CIVIL JUSTICE REFORM

Interim Report and Consultative Paper

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Chief Justice's Working Party On Civil Justice Reform

Hong Kong Special Administrative Region
People's Republic of China

Acknowledgments

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Your Views Are Crucial
Please Take The Time To Respond

THE CONSULTATION PERIOD ENDS ON 30 APRIL 2002

- ***This Report and Consultation Paper affects everyone who has a stake in there being an effective and efficient civil justice system.***
- ***Whether you are someone involved in litigation – or a barrister, solicitor, in-house or academic lawyer – or an accountant, litigation support professional, an expert or a professional association – Your response is crucial.***
- ***Civil justice reforms can only succeed with feedback and input from the system's users.***
- ***Please read the Report and Paper and send us comments on the Proposals put forward for consultation.***
- ***If you do not wish to comment on all the Proposals, please address those aspects of particular interest to you.***

PLEASE SEND YOUR RESPONSES TO

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Abbreviations

ALRC	Australian Law Reform Commission
ALRC No 89	Australian Law Reform Commission, Report No 89, "Managing Justice – A review of the federal civil justice system"
B&M	Henry Brown & Arthur Marriott, "ADR Principles and Practice" (1999, 2nd Ed, Sweet & Maxwell)
CPR	Civil Procedure Rules 1998 (enacted in England and Wales)
EF	"Emerging Findings" – Lord Chancellor's Department, Civil Justice System Evaluation (LCD website – March 2001)
GTC	"Going to Court" – A Discussion Paper on Civil Justice in Victoria, Peter A Sallmann & Richard T Wright (Dept of Justice, Victoria)
HCR	High Court Rules, Cap 4
HKCP 2001	Hong Kong Civil Procedure 2001 (Sweet & Maxwell Asia)
HKIAC	Hong Kong International Arbitration Centre
LCD-DP	The Lord Chancellor's Department's Discussion Paper on ADR, available on LCD's Website
LCD's Website	Website of The Lord Chancellor's Department <http://www.lcd.gov.uk>
LRCWA	Law Reform Commission of Western Australia
RSC	Rules of the Supreme Court
W&B	Michael Wilkinson & Janet Burton, Reform of the Civil Process in Hong Kong (Butterworths Asia, 2000)
WAR	(Western Australia Review) – Review of the Criminal and Civil Justice System in Western Australia, 1997-1999 (The Law Reform Commission of Western Australia)
WFR	(Woolf Final Report) – "Access to Justice, Final Report by Lord Woolf (July 1996)
White Book	Civil Procedure, Vols 1 & 2, The White Book Service 2001 (Sweet & Maxwell), Spring 2001
WIR	(Woolf Interim Report) – "Access to Justice, Interim Report by Lord Woolf (June 1995)

Executive Summary

1. The Working Party was appointed by the Chief Justice in February 2000 with the following terms of reference :-

> "To review the civil rules and procedures of the High Court and to recommend changes thereto with a view to ensuring and improving access to justice at reasonable cost and speed."

2. This Interim Report and Consultative Paper ("the Paper") seeks :-

2.1 to report on reforms in other jurisdictions relevant to Hong Kong;

2.2 to review available evidence as to the state of civil justice in Hong Kong; and,

2.3 to formulate proposals for possible reform for the purpose of consulting court users and all interested members of the public.

PART I – THE NATURE OF THE PROBLEM

The Civil Justice System

3. The existence of a civil justice system enabling individuals and corporations effectively to enforce their legal rights underpins all investment, commercial and domestic transactions as well as the enjoyment of basic rights and freedoms. If the system becomes inaccessible to segments of society, whether because of expense, delay, incomprehensibility or otherwise, they are deprived of access to justice.

Pressures on many Civil Justice Systems and on Hong Kong's System

4. Social change and technological advances have resulted in a sharp increase in the number, rapidity and complexity of transactions, matched by increased complexity in legislation and case-law. These changes have put pressure on civil justice systems all over the world, generating large numbers of civil disputes and court proceedings. Civil justice systems have been criticised for being too slow, too expensive, too complex and too susceptible to abuse in responding to such pressures. This has led to proposals for reform in many countries.

5. Some of the defects in the system commonly identified by commentators include the following :-

- litigation is too expensive, with costs often exceeding the value of the claim;
- litigation is too slow in bringing a case to a conclusion;
- there is a lack of equality between litigants who are wealthy and those who are not;
- litigation is too uncertain in terms of time and cost;
- the system is incomprehensible to many litigants;
- the system is too fragmented with no one having clear overall responsibility for the administration of civil justice;
- litigation is too adversarial as cases are run by the parties and not by the courts, with the rules all too often ignored by the parties and not enforced by the courts.

6. There is general agreement that the desired characteristics of a system include the following :-

- The system should be just in the results it delivers.
- It should be fair and be seen to be so by :-
  - ensuring that litigants have an equal opportunity, regardless of their resources, to assert or defend their legal rights;
  - providing every litigant with an adequate opportunity to state his own case and answer his opponent's;
  - treating like cases alike.
- Procedures and cost should be proportionate to the nature of the issues involved.
- It should deal with cases with reasonable speed.
- It should be understandable to those who use it.
- It should be responsive to the needs of those who use it.
- It should provide as much certainty as the nature of particular cases allows.
- It should be effective, adequately resourced and organised.

7. An influential study was conducted by Lord Woolf who published an Interim Report in June 1995 and a Final Report in July 1996, leading to enactment in England and Wales of the Civil Procedure Rules ("CPR") which entered into force in April 1999. Lord Woolf, along with many other commentators, identifies as the main cause of the ills mentioned above, the unbridled and inappropriate application of adversarial principles in the civil justice system. This results in a distortion of important features of the civil justice system :-

7.1 Pleadings which are supposed to identify the issues between the parties, promoting fairness and procedural efficiency, instead often raise superfluous questions, obscure the issues and complicate the case, delaying or preventing settlement and increasing costs.

7.2 Discovery which is intended to ensure fairness and to promote equality of arms between the parties can be used as a tactic by the wealthier party to oppress the less wealthy, inflating the costs of the action.

7.3 Experts who are supposed to assist the court, are often used excessively and as "hired guns".

7.4 Witness statements which are supposed to encourage early settlement, prevent surprise and save costs are often prepared by teams of lawyers as an adversarial weapon at great expense and producing a "massaged" case rather than reliable evidence to be placed before the court.

7.5 Passivity on the bench often leads to trials significantly overrunning their time estimates.

8. It is a widely-held view that Hong Kong's civil justice system suffers from similar problems.

Pressures on the Hong Kong System: Expense, Delay, Complexity and Unrepresented Litigants

Expense

9. Expense is perceived to be a major barrier to using the system in Hong Kong. Media and other published reports tend to be critical of what are seen to be excessively high litigation costs in Hong Kong.

10. High litigation costs have an adverse effect on Hong Kong's competitive position as a commercial and financial centre. Evidence exists that the parties to some civil disputes have been opting to avoid Hong Kong as a venue for resolving such disputes because litigating here is too

expensive. This has made Hong Kong a less attractive place to do business in and has also led to a loss of work for the legal profession.

11. Hard evidence of professional fee levels in Hong Kong is difficult to find. However, it appears from figures provided by the Secretary for Justice that at the top end of practice at the Hong Kong Bar, counsel charge significantly more on average than comparable counsel from England and Wales.

12. An examination was made of all High Court bills of costs taxed during the 12 month period between 1 July 1999 and 30 June 2000. This found that legal costs in the smaller cases, especially those involving awards or settlements of up to $600,000, were dramatically disproportionate to the sums claimed or recovered. Many claimants, even when successful, had to pay more by way of legal fees and expenses than the sums they recovered.

13. However, cases involving the greatest disproportion between costs and claim have now effectively been transferred to the District Court, following the recent monetary increase of its civil jurisdiction to $600,000. It is to be hoped that this will have ameliorated some of the worst excesses in terms of disproportionate fees.

14. The finding of disproportionate litigation cost, while less dramatic, holds good for the other bands. For instance, cases involving claims of up to $3 million, using median values, involved legal bills (for one side in the dispute) equal to about 16% of the amount recovered. This was so even though many of the bills related to cases which concluded short of trial.

15. The taxed bills also show that in many cases that there is a high level of interlocutory activity, inevitably adding to costs and delays. It also shows that the taxation of costs is disproportionately expensive.

16. The taxed bills also give an insight into the order of sums involved in litigation costs overall. The study involved only 1,113 bills submitted for taxation between 1 July 1999 and 30 June 2000, but they gave rise to a sum of costs claimed totalling $249 million. This represents the costs claimed by the winning side. If one assumes that the losing side was also represented and involved only one party and therefore one set of costs, the overall lawyers' bill for both sides in these 1,113 cases would have been of the order of $500 million. In recent years, some 30,000 to 35,000 cases have been commenced annually although, understandably, many of the parties were unrepresented.

Delay

17. The court's records have also been examined with a view to assessing procedural delays and to identifying the overall pattern of litigation in Hong Kong. While delays are not of crisis proportions, the available statistics show that significant delays are encountered in various areas, particularly where contested interlocutory applications or interlocutory appeals occur.

18. The evidence also shows that a high percentage of cases settle at the courtroom door or after start of the trial.

19. Unrepresented litigants are making increasing demands on the system, particularly on its bilingual resources. Judicial resources have meanwhile not grown significantly and are sometimes below establishment strength.

Complexity

20. Another aspect of Lord Woolf's reforms has aimed at reducing the complexity of the civil procedure rules. This involves replacing the Rules of the Supreme Court ("RSC"), upon which Hong Kong's High Court Rules ("HCR") are based, with the CPR. Archaic and technical terms are replaced using a more modern and accessible vocabulary.

21. More importantly, the CPR are designed so that the court approaches procedural questions broadly in accordance with an "overriding objective" (discussed below) which sets out the system's basic principles of procedural justice and economy. The court does not look to the CPR to provide detailed answers to the range of specific problems that may arise in practice. Instead, the rules require the court to exercise a wide discretion, guided by the overriding objective, when deciding procedural points. Whether such considerations are applicable in Hong Kong is discussed later.

Unrepresented litigants

22. Unrepresented litigants pose difficult challenges in all legal systems. The assumption of such systems is that the parties can be relied on to take the procedural steps necessary to bring the case to trial. This does not hold good for litigants in person, resulting in difficulties operating the system.

23. The available evidence indicates that litigants in person are appearing in increasing numbers in Hong Kong. During 2000, in HCAs, where (unlike personal injury cases) legal aid was generally unavailable, 44% to

64% of hearings of the first interlocutory application involved at least one litigant in person. Some 40% to 50% of trials involved at least one such litigant. Various measures to assist unrepresented litigants navigate the civil justice system are raised for consideration.

PART II – POSSIBLE REFORMS

Need for Reform

24. The available evidence indicates that the civil justice system in Hong Kong shares the defects identified in many other systems. In varying degrees, litigation in our jurisdiction :-

- Is too expensive, with costs too uncertain and often disproportionately high relative to the claim and to the resources of potential litigants.
- Is too slow in bringing a case to a conclusion.
- Operates a system of rules imposing procedural obligations that are often disproportionate to the needs of the case.
- Is too susceptible to tactical manipulation of the rules enabling obstructionist parties to delay proceedings.
- Is too adversarial, with the running of cases left in the hands of the parties and their legal advisers rather than the courts, and with the rules often ignored and not enforced.
- Is incomprehensible to many people with not enough done to facilitate use of the system by litigants in person.
- Does not do enough to promote equality between litigants who are wealthy and those who are not.

25. The Working Party believes that broad-based, coordinated and properly resourced reforms are called for.

Reforms and expense

26. One must however be cautious about making claims that reforming the rules will necessarily mean reduced litigation costs. Some changes may have that result while other reforms may tend to produce the opposite consequence. Costs may be saved in certain classes of cases but increased in others. It may often be difficult to tell whether overall, savings have resulted from changes. The rules function in an institutional, professional and social framework and in particular, in a system involving a market for legal services. The cost of litigation may therefore be determined by market and institutional factors which may be more potent than simply a change in the rules.

27. The debate on whether the pre-action protocols brought in by Lord Woolf add to or reduce the cost of litigation illustrates the difficulty of ascertaining the impact of particular reforms on costs.

- Pre-action protocols (and other reforms introduced by the CPR) require the parties to place a more fully developed and accurately pleaded case before the court at an early stage. This aims at encouraging early settlement and enabling effective case management by the court at an early stage.

- This means however that costs have to be incurred at an earlier stage of the proceedings than previously. Costs are "front-end loaded". Some argue that in many cases, the costs incurred by having to observe the pre-action protocols are thrown away since many cases rapidly settle after proceedings are commenced.

- However, while pre-action protocols (and other reforms) cause costs to be "front-end loaded", it does not follow that such costs are wasted. More cases may settle before or shortly after the start of proceedings because the pre-action protocols bring the parties and their advisers to a more advanced appreciation of the issues and relative merits sooner.

- If the case does not settle quickly then the work funded by the front-end costs will have brought the issues into sharper focus from the outset, making it likely that the parties will avoid the cost of interlocutory activity generated by early inaccuracies and lack of precision.

28. Notwithstanding such caveats about the uncertain impact of reforms on costs, it can be said with some confidence that particular procedural reforms are naturally likely to reduce costs, particularly if operated in the

context of appropriate infrastructural changes. This applies, for example, to reforms seeking :-

- to give prominence to the countering of excessive cost, delay and complexity as part of overriding procedural justice;
- to replace rules which impose blanket interlocutory obligations which may often be disproportionate to the issues in a particular case with rules catering for flexibility and proportionality;
- to discourage wasteful practices such as the proliferation of interlocutory applications or the overworking of witness statements or expert reports;
- to facilitate early settlement by requiring greater openness between the parties and by increasing the parties' options in making effective offers for settlement;
- to make the parties' potential liability to costs, both vis-à-vis their own lawyers and the other side's costs, more transparent and easier to assess;
- to devise a system of incentives and self-executing sanctions aimed at enforcing procedural economy;
- to reduce the need for the taxation of costs.

The Woolf reforms as a useful framework

29. The Working Party was able to draw upon much work on civil justice reform done in a number of jurisdictions. Commentaries and proposals from Australia and Canada have been valuable and are reflected in some of the specific proposals discussed below. However, the reforms having particular relevance to Hong Kong are those promoted by Lord Woolf and implemented by the CPR, which have now been in force in England and Wales for over 2 years.

30. After some teething problems, the CPR have been generally well-received. The Working Party has therefore used the Woolf reforms as a framework for considering the options for possible civil justice system reforms in Hong Kong.

The main concepts underlying the Woolf reforms

31. Two key concepts underlying the Woolf reforms as implemented by the CPR are :-

31.1 Adoption of an explicit overriding objective setting out principles of procedural justice and economy to be treated as the foundation of the system, complemented by a new set of procedural rules to be construed and operated in accordance with the overriding objective; and,

31.2 Adoption of a comprehensive case management approach to civil procedure.

The overriding objective

32. The overriding objective is set out in the first rule of the CPR as follows :-

> "1.1 (1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.
>
> (2) Dealing with a case justly includes, so far as is practicable –
>
> (a) ensuring that the parties are on an equal footing;
>
> (b) saving expense;
>
> (c) dealing with the case in ways which are proportionate –
>
> (i) to the amount of money involved;
>
> (ii) to the importance of the case;
>
> (iii) to the complexity of the issues; and
>
> (iv) to the financial position of each party;
>
> (d) ensuring that it is dealt with expeditiously and fairly; and
>
> (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.
>
> 1.2 The court must seek to give effect to the overriding objective when it-
>
> (a) exercises any power given to it by the Rules; or
>
> (b) interprets any rule.
>
> 1.3 The parties are required to help the court to further the overriding objective."

33. The overriding objective is not merely abstract or aspirational. As recent case-law shows, it is treated by the courts as laying down a set of principles to be projected into all procedural rules, guiding their interpretation in a dynamic and purposive way. Readers are asked

whether Hong Kong should adopt an overriding objective and the accompanying methodology. **[Proposal 1]**

Case management

34. Before enactment of the CPR, the need for more proactive case management by the court was recognized in case-law developed by judges in many jurisdictions, including Hong Kong. The CPR now put case management on an express statutory basis, spelling out the court's case management powers.

35. Active case management is part of the overriding objective of the CPR :-

> "1.4 (1) The court must further the overriding objective by actively managing cases.
>
> (2) Active case management includes –
>
> (a) encouraging the parties to co-operate with each other in the conduct of the proceedings;
>
> (b) identifying the issues at an early stage;
>
> (c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;
>
> (d) deciding the order in which issues are to be resolved;
>
> (e) encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure;
>
> (f) helping the parties to settle the whole or part of the case;
>
> (g) fixing timetables or otherwise controlling the progress of the case;
>
> (h) considering whether the likely benefits of taking a particular step justify the cost of taking it;
>
> (i) dealing with as many aspects of the case as it can on the same occasion;
>
> (j) dealing with the case without the parties needing to attend at court;
>
> (k) making use of technology; and
>
> (l) giving directions to ensure that the trial of a case proceeds quickly and efficiently."

36. Specific and general case management powers are spelt out in Part 3 of the CPR, all being powers that the court can exercise of its own initiative.

37. Some commentators have objected on the grounds (i) that it gives excessive discretion to judges, resulting in inconsistency and unfairness and (ii) that it increases the expense of litigation.

38. These are legitimate concerns. However, judicial discretion is an inescapable part of all procedural systems. Inconsistency and unfairness can be minimised by experience and by training to familiarise judges with the substance of the reforms and the guidance afforded by the overriding objective.

39. The minimising of case management hearings to contain costs is a conscious objective of the rules themselves and would be a necessary aspect of judicial training. As a general approach, the parties are not to be put to the expense of a case management exercise unless it is reasonable to believe that such expense can be justified by the benefits it will produce. Many rules (discussed further below) are designed :-

- To keep case management conferences to a minimum and to have them only where they are truly necessary.
- To provide for self-executing sanctions in orders made by the court so that hearings to enforce directions or compliance with the rules are made unnecessary.
- To encourage the parties to reach agreements on procedural matters without the need for court approval.
- To provide for effective sanctions where a court hearing has been made unavoidable because of unreasonableness or incompetence on the part of one party or his advisers.

40. Readers' views are sought as to whether provisions making case management part of the overriding objective and setting out the court's case management powers should be adopted. **[Proposals 2 and 3]**

Possible reforms in specific areas

41. Readers are invited to consider specific possible reforms which may be adopted either as part of a new set of rules or as amendments to the existing HCR.

Pre-action protocols

42. One of the innovations of the Woolf reforms has been to establish pre-action protocols which are codes of practice on how disputes should reasonably be handled before instituting proceedings. The rules prescribe ex post facto costs penalties for non-compliance with an applicable pre-action protocol if proceedings are subsequently commenced. This innovation involves the court assuming a degree of

control over the parties' conduct before the court's jurisdiction was invoked.

43. The stated object of pre-action protocols is :-

> "(a) to focus the attention of litigants on the desirability of resolving disputes without litigation;
>
> (b) to enable them to obtain the information they reasonably need in order to enter into an appropriate settlement; or
>
> (c) to make an appropriate offer (of a kind which can have costs consequences if litigation ensues); and
>
> (d) if a pre-action settlement is not achievable, to lay the ground for expeditious conduct of proceedings."

44. Under the CPR, a Practice Direction on pre-action protocols and five protocols in the respective fields of personal injury, clinical negligence, construction and engineering, defamation and professional negligence have been adopted after close consultation with bodies and groups interested in litigation in each of those areas. Further protocols are at the stage of consultation and development. Even where a dispute does not fall within a specific pre-action protocol, the parties are expected to act reasonably and in accordance with the spirit of such protocols, non-compliance being potentially subject to costs sanctions.

45. As indicated previously, pre-action protocols were opposed in some quarters on the ground that they cause the costs of an action to be "front-end loaded" and wasted if the case settles quickly. Nonetheless, the protocols have been credited with many early, often pre-action, settlements and to a reduction in the ethos of non-cooperation bred of an unbridled adversarial approach. Readers are asked whether Hong Kong should adopt pre-action protocols. **[Proposals 4 and 5]**

Mode of commencing proceedings and challenging jurisdiction

46. The CPR have simplified procedures for starting proceedings by reducing the forms to two: one for cases with factual disputes and an alternative for those without. Should Hong Kong follow suit? **[Proposal 6]**

47. The CPR have also summarised the rules (mostly judge-made) relating to applications to dispute jurisdiction or to seek a discretionary stay. Should these be adopted? **[Proposal 7]**

Default judgments and admissions

48. Rules giving flexibility in the making of admissions and proposals for the defendant making payment by instalments have been introduced to eliminate certain court hearings and to streamline the procedure for default judgments. Readers are asked whether such procedures should be emulated. **[Proposal 8]**

Pleadings and statements of truth

49. Current practice often leads to unsatisfactory pleadings which :-

- Fail to set out the facts clearly so that the issues are not properly identified;
- Raise numerous alternatives according to causes of action and defences, rather than focussing on the facts;
- Set up "stone walling" defences which do not reveal the true issues;
- Suffer from prolixity;
- Suffer from an initial lack of instructions or imprecision leading to numerous amendments and requests for further and better particulars.

50. Readers are consulted on the possible adoption of measures aimed at curing some of these defects, discussed below.

51. Reforms have sought to bring the focus of pleadings back to the key facts of the dispute and to require substantive defences exposing the true issues between the parties. The CPR, for instance, require the defendant to state his reasons for denying an allegation and if he intends to put forward his own version, to state what it is. Points of law may be included. **[Proposals 9 and 10]**

52. A key change has been the introduction of a requirement that all pleadings (called "statements of case" in the CPR) be verified by "a statement of truth". Making a false statement without an honest belief in its truth is a contempt. **[Proposal 11]**

53. Where clarification of a pleading is necessary, further and better particulars (called "further information") can be requested. However, one ground for resisting such a request is that the request is disproportionate to the needs of the case. The court is also given

powers to require a pleading to be particularised of its own motion. **[Proposal 12]**

54. Amendments are less readily approved under the CPR. This is in support of the court's general insistence on greater accuracy and precision at the early stages, and therefore its desire to discourage parties from filing casual, imprecise pleadings on the footing that they can later be tidied up. **[Proposal 13]**

Summary disposal of cases or issues

55. The CPR have made changes along two broad lines.

- They introduce the test of "no real prospect of success" as the test for the summary disposal of proceedings.
- They apply the same test in all contexts in which proceedings may be summarily disposed of: whether in respect of a plaintiff's or a defendant's case; whether setting aside a default judgment, applying for summary judgment, determining a point of law or striking out pleadings.

56. On its face the new test should make it easier to dispose of proceedings. But a question has arisen by virtue of an English Court of Appeal decision as to whether the "no real prospect of success" test is in practice any different from the current "no triable issue" test. It is likely that the rule is intended to, and in fact does, import a lower threshold for summary orders. Should such changes be introduced? **[Proposal 14]**

Offers of settlement and payment into court

57. "Part 36 offers" under the CPR have been generally well-received. They develop the present machinery for making payments into court and offers of settlement by :-

- Allowing a *plaintiff* to make an offer of settlement which puts a defendant who unreasonably rejects it at risk as to costs and further financial penalty.
- Allowing such offers to be made even before commencement of proceedings, which, if rejected, can be taken into account by the court in relation to pre-action costs.
- Limiting the requirement of an actual payment into court to cases where the defendant seeks to settle a money claim, and

allowing appropriate offers of settlement to play a Part 36 role in respect of non-money claims.

58. The court retains a discretion as to costs since the fairness of penalising rejection of a Part 36 offer may, for example, depend on the information available at the time when the offer or payment was made, and the conduct of either or both of the parties with regard to the giving or withholding of such information.

59. Readers are asked whether rules providing for such offers and their consequences should be introduced. **[Proposal 15]**

Interim remedies and security for costs

60. Part 25 of the CPR conveniently draws together the threads of various interim remedies developed largely by judicial decision over the years (particularly in the *Mareva* and *Anton Piller* jurisdictions). It also deals with interim payments and security for costs. As part of the CPR, all such applications are dealt with in accordance with the overriding objective.

61. One aspect of CPR 25, ie, permitting *Mareva* relief to be granted where the remedy is "sought in relation to proceedings which are taking place, or will take place, outside the jurisdiction," would, if adopted, involve extending the jurisdiction presently enjoyed by the Hong Kong court.

62. Readers are asked whether a similar provision should be adopted and also whether the abovementioned extension to the court's jurisdiction should be made. **[Proposals 16 and 17]**

Case management – timetabling and milestones

63. At present, the progress of actions is left in the hands of the parties and a date for trial is not fixed by the court until all interlocutory issues have been resolved and the parties are seen to have completed their preparations for trial. This enables parties to rely on their own lack of readiness, whether deliberate or otherwise, as the basis for putting off the trial, possibly causing serious delay to conclusion of the proceedings. This is one of the unsatisfactory features of the adversarial design of our civil justice system.

64. A central feature of efforts to counteract such misuse of the adversarial process involves the court, at an early stage of the proceedings, laying down a timetable, with appropriate case management directions marking out largely immovable milestones, including the trial date (as a fixed date

or fixed window period) in that timetable. In consequence, the court, rather than the parties, determines the pace of the litigation and lack of readiness does not lead to the trial date or other milestones being put back. Instead, the party in default has to endure the consequences of his own lack of readiness in some fitting manner (eg, by doing without certain evidence or having part of his case – or in extreme instances, the whole of his case – struck out), save in the most exceptional circumstances.

65. To lay down an effective timetable with appropriate directions, the court must have adequate information as to the nature, scope and particular needs of the case. Possible reforms therefore provide for such information to be given to the court at an early stage, generally by the parties filing written information about the case and setting out the directions (agreed if possible) that they consider required. This information, often in a questionnaire prescribed as a court form, enables the court to give the directions and to set the timetable without a hearing.

66. Where the case is simple, the immediate directions and timetable may extend all the way to trial. If it is more complex, they may extend to a case management conference where further directions are envisaged in the light of progress made at that stage.

67. Readers are consulted as to the desirability of introducing this form of comprehensive, timetable and milestone-based case management. **[Proposals 18 and 19]**

A docket system

68. A docket system is discussed as a possible alternative approach to case management and timetabling. It is a system which involves (i) the same judge handling the case from beginning to end; (ii) the early fixing of a near-immutable trial date; (iii) case management by the judge himself fixing the timetable and giving relevant directions in the pre-trial period in the light of the fixed trial date; and (iv) the judge trying the case if it goes as far as trial.

69. Docket systems have met with success in some jurisdictions particularly in the United States and in the Australian Federal Court. Many advantages are claimed for such a system. However, it was not considered appropriate by Lord Woolf on the grounds that it would require more judges and sacrifice flexibility. Readers are asked for their views as to the adoption of such a system either generally or in relation to particular types of cases. **[Proposal 20]**

Specialist lists

70. In Hong Kong, four specialist lists have been established: the Commercial, Construction and Arbitration, Administrative and Constitutional and Personal Injuries Lists. Admiralty proceedings are also subject to special regulation under Order 75. Contentious Probate Proceedings, which are rare, are dealt with in accordance with Order 76. Companies Winding-up, Bankruptcy and Matrimonial Causes cases proceed according to Rules made under relevant Ordinances.

71. Such specialist lists or specialist courts also exist in other jurisdictions. They often have practices and needs not shared by general High Court actions. The CPR's approach has been to preserve their autonomy, allowing the courts dealing with such specialist business to publish procedural guides which modify the application of the CPR in such courts. Should a similar approach be adopted in Hong Kong? **[Proposal 21]**

72. It has also been suggested that consideration be given to establishing further specialist lists, for instance, a list for complex and heavyweight cases (which could, for instance, be run on a docket system); a list for unrepresented litigants and a list for group litigation (discussed below). Readers are asked whether they see a need for further specialist lists. **[Proposal 22]**

Multi-party litigation

73. Special case management is needed for cases with numerous parties or potential litigants. Two situations need consideration.

74. The first, involving cases which in the United States may be dealt with by "class actions", is not catered for by our system. Consumer and other groups advocate their introduction. Such actions would allow a large number of small claims to be grouped together and pursued in a single set of proceedings, assisted by special case management measures. If this can be done, small claimants would acquire legal access previously denied and large corporate wrongdoers would be faced with proceedings in say, the product liability or environmental pollution fields, to be taken seriously. This would not only be fairer, it would, so the argument runs, lead to long-term social benefits such as better consumer safety and higher environmental standards.

75. The other principal multi-party situation does not involve problems of legal access. It arises where, for some reason or other, a large number of similar or related claims are instituted at about the same time, placing

heavy pressures on the court's resources. Machinery presently exists for ordering parties to act as representative parties, however, there are clear limitations on using these procedures.

76. Multi-party litigation procedures applicable to both situations, while desirable in principle, raise complex issues. Such procedures require compromises and adjustments in relation to the rights of plaintiffs and defendants. Mechanisms for moulding members of a class of potential plaintiffs into a workable group are needed, with the court possibly having to take decisions on certain issues where agreement cannot be reached within the class. Many issues involving resolution of various conflicts within the group may need to be dealt with.

77. The CPR have made a start by providing for "Group Litigation Orders" and special case management powers where such orders are made. However, provisions have yet to be developed to deal with certain important questions. Readers are therefore asked whether a group litigation scheme should in principle be adopted, but subject to further investigation of appropriate models in other jurisdictions. **[Proposal 23]**

78. As a separate matter, the CPR have re-enacted a provision previously in the RSC concerning derivative actions launched by individual members on behalf of their company. The HCR do not contain such rules. Should they? **[Proposal 24]**

Discovery

79. While discovery is in principle a valuable procedure which promotes fairness between the parties, the practice of discovery, particularly in larger, more complex cases, has given rise to serious complaint. It is said to be a major source of litigation expense. It lengthens trials and can be used as an oppressive weapon to delay, harass and exhaust the financial resources of less wealthy opponents.

80. To counter these tendencies, possible reforms have focussed on cutting down the width of the obligation to disclose. In Hong Kong, parties are presently required to disclose all relevant documents to their opponents applying the long-established *Peruvian Guano* test of relevance. That test is extremely wide, encompassing four classes of document, namely :-

- The parties' own documents, relied on in support of his own case.

- Adverse documents which a party is aware of and which adversely affect his own case or support another party's case.

- Documents relevant to the issues in the proceedings, but not within either of the above categories since they do not obviously support or undermine either side's case, being merely background documents not necessary for the fair disposal of the case.

- Train of inquiry documents: these being documents which do not themselves damage a party's case or advance that of the other side but which "may fairly lead him to a train of inquiry which may have either of these two consequences".

81. In many jurisdictions, the *Peruvian Guano* test has been abandoned in favour of a narrower definition of relevance. The CPR have essentially limited the obligation to the first two of the four categories mentioned above, subject to the court widening the disclosure by order in a particular case.

82. The routine obligation is to give "standard disclosure", ie, to disclose only the documents which are or have been in his control being :-

> "(a) the documents on which he relies; and
>
> (b) the documents which –
>
> (i) adversely affect his own case;
>
> (ii) adversely affect another party's case; or
>
> (iii) support another party's case; and
>
> (c) the documents which he is required to disclose by a relevant practice direction."

83. A party is only required to make "a reasonable search" for such documents, the reasonableness of the search being judged by the number of documents involved, how complex the proceedings are, how expensive retrieving the documents is and how significant any document is. In other words, the obligation is intended to be proportionate to the issues.

84. Discovery is to be approached flexibly, with the parties or the court making appropriate arrangements to minimise costs, eg, by ordering discovery by issue or in stages in the hope that vital points can be disposed of first, leading to conclusion of the proceedings without the expense of full discovery.

85. The court also has wide powers to order pre-action disclosure in order to dispose fairly of the anticipated proceedings or to help settle the case without the institution of proceedings or to save costs. Disclosure by non-parties can also be ordered where it is likely to be of direct relevance

to the issues and where disclosure is necessary in order to dispose fairly of the claim or to save costs.

86. An alternative approach to that described above is that adopted in Part 23 of the Supreme Court Rules 1970 of New South Wales. This allows parties access to the documents mentioned in the pleadings, affidavits, etc and also to request up to a total of 50 non-privileged documents which are relevant to facts in issue. To get more documents requires a court order.

87. Readers are consulted as to the desirability of adopting the abovementioned discovery reforms. **[Proposals 25 to 29]**

Interlocutory applications

88. Contested interlocutory hearings introduce substantial delays and additional costs. Possible reforms seek to reduce the number of times when interlocutory applications are required. Where they cannot be avoided, they seek to streamline the process for dealing with applications. More effective sanctions to discourage unnecessary applications and the misuse of such applications, deliberate or otherwise, are also envisaged.

