommendation 33

The court should have power to require, of its own motion and in such manner as it sees fit, any party or parties to particularise or amend their pleadings where clarification is necessary for disposing fairly of the cause or matter or for saving costs.

Recommendation 34

The existing rule should be amended to make it clear that a court will only order delivery of further and better particulars where such order is necessary for disposing fairly of the matter or for saving costs.

Recommendation 35

Voluntary particulars should be required to be verified by a statement of truth.

Proposal 13

Rules making it more difficult to amend with a view to encouraging carefully prepared statements of case early in the proceedings should be adopted.

Recommendation 36

Proposal 13 (for introducing rules making it more difficult to amend pleadings) should not be adopted.

Section 10: Summary Disposal of Proceedings

Proposal 14

The test for summarily disposing of proceedings or issues in proceedings should be changed to the "real prospect of success" test, construed as establishing a lower threshold for obtaining summary judgment, and applied in all procedural contexts where summary disposal of the case may ensue. Cases or issues in cases, whether advanced by plaintiff or defendant, which have no real prospect of success should not be allowed to proceed to trial unless some overriding public interest requires that they do proceed.

Recommendation 37

Proposal 14 (for changing the test for summarily disposing of proceedings) should not be adopted.

Section 11: Sanctioned offers and payments

Proposal 15

Rules governing the making and costs consequences of offers of settlement and payments into court along the lines of Part 36 of the CPR should be adopted.

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.

Section 12: Interim remedies and Mareva injunctions in aid of foreign proceedings

Proposal 16

The rules governing the grant of interim relief, the award of interim payments and security for costs should be rationalized and collected together, accompanied by a Practice Direction setting out appropriate court-approved forms for interim relief applications and orders, along the lines of CPR 25 and CPR 25PD.

Recommendation 44

Proposal 16 (for introducing a rule to consolidate various rules relating to interim relief) should not be adopted.

Proposal 17

Interim relief by way of Mareva injunctions and/or Anton Piller orders should be available in relation to proceedings which are taking place, or will take place, outside the jurisdiction (and where no such substantive proceedings are contemplated in Hong Kong).

Recommendation 45

Proposal 17 (for introducing Mareva injunctions and incidental relief in aid of foreign proceedings) should be adopted as modified and supplemented by Recommendations 46 to 51.

Recommendation 46

The jurisdiction to grant a Mareva injunction in aid of foreign proceedings or arbitrations should be confined to proceedings and arbitrations capable of leading, in the ordinary course, to a judgment or arbitral award which can be enforced in Hong Kong.

Recommendation 47

Section 21L of the HCO should be amended to make it clear that a Mareva injunction can be sought in aid of foreign proceedings and arbitrations as an independent, free-standing form of relief, without being ancillary or incidental to substantive proceedings commenced in Hong Kong, followed by relevant amendments to O 29.

Recommendation 48

Section 21L or some other appropriate provision of the HCO should be amended to give the Rules Committee clear authority to amend O 11 with a view to making applications for free-standing Mareva injunctions an eligible category for the grant of leave to effect service of process abroad, followed by relevant amendments to O 11.

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 or 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 desirable 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.

Section 13: Case management timetabling and milestones

Proposal 18

A rule should be adopted requiring the parties each to fill in and file a questionnaire shortly after the defendant serves its defence, providing the court with specified items of information to enable it to assess the procedural needs of the case with a view to fixing a timetable and giving appropriate directions for the conduct of the case including directions fixing milestones in the progress of the case which are, save in the most exceptional circumstances, immovable.

Proposal 19

Rules should be adopted which give the court maximum flexibility when devising timetables and directions and which also encourage the parties to make reasonable procedural agreements without requiring reference to the court unless such agreements may impinge upon specified milestone events in the prescribed timetable.

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 61

Flexible measures, including the possible establishment of a running list for interlocutory matters, should be adopted to permit any vacated dates in judicial diaries to be used efficiently. While the aim should be to maximise use of fixed milestone dates and progressively to diminish reliance on a Running List, how, when and the extent to which that aim should be implemented should be worked out by the Chief Judge of the High Court and the court administration in consultation with members of the profession and other interested parties.

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.

Section 14: Docket system, specialist lists and vexatious litigants

Proposal 20

As an alternative to Proposals 18 and 19, the possible adoption of case management by a docket system should be explored for use either generally or in connection with particular classes of proceedings.

Recommendation 63

The Working Party does not recommend adopting a docket system generally for managing cases in Hong Kong. However, it supports the continued use of effectively a docket system in accordance with specialist list procedures or pursuant to applications made under PD 5.7 in respect of cases thought appropriate for management by a docket system.

Proposal 21

Specialist lists should be preserved and Specialist Courts permitted to publish procedural guides modifying the application of the general body of rules to cases in such specialist lists..

