

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.

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 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.