89. The need for interlocutory applications may be sought to be reduced by :-

- Enabling certain matters to be dealt with by the parties by agreement without involvement of the court.
- The court dealing with a matter on its own initiative and without the necessity of first hearing the parties, but allowing any party who objects subsequently to apply for the order to be set aside, varied or stayed.
- Making orders self-executing so as to eliminate the need for the applications to enforce orders previously made. The burden is placed on the party in default to seek relief from the prescribed sanction, which relief is by no means automatically granted.

Readers are consulted as to the desirability of adopting similar rules. **[Proposal 30]**

90. Where the interlocutory application is heard, possible streamlining measures include :-

- Dealing with applications on the papers and without a hearing.

- Eliminating the hearing before the master where the matter is likely to be contested and may be likely to proceed on appeal to the judge in any event.

- Allowing applications to proceed by telephone conference calls and other means of communication subject to necessary safeguards where this may be cost effective.

Should such measures be adopted? **[Proposal 31]**

91. Unnecessary applications are deterred by the more frequent use of summary assessments of costs made payable forthwith and notified to the client. Possible reforms tend to shift the emphasis away from the traditional rule that costs follow the event, ie, that costs are paid by the loser of the case to the winner, but only paid at the end of the proceedings and on a final reckoning of outstanding costs. Increasingly, costs are assessed and paid forthwith as a procedural discipline. An unnecessary or wasteful interlocutory application is likely to attract such an order even if the person against whom it is made ultimately wins the case.

92. In England and Wales the reaction to summary assessments of costs was mixed, some believing that the judge is not in a proper position to conduct such an assessment and fearing inconsistent assessments. On the other hand, the efficacy of summary assessments in deterring wasteful applications has been generally acknowledged with the procedure receiving support in many quarters. Inconsistency can be minimised with experience and training. Readers are asked for their views on adopting summary assessments of costs as a deterrent to wasteful interlocutories. **[Proposal 32]**

93. Bad interlocutory applications are sometimes entirely the brainchild of the lawyers. At present, a misconceived step taken by a solicitor may have to be paid for by him personally if the costs were incurred "improperly or without reasonable cause or [were] wasted by undue delay or by any other misconduct or default" on his part. The test arguably requires the solicitor to be guilty of something akin to professional misconduct. This may be thought too high a threshold. Under the CPR, a wasted costs order may be made where the costs are incurred "as a result of any improper, unreasonable or negligent act or omission" of the solicitor or his employee. Should this test be adopted in place of the existing test? **[Proposal 33]**

94. Barristers are presently subject to very restricted liability for wasted costs orders, limited to criminal proceedings. Should they be made subject to

such orders on terms equivalent to those applicable to solicitors? **[Proposal 34]**

Witness statements

95. While in principle the exchange of witness statements is a valuable procedure, in practice, they have often become over-worked and excessively expensive documents reflecting the advocacy of lawyers more than the witness's evidence.

96. Possible reforms involve :-

- Giving the court greater powers to regulate and limit the evidence to be adduced by the parties, with supporting amendments to primary legislation if required. **[Proposals 35 and 36]**

- Introducing greater flexibility in the treatment of witness statements, allowing them to be reasonably supplemented by the witness's oral evidence or in a supplemental statement, so reducing the temptation to cram every conceivable detail into a statement for fear of the witness not being allowed to elaborate at trial. **[Proposal 37]**

- Deterring over-elaboration by appropriate costs orders.

Readers are consulted as to whether such an approach should be adopted .

Expert evidence

97. Expert evidence is an indispensable aid to the court determining many factual issues. However, adversarial pressures have again distorted the practice so that :-

- Experts are often inappropriately or excessively used. Experts are called where expert evidence is either not needed or should be limited to a few issues instead of wide ranging matters covered in the expert report.

- Experts are often partisan and lacking in independence, giving the court no objective assistance but deployed as part of the adversarial armoury.

These are practices which increase costs as well as the duration and complexity of proceedings.

98. To counter these problems, possible reforms aim :-

- to give the court control over the introduction and scope of any expert evidence sought to be adduced;
- to emphasise the expert's primary duty to the court which overrides his duty to his client by requiring the expert to acknowledge that duty and to agree to adhere to a specified code of conduct which promotes independence and impartiality;
- to allow the expert to approach the court for guidance as to his function in his own capacity without giving notice to the parties; and
- to allow the court to require the parties to appoint a single joint expert.

99. Such reforms have been well-received. An increasing use of single joint experts has been reported. Readers are asked whether reforms should be adopted to address the problems of inappropriate, excessive and partisan expert evidence discussed above, and as to whether single joint expert directions should be introduced in Hong Kong. **[Proposals 38 to 40]**

Trials and case management

100. Trials are unpredictable in their duration and sometimes suffer from the prolixity of those appearing. The response has again been to embrace more proactive case management, with the judge setting time limits on the adducing of evidence, cross-examination and submissions pursuant to express powers allowing him to do so. Should such express powers be adopted? **[Proposal 41]**

Appeals

101. Procedural reforms adopted by the CPR in the context of appeals have focussed on :-

- A requirement for a party to obtain the court's leave before being allowed to lodge an interlocutory appeal from the Court of First Instance to the Court of Appeal. **[Proposal 42]**
- Requiring leave to bring a final appeal from the Court of First Instance to the Court of Appeal. **[Proposal 43]**
- Adoption of the requirement that a proposed appeal should have a "real prospect of success" or that "some other

compelling reason why the appeal should be heard" exists before leave to appeal is granted. **[Proposal 44]**

- A principle that leave to appeal should not be granted against case management decisions unless the case raises a point of principle of sufficient significance to justify the procedural and costs consequences of permitting the appeal to proceed. **[Proposal 45]**

- Additionally, the principle has been adopted that 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. **[Proposal 46]**

- If leave to appeal to the Court of Appeal should be introduced as a requirement, enabling the Court of Appeal to refuse leave without an oral hearing where the application is tantamount to an abuse of the appeal process, subject to permitting the applicant a final opportunity to make representations in writing as to why the application should not be summarily rejected. **[Proposal 47]**

- Where a substantive appeal is to take place, case management by the Court of Appeal to improve efficiency in the hearing of the appeal. **[Proposal 48]**

- Limiting the role of the Court of Appeal to a review of the lower court's decision, subject to a discretion to allow a re-hearing. **[Proposal 49]**

- Applying the rule limiting the appellate court's role to a review to the Court of First Instance acting in an appellate jurisdiction. **[Proposal 50]**

Readers are consulted as to the desirability of the abovementioned reforms.

Costs

102. As indicated above, reforms have shifted the emphasis from the principle of costs "following the event" (ie, being paid by the loser to the winner of the case) and costs "in any event" (ie, being paid only at the end of the case) to costs awards being used flexibly throughout the proceedings as an incentive for reasonable litigant behaviour, whoever may ultimately win the case. The court now generally decides on costs

orders taking into account the reasonableness or otherwise of the parties' conduct before and during the proceedings judged in accordance with the overriding objective. Should a like approach be adopted? **[Proposal 51]**

103. Three factors – complexity, number of case events and level of fees – have been identified as important factors for determining how much litigation will cost. Reforms aiming to reduce complexity and the number of case events have already been discussed. In relation to the level of fees, initiatives differ in relation to the fees charged by a party's own lawyers and those which the other side may have to pay to the party in question.

104. In relation to solicitor and own client costs, reforms in other jurisdictions inter alia :-

- Seek to promote costs transparency and predictability by requiring lawyers to provide their clients with specified information as to costs, both as to the basis on which charges are levied and as to the estimated overall cost of the litigation. **[Proposal 52]**

- Seek to improve the availability of information as to how much lawyers may charge. **[Proposal 53]**

- Empower the client to challenge his own lawyer's fees on an assessment of the necessity for the work done, the manner in which it was done and the fairness and reasonableness of the amount of the costs charged in relation to that work. **[Proposal 54]**

- Seek to establish benchmark costs against which fees charged by one's own lawyers or payable to the other side can be measured. **[Proposal 55]**

105. Reforms in relation to party and party costs aim to :-

- Reduce uncertainty as to exposure to costs by requiring the parties to disclose to each other the level of costs incurred and estimated to be required. **[Proposal 56]**

- In Hong Kong, to eliminate an anomalous treatment of counsel's fees in party and party taxation whereby such fees are taxed under a rule adopting in effect a solicitor and own client approach. **[Proposal 57]**

- Encourage agreement as to the cost of taxation by permitting "Part 36" type offers to be made as to costs payable. **[Proposal 58]**

106. The often disproportionate cost of the taxation process is also addressed by proposed reforms which :-

- Encourage avoidance of taxation hearings by encouraging parties to adopt benchmark costs as the presumptive amounts allowable in taxation, insofar as benchmark costs have been established. **[Proposal 59]**

- At the court's discretion, extend the scope of provisional taxations on the papers, subject to a dissatisfied party being entitled to require an oral hearing, but subject to possible costs sanctions if he fails to do better at the hearing. **[Proposal 60]**

- Providing costs sanctions for unreasonable insistence on full taxations or failing to provide sufficient information to allow taxations to take place on the papers and without a hearing. **[Proposal 61]**

The CPR schedules of provisions from the RSC

107. Certain rules from the RSC have not been replaced by the CPR in England and Wales and remain applicable pursuant to Schedule 1. These include rules relating to the enforcement of judgments and orders, rules dealing with special procedural cases, special jurisdictional cases and particular proceedings under specific statutes. As no proposals have been formulated for their replacement, the reader is asked for agreement that the HCR equivalents should remain in force whatever reforms may be adopted. **[Proposal 62]**

Possible reforms and ADR

108. Increasingly, ADR ("Alternative Dispute Resolution") has been seen as potentially a useful process in appropriate cases as an alternative or adjunct to civil proceedings. It is often said that ADR can be simpler, cheaper and quicker and can be more flexible and custom-designed for the dispute in question. It can be less antagonistic and less stressful than a court case and so less damaging to a possible on-going relationship between the parties. It is however accepted generally that some cases will not be suitable for ADR.

109. While no one suggests that a court should permanently turn a litigant away by directing him to ADR, it is increasingly envisaged that a court may make an attempt at ADR a condition of allowing the case to proceed. Several degrees of compulsion or encouragement to use ADR can be discerned in schemes of court-annexed ADR (usually mediation) adopted in various jurisdictions. ADR may be :-

- made mandatory by a statutory or court rule for all cases in a defined class; **[Proposal 63]**
- made mandatory by an order issued at the court's discretion in cases thought likely to benefit; **[Proposal 64]**
- made mandatory by one party electing for ADR; **[Proposal 65]**
- made a condition of getting legal aid in relation to certain types of cases; **[Proposal 66]**
- voluntary but encouraged by the court, with unreasonable refusal or lack of cooperation running the risk of a costs sanction; **[Proposal 67]** or
- entirely voluntary, with the court limiting its role to encouragement and the provision of information and facilities. **[Proposal 68]**

Readers are consulted as to which, if any, of the above regimes for court-annexed ADR should be pursued in Hong Kong.

Judicial review

110. The basic requirements of obtaining the court's leave to bring judicial review proceedings and of acting promptly remain in place. However, there have been efforts in the CPR at procedural reform of judicial review claims seeking :-

- To simplify the definition of the scope and the nomenclature of the remedies. **[Proposal 69]**
- To provide for and facilitate participation of persons, other than the parties, who may be interested in judicial review proceedings. **[Proposal 70]**
- To require claims to be served on defendants and other persons known to be interested. **[Proposal 71]**

- To require defendants who wish to contest the proceedings to acknowledge service and to summarise the grounds relied on. **[Proposal 72]**

- To spell out the court's powers on the quashing of a decision, including, more controversially, power, subject to statutory limitations, to take the decision itself. **[Proposal 73]**

Implementing the reforms

111. Assuming that the Working Party recommends a series of reforms, how can they best be implemented and translated into rules of civil procedure? Two main approaches fall to be considered. First, it may be advantageous to borrow in large measure from the CPR (and from relevant rules in place in New South Wales and elsewhere). Alternatively, one may largely retain the HCR, but amend them to introduce each reform.

112. Both approaches would require substantial effort. New rules would have to be prepared and all persons involved in the civil justice system would have to learn about the new system.

113. Switching from the RSC to the CPR in England and Wales took a great deal of effort. It took some 3 years just to draw up the CPR. Accordingly, much effort might be saved if Hong Kong were to borrow from the CPR (and from rules in other jurisdictions). If, instead, we retain and amend the HCR, much fresh drafting would probably be required. It would also be necessary to ensure that the amendments are in harmony with the retained rules.

114. Effort in relation to training must also be considered. Much effort would be required whichever approach was adopted. While the amendment option may require fewer new rules to be learned, it would still be necessary to learn what the changes are and how the new provisions work.

115. Consideration should also be given to the efficiency with which either approach may be operated in practice.

115.1 One possible difficulty which arises if one retains and amends the HCR concerns interaction between the amendments and the retained rules (with their attached case-law). Costly satellite litigation is likely to ensue over whether the parties should continue to apply the pre-existing case-law or whether it should give way to the amendments (including any amendment to introduce the overriding objective).

115.2 In contrast, if a set of rules along the CPR lines is adopted as a fresh start, accretions of pre-existing case-law would generally not be applicable and such debates are likely to be much rarer.

115.3 That is not to say that adopting a CPR-based set of rules would involve *no* potential questions requiring judicial resolution. Development of *some* case-law is inevitable, particularly for questions closely related to issues of substantive law. Nevertheless, the experience in England and Wales so far suggests that such case-law developments would be relatively sparse and that many of the citations in the White Book would be dispensed with.

115.4 Adoption of rules materially similar to the CPR would also confer persuasive authority status on English decisions and allow such practical experience to be drawn upon.

116. Would unrepresented litigants benefit either way? One reason for switching to the CPR was to bring in simpler and more easily understandable language with a view to making litigation more accessible to unrepresented litigants. As previously noted, this is a consideration only indirectly applicable in Hong Kong because most litigants in person would only refer to the Chinese text. Nonetheless, simplification of the rules in English may well permit a simpler Chinese translation to be used, favouring adoption of a new and simpler set of rules.

117. In the light of these considerations, readers are asked whether, in order to implement recommended reforms, the civil justice system should, adopt a new set of rules largely along the lines of the CPR (and rules drawn from other jurisdictions) or whether, instead, it should continue to employ the HCR with amendments to effect the reforms. **[Proposals 74 and 75]**.

Resources

118. If it is decided in principle that reforms should be instituted, resources will be needed to draft and promulgate the necessary new rules (whether as amendments to the HCR or a new set of rules based largely on the CPR) and to work with all interested parties towards drafting any necessary practice directions and pre-action protocols.

119. Thereafter, adequately funded and organized resources, likely to include additional judicial and court resources, will be needed to implement such reforms, for instance, to enable provision of comprehensive case management by the court and to accommodate trials in accordance with prescribed case timetables. **[Proposal 76]**

120. It must be determined how existing resources can most efficiently be deployed to meet the needs of the reforms. Traditional roles and case-loads may alter, requiring re-deployment of judges, masters and administrative staff. **[Proposal 77]**

121. Training programmes must be set up for judges, masters and court administrative staff to acquire an understanding of the reforms and to hone the skills needed to administer them. Such training should be sensitive to and directed at the needs of any reforms adopted. **[Proposal 78]**

122. Available information technology resources should be harnessed and adapted to support proactive case management by the judges and to improve management statistics. In the longer term, the court should consider commissioning electronic filing and electronic document-sharing in technology courts. **[Proposal 79]**

123. Research should be started now with a view to establishing base-lines by which the success or failure of any reforms adopted may subsequently be judged. Research should refine the reforms and continuously assess the deployment of resources for their implementation. To the extent that reforms may prove unsuccessful or counter-productive, such reforms should be jettisoned. **[Proposal 80]**

摘要

1. 終審法院首席法官於 2000 年 2 月成立上述工作小組，小組的職責範圍如下：—

"檢討高等法院的民事訴訟規則和程序，以及建議改革措施，盡量使市民能以恰當的訴訟費用，和在合理的期限內，把糾紛訴諸法院，尋求公道。"

2. 工作小組的中期報告及諮詢文件(“該文件”）的目的是：—

2.1 滙報其他司法管轄區所進行的改革，以供香港參考；

2.2 檢討香港民事司法制度的現況；並

2.3 提出可行的改革方案，徵詢法庭使用者及各界關注人士的意見。

第一部分 — 問題的本質

民事司法制度

3. 民事司法制度的確立，是要使個人或公司都可以有效地行使法律權利。這個制度除可鞏固各項基本權利和自由外，還可保障一切投資、商業及本地交易。如果市民大眾由於訟費高昂、審訊延誤、理解困難或其他原因，以致無法把糾紛交由法院裁決，就等於訴訟無門。

香港及世界各地民事司法制度所受到的壓力

4. 社會轉變和科技進步使各種交易的數量激增，而交易亦更爲迅速和複雜；與此同時，法律條文和各類案例亦越見繁複。這些轉變帶來了大量的民事糾紛與法律訴訟，給世界各地的民事司法制度造成壓力。在應付這些壓力時，各地的民事司法制度備受批評，不是被認爲過程過於緩慢、費用過份高昂，就是程序過份複雜和易被濫用。因此，很多國家都提出了改革方案。

5. 一般評論認爲民事司法制度的弊端有以下各點：—

- 訴訟費用過份高昂，訟費往往超過申索金額；
- 訴訟過程過於緩慢，以致案件需要很長時間才能終結；
- 富有與非富有的訴訟人之間，存在不公平現象；
- 訴訟所需的時間與費用難以預料；
- 對於許多訴訟人而言，這個制度難以理解；
- 這個制度的組織太鬆散，沒有任何人明顯地負責民事司法程序的進行；
- 訴訟過程對抗性太重。這是由於案件是由與訟各方主導進行，而非由法庭主導，況且與訟各方經常對法院規則置之不理，而法庭又不嚴格執行這些規則。

6. 一般人都認爲理想的司法制度應具以下特點：—

- 司法制度應能給人一個公正的結果。
- 司法制度必須持平，而必須讓市民大眾看到制度是持平的。要做到這點，便須：—
  - 確保訴訟人不論貧富，都有平等機會行使和維護本身的法律權益；
  - 讓訴訟各方都能詳述己方的案情和就對方的案情作出回應；
  - 對同類案件用相同的方法處理。
- 司法程序和訟費數額應與案件的性質相稱。
- 案件應在合理期限內得以處理。
- 司法制度應能讓用者容易理解。
- 司法制度應能照顧到用者的需要。
- 司法制度應能在各類不同性質的案件所容許的情況下，盡量維持案件的可預料性。
- 司法制度應該是高效率、資源充足及組織完善的。

7. 在英格蘭和威爾斯，伍爾夫勳爵 (Lord Woolf) 進行了一個甚具

影響力的研究，於 1995 年 6 月發表了一份中期報告及於 1996 年 7 月發表了一份總結報告。因應該等報告的提議，英格蘭和威爾斯立法制訂了民事訴訟程序規則（下稱 CPR），於 1999 年 4 月生效。伍爾夫勳爵與不少論者都認爲造成上述弊端的主要原因，是人們把民事司法制度中的抗辯式訴訟原則肆意亂用，以致民事司法制度中的重要特點變得面目全非：—

7.1 狀書本該是用來說明與訟各方之間的爭議點，促使訴訟公正進行和提高程序上的效率的，但反而常常被用來提出不必要的問題，使爭議點模糊不清，令案件更加複雜，和解受到拖延或阻礙，訟費亦因此大爲增加。

7.2 “文件透露”這項程序的原意是確保審訊公平和與訟各方勢力均等，可是，富有的一方可以利用這個程序使訴訟費用提高，來欺壓財力較弱的一方。

7.3 專家的作用本該是協助法庭的，但是訴訟人動輒出動專家，並把他們當作“受僱打手”。

7.4 證人陳述書本來的作用是幫助案件早日了結，避免出現突如其來的證供，以及減低訟費的，但有些訴訟人僱用大批律師，而律師又往往不惜代價以證人陳述書作爲抗辯式訴訟的武器，寧可“避重就輕”，也不向法庭呈交可靠的證供。

7.5 法官審案，處於被動的位置，這往往導致審訊時間大大超出預算。

8. 不少人認爲香港的民事司法制度也有類似的問題。

香港民事司法制度所面對的壓力：訟費高昂、審訊延誤、程序複雜及無律師代表的訴訟人

訟費高昂

9. 一般認爲高昂的訴訟費用是公眾人士使用香港民事司法制度的主要障礙。傳媒及其他報告亦常常批評香港的訟費過高。

10. 香港是商業及金融中心，過高的訟費會損害她的競爭力。證據顯示，部分民事糾紛的與訟人不選擇香港作爲解決糾紛的地方，是因爲香港的訴訟費用太昂貴。高昂的訟費削弱了香港作爲營商地方的吸引力，同時亦導致法律專業人士失去一些工作機會。

11. 有關香港法律專業服務的收費水平，我們很難搜集確實的數據。但是，根據律政司司長所提供的數字顯示，香港頂級執業大律師的收費平均比英格蘭和威爾斯的同級律師的收費高出許多。

12. 經查閱高等法院 1999 年 7 月 1 日至 2000 年 6 月 30 日之間十二個月內的經評定訟費，結果顯示：小額案件，特別是所涉及的裁決或和解款額是 60 萬元或以下的案件，其訟費與申索或討回的金額極爲不相稱。許多申索人即使申索成功，也須支付比所討回的金額還要高的法律費用和支出。

13. 然而，區域法院的民事審判權限已於最近提高至 60 萬元，因此，那些訟費與申索金額最不相稱的案件已改由區域法院處理。這麼一來，訟費與申索金額過度不相稱的情況便可望得以

改善。

14. 其他所涉金額較大的案件也有訟費與申索金額不相稱的情況，但程度沒那麼嚴重。以申索金額在三百萬元以內的案件爲例，一方訴訟人的訟費，以中位數計算，約佔討回金額的 16%，當中包括了很多未經審訊而終結的案件。

15. 這些經評定的訟費同時顯示，很多案件都涉及不少非正審程序，那當然會增加訟費和延誤審訊。調查還顯示“訟費評定”是一項昂貴的程序，與所索金額很不相稱。

16. 這些經評定的訟費亦有助瞭解整體的訟費水平。該項調查祇涉及由 1999 年 7 月 1 日至 2000 年 6 月 30 日期間呈交評定的 1,113 張訟費單，但是所申索的訟費總額卻達 2.49 億元。這只是勝方的律師所申索的訟費金額。假設每宗案件敗訴的只有一方，而敗方也有律師代表，故又須支付一筆訟費；那麼，在這 1,113 宗案件中，雙方律師的收費總額就會高達 5 億元。近年來，每年約有新案 3 萬至 3 萬 5 千宗，其中當然有很多當事人是沒有律師代表的。

審訊延誤

17. 工作小組爲評估訴訟程序受延誤的嚴重性及確定香港的整體訴訟模式，亦查閱了法院記錄。數據顯示延誤的情況雖不至於構成危機，但卻廣泛地出現於各個不同領域；非正審申請或非正審上訴若有爭議時，延誤情況尤其嚴重。

18. 數據又顯示，在案件即將開審前，或是在審訊開始後才和解的案件所佔比例是相當高的。

19. 無律師代表的訴訟人對法庭的要求越來越多，尤其是在雙語服務方面。可是，法官的人數卻沒有多大增加，且有時甚至低於編制水平。

程序複雜

20. 伍爾夫勳爵提出的法律改革的另一方面，是減低民事程序規則的複雜程度，這牽涉到以 CPR 取代最高法院規則（RSC）。RSC 是《香港高等法院規則》（HCR）的基礎。此外，這些改革還包括以更符合現代、更容易理解的詞彙取代古舊和專門的術語。

21. 制定 CPR 最重要的目的是讓法庭可按“首要目標”（下文詳述），從多方面處理程序上的問題。該“首要目標”的內容包含民事司法程序應合乎公正和經濟效益的基本原則。法庭處理案件時，可能會遇到各類的具體問題，但法庭不用從 CPR 找尋解決這些問題的詳盡答案。反而，這些規則規定，法庭必須依據“首要目標”行使其酌情權處理有關程序上的問題。至於這些改革是否適用於香港的情況，下文將會詳述。

無律師代表的訴訟人

22. 所有法律體制都面對着一個挑戰，就是處理無律師代表訴訟人的案件。法律體制的運作是假定與訟各方都懂得按程序採取必須的步驟，把案件提交法庭審訊。然而，沒有律師代表的訴訟人不一定懂得這樣做，法律體制的運作因而困難重重。

23. 數據顯示，在香港無律師代表的訴訟人爲數越來越多。一般而言，在高等法院民事訴訟中（個人傷亡案除外），訴訟人經常不獲法律援助；在 2000 年，高等法院就此類訴訟所處理的首次非正審申請的聆訊中，44%至 64%是最少有一名訴訟人是無律師代

表的；另外，就此類訴訟所進行的審訊中，40%至50%也是最少有一名訴訟人是沒有律師代表的。爲了協助沒有律師代表的訴訟人正確使用民事司法服務，工作小組建議多項措施以供考慮。

第二部分 — 可行的改革

改革的需要

24. 數據顯示香港的民事司法制度與很多其他地方的制度皆有同樣的弊端。在不同的程度上來說，本地的訴訟：—

- 太昂貴，訟費數額太難預料。而且，相對於申索金額和可能會提出訴訟人士的經濟能力而言，訟費往往過高，不成比例。

- 過程過於緩慢，以至案件需要很長時間才能終結。

- 實施一套規則，規定當事人有責任辦理某些程序，而這些責任卻往往與該案所需不相稱。

- 太容易受制於策略性的操控。如果與訟一方存心阻礙訴訟進行，不難把程序拖延。

- 偏重對抗形式。案件的進行由與訟各方和他們的法律顧問而非法庭主導；各項規則經常被忽視，沒有加以執行。

- 對許多人來說，太難理解。沒有足夠措施幫助無律師代表的訴訟人使用這個制度。

- 在促進富有與非富有的訴訟人之間的平等方面做得不足。

25. 工作小組認爲必須推行一套可廣泛應用、能互相協調和有適當資源支持的改革。

改革與費用

26. 我們不能輕率地說規則經過改革，訟費就必然下降。某些改革可能會令訟費減低，但另一些改革則可能令訟費增加。某類案件的訟費可能因此得到減省，但另一類案件的訟費則可能會因而增加。我們很難斷定，整體上改革有沒有節省了訟費。這些規則是在一個機構性，專業性和社會性的架構內運作，特別是，它是在一個涉及法律服務市場的體制內運作。訟費的高低，是取決於市場和機構性的因素，多於純粹規則上的改革。

27. 伍爾夫勳爵所引入的一連串訴訟前守則究竟會增加抑或減少訴訟費用？人們就這問題所進行的辯論說明了一點：要確定某些改革對訟費所產生的影響是很困難的。

- 訴訟前守則（以及 CPR 所引入的其他改革）規定，與訟各方須在訴訟初期便向法庭呈交完備的資料及陳述準確的訴狀。這項規定的目的是鼓勵各方盡早達成和解，從而讓法庭盡早對案件進行有效管理。

- 然而，這意味着訴訟人於進行訴訟時，須比以前更早承擔訟費，即把“較多訟費花在訴訟前期”。有人說，爲符合訴訟前守則而花的訟費很多時都是虛耗的，因爲很多案件都會在法律程序開始後不久便迅即和解。

- 雖然訴訟前守則（及其他改革）使訴訟人把“較多訟費花

在訴訟前期”，但這些訟費未必是虛耗的。訴訟前守則令與訟各方及他們的顧問提前深入瞭解案中的爭議點和雙方論據的強弱，從而使更多案件在法律程序開始前或開始後不久便得到和解。

- 即使案件不能迅速得到和解，然而，在訴訟初期所做的工作和因此招致的訟費也不會白費，因爲這些前期工作令爭議事宜在訴訟開始時已更爲明確清晰。這樣一來，與訟各方便毋須因訴訟初期出現失誤和偏差而虛耗訟費於非正審程序上。

28. 縱使如上文所述，改革對訟費的影響未可預料，但我們可以肯定地說，一些程序上的改革，尤其是如果在基礎結構方面也有相應的改革來配合的話，是必然可以把訟費降低的。以下是一些適用的例子：—

- 以“程序公正是首要目標”爲原則而首先針對訟費過高、延誤嚴重及程序複雜的問題，進行改革；

- 以靈活變通、相稱合度的規則，取替一些規定當事人必須辦理某些非正審程序的規則；後者範圍極廣，而且往往與所涉爭議不相稱；

- 設法阻止一些造成浪費的做法，例如大量的非正審申請和濫用證人陳述書或專家報告；

- 要求與訟各方須盡量以坦誠態度進行訴訟，並給予他們更多選擇，以便各方作出可行的和解建議；

- 令與訟各方更加清楚和更易推算自己可能要負擔的訟費，包括己方律師與對方律師的費用；

- 設立制度，以鼓勵或懲罰的方式，達致簡化訴訟程序的目的，當中懲罰必須是自動執行的；

- 減少對評定訟費這項程序的需要。

以伍爾夫改革方案作爲改革骨幹

29. 工作小組從其他司法管轄區的民事司法改革工作成果中，吸收了經驗。澳洲和加拿大的評議報告及建議書甚具參考價值，在以下討論的一些具體建議中可以反映出來。然而，特別可供香港參考的改革，是伍爾夫勳爵所推動，並通過 CPR 實行的改革。CPR 至今在英格蘭和威爾斯已實行了超過兩年。

30. CPR 在實行初期經歷了一些困難，但現已獲廣泛接受。因此，工作小組在考慮各種在香港可行的民事司法改革選擇時，以伍爾夫的改革方案作爲骨幹。

伍爾夫改革方案的基本概念

31. 伍爾夫的改革方案藉 CPR 執行，他的改革有兩個主要的概念：—

31.1 採納一個明確的首要目標，藉以表明法律程序必須公正及符合經濟效益的原則，作爲整個制度的根基，並以一套新制定和依據首要目標來解釋及運作的程序規則加以配合；與

31.2 採納一套全面的案件管理方法，來處理民事訴訟程序。

首要目標

32. CPR的第1條規則訂明了首要目標是：—

"1.1 (1) 這些規則是一套新的程序守則，首要達到的目標是使法庭得以公正地處理案件。

(2) 公正地處理案件，在切實可行的範圍內包括：

(a) 確保與訟各方的地位平等；

(b) 節省費用；

(c) 處理案件的方法須與以下各點相對稱：—

(i) 涉及的金額

(ii) 案件的重要性

(iii) 爭議點的複雜程度；和

(iv)各方的經濟狀況

(d) 確保案件的處理是公正而迅速的；和

(e) 案件獲分配適當比例的法庭資源，但同時亦顧及其他案件的需要。

1.2 法庭於

(a) 行使這些規則所賦予的任何權力時；或

(b) 解釋任何規則時

都必須力求實踐首要目標。

1.3 與訟各方須協助法庭向着首要目標邁進。"

33. 首要目標並非僅僅是理想化的空談。正如近期的案例顯示，法

庭認爲，首要目標已奠定一套原則，這套原則最終必須引用於所有程序規則，和可以引導法庭以靈活而目標明確的方式詮釋程序規則。現諮詢讀者，香港應否定下一個首要目標，及如何安排執行時的配套設施。**[建議 1]**

案件管理

34. 由多個司法管轄區（包括香港在內）的法官發展而成的案例法，早已在 CPR 還未制定前，認同了法庭有需要積極加強案件管理。現在 CPR 清楚訂明了法庭管理案件的權力，使案件管理更具明確的法理基礎。

35. CPR 的首要目標之一是積極的案件管理：—

"1.4 (1) 法庭必須積極地管理案件來實踐首要目標。

(2) 積極的案件管理包括 —

(a) 鼓勵各方在進行法律程序時互相合作；

(b) 及早確定各項爭議點；

(c) 迅速決定哪些爭議點須作全面研究，進行正式審訊，其餘的則以簡易程序處理；

(d) 決定解決爭議點的優先次序；

(e) 在法庭認爲合適的情況下，鼓勵各方採用其他方式解決糾紛，並協助他們使用這些方式；

(f) 協助與訟各方就案件達成完全和解或部分和解；

(g) 設定時間表，或控制案件的進度；

(h) 衡量採取某一步驟所能帶來的好處，是否與其所需要付出的代價相稱；

(i) 盡量在同一場合處理案件多方面的事宜；

(j) 處理案件時，盡量不需各方出庭；

(k) 活用科技；及

(l) 作出指示，以確保案件的審訊可迅速而有效率地進行。”