Recommendation 64

The procedural autonomy currently conferred on judges in charge of specialist lists should be maintained and any special practices adopted should be published as practice directions.

Recommendation 65

Judges in charge of specialist lists, in consultation with users of that list, ought to give consideration to the possible development and introduction, with the agreement of the Chief Judge of the High Court, of suitable pre-action protocols for some or all cases in that list.

Proposal 22

Consideration should be given to establishing additional specialist lists in areas likely to benefit, including lists for complex cases, for cases involving unrepresented litigants and cases where group litigation orders (if introduced) have been made.

Recommendation 66

Consideration should be given to the establishment of an IP/IT specialist list pursuant to Order 72, in consultation with the legal profession and other interested parties.

Recommendation 67

Section 27 of the HCO should be amended to introduce enhancements equivalent to those introduced by section 42 of the Supreme Court Act 1981 in England and Wales.

Recommendation 68

The HCO should furthermore make provision for vexatious litigant orders to be made not only on the application of the Secretary for Justice but also on the application of any person who is or has been party to vexatious proceedings presently instituted by or with the participation of the respondent or who has directly suffered adverse consequences resulting from such proceedings or from vexatious applications made by the respondent in such proceedings.

Recommendation 69

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

Section 15: Multi-party litigation and derivative actions

Proposal 23

A procedural scheme to deal with multi-party litigation should be adopted in principle, subject to further investigation of schemes implemented in other jurisdictions which may be suitable for the HKSAR.

Recommendation 70

In principle, a scheme for multi-party litigation should be adopted. Schemes implemented in comparable jurisdictions should be studied by a working group with a view to recommending a suitable model for Hong Kong.

Proposal 24

A provision regulating derivative actions should be adopted.

Recommendation 71

On the assumption that Part IVAA of the Companies (Amendment) Bill 2003 becomes law, *Proposal 24* (for the introduction of a procedural scheme for the bringing of derivative actions) will have been overtaken and should not be adopted.

Section 16: Discovery

Proposal 25

Automatic discovery should be retained, but the Peruvian Guano test of relevance should no longer be the primary measure of parties' discovery obligations. Subject to the parties' agreeing otherwise, a primary test restricted to directly relevant documents, namely, those relied on by the parties themselves, those adversely affecting each party's case and those supporting the opponents' case, should be adopted instead.

Proposal 26

In making disclosure, the parties should be free to reach agreement as to the scope and manner of making discovery. Where no agreement is reached, they should be obliged to disclose only those documents required under the primary test, ascertainable after a reasonable search, the reasonableness of such search being related to the number of documents involved, the nature and complexity of the proceedings, how easily documents may be retrieved and the significance of any document to be searched for.

Recommendation 72

Proposal 25 (for adopting "standard discovery") and *Proposal 26* (for prescribing a "reasonable search" standard) should not be adopted, retaining the existing *Peruvian Guano* principles as the primary measure of the parties' discovery obligations.

Recommendation 73

A practice direction should be issued and the timetabling questionnaire designed with a view to encouraging the parties to achieve economies in the discovery

process by agreement; and to encouraging the courts, in appropriate cases, to give directions with the same aim.

Proposal 27

In the alternative to Proposals 25 and 26, discovery should not be automatic but should be subject to an inter partes request, with further discovery requiring the court's order, along the lines of the system adopted in New South Wales.

Recommendation 74

Proposal 27 (for adopting a system of discovery based on disclosure of the documents referred to by the parties plus a limited number of requested documents) should not be adopted.

Proposal 28

Parties should be empowered to seek discovery before commencing proceedings and discovery from non-parties along the lines provided for by the CPR.

Recommendation 75

The HCO should be amended to broaden the jurisdiction of the court under section 41 to order disclosure before commencement of proceedings to encompass all types of cases (and not merely cases involving personal injury and death claims).

Recommendation 76

Such jurisdiction should be exercisable where it is shown by the applicant that he and the respondent are both likely to be parties to the anticipated proceedings and that disclosure before the proceedings have been started is necessary to dispose fairly of the anticipated proceedings or to save costs.

Recommendation 77

Orders for pre-action disclosure should relate to disclosure and inspection of specific documents or classes of documents which are “directly relevant” to the issues in the anticipated proceedings, being documents which would be likely to be relied on by the parties themselves or documents directly affecting adversely or directly supporting any party’s case in the anticipated proceedings, the procedure

for such applications being that prescribed by O 24 r 7A, subject to any necessary modifications.

Recommendation 78

Section 42(1) of the HCO should be amended so that the court's jurisdiction to order post-commencement, pre-trial disclosure from persons who are not parties to the proceedings applies to all types of cases (and not merely to personal injury and death claims).