36. CPR 的第三部列明了法庭在案件管理方面的一些具體的和一般性的權力，全部都是法庭可自行運用的。

37. 有評論者提出反對，理由是(i)法官獲賦予過多的酌情權，會導致不一致及不公平的情況；及(ii)訟費會因此增加。

38. 上述的關注都是合理的。但是，在一切司法程序制度中，都不能缺少司法酌情權。當法官累積了經驗，又接受過訓練以瞭解改革的內容要義，再加上從首要目標所得到的指引，不一致、不公平的情況是可以減至最少的。

39. 這些規則本身要達致的一個目標，就是盡量減少爲案件管理而進行的聆訊，從而控制訟費，而這方面的司法培訓更是法官所不可缺少的。按一般的行事方法，除非有合理原因令人相信，所花的費用會帶來好處，否則法庭不會隨便令訴訟各方爲案件管理而花費金錢。很多規則（下文詳述）都是爲以下目的而制定的：—

- 要盡量減少案件管理的會議，祇有在真正需要時才進行。

- 在法庭頒布的命令中附加自動執行的懲罰條款，使法庭不需再經聆訊來確保訴訟各方遵從法庭指示或規則。

- 鼓勵訴訟各方在程序的事宜上達成協議而不需法庭作出批

示。

- 在訴訟一方或其顧問作出不合理或不稱職的行爲，以致法庭不得已而要進行聆訊時，有適當罰則可循。

40. 現諮詢讀者，香港應否採用一套條文，訂明案件管理應屬首要目標，以及訂明法庭管理案件的權力。**[建議 2 及 3]**

具體範圍內可行的改革措施

41. 請讀者就下述具體可行的改革措施提供意見。實施這些措施的方法，可能會是制訂一套新的規則或修訂現行的《高等法院規則》。

訴訟前守則

42. 伍爾夫改革其中一項新猷是建議制訂訴訟前守則。這些守則是一些有關與訟各方在開展法律程序前應如何合理地處理糾紛的實務守則。民事程序規則規定如果訴訟人不遵守適用的訴訟前守則，而法律程序於其後展開，法庭可憑具追溯效力的訟費罰則懲處訴訟人。這項革新使法庭在它的司法管轄權還未援用之前，在一定程度上控制了與訟各方的行爲。

43. 訴訟前守則的既定宗旨是：—

"(a) 使訴訟人認識到在庭外解決糾紛是可取的做法；

(b) 協助訴訟人取得合理所需的資料以達成適當的和解；或

(c) 使訴訟人提出適當的和解建議（這類建議應附帶訟費的安排，以

備必須進行訴訟時所需）；及

(d) 爲未能於訴訟前達成和解的案件做足準備工作，使訴訟得以迅速進行。”

44. CPR訂立了一套有關訴訟前守則的實務指引，又在詳細諮詢過一些與法庭訴訟相關的組織和團體後，分別就傷亡訴訟、醫療疏忽、建築及工程、誹謗和專業疏忽五個範疇採用了五組有關訴訟前守則。至於其他範疇的訴訟前守則現還在諮詢和發展的階段。訴訟人的糾紛即使不屬於任何特定的訴訟前守則範圍，訴訟人仍須按照上述守則的精神，合理地行事。訴訟人如不遵守訴訟前守則，法庭可能會按訟費罰則加以懲處。

45. 正如前述，有部分人士反對採用訴訟前守則，因爲他們認爲這些守則導致“較多訟費花在訴訟前期”，要是訴訟各方迅速達成和解，便會浪費了那些訟費。可是，又有人認爲，有賴訴訟前守則，很多案件才能在初期，甚至往往在訴訟還未開始前已達成和解；由於訴訟方式不受約束和過於對抗性而造成的不合作情況，亦是有賴 CPR 才能得以改善。現諮詢讀者，香港應否採納訴訟前守則。**[建議 4 及 5]**

開展法律程序與質疑司法管轄權之方法

46. CPR 簡化了開展法律訴訟的程序，就是把開展法律訴訟程序的方式減至兩類：一類爲具事實爭議的案件，另一類爲不具事實爭議的案件。香港應否跟隨這做法？**[建議 6]**

47. CPR 亦歸納了關於司法管轄權爭議的申請和要求法庭行使酌情權擱置法律程序的申請兩方面的規則（該些規則大部分源於法官的判例）。香港應否採納這些規則？**[建議 7]**

在欠缺行動的情況下所作的判決與承認

48. CPR 已引入一些規則讓訴訟人可靈活地作出承認及提出讓被告人分期付款的建議，其目的是省卻一些聆訊和精簡法庭在訴訟人欠缺行動的情況下作出判決時所需的步驟。現諮詢讀者，這些程序是否值得仿傚。**[建議 8]**

狀書與事實確認書

49. 在現時的慣例下，狀書未獲善用，經常導致以下的情況：—

- 狀書未能清楚地闡明案中的事實，以致法庭不能準確掌握訴訟的爭議點；
- 狀書非但沒有把重點放在事實的陳述上，反而在訴訟因由及抗辯理由方面，提出多種不同說法；
- 答辯書被用作構成障礙的工具，不能顯示訴訟的真正爭議點；
- 狀書過於冗長囉唆；
- 訴訟人沒有從開始便給予狀書撰寫人足夠指示，又或所給予的指示內容不夠精確，以致需要多次修改狀書和遭對方要求提供更多、更詳盡的資料。

50. 現就“香港是否可以採納一些措施去改正上述弊端？”徵詢讀者意見（詳見下文）。

51. 法律改革致力把狀書的焦點帶回所爭議的主要事實上，又要求狀書陳述實質的抗辯，以顯示訴訟人之間真正的爭議所在。以CPR爲例，它要求被告人陳述否認某項指稱的理由，如果被告人打算提出自己的一套說法，便須說出來，也可一併列舉法律論點。**[建議 9 及 10]**

52. 改革的其中一個重點是引入了一個規定，就是所有狀書（CPR稱之爲“案由陳述書”）均須以一份“事實確認書”聲明其狀書內容屬實。一旦證明事實確認書是虛假，而訴訟人又並非真誠相信所述屬實，便犯了藐視法庭罪。**[建議 11]**

53. 訴訟一方如需對方澄清狀書的內容，可要求對方提供進一步更詳盡的資料（稱爲“進一步資料”）。然而，對方可以其要求與案件的需求不相稱爲由，拒絕其要求。法庭亦有權自行要求訴訟人提供更具體的狀書。**[建議 12]**

54. 按照 CPR 的規定，法庭不會輕易批准與訟各方的修訂申請。這合乎法庭的一貫做法。法庭一般堅持與訟各方在訴訟初期提交的狀書必須相當準確精要，因此設法阻止與訟各方恃着他們可以稍後再整理狀書，而將一些隨便草擬的、不準確的狀書送交法庭存檔。 **[建議 13]**

案件或爭議點的簡易處理

55. CPR依循兩個大方向作出改變。

- 引入“沒有實在的成功機會”這個準則作爲簡易處理法律程序的準則。

- 在所有可以簡易處理的法律程序中引用同一準則，不論是處理原告人或被告人的案情、申請撤銷因欠缺行動而作出的判決、申請簡易判決、就某項法律問題作出裁決或是申請剔除狀書的法律程序均適用。

56. 從表面來看，新的準則使法律程序變得較爲容易處理。但英國上訴庭的一項判決產生以下問題：究竟“沒有實在的成功機會”與目前的“沒有可審訊的爭議點”這兩個準則實際上有沒有分別？這規則的原意很可能是要引進（而事實上已經引進了）一個較低的簡易命令適用標準。香港應否引入這些改變？**[建議 14]**

和解提議與繳存款項於法院

57. 對 CPR“第 36 部所述的和解提議”，一般的反應良好。該部的規定將目前的繳存款項於法院的機制，以及提出和解的機制用以下方式加以發展：—

- 准許*原告人*作出和解提議，如被告人無理拒絕，便可能要支付訟費及受到其他金錢上的懲罰。

- 准許在法律程序展開前提出和解，如果提議不被接受，法庭可將之列入訴訟前訟費的考慮因素。

- 限制將款項實際繳存於法院這規定的適用範圍，使之只適用於被告人就金錢申索提出和解的情況；至於非關金錢申索的案件，如有合適的和解提議，則按第 36 部處理。

58. 法庭保留判定訟費的酌情權，理由是，懲罰拒絕接受第 36 部所述的和解提議的一方是否公平是取決於很多因素的，例如，和

解提議作出時或款項繳存時有甚麼資料可供參考，以及訴訟一方或雙方提供資料時有沒有隱瞞成分。

59. 現諮詢讀者，香港應否引入這些有關和解提議及其後果的條文。**[建議 15]**

中期補救與訟費保證金

60. CPR 第 25 部將多個中期補救辦法串合起來。這些補救辦法主要是從歷年的案例(特別是與“資產凍結令”(*Mareva*)及“容許查察令”(*Anton Piller*)有關的案例）中發展出來的。此部亦處理了中期付款和訟費保證金事宜。既是 CPR 的一部分，上述所有申請均按照首要目標的原則來處理。

61. CPR 25 有一規定，就是法庭可應與訟一方的申請，發出“與正在或將在司法管轄範圍以外地區進行的法律程序有關的”資產凍結令。如果採納這規定，便會擴大香港法庭現有的司法管轄權。

62. 現諮詢讀者，香港應否採用類似條文及應否如此擴大法院的司法管轄權。**[建議 16 及 17]**

案件管理 — 設定時間表及進度指標

63. 目前，訴訟的進度由與訟各方控制。法庭須待所有非正審的爭議都獲得解決和與訟各方看來都已準備就緒的時候，才可訂出審訊日期。如此一來，與訟各方便可有意無意的藉詞準備仍未就緒，以阻延審訊，致令該法律程序可能受到嚴重延誤而遲遲未能終結。這是我們的民事司法制度所採用的抗辯式訴訟其中一處不能令人滿意的地方。

64. 爲了阻止訴訟人這樣濫用抗辯式訴訟，改革重點之一是由法庭在法律程序進行的初期爲案件進度訂立時間表，並發出適當的案件管理指示，設定一些重要項目爲進度指標，其中包括審訊日期（這日期可以是一個已確定的日期，或一段可隨時展開審訊的時段）。一般來說，已設定的進度指標是不能隨便改變的。這樣，訴訟的步伐便掌握在法庭手裡，而非與訟各方的手上，即使與訟各方仍未準備就緒也不會延誤審訊日期或推遲其他指標項目。除非情況極爲特殊，否則失責一方必須爲他未能做足準備工作承擔應有後果（例如，他不能提出某些證據，或法庭可將他的部分案情刪除 — 甚至在極端情況下，將其案件全部剔除）。

65. 爲了設定有效的時間表和作出合宜的指示，法庭必須就案件性質、範圍及其特別需要，取得足夠的資料，因此，建議中的改革措施規定這些資料須在訴訟初期提交法庭，通常做法是由與訟各方將有關案件的書面資料送交法庭存檔，並列明他們認爲需要的指示（最好是經各方協定的）。這些資料通常填寫在一份法庭規定的問卷表格上。法庭按所得的資料，不需聆訊便可作出指示，並設定時間表。

66. 如果案件簡單，法庭即時發出的指示及設定的時間表，可一直用至審訊階段仍可繼續留用。如果案件比較複雜，這些指示與時間表則用至召開案件管理聆訊爲止，屆時法庭可因應案件的進度而作出進一步指示。

67. 現諮詢讀者，在香港引入這種全面性、並以設定時間表及進度指標爲基礎的案件管理方式是否可取。[建議 18 及 19]

"專責法官制度"

68. 工作小組亦有討論除了案件管理及設定時間表的做法外，"專責法官制度"亦是否可行。實行"專責法官制度"的辦法是：(i)一名法官由始至終處理同一宗案件；(ii)盡早編定一個不可隨便改變的審訊日期；(iii)法官親自負責案件的管理，訂下時間表，並在審訊之前，因應已編定的審訊日期，作出相關指示；(iv)如果案件要進行審訊，審訊會由同一名法官負責。

69. "專責法官制度"在一些司法管轄區內是頗爲成功的，尤其在美國及澳洲聯邦法院。此制度有不少優點。然而，伍爾夫勳爵認爲這制度並不合用，理由是推行這制度需要更多法官的配合，而制度本身亦欠靈活性。現諮詢讀者，香港應否全面採用"專責法官制度"，或只在某類案件採用這種制度。**[建議 20]**

特定案件類別

70. 目前香港有四類訴訟被編入特定案件類別：商業、建築與仲裁、行政與憲法、以及人身傷亡訴訟。海事法律程序同時受到《高等法院規則》第 75 號命令的特別規例所管轄。具爭議性的遺囑認證法律程序，較爲少見，是按照第 76 號命令處理。公司清盤案件、破產案件和婚姻訴訟案件則按依據有關條例所制定的規則進行。

71. 其他司法管轄區也設有這種特定案件類別或專責法庭。這些特定案件類別及專責法庭均有特別的處事方法和需要，與一般高等法院的訴訟不同。CPR 的處理方法是保留其自主性，容許審理這些專門事務的法庭頒布程序指引，因應特定案件類別的需要，適切地援引 CPR。香港應否採用類似的處理方法？**[建議 21]**

72. 有建議認爲應考慮設立更多特定案件類別，例如，把複雜和具影響力的案件歸入一類，(例如可以在此類訴訟實行“專責法官制度”)，把無律師代表的案件歸入一類，及把集體訴訟案件也歸入一類（詳見下文）。現諮詢讀者，香港是否有需要設立更多特定案件類別。**[建議 22]**

涉及多方的訴訟

73. 涉及多方或多名擬提出訴訟人士的案件需要特別的案件管理措施。有兩種情況需要考慮。

74. 第一種情況涉及一些在美國可循“組別訴訟”來處理的案件，現時我們的制度不設這類訴訟。消費者及其他團體均倡議引入這類訴訟，將多宗小額申索集合起來，在特別案件管理措施的協助下，在同一法律程序中處理。如果可以這樣做的話，小額申索人便可使用他們以前無法使用的司法渠道，使觸犯法律的大企業要認真面對一些如商品責任或環境污染方面的法律訴訟。有人認爲，這做法不單會對當事人更公平，而且還會爲社會帶來長遠利益，例如提高消費者保障和改善環境。

75. 另一種牽涉多方訴訟的主要情況，與能否使用司法渠道無關。出現這種情況是因爲有多宗類似或相關的申索，由於某些原因，在差不多同一時間展開，以致對法庭的資源構成重大壓力。在現存的機制下，法庭可命令某些訴訟人以代表人的身分進行訴訟。然而，這些程序的使用目前受到法例明確限制。

76. 適用於上述兩種情況的多方訴訟程序，原則上雖然可取，但卻會引起複雜的問題。如果採用這程序，原告人與被告人便須在本身的權益方面作出妥協及調整，而且，我們亦需要一些機制，將一批擬提出訴訟而又適合進行同一法律程序的原告人組合起

來，而法庭亦可能需要就他們之間不能妥協的問題作出決定。他們之間存在很多衝突需要解決，而這些問題可能需要法庭處理。

77. CPR已邁出第一步，爲“集體訴訟令”和有關的特別案件管理權訂定條文。然而，一些關於處理某些重要問題的條文仍有待研究及訂定。故此，現諮詢讀者，香港應否原則上採用集體訴訟計劃，同時進一步研究其他司法管轄區所實行並適用於香港的模式，而是否採用上述計劃須視乎研究結果而定。**[建議 23]**

78. 此外，CPR重新訂立一條原本屬 RSC的條文，該條文涉及個人代表公司展開衍生訴訟的情況。現時的《高等法院規則》沒有這些規則。香港應否訂定這些規則呢？**[建議 24]**

文件透露

79. 原則上，規定與訟各方透露文件對於訴訟能否公平地進行，起很大的作用。但這項程序實行起來的時候，尤其涉及一些較大、較複雜的案件時，卻會引致與訟各方產生嚴重不滿。據說，文件透露方面的訟費支出佔了訟費的主要部分。這項程序延長了審訊時間，更可被與訟人利用作欺壓對方的手段，藉此拖延審訊、製造煩擾、和耗費財力較弱一方的資源。

80. 爲了阻止訴訟人使用此等手段，各種可行的改革方法均着眼於收窄透露文件的責任範圍。在香港，與訟各方現須向對方透露一切相關的文件。法庭使用確立已久的 Peruvian Guano 準則來決定有關文件是否屬相關文件。這項準則涵蓋的範圍非常廣泛，包括四類文件：—

- 與訟各方用以證明其案的文件。

- 與訟各方所知悉對其案不利或對另一方的案有利的文件。

- 與法律程序中的爭議點相關的文件，但由於文件並非明顯地有助或有損任何一方，所以不屬上述兩類別。此類文件祇提供背景資料，並非爲公平審理案件所必須的文件。

- 一些會引發一連串調查的文件：這些文件本身並不會削弱一方的案，亦不會加強另一方的案，但可能會“很自然地令一方進行一連串的調查，而最後結果可能是上述情況其中之一。”

81. 許多司法管轄區已放棄使用 *Peruvian Guano* 準則，改而採用一個較狹窄的定義來界定相關文件。CPR 基本上把必須透露的文件範圍局限於上述四類的首兩類，但法庭可在個別案件中命令訴訟人透露多些資料。

82. 與訟各方的基本責任是要“透露標準範圍內的文件”，即祇透露目前在他掌握中或曾經在他掌握中的文件，而這些文件是：—

> “(a) 他依賴作爲證據的文件；及
>
> (b) 任何 —
>
> (i) 不利於其案的文件；
>
> (ii) 不利於另一方的案的文件；或
>
> (iii) 有利於另一方的案的文件；及
>
> (c) 相關的實務指引規定他必須透露的文件。”

83. 與訟一方祇有責任“合理搜尋”這些文件。何謂合理搜尋取決於所涉文件的數目、法律程序的複雜程度、翻查文件所需的費

用，以及文件的重要性。換言之，這規定的目的是要使透露文件的責任，與爭議點的重要性相稱。

84. 文件透露這一環應靈活處理，與訟各方及法庭應作出合適的安排以減低訟費。例如，法庭可命令訴訟人按爭議點或分階段透露文件，以期藉着優先處理了一些重要事項，而使與訟各方不必支付全面透露文件的費用，便可把法律程序完成。

85. 法庭亦有廣泛權力命令與訟各方在展開訴訟前透露資料，以便法庭能公平地處理將要進行的法律程序，協助雙方在訴訟前達成和解，又或使各方節省訟費。同時，如果有些資料可能與案件爭議點直接有關，又或法庭需要一些資料以便公平處理該宗申索，或節省訟費，法庭也可以命令非與訟者透露有關資料。

86. 除上述方法外，還有另外一種處理方法，即新南威爾士省《最高法院規則 1970》第 23 部所述的方法。此方法容許與訟各方取得狀書、誓章等所提及的文件；與訟各方亦可要求取得總共 50 份與受爭議的事實相關而又不受保密權保障的文件，但如各方擬取得更多文件，則必須先獲法庭頒令許可。

87. 現諮詢讀者，香港應否採納上述關於文件透露的改革措施。**[建議 25 至 29]**

非正審申請

88. 有爭議的非正審申請導致案件嚴重延誤，也令訟費支出增加。各種可行的改革方法均試圖盡量減少非正審申請，或在非正審申請無可避免時，嘗試簡化處理這類申請的程序。改革方案中又訂出一些更有效的制裁措施，以制止訴訟人提出不必要的申請和有意或無意濫用這類申請。

89. 下述方法可減少非正審申請：—

- 促使與訟各方協商解決某些事宜，而無須法庭介入。

- 法庭可自行處理有關事宜而無須進行聆訊；其後如有任何一方反對，可向法庭申請將命令取消、更改或擱置。

- 法庭所頒命令自動執行，免卻日後有一方需要向法庭申請強制執行令。未能遵行命令的一方如欲免受命令所述的處分，便有責任向法庭申請寬免，但法庭不一定會批准。

現諮詢讀者，香港應否採用類似的規則。**[建議 30]**

90. 如須進行非正審聆訊，下述方法可把程序簡化：—

- 以書面方法處理申請而無須進行聆訊。

- 如案件很可能會有所爭議，又很可能會上訴到原訟法庭法官處，便無須由聆案官處理。

- 在可以節省訟費及有得當的保障措施下，容許以電話會議或其他通訊方式進行申請。

香港應否採用這些方法？**[建議 31]**

91. 如果法庭多些採用即時評定訟費的做法，判令訟費須即時支付，並命令律師須知會當事人，便可阻止與訟各方提出不必要的申請。一向以來法庭批予訟費所依循的規則，是訟費須視乎訴訟結果而定，即敗方支付訟費予勝方，但這些訟費在全案審結

並最後計算出未償金額後才須支付。各種可行的改革方法均主張改變這一貫規則。現時越益普遍的做法是，法庭會藉即時評定訟費及判令即時支付訟費，以警剔各方不得濫用程序。任何一方如提出不必要或造成浪費的非正審申請，儘管最終獲判勝訴，法庭都很可能作出以上有關訟費的命令。

92. 在英格蘭和威爾斯，各界對即時評定訟費的反應不一。有些人認爲法官不是評定訟費的合適人選，又擔心評定結果會出現不一致的情況。但另一方面，即時評定訟費對阻止訴訟人提出造成浪費的申請所發揮的效力卻是有目共睹，很多人士均表支持。評定出現不一致的情況可憑累積經驗及增加培訓來盡量避免。現諮詢讀者，香港應否採用即時評定訟費的做法，以阻止訴訟人提出造成浪費的非正審申請。**[建議 32]**

93. 有時，不合宜的非正審申請完全是律師做成的。目前，如果因律師的做法錯誤，而“不恰當地或在無合理因由的情況下招致”訟費或“因他的不恰當的延誤或其他失當或失責行爲而虛耗”訟費，律師便可能需要個人支付這些訟費。這可說是要求律師只須爲近乎專業失當的行爲而個人承擔支付訟費的責任。或許有人認爲這標準定得太高。根據 CPR，如因律師或其僱員的“任何失當、不合理或疏忽的行爲或遺漏”而招致訟費，法庭便可判令律師須個人支付這些虛耗的訟費。香港應否採用這種標準取代目前沿用的標準？**[建議 33]**

94. 目前，大律師爲“虛耗訟費令”而須承擔的責任範圍很狹窄，只局限於刑事訴訟程序。大律師應否爲“虛耗訟費令”承擔與律師一樣的責任？ **[建議 34]**

證人陳述書

95. 雖然原則上交換證人陳述書是一個有用的程序，但實際上，陳述書往往因內容過份堆砌而變成只是一份反映律師的看法多於證人的證詞的昂貴文件。

96. 可行的改革包括—

- 賦予法庭更大權力，以便控制及規限與訟各方將要提出的證據，如有需要，可修訂主體法例來配合。**[建議 35 及 36]**

- 以較靈活的方法處理證人陳述書。在合理情況下，准許與訟各方以口頭證詞或補充陳述書來補充證人陳述書。這可盡量減少與訟各方因擔心證人在審訊時可能不獲准詳述有關事件，而硬將每一項能想到的細節都寫進證人陳述書內。**[建議 37]**

- 以合適的訟費判令來阻止各方將證人陳述書寫得過份詳細。

現諮詢讀者，香港應否採納上述這種處理方法。

專家證據

97. 很多時，法庭在裁斷涉及事實的爭議時，都無可避免要借助專家證據。然而，抗辯式訴訟造成的壓力又扭曲了使用專家證據的原意，以致出現下述情況：—

- 與訟各方很多時都不恰當或過度使用專家證據。在一些不

需要專家證據或祇應在某幾個爭議點上使用專家證據的案件中，與訟各方都傳召專家就專家報告內的廣泛事項作證。

- 專家往往偏袒某方而欠缺獨立性。專家不能提供客觀意見以協助法庭判案，反而成爲與訟各方在對訟時使用的武器。

這些做法導致訟費增加，也延長了訴訟的時間和使法律程序變得越加複雜。

98. 爲了解決這些問題，各種改革方法均試圖：—

- 賦予法庭權力以控制專家證據的援引和所涉範疇；

- 強調專家的首要責任是協助法庭，而且這責任是凌駕於其對案中當事人的責任。爲強調這點而規定專家必須確認此責任，並同意遵行一套特定的、推崇獨立性與客觀性的行爲守則；

- 容許專家無須知會與訟各方，便可自行就其職責功能向法庭尋求指示；

- 容許法庭規定與訟各方聯合委託同一專家。

99. 上述改革獲得良好反應。據悉，越來越多訴訟人聯合委託同一專家。現諮詢讀者，香港應否採用一些改革方法以解決前述的不恰當使用或過度使用專家證據及專家證據偏袒其中一方的問題；同時，香港應否採用由法庭指示訴訟各方聯合委託同一專家的做法。**[建議 38 至 40]**

審訊與案件管理

100. 審訊所需時間是難以估計的，而且，有時出庭應訊的人會嘮叨囉嗦。各方的意見再次認爲法庭應更積極主動管理案件，由法官依據明文賦予的權力，爲舉證、盤問及陳詞設定時限。香港應否同樣以法例訂明法官有這些權力？[**建議 41**]

上訴

101. CPR 採納的有關上訴程序的改革集中於以下各方面：—

- 規定與訟一方必須先取得法庭的許可才可以針對原訟法庭的非正審判決向上訴法庭提出上訴。[**建議 42**]

- 規定與訟一方必須先取得法庭的許可才可以針對原訟法庭的正審判決，向上訴法庭提出上訴。[**建議 43**]

- 擬提出上訴的任何一方，必須證明其上訴“有實在的成功機會”或證明“有其他充分的理由，令法庭不得不聆訊其上訴”，方可獲法庭批予上訴許可。[**建議 44**]

- 針對案件管理決定而提出的上訴許可申請，原則上不會獲得批准，除非該案涉及原則方面的爭論，而其重要性足令法庭認爲，即使批准進行上訴對訴訟程序及訟費支出會造成影響，也是值得，則作別論。[**建議 45**]

- 此外，針對上訴判決而提出的上訴許可申請，原則上一般都不會獲得批准，除非該案涉及在原則或常規方面的重要爭論，又或有其他充分的理由，令法庭不得不批予上訴許

可，則作別論。[**建議 46**]

- 如引入向上訴法庭上訴必須申請許可的機制，容許上訴法庭在遇上一些相當於濫用法庭程序的上訴許可申請時，可無須進行口頭聆訊便拒絕申請，但須容許申請人有最後機會向法庭書面說明，爲何法庭不應在沒有進行口頭聆訊下否決其申請。[**建議 47**]

- 若上訴許可的申請獲准，上訴法庭可實施案件管理措施，以提高上訴聆訊的效率。[**建議 48**]

- 將上訴法庭的角色限於覆核下級法庭的決定，但上訴法庭仍可行使酌情權將上訴視爲重審。[**建議 49**]

- 上訴法庭的角色只限於覆核下級法院的決定，這項規則在原訟法庭行使上訴司法管轄權的時候亦適用。[**建議 50**]

現諮詢讀者，以上改革措施是否可取。

訟費

102. 正如上文指出，各項改革方法均主張不再以“訟費須視乎訴訟結果而定”（即敗訴者須付訟費予勝訴者）及“終結時支付”（即訟費只須於訟案結束時支付）爲原則，而主張法庭在整個法律程序中都靈活運用訟費判令來鼓勵訴訟人作出合理行爲，不論最終誰勝誰負。現時法庭作出訟費判令時，一般會根據首要目標來衡量與訟各方在進行法律程序期間或之前所作的行爲是否合理，再決定如何判給訟費。香港應否採用類似的做法？[**建議 51**]

103. 案件複雜程度、案件聆訊次數及律師收費水平已被認定爲決定訟費金額大小的三項重要因素。前文已討論過有關旨在減低案件複雜程度及聆訊次數的改革問題。至於律師收費水平問題，這涉及訴訟一方的律師向其當事人收取的費用和對方可能須支付上述當事人的費用。兩者的改革建議各有不同。

104. 關於律師與當事人的訟費，其他司法管轄區進行的改革包括：—

- 要求律師向當事人提供有關訟費的具體資料，包括徵收費用的基準及估計所需訟費的金額，務求增加訟費的透明度，以及更明確預計訟費支出。 **[建議 52]**

- 盡量提供更多資料，使當事人知道其他律師的收費。**[建議 53]**

- 使當事人有權評估其律師所做的工作是否必要、處理事務的方法是否恰當，以及處理這些事務的收費是否公平合理，並據此質疑律師的收費。**[建議 54]**

- 嘗試設定基準訟費，並以此數額爲標準來衡量律師向當事人收取的費用及訴訟一方向對方支付的費用。**[建議 55]**

105. 有關“與訟各方之間訟費”的改革，其目的在於：—

- 要求訴訟各方透露已支出的訟費數額，以及預計需支付的訟費數額，務求減少訟費數額不明確的情況。**[建議 56]**

- 消除現時香港法庭處理大律師的費用時所出現的奇怪現象。目前的情況是，在應該以“對訟當事人基準”評定費

用時，法庭實際上所根據的，卻是“律師與當事人基準”。**[建議 57]**

- 准許與訟各方就所須繳付的訟費作出“第 36 部”所述的提議，藉此鼓勵與訟各方達成訟費評定的訟費協議。**[建議 58]**

106. 訟費評定所引起的訟費與整宗案件的訟費，往往不成比例。現針對這弊端作出以下改革建議：—

- 設定基準訟費，假定它是經法庭評定的，以鼓勵與訟各方接納這個基準數額，從而減少訟費評定的聆訊。**[建議 59]**

- 由法庭酌情擴大以書面形式進行暫定訟費評定的範圍。若與訟一方有任何不滿，該方有權要求法庭進行口頭聆訊，但如該方經聆訊後依然未能取得較佳結果，該方可能遭判罰訟費。**[建議 60]**

- 制定訟費方面的處分。如果與訟一方無理堅持要法庭作全面的訟費評定，又或未能提供足夠資料，致使法庭無法以書面方式進行訟費評定而須展開聆訊，該方會遭判罰訟費。**[建議 61]**

CPR 附表中來自 RSC 的條文

107. RSC 的部分規則沒有被英格蘭和威爾斯的 CPR 取代，依據附表 1 這些規則仍然適用，這包括與強制執行判決及命令有關、與處理特別程序案件和特別司法管轄權的案件有關、以及與某些法例所規定的某些法律程序有關的規則。由於沒有任何建議取代這些規則，故希望讀者接納，無論香港採納何種改革，這些等同《高等法院規則》的規則仍繼續有效。**[建議 62]**

可行的改革與“解決糾紛的另類辦法”（ADR）

108. 對於一些適合的案件而言，“解決糾紛的另類辦法”(ADR)越來越被認爲有可能用來取代或輔助民事訴訟程序。常常有人說 ADR 可以讓當事人以較簡單、廉宜、迅速、靈活及切合個人需要的方法處理糾紛。比諸對簿公堂，ADR 有助減少各方互不相容的情況和減輕各方所承受的壓力，也可減少損害各方之間可能維持的長遠關係。然而，一般的意見認爲 ADR 不適用於某些案件。

109. 沒有人認爲法庭應規定訴訟人必須採用 ADR，而將他們摒諸門外，但越來越多人認爲法庭或可規定訴訟人必須先嘗試採用 ADR，然後才可繼續進行該案的法律程序。目前在多個司法管轄區採用的並附屬於法庭的 ADR 計劃（通常是“調停”），在若干程度上不是強迫，便是鼓勵當事人使用 ADR。 採用 ADR 的可能情況是：—

- 經法例或法庭規定，指定類別的所有案件均強制採用 ADR；**[建議 63]**

- 如法庭認爲 ADR 會帶來效益，法庭運用酌情權頒令強制採用 ADR；**[建議 64]**

- 如其中一方選擇用 ADR，ADR 便會強制進行；**[建議 65]**

- 在某類案件中，將 ADR 訂爲取得法律援助的一項條件；**[建議 66]**

- 採用 ADR 與否由各方自行決定，但法庭會鼓勵他們採用

ADR。如果一方無理拒絕或抱不合作的態度，該方可能遭判罰訟費；[**建議** 67]或

- ADR的採用與否全屬自願，而法庭的角色祇限於鼓勵和提供資料及設備。[**建議** 68]

現諮詢讀者，香港應否推行附屬於法庭的 ADR 計劃；如推行的話，應以上述哪一個方法推行。

司法覆核

110. 擬提出司法覆核申請的人士，在進行這些法律程序前必須先取得法庭許可，並須盡速採取行動的基本規定，大致上會繼續採用。 然而，CPR 提出一些改革司法覆核申請程序的建議，其目的在於：

- 簡化各種補救措施的名稱及其界定的範圍。[**建議** 69]

- 規定容許那些與某一宗司法覆核相關，但本身並非訴訟一方的人士參予其中，並爲他們提供方便。[**建議** 70]

- 規定申請人須把申索文件送達被告人，及其他已知與該宗司法覆核相關的人士。[**建議** 71]

- 規定擬對司法覆核法律程序提出反對的被告人須確認獲送達文件，並須概述他所依據的理由。[**建議** 72]

- 闡明法庭撤銷決定的權力，其中包括較具爭議性的、在不抵觸法例的規限下，自行作出決定的權力。[**建議** 73]

推行改革

111. 假定工作小組建議進行一系列改革，我們應如何更有效地推行這些改革及把建議寫成民事訴訟程序規則？ 目前有兩個主要方案可供考慮。第一種方案是大幅借用 CPR 的規則（及新南威爾士省和其他地方的現行有關規則），另外一種方案是大幅保留《高等法院規則》，但因應各項改革而對其作出修訂。

112. 上述兩個方案都很費工夫。我們需要草擬新的規則，而所有與民事司法制度有關的人士，均需重新學習運用這套新的制度。

113. 英格蘭及威爾斯花了很大努力才能從 RSC 轉用 CPR。單單草擬 CPR 便花了大約三年時間。因此，如果香港借用 CPR（及其他司法管轄區的規則），便可節省不少人力物力。如果我們棄用這方法而採納保留《高等法院規則》，但對其作出修訂的方法，我們便大有可能需要重新草擬這些規則。而且，我們亦須確保這些修訂能與保留下來的規則互相協調。

114. 此外，我們亦須考慮培訓方面所需的工作。無論我們採用上述哪一個方案，都要花費很多工夫。雖然修訂方案會有較少新規則需要學習，但大家仍需弄清楚究竟改變了甚麼，和這些新規定如何運作。

115. 我們亦需考慮上述兩個方案付諸實行時的效益問題。

115.1 保留及修訂《高等法院規則》，我們可能要面對一個問題，那就是經修訂的規則與保留下來的規則（連同附帶案例）兩者之間的相互影響。至於與訟各方應否繼續引用現存的案例，抑或

這些案例應被經修訂的規則(包括任何爲引入首要目標而作出的修訂)取代,這問題可能會帶來昂貴的"附帶訴訟"。

115.2 相反,如果一開始便採納一套與 CPR 路線相近的規則,從前累積下來的案例便大致上都不再適用,而這方面的爭辯亦可能會減少很多。

115.3 這並不表示採用了一套以 CPR 爲基礎的規則,便*完全*不會產生一些有可能需要交由法庭定奪的問題。法庭的*一些*判例發展成案例法是無可避免的,特別是一些與"實質法律"有密切關係的問題所產生的案例。然而,至今在英格蘭及威爾斯的經驗顯示,這類案例累積得很少,而 White Book 一書中所引述的案例將不需採用。

115.4 若香港採用實質與 CPR 相同的規則,英國法院的判決亦會具參考價值,而香港亦可以英國在這方面的經驗爲借鑑。

116. 不論採納何種方案,無律師代表的訴訟人能否從中獲益? 轉用 CPR 的其中一個原因是,CPR 所用文字較淺白易明,故希望藉此讓無律師代表的訴訟人能較容易掌握這些訴訟程序規則。誠如前述,這項考慮因素只間接適用於香港,因爲大部分在香港的無律師代表的訴訟人都只會閱讀中文本。但簡化英文本後,這些規則的中文譯本也許亦會隨之而變得較淺白易明,這亦有利於在香港採用一套新訂而簡明的規則。

117. 基於上述考慮因素,現諮詢讀者,若要實行以上改革建議,香港應否採用一套大致上與 CPR(及其他司法管轄區的規則)路線相近的新訂民事訴訟規則,抑或應繼續沿用《高等法院規則》但對其作出修訂來進行改革。**[建議 74 及 75]**

資源

118. 如果我們原則上決定應進行改革，我們便需投放資源來草擬和制定改革所需的新規則（不論是經修訂的《高等法院規則》或大致上以 CPR 爲基礎的一套全新的規則），並和所有與改革相關的人士合作，擬定必要的實務指引和訴訟前守則。

119. 之後，爲了實施這些改革 — 例如，使法庭能夠實行全面的案件管理及按照設定時間表審訊案件，我們需要充足的資金，及有計劃地調配資源，亦可能要增加法官人數和法庭資源。**[建議 76]**

120. 我們必須決定怎樣才能最有效地調配現有資源，以求滿足實施改革時的需要。由於法官傳統的角色可能會有改變，而案件的數量也可能會與目前的不一樣，因此法庭必須重新調配法官、聆案官和行政人員。**[建議 77]**

121. 我們須爲法官、聆案官和法庭行政人員提供培訓課程，幫助他們瞭解各項改革，磨鍊他們實踐改革所需的技巧。培訓課程應切合各項改革的需要。**[建議 78]**

122. 現有的資訊科技設施應予以利用，並加以改動，以配合法官進行積極的案件管理，及改善資料管理系統。長遠來說，法庭應考慮在科技法庭設置電子存檔系統及電子文件共用系統。**[建議 79]**

123. 我們現在應著手研究訂立底線，作爲日後判斷改革成敗得失的根據。這些研究可使改革更趨完善，並有助持續評估資源的調

配能否配合改革的實施。如果證實某些改革未能達到預期效果或引致反效果，我們便應放棄這些改革。[**建議** 80]

Proposals for Consultation

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.

Report paras 225-233

CPR 1.1 to 1.3; Supreme Court Rules of South Australia Rule 2; NSW Supreme Court Rules (amendment No 337) 2000, 20 December 1999, r 1.3

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.

Report paras 240-256

CPR 1.4, 3.1(2), 3.3; NSW Supreme Court Rules, r 26

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.

Report paras 240-256

CPR 3.1, 3.3

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.

Report paras 258-275

Practice Direction on Pre-action Protocols and 5 current Protocols

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.

Report paras 258-275

CPR 3.1(4), 3.1(5), 3.9(e), 44.3(5), 48.1 and 48.2; and Practice Direction on Pre-action Protocols

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.

Report paras 276-277

CPR 7 and 8

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.

Report para 278

CPR 11

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.

Report paras 279-283

CPR Part 14

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.

Report paras 284-288, 298

CPR 16.2, 16.4, 16.5, 16PD

Proposal 10

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

Report paras 289, 298

CPR 16.5

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.

Report paras 290-292, 298

NSW Supreme Court Rules, r 15 and r 15A; CPR 22.1, 22.2, 32.14 and 22PD

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.

Report paras 293-295, 298

CPR 18, 18PD

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.

Report paras 296-298

CPR 17

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.

Report paras 299-316

CPR 3.4, 13, 24

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.

Report paras 317-323

CPR 36, 44.3; New South Wales, Supreme Court Rules 1970, rr 22.2, 52 and 52A

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.

Report paras 324-331

CPR 25, 25PD

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).

Report paras 324-331

CPR 25.4

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.

Report paras 332-358

CPR 26.3

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.

Report paras 332-358

CPR 2.11, 26, 29

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.

Report paras 359-370

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.

Report paras 371-375

CPR 49 and associated Practice Directions

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.

Report paras 371-376

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.

Report paras 377-402

CPR 19.10 – 19.15, 48.6A; 19BPD

Proposal 24

A provision regulating derivative actions should be adopted.

Report paras 403

CPR 19.9

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.

Report paras 404-425

CPR 31.6, 31.8

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.

Report paras 404-425

CPR 31.7, 31.10

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.

Report paras 404-425

Part 23 of the NSW Supreme Court Rules 1970

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.

Report paras 404-425

CPR 31.16, 31.17

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.

Report paras 404-425

CPR 31.13

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.

Report paras 426-441

CPR 1.3, 1.4(2), 2.11, 3.1(3), 3.3, 3.8, 3.9

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.

Report paras 426-429, 442-450

CPR 23.8, 23PD §6.1-7

Proposal 32

The court should be encouraged to make, whenever possible, summary assessments of costs at the conclusion of interlocutory applications.

Report paras 426-429, 451-462

CPR 43.3, 44.2, 44.7, 44PD §13.2, §13.5; 45PD §14.1

Proposal 33

In place of the powers currently conferred on the court by HCR 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.

Report paras 463-467

HCR Order 62 r 8(1); s 51 of the Supreme Court Act 1981 as amended by s 4 of the Courts and Legal Services Act 1996; CPR 48.7

Proposal 34

The court's power to make wasted costs orders against solicitors should be extended to cover barristers.

Report paras 463-468

HCR Order 62 r 8(1); Supreme Court Act 1981, s 51(6), as amended by s 4 of the Courts and Legal Services Act 1996; CPR 48.7

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 powers extend to powers to exclude evidence that would otherwise be admissible and to the limiting of cross-examination.

Report paras 469-479

CPR 32.1

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.

Report paras 469-479

Cf Civil Procedure Act 1997, Schedule 1, para 4

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.

Report paras 480-483

CPR 32.5(3) and (4)

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.

Report paras 485-493, 518

CPR 35.1, 35.4, 35.6, 35.9

Proposal 39

Measures aimed at countering lack of independence and impartiality among expert witnesses should be adopted :-

- Declaring the supremacy of the expert's duty to assist the court over his duty to the client or the person paying his fees.
- Emphasising the impartiality and independence of expert witnesses and the inappropriateness of experts acting as advocates for a particular party.
- 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.
- 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.
- 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.

Report paras 494-506, 518

CPR 35.3, 35.10, 35.14; NSW Supreme Court Rules, Schedule K and r 39

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.

Report paras 507-518

CPR 35.7, 35.8

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.

Report paras 519-528

Western Australia Supreme Court Rules O 34 r 5A; NSW Supreme Court Rules r 34.6AA; CPR 1.4(1), 2.11, 3.9(g), 29.9(2), 29.5, 32.1

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.

Report paras 529-532

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.

Report paras 533-534

CPR 52.3

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.

Report paras 535-539

CPR 52.3(6)

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.

Report paras 535-539

CPR 52, 52PD §4.5

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.

Report paras 535-539

CPR 52.13

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.

Report paras 540-541

Cf Hong Kong Court of Final Appeal Rules, rule 7

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.

Report paras 540, 542-543

CPR 52PD §§4.6, 4.11, 6.5, 6.6, 15.12 to 15.14

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.

Report paras 544-551

CPR 52.11

Proposal 50

The principles upon which appeals are determined should apply uniformly to the Court of First Instance and the Court of Appeal.

Report paras 544-551

CPR 52.11

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.

Report paras 552-557

CPR 44.5(3)(a), 44.14

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.

Report paras 558-573

New South Wales Legal Profession Act 1987, ss 174, 175, 178, 179, 182 and 183; in England and Wales: Solicitors' Practice Rules 1990, r 15; Solicitors' Costs Information and Client Care Code 1999; CPR 44.2, 44.14(3)

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.

Report paras 574-575

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.

Report paras 576-583

New South Wales Legal Profession Act 1987, ss 184, 185, 208C and 208D

Proposal 55

Steps should be taken to compile benchmark costs for use in Hong Kong.

Report paras 584-598

Proposal 56

Provision should be made in Hong Kong to require the parties, periodically and as ordered, to disclose to the court and to each other best available estimates of costs already incurred and likely to be incurred in the case.

Report paras 599-604

43PD §6.1-6.6; 48PD Schedule of Costs Precedents, Precedent H

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 HCR should be deleted.

Report paras 605-607

1st Schedule to Order 62 of the HCR

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.

Report paras 610-612

NSW Supreme Court Rules, r 22.10

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.

Report paras 613-615

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.

Report paras 616-617

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.

Report paras 618-619

CPR 47.18

Proposal 62

Rules similar to those listed in Schedule 1 to the CPR should be retained in the HCR with only such changes as may be necessitated by changes to other parts of the HCR.

Report paras 620-622

CPR Schedule 1

Proposal 63

Rules making mediation mandatory in defined classes of case, unless exempted by court order, should be adopted.

Report paras 623-643

Rule 24.1 of the Ontario Rules of Civil Procedure

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.

Report paras 644-645

Proposal 65

A statutory scheme should be promoted to enable one party to litigation to compel all the other parties to resort to mediation or some other form of ADR, staying the proceedings in the meantime.

Report paras 646-651

Notice To Mediate Regulation (BC Reg 127/98) under the Insurance (Motor Vehicle) Act; Notice to Mediate (Residential Construction) Regulation (BC Reg 152/99) under the Homeowner Protection Act; Notice to Mediate (General) Regulation (BC Reg 4/2001) under the Law and Equity Act

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.

Report paras 652-654

Family Law Act 1996, s 29

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.

Report paras 655-661

CPR 1.4(e), 26.4, 44.3(4), 44.5(3)(a)

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.

Report paras 662-672

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.

Report paras 679-683, 692.1

CPR 54.1(2)(a), HCR O 53 r 1

Proposal 70

Provisions should be adopted to facilitate participation in judicial review proceedings by persons interested therein other than the applicant and respondent.

Report paras 679-680, 684, 692.2

CPR 54.1(2)(f), 54.6(1)(a), 54.7, 54.17

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.

Report paras 679-680, 684, 692.3

CPR 54.8

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**.**

Report paras 679-680, 685, 692.4

CPR 54.8

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.

Report paras 679-680, 690-691, 692.5

CPR 54.19(2) and (3)

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).

Report paras 693-701

Proposal 75

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

Report paras 693-701

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.

Report paras 702-707

Proposal 77

An analysis of the system's demands in the light of proposed reforms should be conducted before and after such reforms take effect in order to determine how judges, masters and administrative staff (including staff in any newly defined posts) should best be deployed so as to respond effectively to those demands.

Report paras 708-711

Proposal 78

Training programmes to familiarise judges and other court staff with any reforms adopted, tailored to the knowledge and skills required to implement such reforms, should be established and made compulsory for civil judges, masters and all other relevant court staff.

Report paras 712-715

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.

Report paras 716-721

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.

Report paras 722

建議 1

訂定明確列出民事司法制度首要目標的條文，以確立在詮釋訴訟程序規則及裁決訴訟程序問題時，須依循的基本原則。

報告第 225 至 233 段
CPR 1.1 to 1.3; Supreme Court Rules of South Australia Rule 2; NSW Supreme Court Rules (amendment No 337) 2000, 20 December 1999, r 1.3

建議 2

訂定規則，規定法庭有責任施行案件管理，和以此爲司法程序的首要目標之一，並訂明案件管理概念範圍內的各個程序。

報告第 240 至 256 段
CPR 1.4, 3.1(2), 3.3; NSW Supreme Court Rules, r 26

建議 3

訂定規則，列明法庭管理案件時具有的權力，這些權力包括法庭可自行頒下與案件管理有關的命令。

報告第 240 至 256 段
CPR 3.1, 3.3

建議 4

與有關商業團體、專業團體、消費者團體和其他團體攜手合作，釐定適用於香港的訴訟前守則，以期爲某些特定類別的糾紛，確立開展訴訟前合理行爲的標準。

報告第 258 至 275 段
訴訟前守則的實務指引及現有 5 組守則

建議 5

訂定規則，使法庭在頒下與案件管理及訟費有關的命令時，可以把與訟各方在訴訟前的行爲列爲考慮因素，並使法庭可就那些無理地違反訴訟前守則的行爲作出懲處。

報告第 258 至 275 段
CPR 3.1(4), 3.1(5), 3.9(e), 44.3(5), 48.1and 48.2；及訴訟前守則的實務指引。

建議 6

簡化開展法律訴訟的程序，將開展訴訟的形式減至兩種，消除令狀、原訴傳票、原訴動議及呈請書的分別。

報告第 276 及 277 段
CPR 7and 8

建議 7

採納 CPR 第 11 部，以規管質疑法庭司法管轄權或要求法庭拒絕行使司法管轄權的申請。

報告第 278 段
CPR 11

建議 8

制定以 CPR 第 14 部爲藍本的條文，訂定程序，使與訟人在承認申索時，或在被告人提出有關清償法庭判決欠款的條件時，可以依循。

報告第 279 至 283 段
CPR 第 14 部

建議 9

訂定以簡化狀書爲目的之規則，規定狀書須爲一份簡明扼要的陳述書，闡明申索的性質及依據的事實，並列舉任何相關的法律論點。

報告第 284 至 288 段及 298 段
CPR 16.2, 16.4, 16.5, 16PD

建議 10

引入規則，訂明被告人須作出實質的抗辯，說明否認原告人的指控的理由及提出實在的案情。

報告第 289 段及 298 段
CPR 16.5

建議 11

規定訴訟人須以事實確認書聲明其狀書內容屬實。一旦證明事實確認書是虛假，而訴訟人又並非真誠相信所述屬實，便犯了藐視法庭罪。

報告第 290 至 292 段及 298 段
NSW Supreme Court Rules, r 15 and r 15A; CPR 22.1, 22.2, 32.14 and 22PD

建議 12

訂定規則，確立法庭有權主動或因應某方的申請，及按照首要目標所定的原則，要求澄清狀書的內容或要求就狀書提供更多的資料。

報告第 293 至 295 段及 298 段
CPR 18, 18PD

建議 13

訂定規則，令狀書修訂更難得到批准，藉以鼓勵與訟各方在訴訟程序初期，便謹慎撰寫案由陳述書。

報告第 296 至 298 段
CPR 17

建議 14

把簡易處理訴訟或訴訟中爭議點的準則，更改爲“有實在的成功機會”，意思是定下一個較低的要求，使訴訟人更易取得簡易判決。在訴訟程序過程中，要利用簡易程序處理案件時，也可以使用這個較低的準則。訴訟或訴訟中的爭議點，不論是由原告人或被告人提出，如果沒有實在的成功機會，不可進展至審訊的階段。但如果涉及重大的公眾利益而必須進行審訊的話，則作別論。

報告第 299 至 316 段
CPR 3.4, 13, 24

建議 15

訂定以 CPR 第 36 部爲藍本的規則，以規管和解提議及繳存款項於法庭的安排，以及連帶的訟費後果。

報告第 317 至 323 段
CPR 36, 44.3; New South Wales, Supreme Court Rules 1970, rr 22.2, 52 and 52A

建議 16

滙集和精簡批予中期濟助、中期款項及訟費保證金的規則，並參照 CPR 25 及 CPR 25PD，訂定實務指引，列出適合和法庭認可的申請中期濟助和命令的格式。

報告第 324 至 331 段
CPR 25, 25PD

建議 17

對於在香港司法管轄範圍外進行或將進行的訴訟（而訴訟人又沒有打算在香港進行同樣實質的訴訟），訴訟人可藉資產凍結令（*Mareva* injunctions）和/或容許查察令（*Anton Piller* orders），取得中期濟助。

報告第 324 至 331 段
CPR 25.4

建議 18

訂定規則，使與訟各方在被告人送達抗辯書後，必須盡快填寫及存檔一份問卷，將指定的資料呈交法庭，使法庭可以評估訴訟程序上的需要，從而訂下時間表，並就訴訟的進行，給予適當的指示。這些指示包括定下訴訟進度指標，除非情況非常特殊，否則指標不可變更。

報告第 332 至 358 段
CPR 26.3

建議 19

訂定規則，使法庭在編定時間表及給予指示時，有極大的靈活性。這些規則亦鼓勵與訟各方就程序問題達成合理協議，除非協議影響進度指標裏的特定事項，否則與訟各方無須請示法庭。

報告第 332 至 358 段
CPR 2.11, 26, 29

建議 20

代替建議 18 和 19 的另一方案，就是探討以“專責法官制度”來管理案件是否可行，並研究此制度是否適用於所有的訴訟，還是只限於某些特定的類別。

報告第 359 至 370 段

建議 21

保留特定案件類別，並容許專責法庭頒布程序指引，因應特定案件類別的需要，適切地援引一般規則。

報告第 371 至 375 段
CPR 49 及相關的實務指引

建議 22

考慮爲其他可能合適的案件增設特定案件類別，這些包括複雜的訴訟、無律師代表的訴訟及法庭已頒下集體訴訟令（如引入的話）的訴訟。

報告第 371 至 376 段

建議 23

原則上採用一套程序來處理涉及多方的訴訟，但仍須進一步研究其他司法管轄區所實行並適用於香港的程序。

報告第 377 至 402 段
CPR 19.10 – 19.15, 48.6A; 19BPD

建議 24

訂定規管衍生訴訟的條文。

報告第 403 段
CPR 19.9

建議 25

保留自動透露文件的責任，但 *Peruvian Guano* 這個以文件是否與訴訟有關的透露準則，不應再是衡量訴訟各方透露文件責任的主要尺度。除非訴訟各方另有協議，否則把透露文件的主要準則改爲限於與訴訟直接有關的文件才須透露，就是指訴訟各方所依據的文件，於己方或於對方案情不利的文件，或支持對方的案情的文件。

報告第 404 至 425 段
CPR 31.6, 31.8

建議 26

訴訟各方可自行就文件透露的範圍和方式達成協議。如果未能達成協議，亦祇須透露根據主要準則所必須透露的文件，該些文件也限於經合理搜尋所能取得的文件。至於搜尋是否合理，則取決於涉及文件的數目、法律程序的性質和複雜程度、查取文件的難度及文件的重要性。

報告第 404 至 425 段
CPR 31.7, 31.10

建議 27

代替建議 25 及 26 的另一方案，就是參照新南威爾士省所採用的制度：文件的透露，不會自動進行，而是應訴訟人彼此之間的要求進行。如果需要對方透露更多的文件的話，還要獲得法庭的命令才可進行。

報告第 404 至 425 段
Part 23 of the NSW Supreme Court Rules 1970

建議 28

參照 CPR，訂定規則，使訴訟各方可在法律程序展開前，要求對方透露文件；各方亦有權要求非與訟者透露文件。

報告第 404 至 425 段
CPR 31.16, 31.17

建議 29

法庭理應運用其管理案件的權力，爲當前處理的個別案件，訂定適用的文件透露方案。法庭應享有最終的酌情權，就文件透露範圍和方式這兩方面定下指示。法庭有權收窄或擴濶透露的範圍，甚至在認爲有必要和與訴訟相稱的情況下，把範圍擴闊至包含全面 *Peruvian Guano* 式的透露。

報告第 404 至 425 段
CPR 31.13

建議 30

採取以下一項或多項的策略，訂定以減少非正審申請爲目標的規則：—

- 鼓勵與訟各方和衷合作，達成與程序有關的協議（但法庭保留最終的權力，可取消或更改這些協議）。
- 授予法庭權力，在適當的時候，主動頒下與程序有關的指示而事前無須聽取訴訟人的陳詞（但受影響人士其後有權申請取消或更改該些指令）。
- 法庭所頒下的命令，須註明不遵從命令時隨之而來的後果，而申請寬免這些後果的責任，則由違令的一方承擔。至於批准與否，由法庭酌情決定。

報告第 426 至 441 段
CPR 1.3, 1.4(2), 2.11, 3.1(3), 3.3, 3.8, 3.9

建議 31

訂定規則，目的爲精簡非正審申請的程序，這些規則包括： —

- 法庭可以根據呈交的文件來處理申請，無需進行聆訊。
- 如案件有所爭議，而又很可能會上訴至原訟庭法官處，便無須由聆案官處理。
- 訂定條文，在可以節省訟費的情況下，使用現代化的通訊方法進行聆訊及免除與訟各方出庭應訊。

報告第 426 至 429 段及 442 至 450 段
CPR 23.8, 23PD §6.1-7

建議 32

法庭應積極在非正審申請完結時，盡可能即時評定訟費。

報告第 426 至 429 段及 451 至 462 段
CPR 43.3, 44.2, 44.7, 44PD §13.2, §13.5; 45PD §14.1

建議 33

法庭目前根據《高等法院規則》第 62 號命令第 8(1)條規則而享有的權力，由另一種權力代替，就是倘若訴訟人的律師或律師的僱員有任何失當、不合理或疏忽的行爲或遺漏，導致浪費了訟費，法庭有權頒下命令，由該些律師承擔虛耗的訟費；又或在訴訟人承擔訟費後，如其律師或律師的僱員有上述的行爲或遺漏，令法庭認爲由該訴訟人支付訟費是不合理的，法庭亦有權頒下命令，由該些律師承擔虛耗的訟費。

報告第 463 至 467 段
《高等法院規則》第 62 號命令第 8(1)條規則；s 51 of the Supreme Court Act 1981 as amended by s 4 of the Courts and Legal Services Act 1996; CPR 48.7

建議 34

擴大法庭處分律師虛耗訟費的權力，使法庭也可頒令由大律師承擔虛耗的訟費。

報告第 463 至 468 段
《高等法院規則》第 62 號命令第 8(1)條規則；Supreme Court Act 1981, s 51(6), as amended by s 4 of the Courts and Legal Services Act 1996; CPR 48.7

建議 35

訂定規則，給予法庭明確的權力，規管訴訟各方所擬提出的證據。法庭有權發出指示，說明哪些爭議事宜需要訴訟各方提出證據來證明，及法庭需要何種性質的證據來裁決該些爭議事宜，以及訴訟各方應用何種方式向法庭提出這些證據。法庭亦有權拒絕接納一些本可接納的證據，也有權局限盤問的範圍。

報告第 469 至 479 段
CPR 32.1

建議 36

爲免產生疑問，修訂《高等法院條例》，賦予法庭訂定規則的明確權力，使法庭有權限制相關證據的用途，以求達到民事司法制度的首要目標。

報告第 469 至 479 段
比較 Civil Procedure Act 1997, Schedule 1, para 4

建議 37

訂定規則，使法庭可以更靈活地處理證人陳述書，又明確規定法庭可以准許證人在合理的情況下，增補添加其陳述書的內容。

報告第 480 至 483 段
CPR 32.5(3) and (4)

建議 38

訂定條文，賦予法庭權力，規管擬引用專家證據的範圍和用途，以求制止訴訟各方傳召過多和不適合的專家證人。

報告第 485 至 493 段及 518 段
CPR 35.1, 35.4, 35.6, 35.9

建議 39

採取措施，務求專家證人能夠不偏不倚、獨立地作供：—

- 聲明專家證人的責任是協助法庭，而且這個責任凌駕於他對當事人或付報酬給他的人的責任。
- 申明專家證人必須不偏不倚和保持獨立，及不應偏袒某方。
- 附加專家證人的行爲守則，專家證人須確認他們首要向法庭負責，及表明願意遵循行爲守則行事，而法庭亦以此作爲聽取專家報告或證據的條件。
- 專家證人撰寫報告以供法庭使用時，須寫明他草擬報告的基礎 — 即其當事人不論以何種形式給予他的所有重要指示的實質內容。如有必要，法庭可撤銷這些指示所享有的法律專業保密權，但訴訟人與其專家證人之間互遞的信息的進一步透露，則仍受合理限制。
- 准許專家以其本人名義和身份向法庭尋求指示而無需通知訴訟各方，涉及的有關費用按法庭指示由訴訟某方或各方承擔。

報告第 494 至 506 段及 518 段
CPR 35.3, 35.10, 35.14; NSW Supreme Court Rules, Schedule K and r 39

建議 40

訂定程序，使法庭可以指示訴訟各方聯合聘請同一專家，並共同承擔所涉的費用；同時訂定恰當的規則，用以規管這些專家的權利、責任和功能。

報告第 507 至 518 段
CPR 35.7, 35.8

建議 41

訂定規則，使法庭有明確的權力管理案件的審訊過程。法庭有權拒絕接納本可接納的證據，及局限大律師盤問和陳詞的範圍。但法庭運用這些權力的同時，不能影響訴訟各方得到公平審訊的權利，以及他們舉證、盤問證人和作出陳詞的合理機會。

報告第 519 至 528 段
Western Australia Supreme Court Rules O 34 r 5A; NSW Supreme Court Rules r 34.6AA; CPR 1.4(1), 2.11, 3.9(g), 29.9(2), 29.5, 32.1

建議 42

引入規定，訂明就有關非正審的上訴事宜，申請人必須取得原訟法庭或上訴法庭的許可，才可向上訴法庭提出上訴。

報告第 529 至 532 段

建議 43

針對所有原訟法庭判決的上訴（即不限於建議 42 中就非正審的上訴事宜所提出的建議），申請人必須取得許可，才可向上訴法庭提出上訴。

報告第 533 及 534 段
CPR 52.3

建議 44

除非法庭認爲申請人有實在的成功機會，或有其他充份的理由，令法庭不得不聆訊其上訴，否則法庭不應給予上訴許可。

報告第 535 至 539 段
CPR 52.3(6)

建議 45

針對管理案件決定而提出的上訴申請，法庭一般不應給予上訴許可，除非該案提出了重要的法律原則問題，足以令法庭認爲給予上訴許可雖不利於減省程序和訟費，但還是值得的，則作別論。

報告第 535 至 539 段
CPR 52, 52PD §4.5

建議 46

針對上訴判決而再提出的上訴，法庭一般不應給予上訴許可，除非該案涉及重要的法律原則或常規方面的問題，又或由於其他充份的理由，令法庭必須給予上訴許可，則作別論。

報告第 535 至 539 段
CPR 52.13

建議 47

若引入規定，訂明申請人須先取得上訴許可，才可向上訴法庭提出上訴，則上訴法庭應享有權力，無須進行口頭聆訊，便可駁回那些全無理據及相當於濫用法庭程序的上訴許可申請，但仍給予申請人最後機會，以書面陳述理由，反對法庭以該些原因駁回其申請。

報告第 540 及 541 段
比較香港終審法院規則，第 7 條規則

建議 48

訂定規則，使法庭更有效率地處理上訴案件的正式聆訊，及使上訴法庭可在案件管理階段，就有關聆訊作出指示。

報告第 540 段及 542 及 543 段
CPR 52PD §§4.6, 4.11, 6.5, 6.6, 15.12 to 15.14

建議 49

上訴法庭聆訊上訴時，應限於覆核下級法庭的決定，但在個別案件適當的情況下，上訴法庭仍有酌情權，將上訴聆訊視爲案件重審。

報告第 544 至 551 段
CPR 52.11

建議 50

用以裁決上訴的各項原則，應同樣適用於原訟法庭及上訴法庭。

報告第 544 至 551 段
CPR 52.11

建議 51

訂定常規，規定法庭行使有關訟費判定的酌情權時，必須以"首要目標"爲原則，考慮訴訟各方在訴訟期間或之前，於處理金錢或案件方面的做法，是否合理。

報告第 552 至 557 段
CPR 44.5(3)(a), 44.14

建議 52

訂定規則，規定律師及大律師(i)須向他們的當事人透露有關收費準則的一切資料；(ii)須向他們的當事人提供當時最準確的資料，即有關該案在各階段及就整體而言（假定該案的律師會繼續委聘大律師），他們預計收取的費用；及(iii)當這些資料及費用預算有更改時，須通知他們的當事人此等修訂或調整，及更改的原因。

報告第 558 至 573 段
New South Wales Legal Profession Act 1987, ss 174, 175, 178, 179, 182 and 183; in England and Wales: Solicitors' Practice Rules 1990, r 15; Solicitors' Costs Information and Client Care Code 1999; CPR 44.2, 44.14(3)

建議 53

採取措施，確保公眾人士在與訟或打算與訟時，可以取得有助他們選擇大律師與律師的資料，即指由該些專業團體所提供，或循其他恰當的途徑而取得的，有關收費、專長及經驗各方面的資料。如有必要，可通過立法來實行上述措施。

報告第 574 及 575 段

建議 54

訂定程序，使所有受到當事人質疑的律師收費，均須由法庭評定。評定的準則，包括考慮律師所做的工作是否必需，處理事務的方法是否恰當，以及相對於律師所做的工作，收費是否公道合理等。而法庭在評定前，不會假定該些收費是合理的。

報告第 576 至 583 段
New South Wales Legal Profession Act 1987, ss 184, 185, 208C and 208D

建議 55

採取步驟，編製適合香港使用的基準訟費。

報告第 584 至 598 段

建議 56

在香港訂定條文，規定訴訟各方定期及按照法庭的命令，互相及向法庭透露當時最準確的資料，即有關案中已承擔及可能承擔的訟費預算金額。

報告第 599 至 604 段
43PD §6.1-6.6; 48PD Schedule of Costs Precedents, Precedent H

建議 57

目前《高等法院規則》第 62 號命令附表 1 第 II 部第 2(5)段的規定，即法庭在評定“對訟當事人之間”的訟費時，對大律師的費用所作的特殊處理方法，應予刪除。

報告第 605 至 607 段
《高等法院規則》第 62 號命令附表 1

建議 58

引入規則，使涉訟各方可在訟費評定時，提出類似 CPR 第 36 部所述定的訟費建議。

報告第 610 至 612 段
NSW Supreme Court Rules, r 22.10

建議 59

假使訂定了基準訟費，便可根據基準訟費而推算在訟費評定時可能批予的訟費款額。倘若某方不滿基準訟費裏有所涵蓋的某項訟費款額，而要求法庭繼續進行訟費評定，但結果卻未能獲批更高的款額的話，法庭在裁決該方應否承擔此項程序的訟費和其數額時，須把此點納入考慮之列。