Recommendation 79

The requirements to be met and procedure to be followed when seeking orders referred to in *Recommendation 78* should be as laid down by O 24 r 7A in respect of section 42(1) orders and by O 24 r 13, with any necessary or desirable modifications.

Proposal 29

The court should be expected to exercise its case management powers with a view to tailoring an appropriate discovery regime for the case at hand. It should have a residual discretion both to direct what discovery is required – to narrow or widen the scope of discovery required, to include, if necessary and proportionate, full Peruvian Guano style discovery – and in what way discovery is to be given.

Recommendation 80

Proposal 29 (for the case management of discovery by the courts) should be adopted, but with *Peruvian Guano* principles as the primary measure of discovery, taken as the starting-point for such case management.

Section 17: Interlocutory applications and summary assessment of costs

Proposal 30

The rules should pursue the objective of reducing the need for interlocutory applications by adopting one or more of the following strategies, namely :-

- *Encouraging the parties to cooperate with each other and to agree procedural arrangements (subject to the court's residual jurisdiction to set aside or vary those arrangements).*

- *Authorising the court, in appropriate cases, to act on its own initiative in giving procedural directions, without hearing any party before so acting (subject to affected persons thereafter having a right to apply for orders so made to be set aside or varied).*
- *Making orders which specify the automatic consequences of non-compliance and placing the onus on the party guilty of non-compliance to seek relief from those consequences, such relief to be granted at the court's discretion.*

Recommendation 81

The parties should be encouraged by rule and practice direction, backed by costs sanctions, to adopt a reasonable and cooperative attitude in relation to all procedural issues.

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.

Recommendation 83

When disposing of interlocutory applications after the summons for directions, the court should normally make orders which specify the automatic consequences of non-compliance appropriate and proportionate to the non-compliance in question. Orders specifying such consequences may, if appropriate, also be made where the interlocutory application is heard before the summons for directions. However, the directions given on the summons for directions itself should generally not specify any such consequences.

Recommendation 84

While it would be open to a party who has failed to comply with a self-executing order to seek relief from the prescribed consequences of his non-compliance, such relief should not be automatic and, if granted, should generally be granted on suitable terms as to costs and otherwise.

Proposal 31

Rules should be adopted with a view to streamlining interlocutory applications including rules which :-

- *Permit applications to be dealt with on paper and without a hearing.*
- *Eliminate hearings before the master where the matter is contested and may be likely to proceed on appeal to the judge in any event.*
- *Make provision for dispensing with attendance and for use of modern means of communication for hearings where costs may be saved.*

Recommendation 85

All interlocutory applications (other than applications for relief against the implementation of sanctions imposed by self-executing orders previously made and subject to special arrangements being made for time summonses) 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.

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.

Proposal 32

The court should be encouraged to make, whenever possible, summary assessments of costs at the conclusion of interlocutory applications.

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 assessments of costs.

Recommendation 90

All available reliable information bearing on current levels of professional fees and charges should be collected and made available to the court with a view to promoting consistency and realism in the court's approach to the summary assessment of 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 the taxation and other possible sanctions in the event that the taxation does not result in a proportionate benefit to him.

Section 18: Wasted costs

Proposal 33

In place of the powers currently conferred on the court by RHC Order 62 r 8(1), the court's power to make wasted costs orders against solicitors should be exercisable where the wasted costs are incurred as a result of any improper, unreasonable or negligent act or omission on the part of a solicitor or any employee of such solicitor; or which costs, in the light of any such act or omission occurring after they were incurred, the court considers it unreasonable to expect that party to pay.

Proposal 34

The court's power to make wasted costs orders against solicitors should be extended to cover barristers.

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 discretion 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 pressurising 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 particularise 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 O 62 r 8.

Section 19: Witness statements and evidence

Proposal 35

A rule should be adopted giving the court express powers to exercise control over the evidence to be adduced by the parties by giving directions as to the issues on which it requires evidence; the nature of the evidence which it requires to decide those issues; and the way in which the evidence is to be placed before the Court. Such power extends to powers to exclude evidence that would otherwise be admissible and to the limiting of cross-examination.

Proposal 36

For the avoidance of doubt, the High Court Ordinance should be amended to provide an express rule-making power permitting the court to restrict the use of relevant evidence in furtherance of the overriding objective.

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.

Proposal 37

A rule should be adopted to promote flexibility in the court's treatment of witness statements, by expressly catering for reasonable applications for witnesses to be allowed to amplify or to add to their statements.

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).

Section 20: Expert evidence

Proposal 38

Provisions aimed at countering the inappropriate and excessive use of expert witnesses should be adopted, giving the court control of the scope and use of expert evidence to be adduced.

Recommendation 101

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

Proposal 39

Measures aimed at countering lack of independence and impartiality among expert witnesses should be adopted :-

- (a) Declaring the supremacy of the expert's duty to assist the court over his duty to the client or the person paying his fees.*
- (b) Emphasising the impartiality and independence of expert witnesses and the inappropriateness of experts acting as advocates for a particular party.*
- (c) Annexing a code of conduct for expert witnesses and requiring experts to acknowledge their paramount duty to the court and a willingness to adhere to the code of conduct as a condition for allowing expert reports or evidence to be received.*

- (d) *Requiring expert reports prepared for use by the court to state the substance of all material instructions conveyed in any form, on the basis of which the report was prepared, abrogating to the extent necessary, any legal professional privilege attaching to such instructions, but subject to reasonable restrictions on further disclosure of communications between the party and such expert.*
- (e) *Permitting experts to approach the court in their own names and capacity for directions without notice to the parties, at the expense of one or all of the parties, as directed by the court.*

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.

Proposal 40

That a procedure be adopted permitting the court to direct the parties to cause single joint experts to be engaged at the expense of the parties and that appropriate rules be adopted to govern the rights, duties and functions of such single joint experts.

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 SJE is unreasonable in the circumstances.

Section 21: Case managing trials

Proposal 41

Rules conferring express powers on the court to case manage trials, including powers to exclude otherwise admissible evidence and to limit cross-examination and submissions by counsel should be adopted, with the proviso that the exercise of such powers is subject to the parties' entitlement to receive a fair trial and a reasonable opportunity to lead evidence, cross-examine and make submissions.

Recommendation 108

A rule along the lines of O 34 r 5A of the Western Australian Rules of the Supreme Court should be adopted, setting out the court's powers of case management in relation to trials, together with a practice direction providing that such powers should primarily be exercised at the pre-trial review.

Section 22: Leave to appeal

Proposal 42

A requirement that interlocutory appeals to the Court of Appeal be brought only with leave of the Court of First Instance or the Court of Appeal should be introduced.

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.

Proposal 43

All appeals from the Court of First Instance to the Court of Appeal (and not merely interlocutory appeals as proposed in Proposal 42) should be subject to a requirement of leave.

Recommendation 114

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

Proposal 44

Leave to appeal should only be granted where the court considers that the appeal would have a real prospect of success or that there is some other compelling reason why the appeal should be heard.

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.

Proposal 45

Leave to appeal from case management decisions should generally not be granted unless the case raises a point of principle of sufficient significance to justify the adverse procedural and costs consequences of permitting the appeal to proceed.

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.

Proposal 46

Leave to appeal from a decision itself given on appeal should generally not be granted unless the case raises an important point of principle or practice or some other compelling reason exists for the grant of leave.

Recommendation 117

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

Proposal 47

If a requirement of leave for appeals to the Court of Appeal is introduced, the Court of Appeal should have power, in relation to applications for leave which are wholly unmeritorious and tantamount to an abuse of its process, to dismiss such applications without an oral hearing, subject to the applicant being given one final opportunity to show cause in writing why the application should not be so dismissed.

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.

Section 23: Appeals

Proposal 48

Rules designed to enable the substantive hearing of appeals to be dealt with efficiently, including rules enabling the Court of Appeal to give directions case managing the hearing, should be adopted.

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).

Proposal 49

Appeals should be limited to a review of the decision of the lower court, subject to the appellate court having a discretion to treat the appeal as a re-hearing if the circumstances merit such an approach.

Proposal 50

The principles upon which appeals are determined should apply uniformly to the Court of First Instance and the Court of Appeal.

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.

Section 24: General approach to inter-party costs

Proposal 51

A general rule should be adopted requiring the court to take into account the reasonableness or otherwise of the parties' conduct in the light of the overriding objective in relation to the economic conduct or disposal of the claim before and during the proceedings when exercising its discretion in relation to costs.

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.

Section 25: Costs transparency

Proposal 52

Rules should be adopted requiring solicitors and barristers (i) to disclose to their clients full information as to the basis on which they will be charged fees; (ii) to provide them with the best available estimates as to the amount of fees they are likely to be charged for the litigation in question, by reference to stages of the proceedings and overall (in the case of barristers, assuming that they continue to be instructed by the solicitors in the case); and (iii) to update or revise such information and estimates as and when they may change, with reasons given for any such changes.

Recommendation 123

Solicitors should be obliged to provide their clients with (i) full information as to the basis on which fees and disbursements (including any barristers' fees) will be charged; (ii) their best estimates of the costs to cover various stages of the litigation process; and (iii) updated or revised information and estimates as and when the circumstances require, with reasons for any such changes.

Recommendation 124

Barristers should be obliged, upon request, to provide to their clients, via the solicitors (i) full information as to the basis on which their fees will be charged; (ii) their best estimates of the fees they would be likely to charge for specified stages of the litigation process; and (iii) updated or revised information and estimates as and when the circumstances require, with reasons for any such changes.