報告第 613 至 615 段

建議 60

引入程序，使法庭可酌情根據案中文件以書面形式進行暫定訟費評定。倘某方不滿該暫定訟費評定的結果，有權要求法庭進行口頭聆訊，但如在聆訊中該方未能取得更有利的評定的話，則可能受到訟費方面的懲罰。

報告第 616 及 617 段

建議 61

引入規則，並輔以訟費罰則，規定涉及訟費評定的各方，須以指定的形式存檔文件。訟費單須與訟費評定文件冊相互指引參考及佐證。某方若反對訟費單上任何項目，在合適的情況下，須用指定的法庭表格或格式，明確列出反對的理由。

報告第 618 及 619 段
CPR 47.18

建議 62

《高等法院規則》中類似 CPR 附表 1 所列的規則，予以保留，但這些規則必須因應《高等法院規則》其他部分的修訂而有所修改。

報告第 620 至 622 段
CPR 附表 1

建議 63

訂定規則，在劃定的案件類別中，除非法庭另有頒令豁免，否則強制訴訟各方進行調停。

報告第 623 至 643 段
Rule 24.1 of the Ontario Rules of Civil Procedure

建議 64

訂定規則，給予法官酌情權力，要求訴訟各方循“解決糾紛的另類辦法”(ADR)中的一種或多種指定方式，調停糾紛，而其間暫時擱置法律程序。

報告第 644 至 645 段

建議 65

推行一個法定計劃，使訴訟一方可強迫各方一起循調停或 ADR 的其他方式來解決糾紛，而其間暫時擱置法律程序。

報告第 646 至 651 段
Notice To Mediate Regulation (BC Reg 127/98) under the Insurance (Motor Vehicle) Act; Notice to Mediate (Residential Construction) Regulation (BC Reg 152/99) under the Homeowner Protection Act; Notice to Mediate (General) Regulation (BC Reg 4/2001) under the Law and Equity Act

建議 66

訂定法例，使法律援助署署長有權在合適的案件類別中，以申請人須尋求 ADR 作爲批予法律援助的條件之一。

報告第 652 至 654 段
Family Law Act 1996, s 29

建議 67

訂定規則，規定當 ADR 屬非強制性時，若訴訟某方不合理地拒絕尋求 ADR，或在 ADR 過程中不予合作，該方可能被罰訟費。

報告第 655 至 661 段
CPR 1.4 (e), 26.4, 44.3(4), 44.5(3)(a)

建議 68

引入一項計劃，使法庭在專業團體及其他機構的協助下，爲純屬自願接受調停的訴訟人，提供有關調停的資料和設施。

報告第 662 至 672 段

建議 69

進行改革，簡化司法覆核範圍的描述及各類司法覆核濟助的術語。

報告第 679 至 683 段及 692.1 段
CPR 54.1(2)(a),《高等法院規則》第 53 號命令第 1 條規則

建議 70

訂定條文，使與某宗司法覆核相關的人士，儘管並非該宗司法覆核的申請人或答辯人，都可以參與其中。

報告第 679 及 680 段, 684 段及 692.2 段
CPR 54.1(2)(f), 54.6(1)(a), 54.7, 54.17

建議 71

訂定條文，規定司法覆核的申索書須送達答辯人及其他已知與此法律程序相關的人士。

報告第 679 及 680 段, 684 段及 692.3 段
CPR 54.8

建議 72

訂定條文，規定擬在司法覆核程序中提出抗辯的答辯人，須確認獲送達文件及概述所依據的理由。

報告第 679 及 680 段, 685 段及 692.4 段
CPR 54.8

建議 73

訂定條文，闡明法庭撤銷決定的權力，其中包括在不抵觸法例的規限下，自行作出決定的權力。

報告第 679 及 680 段, 690 及 691 段及 692.5 段
CPR 54.19(2) and (3)

建議 74

假如工作小組推薦採納本報告中一系列的建議，那麼爲了實行這些建議，必須訂定一套新的規則，而在訂定新的規則時，可以參照 CPR 或其他司法管轄區的有關規則（再作出必要的修改）。

報告第 693 至 701 段

建議 75

工作小組所推薦採納的改革建議，除了按照建議 74 的方法推行外，也可藉修訂現行的《高等法院規則》來實行，其餘不受影響的《高等法院規則》，則繼續沿用。

報告第 693 至 701 段

建議 76

實施任何改革，都需要充足的資源來配合，尤其要作好安排，確保法官人手和法庭資源充足，使全面的案件管理和其他因改革而須推行的措施得以實行，以及審訊可以按設定的時間表進行。

報告第 702 至 707 段

建議 77

在實施改革的前後，分析推行改革對司法系統需求的影響，從而決定怎樣才能最妥善地調配法官、聆案官及行政人員（包括重新劃定工作崗位的人員），以求有效地應付這些需求。

報告第 708 至 711 段

建議 78

爲法官及其他法庭職員提供培訓課程，幫助他們瞭解各項改革。這些培訓課程須專爲實施改革而設，並提供所需的知識和技巧。所有處理民事法律程序的法官、聆案官及其他相關的法庭職員均須接受培訓。

報告第 712 至 715 段

建議 79

採取步驟，發展法庭現有的電腦化系統，以配合改革的進行。電腦系統不單要提供行政事務上的支援，更要提供案件流程管理、資源調配及資料管理等功能。

報告第 716 至 721 段

建議 80

司法機構應着手研究，並持續監察司法系統的運作，訂立評估運作表現的底線，導引資源的調配，改善法官和法庭職員的培訓，以及評估實施某項改革所帶來的利弊。

報告第 722 段

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THE WORKING PARTY

1. This Interim Report and Consultative Paper is issued by the Working Party appointed by the Chief Justice in February 2000 with the following terms of reference :-

> "To review the civil rules and procedures of the High Court and to recommend changes thereto with a view to ensuring and improving access to justice at reasonable cost and speed."

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

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

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

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

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

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 (Civil Law), 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

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)

3. This Report and Consultative Paper ("this Report") seeks :-

3.1 to report on reforms discussed and implemented in other jurisdictions relevant to possible reforms in Hong Kong;

3.2 to report on the available evidence as to the state of the civil justice system in Hong Kong; and,

3.3 to formulate proposals for possible reform to our procedural rules for the purpose of consulting court users, members of the legal profession and all interested members of the public.

PART I – THE NATURE OF THE PROBLEM

A. THE CIVIL JUSTICE SYSTEM

4. Access to the courts by Hong Kong residents for enforcement of their rights is constitutionally protected by the Basic Law.[1] Substantive legal rights only have meaning if they can be enforced. Someone seeking to give effect to his rights against another person must be able to bring his claim before a court which will find the facts, apply the law to those facts, and, if liability is established, grant relief enforceable by a process of legal execution.

5. Claims may, however, be unmeritorious. The system must therefore ensure that the defendant has a fair opportunity to refute such claims. Principles of procedural fairness must be applied between the parties. A defendant must be given proper notice of the allegations against him and of their evidential basis. This will enable him to assemble contrary evidence and arguments if available. Equally, the plaintiff must be given notice of all aspects of the defendant's case in order to have a fair chance of meeting it. The competing allegations must then be exposed in a manner which permits effective adjudication by the court.

6. The civil justice system discussed in this Report is the system of procedural rules and machinery designed to give effect to the processes described above.

7. In any legal system, only a small percentage of justiciable disputes result in the commencement of legal proceedings. Even fewer cases make it all the way to judgment. However, where the civil justice system is accessible and effective, it has an importance reaching far beyond the cases which it actually processes.

7.1 Every time an individual or a corporation enters into a transaction, whether to buy a flat, take on an employee or invest in a business, the

Notes

1 Article 35: "Hong Kong residents shall have the right to confidential legal advice, access to the courts, choice of lawyers for timely protection of their lawful rights and interests or for representation in the courts, and to judicial remedies. Hong Kong residents shall have the right to institute legal proceedings in the courts against the acts of the executive authorities and their personnel."

underlying assumption is that the rights and obligations mutually undertaken can effectively be enforced.

7.2 Settlements of disputes are reached, whether between insurance companies and accident victims, between government agencies and residents or among quarrelling shareholders in the knowledge that failure to settle may lead to legal proceedings.[2]

8. Conversely, where a civil justice system does not adequately perform its functions, the adverse effects are felt not merely by participants in legal proceedings but throughout society. The effectiveness of rights recognized by law becomes subject to question and the underpinnings of investment, commercial and domestic transactions may be seriously weakened. Where the system becomes inaccessible to segments of society, whether because of expense, delays, incomprehensibility or otherwise, such persons are deprived of access to justice.

Notes

2 This does not apply to those transactions and disputes which involve parties who are ignorant of their legal rights and duties and give no consideration to getting legal advice or to the possibility of legal proceedings. Studies in other jurisdictions indicate that such parties are likely to be relatively few: see e.g., Hazel Genn: *"Paths to Justice, What People Do and Think about Going to Law"* (Hart Publishing, 1999), Chap 3.

B. PRESSURES FELT BY MANY CIVIL JUSTICE SYSTEMS

B1. Historically

9. Historically, civil justice systems have from time to time been subjected to criticism for failing to meet current needs. This is hardly surprising since such needs inevitably change with social and economic conditions. With society's modernisation and technological advances, there has been a sharp increase in the number, rapidity and complexity of transactions matched by increases in the scope and complexity of legislation and case-law, testing the ability of the civil justice system to cope with the resultant body of legal proceedings.

10. When subjected to such pressures, legal systems have often been criticised for being too slow, too expensive and too complex or cumbersome when dealing with civil disputes. This has led periodically to the commissioning of reports looking into possible reforms.

11. Lord Woolf points out that since 1851 :-

> "..... there have been some 60 reports on aspects of civil procedure and the organisation of the civil and criminal courts in England and Wales."[3]

12. Of these, as Professor Michael Zander QC points out, there have been :-

> "..... no fewer than five since the Second World War – the Evershed Report in 1953, the Report of the Winn Committee in 1968, the Cantley Working Party in 1979, the Civil Justice Review in the late 1980s and then Woolf."[4]

13. Some twenty-five years ago, a Justice Report, speaking of the English system of civil procedure, stated :-

> "It is too slow, too expensive, too cumbersome and too formalistic. The roots of these defects do not lie in a lack of simplicity, but in the underlying principles and practices upon which the system itself, and the preconceptions of those who administer it (judges, masters, barristers and solicitors) are based."[5]

Notes

3 WIR, p 4, §2. *Please see Abbreviations.*

4 Michael Zander QC, *"The State of Justice – The Hamlyn Lectures, 1999"* (Sweet & Maxwell, London 2000), p 27.

5 *"Going to Law – A Critique of English Civil Procedure"* – Report of Committee chaired by Sir John Foster (Stevens & Sons, 1974), §75.

14. These criticisms struck a sympathetic chord with Australian commentators who explored similar problems in a series of articles published in 1975.[6]

B2. Current criticisms of civil justice systems in other jurisdictions

15. In recent years, disquiet has again been expressed in many common law jurisdictions regarding the adequacy of existing civil justice systems.

16. In England and Wales, in his Interim Report issued in June 1995, Lord Woolf stated :-

> "Throughout the common law world there is acute concern over the many problems which exist in the resolution of disputes by the civil courts. The problems are basically the same. They concern the processes leading to the decisions made by the courts, rather than the decisions themselves. The process is too expensive, too slow and too complex. It places many litigants at a considerable disadvantage when compared to their opponents. The result is inadequate access to justice and an inefficient and ineffective system."[7]

17. In July 1996, in his Final Report, Lord Woolf elaborated as follows :-

> "The defects I identified in our present system were that it is too expensive in that the costs often exceed the value of the claim; too slow in bringing cases to a conclusion and too unequal: there is a lack of equality between the powerful, wealthy litigant and the under-resourced litigant. It is too uncertain: the difficulty of forecasting what litigation will cost and how long it will last induces the fear of the unknown; and it is incomprehensible to many litigants. Above all it is too fragmented in the way it is organised since there is no-one with clear overall responsibility for the administration of civil justice; and too adversarial as cases are run by the parties, not by the courts and the rules of court, all too often, are ignored by the parties and not enforced by the court."[8]

18. In Australia in 1996, Sir Gerard Brennan, a former Chief Justice, addressed a major conference in the following terms :-

Notes

6 Mr Justice R A Blackburn, *"Updating Civil Court Procedures for the 1980s"* (1975) 49 ALJ 374; J Daryl Davies QC, *"Updating Civil Court Procedures for the 1980s"* (1975) 49 ALJ 380; Sir Richard Eggleston, *"What is Wrong with the Adversary System"* (1975) 49 ALJ 428; P D Connolly QC, *"The Adversary System – Is It Any Longer Appropriate?"* (1975) 49 ALJ 439.

7 WIR p 4, §1.

8 WFR, p 2, §2.

> "The overwhelming problem is access to justice – the perennial difficulties of cost and complexity. There is every indication that these difficulties will intensify ..... The courts are overburdened, litigation is financially beyond the reach of practically everybody but the affluent, the corporate or the legally aided litigant; Governments are anxious to restrict expenditure on legal aid and the administration of justice. It is not an overstatement to say that the system of administering justice is in crisis. Ordinary people cannot afford to enforce their rights or litigate to protect their immunities ... If the burden of litigation will increase, some solutions must be found and practical solutions are likely to be radical."[9]

19. A year earlier, in influential articles written by Mr Justice D A Ipp of the Supreme Court of Western Australia, the concerns had been put as follows :-

> "It is sufficient to state that there is a general perception that the administration of justice is unable to cope with the vast increase in litigation, and injustices through unnecessary delays, excessive costs and other causes are rife. Pessimism and cynicism about justice and the legal system abound. This has led to what has been described as a loss of faith in the adversary system."[10]

20. Similar sentiments were expressed in March 1995 in Ontario. The First Report of the Attorney General's Civil Justice Review described the position in these terms :-

> "Unreasonable delay in the disposition of disputes is, indeed, 'the enemy of justice and peace in the community'. It leads inevitably to unreasonable costs. It breeds inaccessibility. It fosters frustration, and frustrates fairness. The administration of justice falls into disrepute. People become alienated.
>
> Patterns of this nature have been developing in Ontario over the past number of years. Unacceptable delays and mounting costs, with their attendant implications for inaccessibility and mistrust of the system, have become endemic.
>
> Backlogs are mushrooming on the crowded urban calendars of Toronto, Ottawa, Windsor, Brampton, Newmarket and Whitby, to name only the hardest hit centres. There is more civil litigation. It is more complex. It takes longer to prepare, to settle and to try. It is fostered by an increasingly 'rights-oriented' and litigious society; enhanced in the prism of mass media coverage; and nurtured by a continuing onslaught of legislation from all levels of government giving people more and more opportunities to go to court.

Notes

9 Sir Gerard Brennan, *"Key Issues in Judicial Administration"* (1997) 6 Journal of Judicial Administration 138, 139; quoted in GTC, p 24.

10 Mr Justice D A Ipp, *"Reforms to the Adversarial Process in Civil Litigation"*, Pt I (1995) 69 ALJ 705; Pt II 69 ALJ 790; at 705.

> These developments pose serious threats to the civil justice system which, simply put, is in a crisis situation."[11]

21. Such problems are not confined to common law countries but tend to be shared in developed countries of various legal backgrounds. Adrian Zuckerman, editing a volume[12] of comparative surveys of the civil justice systems in a number of countries,[13] commented as follows :-

> "A sense of crisis in the administration of civil justice is by no means universal, but it is widespread. Most countries represented in this book are experiencing difficulties in the operation of their system of civil justice. Whether the difficulties take the form of exorbitant costs or of excessive delays, they have serious implications."[14]

22. Indeed, as the Australian Law Reform Commission ("ALRC") states :-

> "..... it is difficult to find a civil justice system in the world which does *not* have problems relating to cost and delay, concerns about levels of access, representation and resourcing, and questions about the management of disputes and litigation."[15]

B3. The main defects identified

23. Some commentators, notably Professor Genn[16] and Professor Zander,[17] have pointed to the paucity of empirical research into the nature, extent and causes of problems of legal access. Nonetheless, as indicated in the preceding section, it is apparent from the literature that a widespread consensus exists as to the nature of the problems afflicting civil justice systems.

Notes

11 At para 1.1. This Report and the Final Report can be read or downloaded at <http://www.attorneygeneral.jus.gov.on.ca>.

12 *Civil Justice in Crisis*, Adrian A S Zuckerman (Ed) (OUP 1999).

13 Including the United States, England and Wales, Australia, Germany, Japan, Italy, France, Brazil, Greece, Spain, Portugal, the Netherlands and Switzerland.

14 *Op cit*, Chap 1 Adrian A S Zuckerman: *Justice in Crisis: Comparative Dimensions of Civil Procedure*. Holland, Germany and to some extent Japan (which has a very low rate of litigation) were notable exceptions.

15 ALRC No 89, p 7.

16 Hazel Genn: *"Paths to Justice, What People Do and Think about Going to Law"* (Hart Publishing, 1999), p 1.

17 Michael Zander QC, *"The State of Justice – The Hamlyn Lectures, 1999"* (Sweet & Maxwell, London 2000), p 28.

24. The list of defects identified by Lord Woolf as set out in the Evaluation of the English reforms published by The Lord Chancellor's Department is typical. Lord Woolf found that :-

- litigation was too expensive, in that costs often exceeded the value of the claim;
- litigation was too slow in bringing a case to a conclusion;
- there was a lack of equality between litigants who are wealthy and those who are not;
- litigation was too uncertain in terms of time and cost;
- the system was incomprehensible to many litigants;
- the system was too fragmented since there was no clear overall responsibility for the administration of civil justice;
- litigation was too adversarial as cases were run by the parties and not by the courts with the rules all too often ignored by the parties and not enforced by the courts.[18]

B4. The desired characteristics of a civil justice system

25. The literature also shows a broad consensus as to the desirable characteristics of a well-functioning legal system. Another list produced by The Lord Chancellor's Department in its Evaluation[19] may be taken to include typical desiderata :-

- The system should be just in the results it delivers.
- It should be fair and be seen to be so by :-
  - ensuring that litigants have an equal opportunity, regardless of their resources, to assert or defend their legal rights;
  - providing every litigant with an adequate opportunity to state his own case and answer his opponent's;

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18 EF, §1.7.

19 EF, §1.10, reproducing WIR, p 2, §3. See also WFR, p 2, §1. For a similar list produced by Hong Kong commentators, see W&B, Prof M Wilkinson & J Burton, p 326.

- treating like cases alike.

- Procedures and cost should be proportionate to the nature of the issues involved.
- It should deal with cases with reasonable speed.
- It should be understandable to those who use it.
- It should be responsive to the needs of those who use it.
- It should provide as much certainty as the nature of particular cases allows.
- It should be effective, adequately resourced and organised.

B5. The principal perceived causes of the maladies

26. The faults in the civil justice system are generally seen to be the product of distortions caused by its adversarial design. As Mr Justice Ipp put it :-

> "There is a striking similarity in Australia, England and America amongst the views of leading judges and commentators as to the causes of the defects in the administration of justice and as to the measures which should be taken to combat them.
>
> The reforms already implemented or being proposed in the three countries are predicated upon the proposition that 'the principal cause of problems in our system of civil dispute resolution is the unqualified acceptance of the adversarial ethic'[20]....."[21]

27. Those faults are thought to be exacerbated by the impact on that design of other factors such as a perceived "litigation explosion", the rapid growth and, in some quarters, falling standards, of the legal profession and the inadequacy of judicial resources. [22]

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20 Davies and Sheldon, *"Some Proposed Changes in Civil Procedure: Their Practical Benefits and Ethical Rationale"* (1993) 3 JJA 114.

21 Mr Justice D A Ipp, *"Reforms to the Adversarial Process in Civil Litigation"*, Pt I (1995) 69 ALJ 705; Pt II 69 ALJ 790; at 725.

22 *Ibid*, at 706: "The term 'litigation explosion' has been used so often that it has tended to lose its meaning and its impact. There has, however, been a vast, continuing increase in litigation, not only in Australia but throughout the common law world, and this is the principal cause of the problems now being experienced."

28. The adversarial operation of the English system of procedure was described by Cyril Glasser as follows :-

> "English civil litigation has always been regarded as a predominantly voluntary system in which the parties play a dominant role in formulating and developing the demand for a remedy and the presentation of the factual and legal issues for determination by the court. Within this framework the parties are free to bargain for settlement, within or without the available court procedures, and to withdraw the case at any stage prior to judgment. By contrast, the court, representing the wider public interest in the peaceful resolution of disputes, remains neutral and inactive towards the parties, regulating the way in which the disputants must proceed if they are to obtain finality in the action and responding only to interlocutory applications made to it and the necessity to deliver judgment after a trial has taken place."[23]

29. The Hong Kong procedural system follows the same design and exhibits the same features, described as follows by Professor Michael Wilkinson :-

> "The basic features of the conventional adversarial system of justice are:
>
> (1) the decision whether or not to commence proceedings is left to the initiative and discretion of the parties; so is the decision whether to appeal;
>
> (2) the decision whether or not to attempt to negotiate a settlement (and the form and terms of any settlement) is left to the discretion of the parties;
>
> (3) the speed at which pre-trial proceedings progress is left largely to the initiative and discretion of the parties; so is the manner and speed of execution of judgment;
>
> (4) the collection and introduction of evidence rests exclusively in the hands of the parties;
>
> (5) the trial takes place as one continuous process; and
>
> (6) at the trial the judge conveniently plays a passive role.
>
> The adversarial process also recognises the fundamental nature of the principles of orality and the parties' day in court."[24]

30. It should perhaps be stressed that in this Report and in the literature generally, criticisms are made of the adversarial system only in so far as its undue application produces procedural distortions. Common law

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23 Cyril Glasser, *Civil Procedure and the Lawyers - The Adversary System and the Decline of the Orality Principle* (1993) 56 MLR 307. For a similar description of the system in Australia, see Mr Justice D A Ipp, *"Reforms to the Adversarial Process in Civil Litigation"*, Pt I (1995) 69 ALJ 705; Pt II 69 ALJ 790; at 712.

24 W&B, pp 5-6.

commentators are not suggesting abandonment of the adversarial system nor its replacement by an inquisitorial one.

31. This was emphasised by Lord Woolf :-

> "I do not propose that we should abandon our adversarial and oral tradition in England and Wales in favour of an inquisitorial system where the court takes the leading role in determining issues and commissioning evidence. The approach I am advocating is to preserve the best features of the present adversarial system while giving a more interventionist management role to the courts in order to prevent the excesses which at present distort the system."[25]

32. Mr Justice Ipp was of the same view. He stressed that certain aspects of the adversarial system are immutable and crucial to fairness in the proceedings.[26] These are the principles which require the application of and appearance of compliance with, the basic rules of natural justice precluding bias and requiring the court fairly to hear both sides.

33. These principles are reflected, for example, in decisions holding :-

33.1 that the mode of presentation of each party's case (as to the evidence to call, the questions to ask in cross-examination and so forth) rests with counsel and is not to be dictated by the judge;[27]

33.2 that in a civil case, in the absence of the parties' acquiescence, the judge is not entitled himself to call a witness;[28] and,

33.3 that the judge must avoid descending into the arena by, for instance, taking over the examination of a witness, lest he appear to have lost his impartiality.[29]

34. It is the excessive and inappropriate application of such principles which gives rise to counter-productive results. For instance :-

34.1 Pleadings are supposed to identify the issues between the parties, promoting fairness and trial efficiency by preventing surprise. Yet in

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25 WIR p 29, §15.

26 *Op cit*, at 716.

27 *Tay Bok Choon v Tahanson Bhd* [1987] 1 WLR 413 at 417; *Giannarelli v Wraith* (1988) 165 CLR 543.

28 *Re Enoch & Zaretzky, Bock & Co* [1910] 1 KB 327 at 332-3, 337.

29 *Jones v NCB* [1957] 2 QB 55 at 63; *Yuill v Yuill* [1945] 1 All ER 183 at 185.

many cases, the adversarial attitude of the parties and the court's non-interventionist stance result in pleadings which raise numerous superfluous questions. They obscure rather than clarify the issues and complicate the case, delaying or preventing settlement and increasing costs.

34.2 Similarly, discovery is intended to ensure procedural fairness and to promote an equality of arms between the parties. Yet adversarial psychology has frequently led to non-compliance with the parties' obligations of disclosure. Sometimes misuse of discovery is a deliberate tactic, with a wealthy party precipitating expensive interlocutory battles over peripheral documents or overwhelming the other side with masses of documents which are at best of marginal relevance, inflating the complexity and cost of the action.

34.3 Experts are supposed to help the court, yet adversaries use them to excess and often as partisan "hired guns".

34.4 Witness statements are intended to provide mutual disclosure of the relevant evidence to encourage early settlement, prevent surprise and save costs by shortening the trial. Yet, they are often prepared by teams of lawyers as part of the adversarial weaponry, giving rise to great expense and producing a statement which does not represent the maker's evidence so much as the "massaged" case which the lawyers desire to place before the court.

34.5 Passivity on the bench, no doubt with the words of Denning LJ in *Jones v NCB* in mind,[30] may often lead to trials significantly overrunning their time estimates.

35. Commentators argue that distortions such as these flow naturally from the adoption of adversarial principles in procedural structures.

35.1 In the first place, the adversarial design by definition places the parties on a war footing, with each trying to secure victory on a winner-take-all basis. It is not a question of the parties going to the court simply to let an independent arbiter decide who is right, but of going to court to "win" and to "beat" the other side.

35.2 It is therefore an attitude not conducive to openness and the fair identification of the issues, the evidence and applicable law. Lawyers often feel bound to file pleadings raising a whole range of issues, when

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30 [1957] 2 QB 55 at 63.

the case is in reality a one-issue case. Procedural distortions like those already discussed are a natural consequence.

35.3 The psychology of warfare also tends to promote disproportionate efforts and spending on interlocutory and objectively minor aspects of the case. An interlocutory application, whatever its outcome, may be likely to have little impact on the final result of the action. However, the adversarial ethic may present it as a necessary part of the general campaign to defeat and cow the enemy, justifying expenditure of both the parties' and the court's resources.

35.4 Secondly, in promoting the neutrality of the court, procedural rules have tended to leave the progress of the action in the parties' hands. Enforcing procedural rules or interlocutory orders is left up to the litigants who decide whether and when to make an interlocutory application. They also decide when to set the case down for trial. This is a feature of the system which plainly lends itself to delays and possible abuse.

35.5 The "hands off" approach by the court is heavily dependent "upon the lawyers acting honestly and ethically, not only in the presentation of evidence and argument, but in not deliberately delaying or lengthening the proceedings or employing obstructionist tactics."[31] Unfortunately, such reliance is in many cases unjustified. Procedural abuses attributable to lawyers (whether through incompetence, negligence or by design) are not difficult to find. This leads to the running up of costs, increasing delays and the running down of the system's effectiveness.

35.6 Thirdly, the unbridled adversarial system makes it difficult to settle cases. To display willingness to negotiate early in the case is often considered too risky as it may be interpreted as a sign of weakness. In consequence, settlements often occur late in the proceedings and after much money has been unnecessarily spent on steps taken to prepare for a trial that never takes place.

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31 Mr Justice Ipp, *op cit*, at 726.

C. PRESSURES FELT BY THE HONG KONG SYSTEM

36. It is undoubtedly the case that many who are concerned with the civil justice system believe that the abovementioned problems and their causes apply equally to Hong Kong.

37. Such views can be found in the collection of papers edited by Professor Michael Wilkinson and Janet Burton and published in 2000.[32]

37.1 In its Foreword, Mr Justice Litton, then a Permanent Judge of the Court of Final Appeal, stated :-

> "Civil litigation is in crisis. It has been so for some time. The situation has now been aggravated by the sharp increase in the number of writs issued in the High Court following the economic down-turn over the past two years."[33]

37.2 Professor Wilkinson put it in the following terms :-

> "Despite some impressive assessments in comparative tables, there is a widely held perception that the civil justice system in Hong Kong is in urgent need of reform. There are complaints that it is too costly, too slow, too complex and too readily susceptible to abuse. These criticisms are not, of course, peculiar to Hong Kong. Almost identical criticisms have been voiced in recent years in England, Australia, Canada, Singapore and other common law jurisdictions."[34]

37.3 Similar views were expressed by Mr Justice Seagroatt, a judge with particular experience of personal injury cases :-

> "..... the problems which gave the impetus to the Woolf proposals also exist here: delay, unwieldy procedure, excessive use of resources to advance or rebut a claim, and an unacceptable level of cost."[35]

37.4 This was echoed by Mr David Leonard, recently retired from the High Court bench :-

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32 Michael Wilkinson & Janet Burton, *Reform of the Civil Process in Hong Kong* (Butterworths Asia, 2000).

33 W&B, p v. See also Henry Litton, *"Old Wine in New Bottles: Civil Justice Reform in Hong Kong:* (2000) 30 HKLJ 351.

34 W&B, p 2.

35 W&B, p 142.

> "There has long been disillusion with the civil justice system amongst those whom it is supposed to serve. Civil litigation has been slow, complex and expensive and the outcome uncertain."[36]

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36 W&B, p 63.

D. EXPENSE AND THE HONG KONG CIVIL JUSTICE SYSTEM

D1. Perception as major barrier to legal access

38. Where the cost of litigation becomes too high, whether when compared with the resources of potential court users or relative to the amount of the claim, it endangers one's rights, putting them out of reach if they become too expensive to enforce. It also increases inequality between the wealthier and the poorer litigant, the former being able to use his deeper pockets as a strategic or tactical advantage.

39. Lord Woolf said of the English system :-

> "There is no doubt that the expense of litigation is one of the most fundamental problems confronting the civil justice system."[37]

In his Final Report, his Lordship explained why :-

> "Costs are a significant problem because :-
>
> (a) litigation is so expensive that the majority of the public cannot afford it unless they receive financial assistance;
>
> (b) the costs incurred in the course of litigation are out of proportion to the issues involved; and
>
> (c) the costs are uncertain in amount so that the parties have difficulty in predicting what their ultimate liability might be if the action is lost."

40. It is clear that most people consider that the same can be said of Hong Kong. There is a widespread perception that litigating in Hong Kong is prohibitively expensive because lawyers charge fees that are unaffordably high, often disproportionate to the amounts in dispute, and uncompetitive when compared to fees charged in comparable jurisdictions.

40.1 This is persistently the flavour of reporting in the local press. To take a few recent examples (which, it should be stressed, the Working Party does not endorse for their accuracy, but refers to as an indication of public concern) :-

(a) In March 2000, Mr Mark Bradley, a solicitor and Council Member of the Hong Kong Law Society, launched an attack on

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37 WIR p 8, §12.

the level of barristers' fees on the basis of his experience in the Law Society's Claims Committee, alleging that local counsel most in demand "are now charging something like four times as much as their equivalents in the UK."[38]

(b) On 20 July 2000, Sing Tao Daily discussed competition between Hong Kong lawyers, referred to "opinions that Hong Kong's lawyers were ..... charging exorbitant fees" and called for improvements in the variety of services provided by the legal sector.

(c) In her published election platform in the 2000 Legislative Council elections for the Legal Functional Constituency, the Hon Ms Margaret Ng stated: "Prohibitive litigation cost obstructs access to justice and gives lawyers a bad name."[39]

(d) An article in the South China Morning Post entitled *"Justice comes with a hefty price tag"*,[40] refers to parties being prepared to: "..... fly a barrister out first-class from London, put him up at the Mandarin for a few weeks and fork out HK$8,000 an hour than hire a 'costly' Hong Kong counterpart." It adds: "Lawyers may charge breathtaking fees, but the system perpetuates the exorbitant price of going to court." This, it suggests, is because the system "leaves everything in the hands of lawyers" (quoting a partner from a City firm), giving little incentive for lawyers to cut costs and resulting in "lengthy cases and time-consuming applications which do not achieve much."

(e) An article in the SCMP Business News[41] on a "magic circle" of senior counsel referred to them as "Hong Kong's highest-paid

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38 Hong Kong Lawyer, Viewpoint, March 2000. In June 2000, the Hong Kong Bar Association published income figures in relation to junior barristers and referred to "the falsity of wild accusations that Hong Kong Silks are charging three to four times the fees of London silks".

39 She added: "Yet high legal fees may only be part of the cause. Cumbersome procedure is likely to be a major culprit. I believe objective facts and analyses are essential if the issue is to be properly addressed and resolved", with a following reference to this Working Party.