Recommendation 125

There should be further consultation as to the manner in which *Recommendations 123 and 124* should be implemented.

Proposal 53

Steps should be taken, including the promotion of legislation if necessary, to ensure that the public is given access to information regarding barristers and solicitors relevant to a choice of legal representation in connection with litigation or possible litigation, including information concerning fees, expertise and experience to be made available by the professional associations concerned or in some other appropriate manner.

Recommendation 126

There should be further consultation by the Chief Justice as to whether rules should be introduced to permit publication by barristers of information relating to their fees.

Proposal 55

Steps should be taken to compile benchmark costs for use in Hong Kong.

Recommendation 127

Proposal 55 (relating to benchmark costs, as outlined in the Interim Report) should not be adopted, without prejudice to the adoption, where thought appropriate, of costs indications compiled from available reliable costs information, for fixing costs in specialist lists and for guidance generally.

Recommendation 128

The Judiciary should compile and publish information as to costs derived from the decisions of taxing masters and other reliable sources to promote consistency, accuracy and fairness in judicial awards of costs and to assist parties in the negotiation of legal fees and in settling disputes as to costs.

Proposal 56

Provision should be made in Hong Kong to require the parties, periodically and as ordered, to disclose to the court and to each other best available estimates of costs already incurred and likely to be incurred in the case.

Recommendation 129

Proposal 56 (for disclosure of costs between the parties and to the court) should not be adopted.

Section 26: Challenging one's own lawyer's bill

Proposal 54

Procedures should be adopted to make challenges by clients to their lawyers' charges subject to a test whereby the necessity for the work done, the manner in which it was done and the fairness and reasonableness of the amount of the costs in relation to that work, are all subject to assessment without any presumption that such costs are reasonable.

Recommendation 130

Proposal 54 (for introducing a new test for use in solicitor and own client taxations) should not be adopted.

Section 27: Taxing the other side's costs

Proposal 57

The exceptional treatment given to counsel's fees on party and party taxations, as provided for by para 2(5) of Pt II of the 1st Schedule to Order 62 of the RHC should be deleted.

Recommendation 131

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

Proposal 58

A rule should be introduced to enable offers similar to Part 36 offers under the CPR to be made in the context of the taxation of costs.

Recommendation 132

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

Proposal 59

Conditional upon benchmark costs being adopted, such benchmark costs should be taken to represent the presumptive amounts allowable in a taxation of costs and pursuit of a taxation process by a party who subsequently fails to secure an award for a higher amount in respect of an item covered by a costs benchmark should be taken into account in determining the incidence and quantum of the costs of the taxation process.

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.

Proposal 60

A procedure should be introduced to enable provisional taxations to be conducted on the papers, at the court's discretion, subject to a party dissatisfied with any such provisional taxation being entitled to require an oral hearing, but subject to possible costs sanctions if he fails to do better at the hearing.

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.

Proposal 61

Rules, backed by costs sanctions, 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, using where applicable, prescribed court forms and precedents.

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.

Section 28: CPR Schedule

Proposal 62

Rules similar to those listed in Schedule 1 to the CPR should be retained in the RHC with only such changes as may be necessitated by changes to other parts of the RHC.

Recommendation 137

Proposal 62 (relating to the Rules of the Supreme Court retained after introduction of the CPR) should not be adopted.

Section 29: Alternative Dispute Resolution

Proposal 68

A scheme should be introduced for the court to provide litigants with information about and facilities for mediation on a purely voluntary basis, enlisting the support of professional associations and other institutions.

Recommendation 138

Proposal 68 (for the court to provide litigants with better information and support with a view to encouraging greater use of purely voluntary mediation) should be adopted in conjunction with other appropriate measures to promote court-related mediation.

Proposal 63

Rules making mediation mandatory in defined classes of case, unless exempted by court order, should be adopted.

Recommendation 139

Proposal 63 (for introducing mandatory mediation by statutory rule) should not be adopted, without prejudice to any initiatives within the construction industry for the adoption of statutory adjudication.

Proposal 65

A statutory scheme should be promoted to enable one party to litigation to compel all the other parties to resort to mediation or some other form of ADR, staying the proceedings in the meantime.

Recommendation 140

Proposal 65 (for introducing mandatory mediation by election of any party to a dispute) should not be adopted.

Proposal 66

Legislation should be introduced giving the Director of Legal Aid power to make resort to ADR a condition of granting legal aid in appropriate types of cases.

Recommendation 141

The Legal Aid Department should have power in suitable cases, subject to further study by the Administration and consultation with all interested institutions and parties on the development and promulgation of the detailed rules for the implementation of the scheme, to limit its initial funding of persons who qualify for legal aid to the funding of mediation, alongside its power to fund court proceedings where mediation is inappropriate and where mediation has failed.

Proposal 64

A rule should be adopted conferring a discretionary power on the judge to require parties to resort to a stated mode or modes of ADR, staying the proceedings in the meantime.

Recommendation 142

Proposal 64 (for giving the court power to order the parties to engage in mediation) should not be adopted at present.

Proposal 67

Rules should be adopted making it clear that where ADR is voluntary, an unreasonable refusal of ADR or uncooperativeness during the ADR process places the party guilty of the unreasonable conduct at risk of a costs sanction.

Recommendation 143

In accordance with *Proposal 67*, subject to the adoption (after due consultation) of appropriate rules, the court should have power, after taking into account all relevant circumstances, to make adverse costs orders in cases where mediation has been unreasonably refused after a party has served a notice requesting mediation on the other party or parties; or after mediation has been recommended by the court on the application of a party or of its own motion.

Section 30: Unrepresented litigants

Section 31: Judicial review

Proposal 69

Reforms should be adopted to simplify description of the scope of judicial review and to simplify the terminology for forms of judicial review relief.

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.

Proposal 70

Provisions should be adopted to facilitate participation in judicial review proceedings by persons interested therein other than the applicant and respondent.

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.

Proposal 71

Provisions should be adopted to require claims for judicial review to be served on respondents and on other persons known to be interested in the proceedings.

Proposal 72

Provisions should be adopted to require respondents who wish to contest the proceedings to acknowledge service and to summarise the grounds relied on.

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.

Proposal 73

Provisions should be adopted spelling out the court's powers on quashing a decision, including a power, subject to statutory limitations, to take the impugned decision itself.

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.

Section 32: Material support for the reforms

Proposal 76

Any reforms to be undertaken must be adequately resourced. In particular, provision must be made to ensure that adequate judicial and court resources are in place to implement comprehensive case management and other functions mandated by the reforms and to accommodate trials in accordance with prescribed timetables.

Proposal 77

An analysis of the system's demands in the light of proposed reforms should be conducted before and after such reforms take effect in order to determine how judges, masters and administrative staff (including staff in any newly defined posts) should best be deployed so as to respond effectively to those demands.

Proposal 78

Training programmes to familiarise judges and other court staff with any reforms adopted, tailored to the knowledge and skills required to implement such reforms, should be established and made compulsory for civil judges, masters and all other relevant court staff.

Proposal 79

Steps should be taken to develop the Court's existing computerised system to enable it to facilitate any reforms by being able to accommodate not merely administrative support, but also to perform case-flow management, resource allocation and management statistics functions.

Proposal 80

Research should be commissioned so as to monitor continuously the system's functioning, establishing baselines of performance, guiding the deployment of resources, helping tailor judicial and court staff training and assessing the benefits or disadvantages of particular reforms in practice.

Recommendation 150

Proposals 76 to 80, for making it essential that the proposed reforms be supported by the allocation of adequate resources; by proper training for judges and court staff (and members of the legal profession and others concerned); by continuous monitoring and the implementation of adjustments and changes as necessary; and by seeking efficiencies through the use of information technology; should be adopted.

Appendix 1

Consultation Activities Undertaken by the Working Party

1. Distribution of Interim Report

Interim Report – Printed 5,000 copies. Distributed 4,990 (General public: 2,100 copies; lawyers 1,200 copies)

Executive Summary – Printed 12,000 copies. Distributed 11,485 (General public: 6,812)

CD-Rom – 500 prepared. 480 distributed (Supplied on request).

Copies of the Consultative Paper were placed as reference papers in public libraries run by the Leisure and Cultural Services Department.

2. Web Site

A dedicated web site <http://www.civiljustice.gov.hk> was set up for the consultation exercise to facilitate viewing and downloading of the Consultative Paper and sending in responses. At the close of 30 June 2002, some 41,000 hits were recorded.

3. Briefings delivered by Judiciary

Pre-Launch Briefings: 5

Internal Briefings (including pre-launch): 4

Radio Programmes: 4

Press Conferences and Seminars: 9

Breakdown

Date	Event
Just prior to launch	Briefing principal government officials concerned Briefing High Court judges and District Court judges Briefing Legco Panel Briefing Law Society and Bar Association Briefing Editors of press
29/11/01	Press Conference on launch
4/12//01	Radio interview
14/12/01	Briefing Judiciary support staff
22/12/01	Letter to HK (Radio Programme)
4/1/02	HK Today (Radio Programme)
5/1/02	Civil Justice Reform Seminar
10/1/02	Attending Seminar on “Legal Aid and the Community” (opening address)
18/1/02	Briefing Court interpreters
19/1/02	Briefing Judicial Officers
25/1/02	Attending Friday Workshop hosted by the Hon Ms Margaret Ng
1/2/02	Attending International Conference on Arbitration and ADR (opening speech)
2/2/02	Ming’s Tea house (Radio Programme)
15/2/02	Attending Friday Workshop hosted by the Hon Ms Margaret Ng
12/3/02	Briefing the Society of Construction Law
18/3/02	Attending Academy of Experts’ Conference on Civil Justice Reform
23/4/02	Attending seminar organised by the HK Federation of Women Lawyers
25/5/02	Attending Law Society Seminar on Civil Justice Reform
27/7/02	Attending LexisNexis Seminar on Civil Justice Reform