40 SCMP, 18 April 2001, by Jane Moir.

41 *"Magic circle of $ilk"* SCMP, Business 2, 5 June 2001, by Jane Moir. Mr Alan Leong SC, Chairman of the Bar Association, is quoted as supporting a change permitting barristers to publicise their fee rates if they wish to do so.

elite, pocketing millions of dollars and maintaining one of the SAR's longest-running cartels." It continued :-

> "Exactly what the fees are remains the privileged information of the inner sanctum. Solicitors are another source of knowledge, however. One partner at a leading international law firm cites figures of HK$6,000 to HK$12,000 an hour charged by elite barristers. When the case goes to trial there will be "refresher fees" of HK$60,000 to HK$120,000 a day. By comparison, a junior barrister might charge HK$2,500 an hour and HK$25,000 a day. Those in the middle range - senior juniors - would cost in the region of HK$4,000 to HK$5,000 an hour and HK$40,000 to HK$50,000 a day."

(f) In a study completed in March 2001 on "The Manpower Needs of the Legal Services Sector of Hong Kong" conducted by GML Consulting Limited for the Education and Manpower Bureau as part of the review of legal education and training in Hong Kong, interviews were conducted with some of the findings summarised as follows :-

> "All interviewees commented that the leading barristers in Hong Kong are expensive and the majority considered them too expensive, of good quality but too few and too slow. Numerous interviewees mentioned that when they used barristers they would instruct or be instructed to go straight to barristers in London." [42]

> "The overall opinion we have discerned from our interviews is that the levels of fees being charged by a number of solicitors and barristers are declining but the overall cost of using the courts or obtaining an opinion solely in Hong Kong is still out of reach of the majority of the population unless they are eligible for Legal Aid. This is a serious issue for many people and smaller businesses. We have been told that if it is not addressed effectively, there will be a decline in the number of people resorting to the providers of legal services or the courts to assist in solving their problems. With that decline, it is suggested, will come a diminishing respect for the Rule of Law, reducing its effectiveness."[43]

40.2 Use of an internet search engine on Hong Kong lawyers' fees shows a like perception in the articles posted (although again, it should be stressed that the Working Party does not seek to endorse their accuracy). These include articles purporting to give guidance on doing business in

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42 Final Report, p 18.

43 Final Report, p 6. The consultants however did not fully support that view. As they saw it: "..... there is an issue of costs for individuals but, more importantly, the issue is the provider demonstrating the value that has been added for a client using that provider's services. At the moment, that is not happening in all cases but the changing nature of clients' demands and their greater sophistication (plus opportunity to be better informed) than 20 or even 10 years ago mean that there has been progress in this area in recent years." (*Ibid*)

Hong Kong. Some examples, with their authorship as posted on the internet footnoted, are as follows :-

- "Attorneys fees are very high, very little pro bono."[44]
- "The principal concern remains the cost of arbitration in Hong Kong, which can be substantial on account of legal and other professional fees."[45]
- "Cost would appear to be a just complaint; the leading silks in Hong Kong have been known to charge up to HK$200,000 (US$26,000) per day and certainly quotes in excess of HK$100,000 per day are frighteningly common. But the simple fact is that because there are so few of them, competition for the best advice is steep and therefore the best advice doesn't come cheap."[46]
- "..... the average solicitor in Hong Kong charges more in two hours than the average worker earns in a month. In three hours, legal advice can cost as much as a month's salary of a well paid university graduate – who still has to live with his parents in order to make ends meet. If a case does go to court, the legacy of the colonial legal system requires instructing a barrister, who, typically may receive instructions and give advice only through the solicitor – a practice which not only doubles the expense but also creates opportunity for misunderstanding in relaying the facts. Even big business, we are told, finds it cheaper to bring in leading barristers from London, and put them up in hotels during their stay here (in what were, until the Asian financial crisis, among the highest priced hotel rooms in the world) than to hire counsel in Hong Kong."[47]

40.3 It is fair to state that, because they occupy the obvious, high-profile position in litigation, the preponderance of adverse comment has been directed at the Bar (often by solicitors). That is not however to say that

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44 Travis A Wise, of Pricewaterhouse Coopers LLP in California, describing the Hong Kong legal system.

45 *Arbitration in Hong Kong after the Handover*, by Darren FitzGerald, Esq, Senior Associate, Coudert Brothers, Hong Kong, an article promoting the virtues of arbitration in Hong Kong.

46 International Centre for Commercial Law in association with The Legal 500, article on "The Hong Kong Bar."

47 Orlan Lee, Hong Kong University of Science & Technology, in "Media Alarm and the Handover: The 'Right of Abode' Cases and Constitutional Crisis in Hong Kong" October 2000, Humboldt Forum Recht (<http://www.humboldt-forum-recht.de/10-2000/Drucktext.html>). The author was adopting a "going rate" of about HK$4,000 per hour, stated to be "almost double the average US rate". In a postscript to the article, the author reports challenges by colleagues to the views expressed regarding restricted legal access but maintains those views, arguing that high litigation costs mean that ".....the better off party knows that if he outspends his adversary on legal fees, he can either recover them in costs if he wins – or he may deter the other party from continuing his case at all."

the Bar is necessarily either solely or even mainly the branch of the profession contributing to the perception of disproportionate charges. It is easier for media stories to focus on allegedly exorbitant brief fees or daily refreshers than on the build-up of solicitors' time charges over the life of a case, yet experience suggests that the solicitors' charges may significantly exceed those of the barrister in a particular case.

40.4 Published comment has however been critical of the Bar Association's rules precluding transparency in the fees charged by different barristers, making it difficult to "shop around" in the legal services market.

(a) Thus, in April 1996, in commenting on the Attorney General's Report on Legal Services, the Hong Kong Coalition of Service Industries published as its Recommendation 26, that :-

> "The Bar Association should actively encourage the dissemination of information about the services offered and fees charged by barristers."

The Coalition added :-

> "The issue of transparency is so important that mere encouragement by the Administration does not suffice. Instead, the public should have a role in contributing to client education and in monitoring transparency of the legal process."

(b) However, the restrictive rules remain in place. Three successive motions sponsored by the Bar Council under two successive Chairmen to liberalise present professional restrictions on the dissemination of information on fees and services were defeated at General Meetings of the Bar Association.

D2. Cost of legal services and competitiveness

41. Reasonable litigation costs are not only a matter of importance to "the small man". The need for access to an economically priced civil justice system is fundamental to the success of any major commercial or financial centre. International businesses will inevitably need to resolve commercial disputes in the ordinary course of their operations. In so far as this is done through the civil justice system, the cost of litigating and of other legal services forms part of their overheads and becomes part of their transaction costs. If such costs are too high, the competitiveness of the jurisdiction as a place to do business or as a venue for litigation becomes undermined.

42. The legal professional's own interests also suffer in that other, more economic, means of dispute resolution away from the jurisdiction or by

arbitration whether in Hong Kong (often conducted by imported counsel charging lower rates) or elsewhere are likely to be pursued.

43. These considerations were important factors motivating the Woolf reforms in the UK. In his Interim Report, Lord Woolf stated :-

> "An international financial centre has to provide many services for its international operators, including an efficient legal system for resolving the legal disputes which will inevitably arise. The representatives of a leading international bank informed me that they were finding the costs of conducting litigation in the Commercial Court totally beyond reason. Because of this the bank was giving serious consideration to changing the venue for resolving legal disputes from London to New York. This is, therefore, a matter of considerable importance to the City of London and the economy of the country. The Patents judges, recognising the attraction of significantly lower costs in Germany and Holland, have recently proposed rule amendments to limit the scale and cost of discovery in intellectual property cases."[48]

44. The implications for loss of work to the legal profession are clear :-

> "..... in areas of commercial litigation where this country is in competition with other jurisdictions, a comparison of the respective costs involved will increasingly deter prospective litigants from using the English courts."[49]

45. The importance of the federal civil justice system to the Australian economy was also noted by the ALRC :-

> "The Federal Court plays a pivotal role in relation to various sectors of economic activity — a role applauded and supported by corporations and corporate counsel consulted by the Commission. Corporate lawyers and inhouse counsel were of the view that effective judicial management of commercial cases make Australian legal services a key export, and are part of what makes Australia competitive in the Asia-Pacific region and beyond. The Federal Court in its jurisdiction creates and maintains formal and informal rules which keep business transaction costs low, defines and protects rights (for example, intellectual property rights), gives force to contracts, influences private dispute resolution, ensures the security of property, helps to regulate markets and ensure competition, and scrutinises the behaviour of public officials."[50]

46. The relevance of such comments to Hong Kong is obvious. This was forcefully argued by Mr Martin Rogers, then a litigation partner with the firm of Herbert Smith in Hong Kong, as follows :-

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48 WIR p 12, §28.

49 WIR p 12, §27.

50 ALRC No 89, p 8.

> "Hong Kong's primary reputation is as one of the world's leading financial and international trading centres. The effectiveness of financial and commercial markets' depends on a combination of their transparency, speed, robustness and the consistent application of the same, internationally recognised rules to all participants. It should be obvious that each of these four features will only be properly present if there is an efficient, high-quality and fair legal system. So far as financial markets are concerned, this necessitates a capable system of market regulation: dispute resolution must be dealt with on a day-to-day basis by regulators with direct market-supervision powers. So far as commercial trade is concerned, what is required ideally is a fast efficient arbitration mechanism. Ultimately, however, market participants must be able to have recourse to just Courts who will not only have the power to act as the ultimate appellate body and develop a comprehensive commercial common law, but also regulate the regulators themselves."[51]

47. Mr Rogers warns of local uncompetitiveness :-

> "Doubts have been expressed internationally about the effectiveness and competitiveness of Hong Kong's legal services, including those provided by the courts. Other jurisdictions, particularly Singapore, London and Stockholm, are attracting litigants to make use of their procedures for international arbitrations. The Hong Kong legal profession in particular should be asking itself: how do we make the system better; how do we make ourselves more competitive so that we can provide a better service to our clients?"[52]

48. He states that in his experience, high legal costs (among other factors) have already had the effect of driving dispute resolution processes away from the SAR, to the detriment of the legal profession's interests. He suggests that currently, Hong Kong may be "losing at least part of the battle to Singapore."[53] In a recent newspaper article, he is reported as stating that "big multinational corporations are not spending a lot of time litigating in Hong Kong" and that, instead "they are conducting disputes by way of arbitration: more often than not in Singapore or London."[54]

49. This was echoed by Mr Andrew Jeffries, Head of Asian Litigation and Practice at Messrs Allen & Overy :-

> "England is now seen to have a revised and modernised system of civil justice. The reforms are still being refined and will of course take time to bed down, but life is certainly very different to how it was in early 1999 before the rules of civil procedure

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51 W&B, Chap 8: Martin Rogers, *The Role of Solicitors in Civil Litigation,* p 222.

52 *Ibid,* p 224.

53 *Ibid,* p 223.

54 SCMP 18 April 2001, *"Justice comes with a hefty price tag"* by Jane Moir.

> were introduced. Australia, New Zealand and, to a growing extent North America, are seen by businessmen globally also to have modern and efficient systems of civil justice. Closer to home, Singapore in particular is seen to be at the forefront of technology and efficiency in its court processes. Litigation lawyers in Singapore moan regularly about the pressure they are put under to push cases along by ruthless court efficiency and case management. Litigation colleagues in Bangkok lament their own court system by comparison but, perhaps more tellingly, disclose that clients are now turning more to Singapore than Hong Kong as a place to do business and resolve disputes, in part driven by its civil justice efficiency. .....
>
> An efficient system of civil justice is an important feature of Hong Kong as an international business centre. People who do business here want to know that disputes arising on their agreements can be dealt with in a time and cost efficient manner. More than that, potential litigants within Hong Kong need to have confidence that, whilst their rights will be upheld, the simplicity and efficiency of the court system will serve their needs."[55]

50. In an overview of arbitration and mediation in Hong Kong, Mr Christopher To, Secretary General of the Hong Kong International Arbitration Centre, reported market resistance to the level of local barristers' proposed fees as arbitrators and that overseas barristers are sometimes chosen in preference because of fees :-

> "Arbitrators fees range from HK$2,000.00 to HK$6,000.00 per hour. Some arbitrators after persuasion have been requested to reduce their hourly fees and in most cases this has been the result of parties intervention. Arbitrators who have been requested to do so have in fact reduced their fees accordingly to suit market needs. In the majority of cases, local barristers tend to be the ones who are often asked to reduce their fees. This sometimes results in parties choosing overseas barristers as arbitrators instead. Unfortunately this is a true fact of life."[56]

51. The Director of Intellectual Property, Mr Stephen Selby, is reported to have stated that companies are too afraid of Hong Kong's high legal costs to take court action against counterfeiters. He is quoted as saying :-

> "The civil route is particularly expensive, probably much too expensive in Hong Kong ..... The courts are quite capable of dealing with these things, but people are afraid of the costs."[57]

Asian Lawyer reported on this as follows :-

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55 Hong Kong Lawyer, August 2001, pp 81-82.

56 Mr Christopher To, HKIAC, *Summarised points on Arbitration and Mediation.*

57 Jane Moir, "High Court costs curb civil action against counterfeiters", SCMP, 5 July 2001.

> "Hong Kong's High Court costs act as a deterrent to companies that would otherwise take court action against counterfeiters, according to Director of Intellectual Property Stephen Selby. For example, to obtain an interlocutory injunction that will put a temporary halt to intellectual property infringements runs a minimum of HK$250,000. With fees like these, company executives often feel it is not cost-effective to take legal action against counterfeiters since the cost of an all-out legal action to stop the counterfeiter will be greater than the revenue lost due to consumers producing fake products."[58]

D3. Evidence of the expense of litigating in Hong Kong

52. As indicated above, it is difficult to assess how accurate or reliable the perceptions commonly reported in the media are. Hard evidence of the cost of litigation is difficult to come by. The difficulty is not solved simply by asking lawyers how much they charge since the responses may not be meaningful unless accompanied by details of cases which are subject to client confidentiality or legal professional privilege. Thus, it is not a good indication to be told that a partner in a solicitor's firm charges $x per hour or that an associate charges $y, since the impact of such charges cannot be assessed without knowing how many chargeable hours are claimed, and at what professional level, for a particular case of a known weight and complexity – matters likely to be confidential.

53. Quite apart from such objections of principle, lawyers may be reluctant to disclose such information on personal or other grounds, such as fear of losing out to an under-cutting competitor or, conversely, being seen to command excessively low fees.

54. While the fact that litigation in Hong Kong is perceived to involve excessive cost is unquestionable, that perception tends very much to be based on anecdote. But anecdotes tend to relate to extreme cases with a "shock" value. They therefore cannot be taken alone as a reliable measure of overall costs. Nevertheless, the persistence of published disquiet over high fees, even anecdotally, can perhaps be treated as a broad indication that fees are in many cases considered unacceptably high by users of legal services.

55. One of the "hardest" indications of fees recently published is in the answer given by the Secretary for Justice, Ms Elsie Leung, in the Legislative Council on 9 June 1999. It was given in response to a

Notes

58 Asian Lawyer, August 2001, p 8.

question tabled by the Hon Yeung Yiu-chung, the relevant part of which was in the following terms :-

> "Regarding the quality and number of practising solicitors and barristers in Hong Kong as well as the fees they charge, will the Government inform this Council if it knows: ..... the respective numbers of cases in which the public hired practising solicitors and barristers in the past year, together with the respective highest, lowest and average amounts of fees charged in those cases; how the respective average fees compare with those charged by their counterparts in South Africa and the United Kingdom?"

The relevant part of Ms Leung's response was :-

> "I am advised that the Law Society does not have any record as to 'the highest, lowest and average amounts of fees charged' by solicitors.
>
> ..... A recent survey of the fees of Senior Counsel conducted by the Bar Association indicates that the majority of those who responded (72.7%) charge a daily fee of $40,000 to $60,000, and the rest charged a daily fee of $65,000 or above. The majority (54.5%) charge an hourly rate of between $4,000 to $6,000; 11.4% charge an hourly rate of $8,000 or above; and the rest between $6,000 and $8,000.
>
> According to data gathered by the Civil Division of my Department between 1 October 1997 to 31 March 1999, Senior Counsel engaged by that division charged an average daily refresher rate of $53,368 and an average hourly rate of $6,088. Queen's Counsel from England hired by the Civil Division of my Department charged an average daily refresher rate of approximately $35,000 (£2,748.90) and an hourly rate of approximately HK$4,900 (£385.70). The daily refresher rate charged by English Queen's Counsel hired by my department was on average 34% less than that charged by their Hong Kong counterparts, and the hourly rate 19.5% less. However, these figures do not take into account passages and hotel accommodation which must be provided to overseas counsel in addition to their fees.
>
> Apart from these fees for English counsel, I have been unable in the time available to obtain any data in respect of the legal fees charged in South Africa and the United Kingdom."

56. These figures no doubt relate to the top end of charges involving the most sought-after silks for the conduct of heavyweight litigation. This is so since experience indicates that overseas silks admitted are usually of a high quality and often have specialist experience. One may also assume that the Department of Justice is not in the habit of briefing out such work save in relation to heavy cases.

57. The Secretary for Justice's figures indicate that appreciably higher average rates were charged in the top echelons of the local Bar in respect of daily refreshers and hourly charges when compared with the rates charged by overseas counsel. Mention is not made of relative levels of brief fees. One may perhaps proceed on the assumption that the Hong Kong and English brief fees were comparable (since it seems likely that any significant difference would have been mentioned). On that footing,

these figures suggest that in the area of practice mentioned by Ms Leung, average Hong Kong fees are markedly higher than comparable English fees and involve very substantial charging rates viewed in terms of general affordability.

D4. The Working Party's figures

58. The figures provided by the Secretary for Justice fall of course within a narrow ambit. They involve a comparison of the fees which the Department of Justice had to pay English and Hong Kong leading counsel respectively. They do not indicate what other Hong Kong silks or junior barristers would have charged. They say nothing about the cost of engaging solicitors in litigation, presumably because government counsel often assume the role of instructing solicitors.

59. In an attempt to gain a better picture of the state of litigation in Hong Kong as a whole, including the expense of litigating in the Region, the Working Party has sought to examine such evidence as can be extracted with reasonable effort from the Judiciary's records. It is however necessary to make it clear that such information as has been obtained is of limited value and that it should not be given exaggerated weight. While some categories (such as those concerning overall case-loads, waiting-time, etc) represent firm evidence, others may be incomplete or may allow greater scope for human error or inconsistency. Where reference is made to such figures, it is in the belief that they give a broad indication of the picture, but with a certain margin for error, no higher claims being made for such data.

60. Several categories of information were assembled.

- Information from published sources such as Judiciary Annual Reports involving general overall statistics as to case-load, establishment and so forth.

- Information extracted from the Judiciary's own computerised records. These contain more detail but must be approached with caution. The system only began operation on 30 March 1998 and the figures referred to in this Report extend only to 31 December 2000. The system was also designed primarily to assist in the keeping of administrative records rather than for retrieval of management information. It is still in the process of being developed to cater for the latter purpose. Thus, for instance, information identifying a hearing as the trial began to be entered only as from mid-1999. Before then, the software

did not cater for this information to be recorded. It is moreover a system based on de-centralised data input, involving an extensive number of staff. As with all such systems, the quality of data input may vary.

- Information from a study requested by the Working Party of all High Court bills of costs taxed during the 12 month period between 1 July 1999 and 30 June 2000. This aims, among other things, at relating costs claimed and awarded to the amounts claimed. Other features of the cases studied, such as the frequency of interlocutory applications, are also noted.

- Information from a review conducted by the Registrar of the High Court of the nature of representation at certain types of hearing which took place during the calendar year 2000, with the intention of identifying, among other things, the extent to which litigants are unrepresented.

D5. The picture emerging from the taxed bills

61. A Survey Report on the Working Party's examination of bills submitted to the High Court for taxation between 1 July 1999 and 30 June 2000 is in ***Appendix A***. The Tables upon which the Survey Report is based are set out in ***Appendix B***.

62. These bills represent direct evidence of the level of litigation charges levied by both solicitors and barristers. They provide "hard" evidence. Nevertheless, it must be recognised that the figures do not purport to be representative of the costs picture generally in the Hong Kong system and must be approached subject to the caveats mentioned in Appendix A.[59] On this basis, the analysis of the taxed bills set out in Appendix B would appear to justify some of the inferences and comments (using the terminology defined in Appendix A) which follow.

(a) Appendix B Tables 1 to 6, Graphs 1 to 5

63. The first six Tables in Appendix B concern HCAs, referred to in the Tables as "General Civil Actions". They correlate the amounts claimed

Notes

[59] At §§5 to 7.

and recovered[60] in the proceedings on the one hand, with the costs claimed and costs allowed on the other. For present purposes, one may assume that the figures for "costs claimed" represent the fees and disbursements charged to a party by his own lawyers which he is seeking to recover from the other side. The "costs allowed" amount represents what he recovers by way of costs after items disallowed have been taxed off.

64. Where the claim was quantified, the amounts claimed varied from $4,200 to $99,601,700.[61] The amounts eventually recovered ranged from $1 to $52,728,000.[62] It was therefore appropriate to divide the cases into five bands, by amounts claimed and recovered and to show the range[63] and median[64] sums in each category of amounts claimed, amounts recovered, costs claimed and costs recovered.

65. It will be appreciated that a case in which the median amount was claimed may very well not be the same case as the one where the median amount of costs was claimed. Nor are the cases where the median amount and the median sum of costs respectively were recovered, either the same case or the same as either of the two cases mentioned in the preceding sentence. Nevertheless, it is convenient to discuss median values against median values even though such comparisons strictly do not establish proportionality or the lack of it in any particular case. The client paying median costs may have had comparatively good value in recovering the highest – and not merely the median – amount among the range of sums recovered. Nevertheless, the median values are indicative of the spreads within each band and category.

66. Approaching the figures in this way, it may generally be said that costs were markedly disproportionate in the smaller claims. To take the first band (<$120,000) in Appendix B, Table 1, the median recovery was $62,700, against which the median lawyers' bill to the client was for $46,400 (equivalent to 74% of the median recovery), while the median

Notes

60 This is defined in the Report on the Survey as "..... the amount awarded or the settlement sum for a particular action." It is not a reference to recovery after payment or execution.

61 Appendix B Table 3.

62 Appendix B Table 1.

63 That is, the highest and lowest values in the category.

64 A "median" is a "value of a quantity such that exactly half of a given population have greater values of that quantity" (Concise OED).

costs allowed on taxation came to $29,000 (equivalent to 63% of the median costs claimed). If the three figures came hypothetically together in a single case, it would mean that to pursue a claim leading to recovery of $62,700, the plaintiff would have had to pay his lawyer $46,400, but, recovering only $29,000 on the party and party taxation, would have incurred $17,400 in irrecoverable costs so that his effective recovery would come down to $45,300 which is *less* than he had to pay his own lawyers. Of course, this is a hypothetical calculation assuming median values all round. In many cases, the result would be less disproportionate. However, there will also be many cases where the disproportionate outcome is *worse,* with the client recovering less and paying more in costs.

67. The disproportion applies equally to the second band ($120,000 to <$600,000) where all-round median values for amount claimed, amount recovered, costs claimed and costs recovered are the respective sums of $245,100, $230,000, $119,400 and $81,800.[65] If applied to a single hypothetical case, it would mean that to recover $230,000, a claimant would have to pay his lawyers $119,400 (equivalent to 52% of the recovery) and, having had $37,600 taxed off that bill, obtain a recovery reduced to $192,400, his lawyers' bill being the equivalent to 62% of that sum. Again, while some clients will have done better, many will have done worse.

68. It is to be hoped that for claims in these two bands, ie, of up to $600,000, such unacceptably disproportionate figures will have been ameliorated by the increase of the District Court's jurisdiction in respect of monetary claims from $120,000 to $600,000 which took effect on 1 September 2000.[66] After a period of operation, the costs consequences of this jurisdictional change on the cases which have migrated from High Court to District Court should be studied. By O 62 r 23(1A) of the District Court Rules, costs generally allowable on a taxation are not permitted to exceed two thirds of the amount which would have been allowed in respect of the same items on a High Court taxation. This may well influence not only the level of costs allowable but also the level of costs incurred.

Notes

65 Appendix B Tables 1 and 3.

66 District Court Ordinance, Cap 336, Pt IV, as amended by Ord No 28 of 2000, s 21. Commencement: LN 247/2000.

69. In the next band ($600,000 to <$1 million), concerned with a relatively small sample of 19 cases, the disproportion is considerably less marked. The four median figures for amounts claimed and recovered and costs claimed and recovered are $776,900, $720,000, $88,400 and $66,100 respectively.[67] In the hypothetical all-median value case, an effective recovery of $697,700 (after deducting irrecoverable costs) would have cost $88,400 in legal fees, equivalent to about 13% of the recovered amount.

70. The figures in the next band up ($1M to <$3M) do a little worse. The four comparable median figures are $1,613,700, $1,503,000, $234,100 and $190,000. The hypothetical all-median case in this band would mean an effective recovery of $1,458,900 after costs taxation against a legal bill of $234,100 which is equivalent to 16% of the recovered amount.

71. The final band, with a quantified value exceeding $3 million, involves a very small sample of 8 cases. The median amount claimed ($6,076,900) was lower than the median amount recovered ($10,075,300). The median costs claimed and allowed were small sums in comparison, namely $289,200 and $286,600. If the same approach as that adopted above is applied, one arrives at a hypothetical all-median effective recovery $10,072,700 and costs equivalent to 3% of that sum. It is practical, given the smallness of the numbers to consider the actual figures as follows. They tend to indicate that costs are on the whole less disproportionate in relation to larger claims.

Case No.	Amount Claimed	Amount Recovered	Total Costs Claimed	Total Costs Recovered
HCA467/1998	12,348,683	11,124,750	806,648 (7.3%)*	804,798 (7.2%)
HCA18928/98		52,728,000	959,273 (1.9%)	908,783 (1.7%)
HCMP1053/98	13,912,978	13,912,978	255,999 (1.8%)	211,571 (1.5%)
HCAJ238/99	25,318,369	25,530,736	274,249 (1.1%)	270,849 (1.1%)
HCA3195/97	4,806,364	4,806,364	304,077 (6.3%)	302,299 (6.3%)
HCA8163/98	4,560,000	4,560,000	500,445 (11%)	499,576 (11%)
HCMP4237/98		9,025,781	92,086 (1%)	54,855 (0.6%)
HCA2346/96	3,049,366	3,049,366	40,903 (1.3%)	29,608 (1%)

*%age of Amount Recovered

Notes

67 Appendix B Tables 1 and 3.

72. Interesting findings as to the amounts taxed off also emerge. The figures tend to show that :-

- The median percentage taxed off ranges from about 8% to 30% of the bill.[68]
- Solicitors' profit costs are consistently taxed off more than counsel's fees.[69] The former (ignoring the top band) tends to lose about 30% in taxation while the latter tends to be reduced by about 10% or less.[70]

73. A striking finding is that the cost of the taxation process is itself surprisingly high and is often quite disproportionate to the amounts claimed and recovered as well as to the overall costs and when compared to other elements of the total costs bill, eg, the profit costs and counsel's fee elements, especially in the lower bands of claim. Thus :-

- In the two lower bands, the highest taxation bills came in each case to over $50,000, a sum exceeding half of the maximum claim amount in the first band.[71]
- Even the median sums claimed by way of taxation costs were highly disproportionate, being $9,200 and $18,900 in the first two bands.[72] Comparing these to the median awards recovered of $62,700 and $230,000 in these bands, such taxation costs are the equivalent of 15% and 8% respectively of the sums recovered.
- Compared to the median sums in these two bands for total costs claimed ($46,400 and $119,400).[73] the median sums claimed for the expense of taxation represent 20% and 16% of the total costs bill respectively.

Notes

68 Appendix B Table 6.

69 This is likely to be the consequence of HCR O 62, Sch I, Pt 2, para 2(5) discussed later in the section on taxation of costs.

70 Appendix B Table 4.

71 Appendix B Table 1.

72 *Ibid.*

73 Appendix B Table 1.

- A similar comparison of such taxation costs claimed with profit costs claimed ($42,700 and $100,700) shows that taxation costs in these two bands were the equivalent of 22% and 19% of such profit costs respectively.[74]

- In relation to median counsel's fees claimed in these two bands ($61,000 and $60,000), taxation costs claimed are the equivalent of 15% and 32% respectively.[75]

74. As Appendix B Table 5 shows, claimed taxation costs represent a significant percentage of total costs claimed. Taking the median of total costs claimed for all bands of cases ($129,100), the median of taxation costs claimed ($18,600) was equivalent to 14%.

(b) Appendix B Tables 7, 8 and 11 to 14

75. While the costs of the HCAs discussed above were for 336 cases that were all concluded, it is important to note that it was by no means the case that they all went the full distance. In fact, for quantified claims, only 10% were disposed of at trial and another 8% disposed of by a substantive hearing in a non-writ case.[76] In contrast, 27% overall ended in a default judgment, this figure being 58% for cases where the recovery was less than $120,000.[77]

76. This must be borne in mind in assessing the costs examined above. Such costs, and again particularly the costs in the lower bands, must be considered particularly high when one remembers that the median figures worked with include many cases that were disposed of by default or were otherwise concluded early on in the proceedings, eg, by summary judgment or consensually. It is also noteworthy that in the >$3M category two of the eight cases went by default,[78] this no doubt contributing to relatively low overall costs figures for that category.

Notes

74 Appendix B Table 1.

75 *Ibid.*

76 Appendix B Table 7.

77 *Ibid.*

78 *Ibid.*

77. Non-provisional HCA bills (that is, bills other than those below $100,000 and taxed provisionally pursuant to HCR O 62 r 21(4)) were analysed to correlate costs with the stage when the proceedings terminated, showing disproportionately high fees. [79]

77.1 The findings on cases that concluded early suggest that there is already a considerable degree of front-end loading of costs since large bills were issued despite early settlement. The costs may also be said to be disproportionate to the amounts recovered. Thus, for the 63 cases begun by writ, 29 were concluded before the summons for directions with $340,000 as the median sum recovered and median total costs of $129,400 equivalent to 38%.

77.2 For the 13 cases which continued after the summons for directions but were concluded before being set down, the median cumulative costs rose to $198,300 against a median recovery of $593,600, a 33% equivalent.

77.3 Another four cases ended after being set down but before trial. The median cumulative costs rose to $315,300, now 54% of the median amount recovered ($578,800).

77.4 17 cases went to trial, with 16 proceeding to judgment. The cumulative costs were up to $414,600 representing 59% of the median amount of $701,800 recovered.

(c) Appendix B Tables 9 and 10

78. Costs are obviously likely to rise in proportion to the amount of interlocutory activity a case generates. The non-provisional bills for HCAs were accordingly studied to see how far there was such interlocutory activity, going beyond routinely necessary hearings like summonses for directions as indicated in the Notes to Table 9.

79. The results showed a surprisingly high level of interlocutory activity.[80] Of the 77 HCAs with a quantified value, only 10% did not have interlocutory applications beyond the routine. Some 45% had between 1 and 3 additional interlocutory applications. The remaining 45% had more than 3, with 29% in the 4 to 6 additional application band, 9% in the 7 to 9 band and 6% making 10 or more such applications.

Notes

79 Appendix B Table 11.

80 Appendix B Table 9.

80. The results also show that the most frequent interlocutory applications tend to relate to pleadings (39%), discovery (17%), unless orders (18%) and time (52%).[81] The percentages refer to the percentage of total cases involving quantified claims where such an application was made.

(d) Appendix B Tables 15 to 32

81. These Tables perform the same exercises in relation to personal injury cases. Appendix B, Table 15 indicates an even greater disproportion than that prevailing in relation to general civil actions.

81.1 Thus, the median cost of hypothetically recovering the median amount of $100,000 in the lowest band was $127,100 or 127% of the median recovery. Assuming a taxation reducing this to the median costs allowed in the sum of $90,800, the hypothetical plaintiff's effective recovery is reduced to $63,700, representing almost exactly half of the cost of the litigation to the successful party.

81.2 Almost as unacceptable is the disproportion in Band 2 with median costs claimed ($284,900) representing 90% of the amount recovered and, after deduction of irrecoverable costs based on median costs allowed ($236,400), results in a hypothetical effective recovery of $266,500 with costs claimed representing 107% of that sum.

82. Taxation costs in personal injury cases also represent a surprisingly large percentage of the total costs claimed. The median taxation costs figures often exceed 10% of such total costs claimed, with none falling below 6%. Expert fees could also be significant. Taking median values, they ranged from 4% to 10% of the total costs, with the higher percentages incurred in relation to the larger claims.[82]

83. Again, all of these fees must be viewed in the context of the fact that only a very small percentage of personal injury cases actually conclude after trial. Of the taxed bill cases studied, some 87% were disposed of by settlement and only 13% proceeded to trial.[83] Although (as discussed later),[84] many cases settled at the courtroom door, the cost amounts

Notes

81 Appendix B Table 10.

82 Appendix B Table 15.

83 Appendix B Table 21.

84 See Appendix C Table 15.

discussed include cases settling at a somewhat earlier stage and before the full work of preparing for and conducting a trial had taken place.