Appendix 2

Respondents (in alphabetical order)

Asian Patent Attorney Association – Hong Kong Group

Association of Expatriate Civil Servants of Hong Kong

Association of Personal Injury Lawyers

Bailiffs' Grade Union

Bailiff's Office

Mr Laurence BESEMER of Allianz Insurance (Hong Kong) Ltd

Mr John R BUDGE, solicitor

Mr Glenn CAMPBELL, barrister, United Kingdom

Mr Edwin CHAN, Associate Professor, Department of Building and Real Estate,
The Hong Kong Polytechnic University

Mr Peter PF CHAN

Mr CHEUNG Kam Chuen

Ms Grace CHOW

Mr CHOW Shun Yung

Mr Henry CHUNG

Registrar of Companies

Consumer Council

Messrs Deacons, solicitors

Department of Justice

Des Voeux Chambers, barristers' chambers

Equal Opportunities Commission

Mr Gerald GODFREY, CBE, QC

The Chambers of Mr Clive GROSSMAN QC, barristers' chambers

Mr David GUNSON

Messrs Herbert Smith, solicitors

Hong Kong Federation of Women's Centres

Mr HO Man Leung, Lawton, solicitor

Hong Kong Bar Association

Hong Kong Blind Union

Hong Kong Christian Service

Hong Kong Civic Association

Hong Kong Construction Association

Hong Kong Democratic Foundation

Hong Kong Institute of Arbitrators

Hong Kong Maritime Law Association

Hong Kong Mediation Centre

Hong Kong Reprographic Rights Licensing Society

Hong Kong Trade Development Council

Hospital Authority

Mr A W HUGHES, solicitor

Judicial Clerk Grade Working Group on Consultative Paper on Civil Justice
Reform

Mr Neil KAPLAN, CBE, QC

Mr John LAM

Law Society of Hong Kong

Mr Maurice WM LEE, solicitor

Legal Aid Department

Legal Aid Services Council

Legislative Council Debate on Civil Justice Reform on 8 May 2002

Speakers: The Hon Ms Margaret Ng, The Hon Mr Martin Lee, SC, The Hon Ms Miriam Lau, The Hon Ms Audrey Eu, SC, The Hon Mr Albert Ho, The Hon Mr Ambrose Lau, The Hon Mr Andrew Cheng, The Hon Mr Ip Kwok Him (delivering speech for The Hon Mr Japser Tsang), The Hon Ms Li Fung Ying and The Hon Mr Ng Leung Sing.

Mr Samuel WC LI, solicitor

Mr P Y LO, barrister

Ms Katherine LYNCH, Faculty of Law, University of Hong Kong

Messrs Masons, solicitors

Masters of the High Court and the District Court and Judges of the District Court

Mr Malcolm MERRY, barrister

Nelson Wheeler, Corporate Advisory Services Ltd

Mr Ludwig NG, solicitor

Mr William NG

Messrs Simmons & Simmons, solicitors

Society of Construction Law Hong Kong

Special Committee on Personal Injuries, Hong Kong Bar Association

Temple Chambers, barristers' chambers

The Academy of Experts

The Advocacy Institute

The British Chamber of Commerce in Hong Kong

The Hong Kong Association of Banks

The Hong Kong Family Law Association

The Hong Kong Federation of Electrical and Mechanical Contractors Ltd

The Hong Kong Institute of Architects

The Hong Kong Institute of Surveyors

The Hong Kong Mediation Council

Mr TSANG Wai Cheong

Ms Helena TSE, solicitor

Mr Alan TSO

Mr L F TSOI

Mr Hugh TYRWHITT-DRAKE and Mr Samuel LEE

Mr WONG Tai Cheong, John

Legal Advisory Division, Works Bureau

Mr Ernest YANG, solicitor with Messrs Holman, Fenwick & Willan, London

Mr YEUNG

Mr YU Man

中薈行有限公司

Appendix 3

(A) The Academy of Experts' Code of Practice

Preamble

This Code of Practice shows minimum standards of practice that should be maintained by all Experts. There are, in addition to the Code of Practice, General Professional Principles with which an Expert should comply.

These include the Expert:

- Being a 'fit and proper' person;
- Having and maintaining a high standard of technical knowledge and practical experience in their professional field;
- Keeping their knowledge up to date both in their expertise and as an Expert and undertaking appropriate continuing professional development and training.

The Code

1. Experts shall not do anything in the course of practising as an Expert, in any manner which compromises or impairs or is likely to compromise or impair any of the following :-

- a. the Expert's independence, impartiality, objectivity or integrity;
- b. the Expert's overriding duty to the Court or Tribunal;
- c. the Expert's duty having complied with the other sections of this Code and where the law permits, to act in the best interests of those appointing him;
- d. the good repute of the Expert or of Experts generally;

- e. the Expert's proper standard of work; and
- f. the Expert's duty to maintain confidentiality.

2. An Expert who is retained or employed in any contentious proceeding shall not enter into any arrangement to receive a contingency fee in respect of that proceeding nor should he accept any benefits other than his fee and expenses.

3. An Expert should not accept instructions in any matter where there is an actual or potential conflict of interests. Despite this rule, if full disclosure is made in writing, the Expert when those concerned specifically acknowledge the disclosure, may in appropriate cases accept instruction. Should an actual or potential conflict occur after instructions have been accepted, the Expert shall immediately notify all concerned and in appropriate cases resign his Appointment.

4. An Expert shall for the protection of his client maintain with a reputable insurer proper insurance for an adequate indemnity. The insurance shall include professional indemnity of not less than £500,000.

5. Experts shall not publicise their practices in any manner that may reasonably be regarded as being in bad taste. Publicity must not be inaccurate or misleading in any way.

6. The Expert shall comply with all appropriate Codes of Practice and Guidelines.

(B) Code of Practice for Experts within Europe

Preamble

This Code of Practice shows minimum standards of practice that should be maintained by all Experts. There are, in addition to the Code of Practice, General Professional Principles with which an Expert should comply.

These include the Expert :-

- Being a 'fit and proper' person;

- Having and maintaining a high standard of technical knowledge and practical experience in their professional field;
- Keeping their knowledge up to date both in their expertise and as Experts and undertaking appropriate continuing professional development and training.

The Code

1. Experts shall not do anything in the course of practising as an Expert, in any manner which compromises or impairs or is likely to compromise or impair any of the following :-

- a. the Expert's independence, impartiality, objectivity or integrity;
- b. the Expert's overriding duty to the Court or Tribunal;
- c. the good repute of the Expert or of Experts generally;
- d. the Expert's proper standard of work; and,
- e. the Expert's duty to maintain confidentiality.

2. An Expert who is retained or employed in any contentious proceeding shall not enter into any arrangement which could compromise his impartiality nor making his fee dependent on the issue of the case nor should he accept any benefits other than his fee and expenses.

3. An Expert should not accept instructions in any matter where there is an actual or potential conflict of interests. Notwithstanding this rule, if full disclosure is made under the control of the judge or of those appointing him the Expert may in appropriate cases accept instruction when those concerned specifically acknowledge the disclosure. Should an actual or potential conflict occur after instructions have been accepted, the Expert shall immediately notify all concerned and in appropriate cases resign his Appointment.

4. An Expert shall for the protection of his client maintain with a reputable insurer proper insurance for an adequate indemnity.

5. Experts shall not publicise their practices in any manner which may reasonably be regarded as being in bad taste or unlawful. Publicity must not be inaccurate or misleading in any way.

Appendix 4

Overall Caseload of the Court of First Instance [1998 - 2002]

Case Type	Case Filing Year				
	1998	1999	2000	2001	2002
High Court Actions (HCA)	22482	19733	10704	5556	4865
Miscellaneous Proceedings (HCMP)	7087	7998	6689	6699	5412
Special List					
Admiralty Actions (HCAJ)	432	338	312	344	246
Bankruptcy Proceedings (HCB)	1637	3879	5487	13191	26920
Commercial Actions (HCCL)	308	235	110	73	91
Companies Winding-up Proceedings (HCCW)	942	1161	1242	1403	1432
Constitutional and Administrative Law Proceedings (HCAL)	112	162	2767	3869	209
Construction and Arbitration Proceedings (HCCT)	137	128	140	100	110
Personal Injury Actions (HCPI)	1340	1460	1535	1055	1201
Probate Actions (HCAP)	7	11	22	15	13
Special List Sub-total	4915	7374	11615	20050	30222
Other Cases					
Adoption Application (HCAD)	2	0	1	0	1
Application for Interim Order (Bankruptcy) (HCBI)	15	6	2	13	1287
Application to Set Aside a Statutory Demand (HCSD)	17	43	47	34	40
Bill of Sale Registration (HCBS)	9	18	17	7	15
Book Debt Registration (HCBD)	13	15	50	59	42
Matrimonial Causes (HCMC)	3	5	3	5	3
Stop Notice (HCSN)	13	20	26	8	16
Other Cases Sub-total	72	107	146	126	1404
Overall Caseload	34556	35212	29154	32431	41903