84. Interlocutory activity in the personal injury cases among the non-provisional taxed bills surveyed[85] was also frequent. While 28% of such cases stayed with their routine hearings, 51% had 1 to 3 applications beyond the routine hearings. Another 16% ran to between 4 and 6 applications with the remaining 6% of cases running to over 7 applications. Again the principal categories of interlocutory application concerned pleadings (35% overall), discovery (24%) and time summonses (28%).[86]

(e) Appendix B total sums

85. The 1,113 taxed bills examined in Appendices A and B also provide an insight into the order of the sums incurred by way of legal costs in gross terms. Adding up the costs claimed in these cases gives a total of $249 million. This represents only what one side in the taxation was charged. If one assumes that the other side was also represented and involved one set of costs, that figure may roughly be doubled to arrive at overall costs of about $500 million.

86. By way of comparison, the entire recurrent expenditure of the Judiciary (comprising 180 judicial officers and 1600 support staff) for 1999-2000 amounted to $928 million.

87. These 1,113 bills, which comprise only those bills for concluded cases submitted for taxation during the 12 month period between 1 July 1999 and 30 June 2000, obviously constitute only a small fraction of the total number of cases processed through the courts. As Appendix C Table 1 indicates, the overall annual case load of the High Court in the three years 1998 to 2000 ranged between about 29,000 and 35,000 cases although, given the expense perhaps understandably, many of the parties were unrepresented.

Notes

85 Appendix B Table 23.

86 Appendix B Table 24.

E. DELAYS AND THE HONG KONG CIVIL JUSTICE SYSTEM

E1. The adverse effects of delay

88. The aphorism that justice delayed is justice denied has obvious substance. The existence of a right is rendered merely theoretical if its enforcement takes so long that the relief comes too late to be of value. The claimant is in substance deprived of relief. Lord Woolf describes the adverse effects of delay in the civil justice system as follows :-

> "Delay is an additional source of distress to parties who have already suffered damage. It postpones the compensation or other remedy to which they may be entitled. It interferes with the normal existence of both individuals and businesses. In personal injury cases, it can exacerbate or prolong the original injury. It can lead to the collapse of relationships and businesses. It makes it more difficult to establish the facts because memories fade and witnesses cannot be traced. It postpones settlement but may lead parties to settle for inadequate compensation because they are worn down by delay or cannot afford to continue."[87]

89. Lord Woolf was referring generally to plaintiffs. But delays may oppress defendants just as much as they frustrate plaintiffs. The burden on an individual, psychological, financial and social, of having an action hanging over his head is substantial and well-recognized. A business facing a claim may lose customers, have its credit withdrawn and otherwise be damaged. Where the claim cannot be made good, it is essential from the defendants' point of view that it be disposed of as soon as possible.

90. In many cases, the matters which cause delays, such as excessive engagement in interlocutory disputes, are also major contributors to unacceptably high litigation costs. It is therefore plainly crucial that the civil justice system in Hong Kong (as elsewhere) should be able to deliver a result efficiently and within a period that is reasonable in terms of the parties' needs.

E2. The mechanisms of delay

91. From the claimant's perspective, the relevant period may be thought to run from the time when, having suffered some injury, he identifies a possible legal claim against a possible defendant, to the time when that

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87 WIR, p 12, §30.

claim is met by an effective remedy. However, the period looked at from the civil justice system's point of view traditionally starts with the plaintiff's invocation of the court's jurisdiction by the issue of proceedings and runs to the time when those proceedings are finally disposed of.[88] The court's records tend to be confined to the post-writ period.

92. The time taken between issue and resolution of proceedings will depend on the nature of the claim and on the manner in which the proceedings are resolved. Some instances may now be considered.

E2.1. Duration where no defence exists

93. Many proceedings do not raise any disputed issues of fact or law. The defendant in such cases may simply have defaulted in some credit transaction and has no defence. The court's machinery is invoked as a means of debt enforcement, to realise a security or to manage an insolvency. The defendant often appears in court merely to ask for time to try to meet his obligations. Where he fails to meet them, the proceedings concern themselves with setting appropriate terms for enforcement.

94. Cases falling within this description include many debt collections listed as High Court Actions ("HCAs"); mortgage enforcement proceedings listed as High Court Miscellaneous Proceedings ("HCMPs"); and insolvency cases involving Bankruptcies and Company Windings-Up. It is obvious that in such cases, the period between institution and resolution of the proceedings will generally be much shorter than for contested proceedings. The case ends rapidly with a judgment by default or by consent; or summary judgment, or judgment at the hearing of an originating summons (in mortgage proceedings); or with an order made in insolvency proceedings. The pressures which such cases exert on the system are therefore relatively short-lived and felt not so much by the judges as by masters and the Registry staff. They involve handling a large volume of cases.

Notes

88 The practical possibility and means of enforcement of any judgment and the time taken for that process are of importance. They are however outside the scope of this paper.

E2.2. Causes of delay in contested cases

95. Where a claim is contested, delays have different causes. In our present adversarial system, a key factor involves the attitude of the parties. The more determined a plaintiff is to press on with the action, the more likely it is that delays will be avoided. Conversely, where a plaintiff lacks resolve in the pursuit of the proceedings, the action may become inactive for long periods.

96. At various points in the process, delays may be due to the conduct of the litigants or their legal advisers. At other points, the delays may be due to congestion in the lists or pressures on judicial resources.

96.1 Pre-action delays: Delays before issue of the writ will obviously be due to factors outside the court structure. The parties and their advisers may for instance have engaged in long and ultimately fruitless negotiations. Their insurers may have taken time to be satisfied that the litigation ought to be brought or defended under the insurance policy. Or they may have been held up while trying to secure Legal Aid.

96.2 Summary judgment and delay: How soon a summons for summary judgment can come up for hearing depends on the level of judicial resources available. There will inevitably be a queue of some duration. Attempts to obtain summary judgment obviously can be counter-productive unless one is quite sure that the defendant cannot raise any triable issue. Otherwise, an application for summary judgment which fails before the master, and even worse, fails again before the judge on appeal from the master, will mean significant costs and delay.

96.3 Prior to setting down: Whether and why delays occur in the context of the pleadings, discovery and evidence gathering stages depends on certain variables.

(a) The size, complexity and weight of the case are of obvious importance, particularly when seen through the prism of present-day obligations in relation to pleadings, discovery, preparation of expert reports and exchanging witness statements. Heavy cases may generate a great deal of interlocutory activity.

(b) Delays may occur in this phase, even in a relatively light case, where a defendant (who desires delay) adopts obstructionist tactics. This may require the plaintiff to take out numerous interlocutory applications to enforce the defendant's procedural obligations by seeking "unless orders" and so forth. Or the defendant may apply for interlocutory orders, each time holding

up progress. Such conduct is likely to add substantially to the costs bill. The elimination or reduction of such "satellite litigation" is generally seen to be one of the key areas of reform.

96.4 Between setting down and trial: A certain waiting-time is inevitable since efficient use of judicial resources demands that cases are not listed for trial until the parties are ready to proceed. To do otherwise is likely to lead to ineffective trial appointments and wasted court time where parties "book ahead" for trial dates but find themselves not ready to proceed. Accordingly, if a case has been set down for trial, this ought to mean that the parties have completed their preparations and are prepared to go ahead with the trial. In such cases, delays going beyond a reasonable time spent in the post-setting down queue will tend to be due to an insufficiency of judicial resources creating a bottle-neck at setting-down.

96.5 Delays and the trial itself: Delays can sometimes arise where, due to poor estimates by the parties, other trials overrun so that a slot originally allocated for a particular trial remains unavailable. If no other slots have come free, a last-minute adjournment of the scheduled trial may have to occur with costs possibly thrown away and a delay incurred as the date is re-fixed. Such delays obviously interfere with the court's ability to manage judges' hearing diaries. The parties to overrunning trials are themselves obviously also affected. While not a "delay" complaint as such, the fact that their trial overruns means that they are exposed to costs not initially budgeted for.

96.6 Delays and appeals: Where, as in Hong Kong, all appeals to the Court of Appeal, even interlocutory ones, are as of right, a defendant who is intent on delaying matters, has plenty of scope for using the appeal process as a means of delay. There is inevitably a queue for the Court of Appeal. The wait can be substantial at times when pressure builds up on appellate resources.

97. The accepted practices of the legal profession may also have an important bearing on litigation delays. A legal and court culture where delays are accepted and taken for granted may make it difficult to change waiting-times or reduce backlogs. As Peter Sallmann and Richard Wright point out,[89] this was a conclusion reached in research carried out in the United States by Thomas Church, whom they quote as follows :-

Notes

89 GTC, p 69.

> "..... both quantitative and qualitative data generated in this research strongly suggest that both speed and backlog are determined in large part by established expectations, practices and informal rules of behaviour of judges and attorneys. For want of a better term, we have called this cluster of related factors the 'local legal culture.' Court systems become adapted to a given pace of civil and criminal litigation. That pace has a court backlog of pending cases associated with it. It also has an accompanying backlog of open files in attorneys' offices. These expectations and practices, together with court and attorney backlog, must be overcome in any successful attempt to increase the pace of litigation. Thus most structural and caseload variables fail to explain interjurisdictional differences in the pace of litigation. In addition, we can begin to understand the extraordinary resistance of court delay to remedies based on court resources or procedures."[90]

98. Lord Woolf puts a related point in the following terms :-

> "Delay is of more benefit to legal advisers than to parties. It allows litigators to carry excessive caseloads in which the minimum possible action occurs over the maximum possible timescale. In a culture of delay it may even be in the interest of the opposing side's legal advisers to be indulgent to each other's misdemeanours. Judicial experience is that it is for the advisers' convenience that many adjournments are agreed. This is borne out by the fact that when the courts have required the client to be present to support a late application to adjourn the trial, the number of such applications has reduced dramatically."[91]

E2.3. Proceedings commenced for special purposes

99. In assessing the duration of proceedings, it is necessary to recognize that in certain areas, actions are begun for special purposes. One illustration can be found in the Admiralty Jurisdiction ("HCAJ" cases).

99.1 In the years 1998, 1999 and 2000 respectively, 432, 338 and 312 HCAJ writs were issued. As at April 2001, 162 (38%), 167 (49%) and 170 (54%) cases commenced in those years were cases where no step had been taken beyond the issue of the writ or acknowledgment of service.

99.2 Bearing in mind the short limitation periods often applicable in shipping litigation, it is reasonable to infer that those writs were issued to protect the claims from becoming time-barred in case it might subsequently be possible to arrest a vessel arriving in Hong Kong and to found jurisdiction locally.

Notes

90 Thomas Church, *Justice Delayed: The Pace of Litigation in the Urban Trial Courts,* National Center for State Courts, 1978.

91 WIR, p 12, §31.

99.3 The writs in those cases therefore did not signal the start of a live action and their continued presence "on the books" should not be considered to involve delay.

E3. The overall picture in relation to delay in Hong Kong

100. The Tables setting out the information referred to in this section are contained in ***Appendix C***.

E3.1. The overall case-load

101. **Table 1** in Appendix C sets out the overall case-load of the Court of First Instance, with a breakdown of the types of cases commenced in the last three years.

102. **Table 2** and **Table 3** in Appendix C attempt a breakdown of the subject-matter of two of the main categories, namely, High Court Actions (HCAs) and High Court Miscellaneous Proceedings (HCMPs). A caveat is however necessary. Many actions will have been capable of classification by more than one category of subject-matter, but in each case, only one category was recorded. It is also apparent that input was sometimes imprecise, with excessive use of a fall-back global category. These figures therefore present only a general and not a precise indication of the subject-matter of claims.

E3.2. The level of judicial resources

103. **Table 4** in Appendix C provides a picture of the system over the last decade. It demonstrates firstly that over that period, there has been little change in the established numbers of High Court judges or masters. The establishment of Justices of Appeal has remained at 10 (the Chief Judge of the High Court, 3 Vice-Presidents and 6 Justices of Appeal) although over considerable periods, they have been one or two judges below full strength. Judges of the Court of First Instance have not exceeded 25, varying between 20 and 25 in number. Masters have varied in number between 6 and 10.

104. Indeed, judicial numbers at similar levels have been maintained for well over a decade. It was in 1981 that the Court of Appeal expanded from two to three divisions, taking the number of appeal court judges to 9. Court of First Instance judges (then referred to as High Court judges) increased to 20 in 1982.

105. This is in contrast with the growth in the number of legal practitioners holding practising certificates (the figures in question excluding government and, in some cases, in-house lawyers). Over the last decade, the number of practising barristers has increased by two-thirds. The number of solicitors has doubled.

106. In the same period, the case-load of the High Court has steadily increased. The greatest increase (coinciding with the Asian financial crisis) was in 1998 and 1999. The number of HCAs commenced jumped from 14373 in 1997 to 22482 to 1998. It stayed at the relatively high level of 19733 in 1999. The figures for the CFI's total caseload show similar growth. Taking 1991 as the base year, the total case-loads for 1994, 1998 and 2000 increased by 22%, 115% and 82% respectively.[92]

107. It may be noted that the HCA figures show a sharply downward trend in 2000, falling back to levels comparable to the 1991 base year levels. Those figures must however be read bearing in mind the most recent extension of the District Court's civil jurisdiction.

107.1 With effect from 1 September 2000, the District Court's jurisdiction in respect of monetary claims was increased from $120,000 to $600,000.[93] Moreover, claims falling within that limit but brought in the Court of First Instance must be transferred to the District Court "unless [the CFI] is of the opinion that, by reason of the importance or complexity of any issue arising in the action or proceeding, or for any other reason, the action or proceeding ought to remain in the [CFI]."[94] It follows that a significant number of claims can be expected to migrate from the CFI to the District Court, taking some of the pressure off the CFI's lists.

107.2 **Table 5** in Appendix C bears this out. It depicts year on year comparisons for cases started in the District Court in its most important categories during the first 6 months after its jurisdiction was extended, as compared with the same months in the year prior to the increase. The figures indicate a two- to three-fold increase in the District Court's general civil actions, a 57% increase in its miscellaneous proceedings

Notes

92 The District Court's jurisdiction had previously been increased from $60,000 to $120,000 with effect from 1 July 1988: Ord No 49 of 1988, s 4.

93 District Court Ordinance, Cap 336, Pt IV, as amended by Ord No 28 of 2000, s 21. Commencement: LN 247/2000.

94 District Court Ordinance, Cap 336, s 43.

category and a transfer of some 200 personal injury claims from the High Court.

108. The figures therefore show that the number of judges in the Judiciary's permanent establishment has not changed significantly over a long period of time notwithstanding some substantial and sharp increases in workload. Important assistance was derived from Recorders of the High Court (recruited from among Senior Counsel who each sit for about one month each year) and deputy judges (mainly redeployed from amongst District Judges and masters). Judges at first instance have nonetheless had to cope with increasing pressures and bigger case-loads. Such pressures are bound to have an impact on waiting-times and to create delays. The quality of case management in the system inevitably must also suffer under such pressures. Some relief is likely to come from the recent increase in the civil jurisdiction of the District Court. However, the longer-term trends remain to be established.

E3.3. How cases are disposed of

(a) Default judgment

109. As in other jurisdictions, a large percentage of cases commenced in our system will meet no resistance from the defendant and will be disposed of by a default judgment. **Table 6** in Appendix C examines default judgments in relation to HCAs and cases on the Commercial List (HCCL) and Construction and Arbitration List (HCCT).

109.1 To take, for example, the 22,482 HCA cases started during 1998, 11,156 were disposed of by default judgment during the same year.

109.2 A further 2,670 cases, presumably mostly started towards the end of 1998, were disposed of in the same way during 1999, leaving only 164 cases, for whatever reason, to go by default in the year 2000.

109.3 The pattern for cases started in 1999 and 2000 is very similar, with about half disposed of by a default judgment in the year in which they were started. For the 1999 cases, the pattern of default judgments during the following year (2000) is again similar. Data for later years is not yet available.

109.4 It follows that about a little over 60% of all HCA cases started can be expected to be disposed of by default judgment.

110. The position in relation to Commercial List and Construction List cases is different. Within the first two years of commencement, no more than

about 20% of the case-load has ended in default judgment. Actions brought in one of these specialist lists are therefore more likely to fight.

(b) Summary judgment

111. **Table 7** of Appendix C sets out the numbers of cases disposed of by way of summary judgment in the categories HCA, HCCL, HCAJ and HCPI. These show that summary judgment was obtained in 777, 772 and 252 cases as at the end of 2000 for cases started in 1998, 1999 and 2000 respectively. The vast preponderance of these were awarded in HCA cases. In the specialist lists, they are rare.

112. The figures indicate that in 1998 (after 30 March 1998), 1999 and 2000, there were altogether 1,802, 2,738 and 1,662 applications made for summary judgment respectively. This gives a success rate of about 43% in 1998 and only 28% in 1999 (although it is possible that a further number of summary judgments might eventuate in 2001). The figures for 2000 are low perhaps because applications were still pending at the time these figures were obtained.

113. **Table 8** in Appendix C quantifies the cases disposed by way of summary judgment against the overall case-load. The figures are low, with less than 4% even for HCAs, leading to summary judgment. This indicates that summary judgment does not represent a significant mode of disposing of cases at present.

(c) Inactive cases

114. Cases which are not resolved by default or summary judgment may be expected to run on to conclusion of the trial or to settle at some point before then. However, this is not always the case. A significant percentage of cases remain dormant. Thus, as Appendix C, **Table 9** shows, of the HCA and HCPI cases begun in 1998, as at 31 December 2000, 5,979 HCAs (27%) were inactive, "inactivity" defined to cover cases not known to have been concluded, but in respect of which no case event (eg, a hearing or filing of a document) has occurred for one year or more. The figure for such inactive HCAs instituted in 1999 was 3,702 (19%). In personal injury cases, the comparable percentages for actions started in 1998 and 1999 are 41% and 9% respectively. Many of these may in fact have settled or been abandoned by the plaintiff and so actually have been disposed of. However, they remain on the court's books.

(d) Cases listed for trial

115. The percentage of cases which proceed to the point of being listed for trial varies greatly depending on the nature of the case. Appendix C, **Table 10** examines the figures (as at 31 December 2000) for cases started in 1998 which had obtained a trial listing. As the Table shows, with HCAs, the percentage reaching a listing was very small, only some 1.7% as at 31 December 1998. The overall percentage was about 3%, but with much higher percentages for constitutional and administrative law (42%) and personal injury (26.5%) cases. However, as noted in **Table 15** of Appendix C discussed below, a large proportion of actions, particularly personal injury actions, that are listed, settle at the courtroom door or after start of the trial.

116. **Table 11** in Appendix C looks at HCA and HCPI cases begun in the three relevant years and disposed of by the end of 2000, seeking to identify the modes of disposal. A considerable number of cases end by withdrawal or discontinuance and also as a result of non-compliance with unless orders.

E3.4. Waiting-times

117. Waiting-times recorded during the six-month period from October 2000 to March 2001 are contained in **Table 12** and **Table 13** of Appendix C. **Table 12** sets out the time it takes on average to get from listing to hearing (of the appeal or trial, as the case may be). Records are presently kept on two bases. First, there is the "Court Waiting Time", defined as the period from the date of listing to the first free date offered by the court. Since the parties will sometimes seek an alternative date (whether because of counsel's unavailability or otherwise), the court also keeps records of the period referred to as the "Case Waiting Date" defined as the period from the date of listing to the first day of the actual hearing.

118. It will be apparent that over this six-month period, court waiting-times have steadily increased. In the case of the Court of Appeal, it has gone from 82 days in October 2000 to 151 days in March 2001. The waiting-time for CFI fixtures has risen from 187 days in October to 209 days in March. CFI running list waiting-times have also deteriorated: from 121 days in October to 143 days in March.

119. Appendix C, **Table 13** deals with waiting-times over the same six month period for applications before the Master. Such waiting-times vary substantially depending on the nature of the application. With the increase in insolvencies experienced in recent years (see **Table 4**), it is

perhaps not surprising that the waiting times in the bankruptcy and winding-up jurisdictions are substantial.

120. **Table 14** of Appendix C deals with waiting-times over the same period for interlocutory applications before the Judge. A hearing estimated to last less than 30 minutes can usually be heard within about a week. If for more than an hour is estimated, the average waiting-time runs to a month or 6 weeks. Master's appeals involve a wait of about 2 weeks for an appointment of less than 30 minutes, about 6 weeks if more than an hour is needed and some 2 ½ months if a whole day or longer is required.

121. Appendix C, **Table 15** shows what happened to the 648 cases that proceeded to the first day of trial during the year 2000 (many of such cases obviously having been commenced in earlier years). It shows that a very substantial percentage involve late settlements.

121.1 Overall, the figure of such settlements occurring at the start or during trial represented 27% of all cases reaching trial. For HCAs, the percentage settling in this way came to 22%.

121.2 With personal injury cases, such courtroom door settlements dramatically represented 55% of cases coming to trial. Why this was so is not clear. The fact that many of the defendants were probably insurers may be relevant. It may also be relevant that many of the plaintiffs were probably legally aided and so did not have to bear most of the costs risk themselves. The figures do certainly suggest that substantial room for encouraging earlier settlement may exist.

121.3 In contrast, all 16 Commercial List and both Admiralty cases fought to the conclusion of the trial. Such parties are likely either to be privately financing the litigation or to be insurers on both sides engaging in litigation as a business expense. It suggests that parties in this kind of action generally will try to settle earlier if possible and tend to take a matter to trial only where settlement genuinely cannot be reached.

122. **Table 15** also tends to show that most trials last for 3 days or less, this or a lower figure being the median value for trial durations in all categories except Commercial List Actions (where the median was 4 days) and Construction List Actions (where the median was 7 days).

123. **Table 16**, Appendix C, indicates that the estimates of trial duration are inaccurate in a large proportion of cases. To take the cases started in 1998, of the 218 cases that had proceeded to trial by the end of 2000, there were over-estimates and under-estimates in a total of 91 cases, representing 41.7% of the whole. Few estimates in personal injury

actions were accurate. They tended either to go short or to overrun except in about 10% of the 1998 cases and 26% of the 1999 cases.

E4. Some conclusions drawn from the Appendix C figures

124. The figures for 1998, 1999 and 2000 do *not* indicate that the system as a whole is "in crisis" due to delays. However, considerable room clearly exists for reducing the overall duration of contested cases and for cutting down unduly long waiting-times in some procedural pockets. It is especially evident that interlocutory applications may lead to very considerable delays.

125. Looking at some of the other aspects of the picture revealed in the figures, it is notable that a high level of cases which eventually settle do not do so until the very last moment. This implies that many cases settle after the parties have probably incurred full, but ultimately unnecessary, trial preparation costs. Scope therefore clearly exists to encourage earlier settlement and the avoidance of such costs. It is difficult to say whether trial durations can be cut down, but a 3 day median appears to suggest room for manoeuvre. There is certainly much room for improvement in relation to trial duration estimates.

F. THE COMPLEXITY OF THE CIVIL JUSTICE SYSTEM

(a) Complexity under the RSC

126. In addressing the complexity of the civil justice system, the Woolf reforms focussed on the then existing set of procedural rules, the Rules of the Supreme Court ("RSC") and on how they were used in practice. In Hong Kong, the High Court Rules ("HCR") are closely based on the RSC.

127. Lord Woolf saw as a major barrier to legal access, particularly vis-à-vis unrepresented litigants, the complexity and sometimes archaic and impenetrable language of the RSC, with their case-law accretions :-

> "No doubt each proposition contained in the rules was considered to be necessary when it was introduced. But the size and number of the rules is now such that in my view they are wholly inaccessible to those unfamiliar with them, and complex and daunting even to those who are familiar with them. It might even be said that the rules themselves have become an obstacle to access to justice. The problem becomes worse as the number of those who may have to act without legal representation increases. Complexity in the rules takes two obvious forms :-
>
> - too many ways of doing the same or similar things;
>
> - the use of specialist terms and an over-elaborate style of language.
>
> This is compounded by the problem of accretion: additions are made to deal with specific matters without taking into account the problem of meshing with the existing structure."[95]

128. Complexity in the RSC was seen to be the inevitable result of the then accepted methodology, namely, to approach procedural rules on the footing that they were or could be made comprehensive so as specifically to cover every situation. Lord Woolf states :-

> "In many instances, the complexity of the rules lies in their sheer length and the number of words used. This is the result of the attempt to cover all eventualities comprehensively and the need to give every single word a definite meaning, which leads to the repeated use of the same phrase or to cross-referencing."[96]

Notes

95 WIR, p 208, §6.

96 WIR, p 211, §17.

(b) Replacing the RSC with the CPR

129. The decision taken in England and Wales was to undertake the huge effort of substituting the RSC and to simplify procedural rules "so that they will be more easily understood and followed by litigants as well as their advisers".[97] As a result, the RSC have now been replaced with the Civil Procedure Rules 1998 ("CPR").

130. This task was undertaken with two fundamental aims. In the first place, recognizing the persistent upward trend in the numbers of unrepresented litigants, the CPR are an attempt to make procedural rules more accessible and therefore less of a potential source of unfairness to them. Lord Woolf put the point this way :-

> "..... an increasing number of people, if they wish to assert their legal rights, may have to do so without professional help. It is therefore vital to enable them to do so, so far as the unravelling of unnecessary complexity and the simplification of language can assist. ..... Procedural justice is as important as substantive justice. It must be seen to be fair. The rules should, therefore, be comprehensible to the parties (whether or not they are legally represented) and to others who are concerned with the outcome of litigation. The civil process should command respect, not because it generates a sense of awe or mystery, but because it is patently fair."[98]

131. A similar approach is adopted by the Law Reform Commission of Western Australia ("LRCWA") :-

> "The public submissions convinced the Law Reform Commission that there is no point in having a justice system that people don't understand. Moreover it would be wrong to call it a 'justice system' if the prevailing view is that the system is unjust and unfair. The Commission heard from many people who feel that the present system is not accessible because it isn't comprehensible to the ordinary participant or observer. If, at the end of legal proceedings, people feel aggrieved by the process and procedures, the system is neither effective nor fair."[99]

132. The LRCWA emphasised the difficulties caused to litigants in person by archaic language and forms :-

> "There are more than 200 complex, archaic forms in use in the Local Court and it is necessary for a litigant to make sense of quaint terms including 'plaint', 'praecipe' or 'allocatur'. While a term like 'subpoena' has come to have a generally understood meaning: ie, if you get one you have to go to court or take something there, many of

Notes

97 WIR, p 120, §7.

98 WIR, p 216, §§28-29.

99 *WAR– Project Summary*, p 3.

the words used and forms required by courts are confusing and unnecessarily complicated."[100]

133. One of the main features of the CPR is its jettisoning of such language and its replacement by more functional terms. For instance :-

Used in RSC	**Used in CPR**
action	claim
plaintiff	claimant
writ	claim form
summons	notice of application
pleadings	statement of case
statement of claim	particulars of claim
request for further and better particulars	request for clarification or information
leave of the court	permission of the court
guardian ad litem	litigation friend
settlement	compromise
mareva injunction	freezing injunction
anton piller order	search order
subpoena	witness summons
execution	enforcement

The CPR also contain a "glossary" explaining technical terms.[101] It is fair to say that comparing the CPR with the RSC (and our HCR), the CPR are far more readable and easier to understand, both in their structure and as a matter of language.

(c) The new approach to procedural questions

134. As indicated above, the changes go deeper than merely modernising the language or simplifying the drafting. The second fundamental aim of the

Notes

100 *Ibid*, p 15.

101 The CPR are published in *Civil Procedure, The White Book Service 2001* (Sweet & Maxwell). The current version of the CPR may also be read or downloaded from the LCD's website: <*http://www.lcd.gov.uk*>.

CPR is to foster a qualitatively new approach to deciding procedural questions. The danger, as some commentators have pointed out, is that over time, any new set of rules will itself attract case-law accretions and develop complexity.[102] However, as Lord Woolf explains, the CPR are designed to avoid this in so far as possible :-

> "The new rules are deliberately not designed expressly to answer every question which could arise. Rule 1, the statement of the objective, provides a compass to guide courts and litigants and legal advisers as to their general course. Where detailed instructions are needed, matters of general application will be dealt with in the rules; other matters will, I hope, be capable of being dealt with in practice directions and practice guides."[103]

135. The lawyer or litigant and the Judge must therefore orient themselves differently in relation to the CPR. Lord Woolf argued that the objectives of the new rules could only be achieved :-

> "..... if a new approach is taken by the judges applying the rules under a managed system of litigation. Instead of the over-technical way the rules have been applied in the past, the new rules will have to be used in a different way: they will have to be read as a whole, not dissected and viewed word by word under a microscope. A paramount consideration of those applying the rules must be saving cost and reducing delay. It is this new approach to procedural matters which will be the cornerstone of the new rules because the rules will be applied to save expense and avoid delay. The new rules are being deliberately framed so that the approach of those construing them can be more purposive and less technical. It will thus be the responsibility of the judiciary to make the new system work."[104]

136. In other words, the second fundamental aim of replacing the RSC is to establish a new methodology for approaching procedural questions. More broadly formulated rules are there to be interpreted in the light of the overriding objective in rule 1 of the CPR (set out below). Decisions based on close linguistic construction of particular rules or reported cases in favour or against a particular construction should be avoided. The judge is to adopt a purposive approach, exercising a broad discretion which takes into account considerations of procedural economy as an aspect of procedural fairness.

Notes

102 In 1998, Professor Michael Zander QC stated: "Whatever may prove to be [the CPR's] advantage, it will take many years and a great deal of litigation to establish their meaning." (1998) 61 MLR 382 at 388.

103 WFR, p 275, §12.

104 WIR, p 215, §26.

137. This new departure, both for the court and for the parties, is expressly prescribed in the overriding objective prescribed by CPR 1 as follows :-

> "1.1 (1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.
>
> (2) Dealing with a case justly includes, so far as is practicable –
>
> (a) ensuring that the parties are on an equal footing;
>
> (b) saving expense;
>
> (c) dealing with the case in ways which are proportionate –
>
> (i) to the amount of money involved;
>
> (ii) to the importance of the case;
>
> (iii) to the complexity of the issues; and
>
> (iv) to the financial position of each party;
>
> (d) ensuring that it is dealt with expeditiously and fairly; and
>
> (e) allotting to it an appropriate share the court's resources, while taking into account the need to allot resources to other cases.
>
> 1.2 The court must seek to give effect to the overriding objective when it –
>
> (a) exercises any power given to it by the Rules; or
>
> (b) interprets any rule.1.3 The parties are required to help the court to further the overriding objective."

138. In Section M below, after examining a range of possible specific reforms, this Report considers the arguments for and against the alternatives of (i) adopting in large part the CPR in place of the HCR and (ii) largely retaining the HCR with limited amendments.

G. UNREPRESENTED LITIGANTS

G1. The challenges generally posed by unrepresented litigants to civil justice systems

139. In recent times, having to cope with increasing numbers of litigants in person has become a problem shared by many civil justice systems. It is difficult to know much about unrepresented litigants as a group. As The Lord Chancellor's Department points out when evaluating the impact of Lord Woolf's reforms on such litigants :-

> "They tend to only use the system once and in order to find those who have used the system a very large sample size must be used. Furthermore, they are unlikely to have used the system both before and after the introduction of the civil procedure rules."[105]

140. There may be many different reasons why a litigant is not legally represented. Referring to such litigants in the Australian federal system, the ALRC suggests some of those reasons :-

> "Some litigants choose to represent themselves. Many cannot afford representation, do not qualify for legal aid or do not know they are eligible for legal aid, and are litigants in matters which do not admit contingency or speculative fee arrangements. They may believe they are capable of running the case without a lawyer, may distrust lawyers, or decide to continue unrepresented despite legal advice that they cannot win."[106]

141. Litigants in person present particular challenges to the system. While some tribunals (such as the Small Claims and Labour Tribunals in Hong Kong) are expressly designed for use by unrepresented litigants, even excluding lawyers from their proceedings, the traditional civil justice system is designed on the footing that parties are familiar with the procedural rules and will take the needed steps to bring the case properly to trial or to some earlier resolution. The system is, in other words, designed on the assumption that parties will have legal representation.

142. Few unrepresented litigants will know the rules. This causes them, as well as any represented parties and the court, difficulties in progressing and trying the case. To quote the ALRC once more :-

Notes

105 EF, §8.7.

106 ALRC No 89, §5.147.

> "When only one party is unrepresented, a primary difficulty can be maintaining the perception of impartiality. Judges need to ensure that all relevant evidence is heard, relevant questions asked of witnesses, and that the unrepresented party knows and enforces their procedural rights. The represented party may see such judicial intervention as partisan, and judges must ensure they do not apply different rules to unrepresented parties. Where both parties are unrepresented, the parties may be difficult to control, the case disorganised and wrongly construed, there may be party quarrels over irrelevant points, or even harassment or violence."[107]

143. As the LRCWA points out :-

> "The presence of self-represented litigants in the civil justice system has the potential to increase costs for all court users. These increases may arise from:
>
> - more pre-trial procedures;
> - poor issue definition and clarification;
> - greater time and expense spent in responding to unclear or irrelevant evidence; and
> - excessive time spent in hearings."[108]

144. It is perhaps understandable that such problems sometimes lead judges and legal practitioners to view unrepresented litigants as a nuisance and to treat them with intolerance and hostility. However, such an attitude is plainly unacceptable. Litigants in person probably feel in any event at a great disadvantage and, meeting a hostile reception, are likely to see the system as unjust and themselves as its victims. It must be borne in mind that an unrepresented person is as much entitled to seek enforcement of his rights as someone willing and able to instruct lawyers to do so on his behalf. In an extra-judicial statement, Sir Anthony Mason, when Chief Justice of Australia, voiced this reminder :-

> "The courts are an integral part of the life of the community and the judges have a responsibility to treat those who resort to the courts, whether they be lawyers, litigants or witnesses, with consideration and, above all, with that respect which the dignity of the individual deserves, unless good reason emerges for taking some other course. As Sir Owen Dixon once remarked in a case in which I appeared, it is the responsibility of the trial judge in each instance to listen sympathetically to the case which the litigant seeks to present with a view to ascertaining and understanding it. Only having done that can the judge, with a due sense of responsibility, reject the litigant's case."[109]

Notes

107 ALRC No 89, §1.152.

108 WAR – Final Report, p 153, §18.3.

109 Sir Anthony Mason CJ, *The Role of the Courts at the Turn of the Century* (1993) 3 JJA 156 at 166.

145. Difficult and possibly intractable though the challenges posed by litigants in person might be, it is increasingly recognized in civil justice systems around the world that such litigants are likely to remain a permanent feature of the landscape and that measures must be taken to accommodate them and at least to facilitate their participation in the legal process.

G2. Unrepresented litigants in Hong Kong proceedings

146. There is no doubt that unrepresented litigants have become a major feature of the litigation landscape of the HKSAR. However, care must be taken in measuring the level of their involvement. The status of a litigant may change from unrepresented to represented and vice-versa in the course of a case. If one looks at cases at too early a stage, a huge percentage of all actions may be thought to involve unrepresented litigants simply because they have not yet instructed lawyers or because their lawyers have not yet come onto the court's record.[110] Moreover, as indicated above, a very substantial percentage of cases end in a default judgment. In such cases, the fact that a defendant is unrepresented does not pose any problems for the system.

G3. The percentage of cases involving unrepresented litigants

147. It is in cases where the litigant must take a step in the proceedings by filing documents or participating in a hearing that his unrepresented status matters. Taking the available evidence as to the incidence of unrepresented litigants at such points in a case, the following picture emerges :-

147.1 **Table 17** in Appendix C shows that at the first interlocutory hearing (where one takes place) the incidence of unrepresented litigants is still extremely high, between 44% and 64% of all HCAs involved at least one party in person. The figures are particularly high in Constitutional and Administrative List cases.

Notes

110 This appears to have been what had happened when legislative councillor, the Hon Ms Audrey Eu SC, was quoted as saying that she had received Judiciary figures showing that 85% of High Court civil cases involved litigants in person: *SCMP 27 April 2001*. The true figure, though substantial, is much lower at various points later in the proceedings, as the present discussion seeks to demonstrate.

147.2 If summary judgment is sought – an application which certainly *matters* to the defendant – a higher level of representation generally appears. In HCAs, which are, for practical purposes, where one finds all such applications, between 30% and 39% of cases involve unrepresented litigants. (Appendix C, **Table 18**)

147.3 At the summons for directions stage, ignoring the year 2000 as many cases commenced in that year will not yet have made their way to that stage,[111] about a quarter of all HCAs involve at least one litigant in person. (Appendix C, **Table 19**)

147.4 The percentage of unrepresented litigants rises at the commencement of trial stage, with about 40% to 50% of HCAs involving at least one litigant in person. Although the numbers are small and may not justify extrapolation, a large percentage of Commercial List cases also appears to involve unrepresented litigants. The same applies to the Administrative Law list. (Appendix C, **Table 20**)

147.5 The overall picture of cases involving litigants in person at various stages of the proceedings in HCA cases is set out in **Table 21** of Appendix C. The percentage is substantial, varying between a quarter and two-thirds of such cases.

G4. Judiciary's survey of representation at certain hearings

148. With a view to gaining a picture of the extent of legal representation at High Court hearings and the nature of such representation (where it existed), the Judiciary conducted a survey of three kinds of hearing held during the year 2000. These were :-

- cases before the master in chambers where applications were made for orders relating to pleadings, discovery, summary judgment and striking out proceedings, security for costs, setting aside judgments, consolidation, stays and so on.
- assessments of damages and examinations of judgment debtors before the master sitting in court; and
- appeals to the judge in chambers from masters' decisions (including two heard in open court).

Notes

111 Ignoring also the tiny numbers in the "AP" (administration and probate) section.

Excluded from the survey were hearings lasting for less than one hour (including many "3 minute summonses"), and for the taxation of costs.

149. The relevant findings are set out in :-

149.1 Appendix C, **Table 22,** as to interlocutory hearings before the master in chambers);

149.2 Appendix C, **Table 23** involving the master sitting in court on assessments of damages and examinations of judgment debtors;

149.3 Appendix C, **Table 24** as to hearings before the judge on masters' appeals; and

149.4 Appendix C, **Table 25** which sets out the totals.

150. These figures, relating to cases in progress in 2000 where interlocutory hearings were held, tend to confirm a significant involvement of unrepresented litigants. They also indicate that parties may be more or less likely to be represented depending on the nature of the hearing.

150.1 Chambers applications before the master in an on-going dispute were most likely (in 73% of the cases) to involve representation on both sides.

150.2 Assessments of damages were likely to involve a lower degree of representation on both sides (58%). However, perhaps because an insurer is often involved, there were no cases where all parties were in person.

150.3 In examinations of judgment debtors, representation was at its lowest with 80% of the cases having at least one party (probably the debtor) unrepresented and only 20% of the cases with all parties represented. The inference may be that the case having been lost, legal representation was dispensed with.

150.4 Before the judge in chambers, on appeal from a master's decision, just under half of the cases (44%) involved at least one party who was unrepresented.

150.5 A very small fraction of the cases involved the absence of representation on both or all sides.

151. The same cases were also analysed for existence and nature of representation counting on a "per party per hearing" basis (Appendix C, **Table 26**). Thus, a single case involving several parties produced multiple figures, possibly with different categories of representation, for each hearing held. This takes into account the fact that parties may be

added or drop out and that the nature of representation may change. The litigants in person rate stood at 19% before the master and 23% before the judge.

G5. Litigants in person – a substantial call on the system's resources, particularly its bi-lingual resources

152. It is plain from the available evidence that unrepresented litigants are to be found in increasingly large numbers. This raises difficult issues for the HKSAR's civil justice system. Litigants in person exert particular pressure on the court's bilingual facilities since the vast majority would wish the proceedings to be conducted in Chinese. As Appendix C, **Table 27** shows, there has recently been a sharp increase in hearings conducted in Chinese.

G6. Measures being developed in other jurisdictions towards meeting the needs of unrepresented litigants

153. Measures developed by other civil justice systems tend to consist of one or more of the following initiatives :-

- Getting the litigants representation.
- If not full representation for all aspects of the proceedings, getting litigants professional legal advice or assistance at key points of the litigation (sometimes called getting them "unbundled legal assistance").
- Streaming disputes involving unrepresented litigants to small claims courts or to special court lists.
- Encouraging third parties to provide unrepresented litigants with free legal advice or assistance.
- Getting the court to provide information about court proceedings, such as regarding the filling in of forms and the assembly of court bundles, etc.
- Enhancing all systems for delivering information and assistance by use of audio-visual and information technology.
- Simplifying the rules, procedures and court forms to give litigants a better chance of being able to conduct cases for themselves.

- Diverting unrepresented litigants away from the civil justice system by encouraging or requiring them to use alternative dispute resolution ("ADR") schemes.

- Training judges and court staff to deal with unrepresented litigants.

G6.1. Getting representation for litigants in person

154. The most direct response to the problems of unrepresented litigants is obviously to change them into *represented* litigants. Assuming that the litigant is unable to finance the litigation from his own (or any insurer's) resources, one must consider the practicability of finding funding from elsewhere. The source of finance may be public or private.

155. Public funding for civil litigation in Hong Kong is by legal aid pursuant to the Legal Aid Ordinance, Cap 91.

155.1 This is confined to individuals (excluding corporations and unincorporated associations) whose financial resources should not exceed $169,700,[112] with a discretion given to the director to waive this limit if a Bill of Rights issue is raised in the litigation.

155.2 Additionally, an individual may qualify for legal aid in respect of a personal injury, Fatal Accidents, Employees' Compensation or medical, dental or legal professional negligence claim under the Supplementary Legal Aid Scheme, even if his financial resources exceed $169,700, provided they do not exceed $471,600.[113]

155.3 Certain types of proceedings do not qualify for legal aid, including actions for defamation and simple debt actions where no issues of defence arise.

155.4 The grant of legal aid is subject to the applicant showing reasonable grounds for taking, defending, opposing or continuing the relevant proceedings.[114] It is also subject to certain discretions exercisable by the Director of Legal Aid.

Notes

112 Section 5(1).

113 Section 5A.

114 Section 10(3).

156. It is beyond the remit of this Working Party to debate the adequacy or otherwise of the legal aid regime. In principle, the allocation of public funds to legal aid, particularly for civil as opposed to criminal cases, must have its limits. Nonetheless, it is to be hoped that in ongoing reviews of the scope of legal aid, notice will be taken of the growing phenomenon of unrepresented litigants and of their impact on the civil justice system, prompting consideration of broader public funding of meritorious claims by such litigants. Legal aid should also be considered as a funding source for "unbundled litigation assistance" mentioned below.

157. In the United States, it has long been an accepted practice that representation may be privately funded by means of contingency fees whereby lawyers accept the cost risk against the incentive of a share in the damages if the case is won. In the United Kingdom, the civil justice system has not gone so far, but it has embraced "conditional fee agreements."[115] These are agreements aimed at enabling unfunded litigants to bring claims with private lawyers bearing the cost risk, the incentive being a success fee involving an uplift by a stated percentage of the fee otherwise chargeable.

158. While these are controversial developments, the argument in their favour is that they extend legal access to persons who may otherwise have no means of enforcing their legal rights. From the civil justice system's point of view, to the extent that potentially unrepresented litigants secure legal representation, such arrangements alleviate the difficulties posed by litigants in person. However, consideration of conditional fees also falls beyond the scope of this Report.

G6.2. "Unbundled legal assistance"

159. Another initiative aims at making such resources as may be available to litigants in person (whether private resources or legal aid funds[116]) go further. It is referred to as the "unbundling" of legal assistance, with private lawyers providing (and charging for) advice and assistance at key points in the proceedings, designed to help the litigant represent himself. Lord Woolf explains this concept as follows :-

Notes

115 Under the Courts and Legal Services Act 1990, s 58 and s 58A. New South Wales also permits conditional fees via conditional costs agreements: Legal Profession Act 1987, s 174(1)(c) and Division 3.

116 As occurs in Ontario: see ALRC No 89, §5.161.

> "Not all litigants need assistance with every aspect of their case. Some may be able to undertake much of the preparatory and paper work themselves and need access to competent advice only at key points in the progress of their case. Initially this could be as to the validity of their claim or defence and the way in which they should seek to prove it. This should then be followed up at key stages, particularly in assessing whether an offer from the other side should be accepted. In Arizona and in California a new approach has been developed to provide advice and assistance on this basis. Known as 'unbundling' it was outlined at the Legal Action Group Annual Conference 1994 by Forrest Mosten, one of the pioneers of the approach. He said:
>
> > 'The essence of unbundling is consumer choice. The consumer is empowered to make a choice of lawyers and a choice about the scope and depth of their use of those they select. It is up to the legal profession to educate the client that this is an option'.
>
> 'Unbundling' involves the 'bundle' of work that has to be done on the case being taken apart and shared between the adviser and the litigant."[117]

160. One well-known example of such a scheme that has been implemented for some time in England and Wales is the "Green Form Scheme". Funded by legal aid, it enables an individual who is of limited means to consult a solicitor for two hours (i) to get initial general advice about his legal situation and the options available, (ii) to get help to try and settle the dispute, (iii) to seek a barrister's opinion, and/or (iii) to write letters.[118]

161. In fact, as a recent study[119] conducted by the Legislative Council Office of the Hon Margaret Ng ("the Margaret Ng Legco Office Study") points out, a consultative paper proposing a similar scheme in Hong Kong was published in 1993. The idea was for members of the public to be charged $100 for one hour of legal advice, returning for repeat sessions as needed. The response of interested bodies was negative and the scheme dropped. However, as this may have been due to the likely difficulty of attracting any lawyers to do the work for $100 an hour, the suggestion has been made to look again into the scheme with a public subsidy of some $700 or $800 added to the $100 for each hour to make the scheme more feasible.

162. Another idea is for the establishment of a "duty advice scheme". It was, for example, a recommendation of the LRCWA that :-

Notes

117 WIR p 129, §§39-40.

118 See LCD's website.

119 "Paths to Justice – A preliminary Study on the channels of free legal advice available in Hong Kong," by the Legislative Council Office of the Hon Margaret Ng, July 2001, p 6.

> "A duty counsel scheme, providing free legal advice and limited representation to self-represented litigants, should be established for civil matters modelled on Legal Aid's existing criminal duty counsel scheme."[120]

163. For such schemes to succeed, the litigant must have a certain level of education and ability giving him some prospect of properly representing himself. The dispute must also not be too complex. As the ALRC points out :-

> "The problems faced by unrepresented litigants and applicants vary, depending on their individual capabilities, the complexity of the proceedings, whether they are applicants or respondents and the extent of assistance available by advisers or court staff."[121]

164. The Free Legal Advice Service operated by the Duty Lawyer Scheme is mentioned below.

G6.3. Streaming unrepresented litigants to small claims courts

165. Lord Woolf recommended increasing the monetary jurisdiction limits of the small claims tribunal to £3,000. In fact, when the Woolf reforms were implemented, the small claims jurisdiction in England and Wales was increased to £5,000.[122] In Hong Kong, the Small Claims Tribunal's monetary jurisdiction is comparable. It has, since 19 October, 1999, run to $50,000.

166. The idea of streaming larger disputes to special lists in the High Court is aimed at getting the dispute before a specially trained judge who will case manage the dispute appropriately. This is however a problematical suggestion. It may be a good idea where all parties are acting in person. However, the evidence suggests[123] that in Hong Kong, only a very small fraction of High Court actions falls into that category. Where one or more of the parties is represented, consignment of the case to some

Notes

120 WAR – Final Report, Recommendation 205.

121 ALRC No 89, §5.150. The ALRC also points out that litigants may find it more challenging to establish a defence than to present a series of facts on which a claim is based, citing American studies to such effect: see *fn 379*.

122 See Prof Michael Zander QC, *"The State of Justice – The Hamlyn Lectures, 1999"* (Sweet & Maxwell, London 2000), p 35.

123 Appendix B, Tables 22 to 24.

special list may cause resentment and appear to involve a bias in favour of the unrepresented party.

G6.4. Encouraging free legal advice and help for unrepresented litigants

167. In many systems, lawyers provide some degree of pro bono advice or assistance but help need not come exclusively from legal professionals. Bodies like Citizens Advice Bureaux, staffed by non-professionals, can develop detailed knowledge and experience in areas where advice is commonly sought (such as in relation to employment, housing or family disputes) and may be able to give effective assistance and advice in such areas or to refer litigants to other appropriate agencies for help. Lord Woolf recommended that space be allocated for permanent advice centres manned by such bodies to operate in the busiest courts.[124]

168. Where the resource of free legal advice or assistance is available, the question tends to arise as to how it should most effectively be used. "Unbundled" assistance has been discussed. As mentioned below, it may be that such advisers would best be deployed in some mediatory role rather than in what may be an inadequate attempt at helping litigants in person mount or defend an action in the formal legal system.

169. In Hong Kong, a Free Legal Advice Scheme (FLAS) is operated by the Duty Lawyer Service, a service funded by the Government and managed and administered jointly by the Law Society and Bar Association. The Duty Lawyer Service also operates the Duty Lawyer Scheme which provides representation in Magistrates Courts in relation to certain criminal offences and the Tel-Law Scheme which provides information on legal issues.

170. The FLAS is manned by volunteer lawyers who have increased in number from 100 in 1978 to 754 in the year 2000.[125] Services are provided at seven different locations, usually once a week but in one case, twice a week. Advice is restricted to cases not excluded by certain criteria[126] and is mostly sought on matrimonial matters. However, during times of economic downturn, advice was commonly sought on property and commercial disputes. Landlord and tenant, employment,

Notes

124 WIR p 134.

125 Margaret Ng Legco Office Study, p 5.

126 *Ibid, Appendix 1.*

estate administration, personal injury and criminal matters also featured as areas where advice was sought. [127]

171. This appears to be a successful scheme for providing general legal advice. The Margaret Ng Legco Office Study reports that in 2000, some 5945 advisory sessions of some 25-30 minutes each were held. [128] However, the Scheme is not designed specifically to assist litigants in person and makes no provision for assistance with any litigation in progress or to be initiated. Room therefore remains for pro bono or publicly funded assistance in that quarter.[129]

172. A more recent scheme, launched on 1 June 2000, is the Bar Association's Free Legal Services Scheme. This is more directly related to assisting unrepresented litigants. Its stated purpose is "to refer those with deserving cases who are unable to obtain Legal Aid and not able to pay for the legal help they need to members of the Bar who can advise and represent them."[130] It its first 6 months, it received 130 applications, from which 9 applicants received assistance. Although in its infancy, this Scheme is obviously a welcome development, with some 86 barristers, including 8 Senior Counsel, having joined the panel. [131]

G6.5. Getting the court to provide assistance by providing information

173. As indicated above, the assistance that court staff can properly render is necessarily limited by the need for the court to remain impartial in the dispute. However, properly trained staff dedicated to helping litigants in person fill in forms correctly and helping them with information as to preparing court bundles and so forth, could be valuable, both in helping the litigant progress the case and in establishing a helpful rather than a hostile atmosphere in the proceedings.

Notes

127 *Ibid, p 5.*

128 *Ibid, p 5.*

129 The Margaret Ng Legco Office Study also refers to the work of the Free Legal Advice Clinic for Women which helps with advice, including legal advice, in relation to domestic violence, matrimonial and family problems. This scheme, along with other social welfare schemes, are again more general in focus and not designed specifically to assist unrepresented litigants in relation to existing or intended proceedings.

130 Hong Kong Bar Association 2000 Annual Statement, p 12.

131 *Ibid.*

G6.6. *Enhancing systems for delivering information and assistance.*

174. A major difficulty with many of the initiatives mentioned above is their labour-intensive (and so costly) character. As Lord Woolf puts it :-

> "Procedural and other advice to litigants is at present provided on a one to one basis. This imposes heavy time demands on court staff and advisers alike. It also requires considerable expertise to be effective. A growth in litigants in person will increase the burden on all potential givers of advice."[132]

175. Recent developments have sought to achieve savings by the application of information technology to the delivery of information and advice to litigants.

175.1 Websites, video tapes and pre-recorded telephone tapes answer "frequently asked questions" in relation to topics such as – how to make a small claim; eligibility for legal aid; how to get advice; how to find and instruct a solicitor; how to commence proceedings; what the main court forms are and how to fill them in; what the main procedures are; and the cost of proceedings.

175.2 "Law shops" have been set up where advice can be obtained, advisory videos can be watched and reference books, leaflets, court forms, word-processing equipment, faxes, photocopiers and so forth are made available.[133]

175.3 In some jurisdictions, the use of "electronic kiosks" has proved popular. Lord Woolf describes them as follows :-

> "One possibility is self service legal 'kiosks', pioneered in California, and used across the United States, in Australia and in Singapore. These kiosks are located in or near court buildings and provide the public with user friendly, multi-media and touch screen information about legal and court practice as well as certain limited issues of law. The user enters information through a simple keyboard or by touching appropriate parts of the screen itself and is guided through legal issues by a mixture of video recordings, colour screens and recorded voice. In the United States, this technology guides users in the completion of forms for small claims and filing for divorce. It also offers information about matters such as how the courts work, alternative dispute resolution and landlord and tenant law.

Notes

132 WIR p 123, §20.

133 Lord Woolf referred to the Law Shop in Bristol as an example.

> As people become more comfortable with using technology, kiosk systems (or their equivalent) could be used to provide preliminary guidance and help to those who might otherwise be reluctant or unable to instruct lawyers."[134]

175.4 Indeed, interactive internet access to such "kiosk-type" information using personal computers can be established to provide at least the initial advice needed by unrepresented litigants.

G6.7. Simplifying the rules, procedures and court forms

176. As discussed more fully in Section M below, the objective of helping litigants in person by simplifying the English text is only indirectly applicable in Hong Kong. Any reference that such litigants may make to the procedural rules is most likely to be to the Chinese version. Accordingly, they are likely to be assisted only if replacing the existing HCR with rules that are more readily understandable in English enables the existing Chinese version to be replaced by a more accessible Chinese translation. There is reason to believe that some improvement is possible along these lines. Simplification of court forms in both languages would obviously be helpful.

G6.8. Encouraging or requiring unrepresented litigants to use ADR schemes.

177. In most systems, including the present, it is unacceptable to debar litigants in person altogether from conducting a case in the civil justice system on the ground that he is unrepresented. In Hong Kong, such a policy may well fall foul of Art 35 of the Basic Law and would in any event be contrary to the common law's acceptance of the subject's right to approach the seat of justice.

178. Some systems give the court power to order litigants to engage in court-annexed ADR at the outset as a condition of allowing them to proceed in the court system. This however poses the risk of additional costs and delays should the attempt at ADR fail. It may nonetheless be worthy of adoption if a sufficiently large percentage of cases referred to ADR are successfully mediated in whole or in part.

179. Properly conducted ADR may prove a beneficial process capable of providing a desirable outcome sparing the unrepresented litigant from having to negotiate the court system.

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134 WIR p 87, §§20-21.

180. It is in any case undoubtedly worthwhile to ensure that potential litigants in person are at least made aware of what ADR possibilities exist and encouraged to use them in preference to court proceedings.[135] Facilities in Hong Kong are discussed in the section on ADR below.

G6.9. Training judges and court staff

181. As mentioned earlier in this section, an unrepresented litigant in court is sometimes regarded as an unwelcome sight. Save in the most exceptional case, he is likely to find himself at a disadvantage especially where (as usually happens) the other side is represented. However much the judge may wish to help the litigant in the conduct of his case, interventions to this end tend to generate uneasiness for fear of an improper descent into the arena. In such an atmosphere it is difficult for justice to be done or seen to be done.

182. It is therefore important that all judges should address the management of cases involving litigants in person as part of their continuing training and education. This should aim to promote judges' understanding of the needs of unrepresented litigants and to develop an acceptable and consistent proactive approach to help the litigant present his case. Lord Woolf put it thus :-

> "Courts and judges must be more responsive to the needs of litigants in person ..... In proceedings where litigants appear in person, judges at all levels should adopt a more interventionist approach to hold the ring and ensure the adequate presentation of the litigant's case. This new role will require appropriate training."[136]

183. Court staff should be given clear guidance on the proper treatment of litigants in person. As recommended by the LRCWA :-

> "There should be a manual for court staff, specific guidelines for the judiciary ....., and training for all court personnel, including the judiciary ....., to assist in dealing even-handedly with self-represented litigants and other litigants."[137]

Notes

135 As suggested by Lord Woolf: WIR p 121, §11.

136 WIR p 23, §20.

137 WAR – Final Report, Recommendation 199.

G7. Unreasonable litigants abusing the process

184. The discussion has proceeded so far on the assumption that the unrepresented litigants concerned have respectable claims. Unfortunately, this is not always the case. The court is regularly faced with litigants whose claims are without foundation, maintained unreasonably and constituting an abuse of process. Such claims are not only oppressive to those on the receiving end, they tend to soak up the court's time and resources to the detriment of litigants with legitimate claims pending.

185. The courts have been slow to exclude even such litigants from invoking its jurisdiction. The existing provisions[138] for declaring someone a vexatious litigant are narrow in scope, requiring involvement of the Secretary for Justice and a cumbersome procedure. They are virtually never used. However, the constitutional right of access to the courts does not give anyone the right to misuse its processes, especially when the court's limited resources are much in demand. Accordingly, part of the discussion relating to litigants in person must concern itself with responses to unreasonable litigants.

186. The LRCWA's approach :-

> "In spite of the courts' inherent rights to control proceedings, there is an understandable reluctance to terminate the right to litigate. The Commission recommends new legislation for dealing with litigants who use the justice system to abuse others. Unreasonable litigants are people who litigate in a manner that may abuse opposing parties and other participants in the justice system. These litigants may or may not be legally represented. They often engage in 'solicitor shopping' and excessive interlocutory and pre-trial manoeuvres. They may raise spurious claims or defences, flout time limits to cause delays, pursue unmeritorious applications, refuse reasonable settlement offers, fail to pay orders for costs and launch frivolous appeals. The conduct of unreasonable litigants impinges on the effectiveness and efficiency of the justice system and makes the process of litigation more expensive and protracted for everyone."[139]

187. To remove such cases from the system, the LRCWA recommends that the rules be changed, expanding the grounds upon which control can be exercised by the court against "groundless or malicious" proceedings brought by such litigants,[140] eg, where there has been a history of

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138 High Court Ordinance, Cap 4, s 27.

139 WAR – Project Summary, p 33.

140 WAR – Final Report, Recommendation 213.

frequent issue of proceedings without cause by a potential litigant; or "unreasonable conduct" by a litigant in a particular action.[141] It recommends powers to require payment of security for the other party's costs taking into account conduct in previous proceedings.[142] Proper application of summary procedures to dispose of such cases is also envisaged. Many of such measures would be open to a court armed with modern case management powers. If not, consideration should be given to conferring appropriate powers on the court by a special rule.

Notes

141 *Ibid,* Recommendation 214.

142 *Ibid,* Recommendations 216 and 217.

PART II – POSSIBLE REFORMS

H. THE NEED FOR REFORM

188. The evidence examined above plainly indicates that the civil justice system in Hong Kong shares with many other systems the common defects identified in the literature. While it would not be accurate to say that the civil justice system here is "in crisis" it may justifiably be said that, in varying degrees, litigation in Hong Kong :-

- Is too expensive, with costs too uncertain and often disproportionately high relative to the value of the claim and to the resources of potential litigants.
- Is too slow in bringing a case to a conclusion.
- Operates a system of rules imposing interlocutory obligations that are often disproportionate to the procedural needs of the case and productive of expense and delay.
- Is too susceptible to obstructionist tactics by the manipulation of interlocutory rules, contributing to and permitting exploitation of substantial waiting-times for interlocutory applications.
- Is insufficiently case-managed and too adversarial, with the running of cases left in the hands of the parties and their legal advisers rather than the courts, with the rules often ignored and not enforced.
- Is incomprehensible to many people and does not do enough to facilitate use of the system by litigants in person.
- Does not do enough to promote equality between litigants who are wealthy and those who are not.

189. There is, in the view of the Working Party, plainly a need for reforms designed to remove or reduce these deficiencies and to improve the performance and competitiveness of our civil justice system. Simply doing nothing should not be considered an option. This is a view shared by Mr Andrew Jeffries, a solicitor with Messrs Allen & Overy and a member of the Law Society's Working Party on the Reform of Civil Process. He writes :-

> "No one seems to doubt that some reform of civil justice is needed. The problems to which commentators point are very familiar. The system of civil justice is seen as being too slow, too expensive and too complicated. The costs of a claim, particularly in the District Court, can often outweigh the amount in dispute. The wealthy litigant can browbeat the poorer litigant into submission through endless applications, posturing or delay. The litigant in person finds the whole system complicated and unnerving. These are exactly the same problems as were identified in England by Lord Woolf in his report and exactly the same problems that have faced other comparable systems of civil justice."[143]

H1. Coordinated reforms on a broad front

190. The Working Party's terms of reference are directed at possible reforms to the High Court's system of procedural rules. While reforms to those rules are a vital element of any attempt to cure the defects in our civil justice system, it must be emphasised that changing the rules alone cannot be a sufficient response. The rules function within an institutional, professional[144] and cultural framework which must undergo complementary and supporting changes if the reforms are to succeed.

191. To take one example, changes to the rules would have little effect if they were not supported by judicial and court administrative staff in sufficient numbers, properly resourced and given appropriate training on the objectives of the reforms and how to implement them.

192. Not having changed for well over a decade,[145] additions to the Judiciary's establishment may be needed to meet current demands on the system.

192.1 In recent months, waiting-times appear to have been deteriorating.[146]

192.2 Given the sharp increase in bi-lingual court business,[147] appropriate resources need to be deployed to meet those demands if performance

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143 Hong Kong Lawyer, August 2001, p 82.

144 In many jurisdictions, lawyers' professional associations have cooperated by making complementary changes to their codes of professional conduct and etiquette, sometimes with a view to providing a sanction against conduct deemed improper under the new rules but more often to ensure that lawyers who seek to comply with duties imposed under the new rules do not fall foul of pre-existing professional rules.

145 Appendix B, Table 4.

146 Appendix B, Tables 12 to 14.

147 Appendix B, Table 27.

standards are not to deteriorate.

192.3 Modern litigation arising from increasingly complex transactions in a framework of sophisticated legislation and case-law unquestionably tends to be heavier and more complex, making additional demands of the judiciary.

192.4 Most of the possible reforms are premised on greater discretionary case management by judges – an adjustment which is likely to call for more judges on the ground if delays are not to result. This illustrates the fact that pursuit of one reformist objective (better case management by the courts) may prejudice another (the reduction of delays) unless reforms proceed on a coordinated broad front.

193. However, additional judges cannot be precipitously appointed to what are effectively life-time posts. Candidates with suitable qualifications, abilities and temperament, who are willing to accept appointment have to be found.

194. Lord Woolf has pointed to the entrenched interests and a legal culture that have to undergo change if true reform, accompanying changes to the system of rules, is to take place. The task is intrinsically a difficult one, as Professor Garry D Watson QC points out :-

> "I ..... agree with Lord Woolf that radical change is needed, not cosmetic surgery. However, reforming the civil justice system for the better 'ain't easy'. This is why, despite some sixty reports in England on aspects of civil procedure since 1851, there has been no lasting solution to the twin problems of cost and delay. The same is true of North America. Our predecessors were neither fools nor dullards nor acting in bad faith; reform is simply very difficult. The challenge is not simply to propose change: it is to propose reforms which significantly improve the current position."[148]

195. As the ALRC puts it :-

> "It is difficult not to agree with Professor Thomas Cromwell (now Justice Cromwell) of the Canadian Task Force on Civil Justice, who has summarised a finding common to all such efforts: '[t]here are probably no quick fixes or sudden insights that will ensure great improvement' to the justice system."[149]

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148 Garry D Watson QC, *From an adversarial to a managed system of litigation: A comparative critique of Lord Woolf's interim report*, in Roger Smith (ed), *Achieving Civil Justice*, Legal Action Group (1996).

149 ALRC No 89, p 77 §1.75.

H2. Reforms and reducing costs

196. As the figures discussed above show, litigation in Hong Kong is undoubtedly expensive. In relation to the smaller claims, the costs bill often exceeds or equals an unduly large proportion of the claim amount. Whether the litigant is an ordinary individual or a large company, paying for litigation in the HKSAR is often not regarded as getting value for money. It is likely that one important factor behind the increasing number of unrepresented litigants is the fact that they are unable to find affordable lawyers, even junior ones, to act for them. There are also clear indications that the cost of legal services is making the civil justice system uncompetitive and that large corporate litigants are finding it more cost-effective to arbitrate or to litigate elsewhere.

197. The question therefore arises: To what extent will reforms to the civil justice system reduce litigation costs? The answer requires caution.

197.1 In the first place, it is extremely difficult to assess the overall costs implications of a set of reforms. It may well be that while certain specific reforms may lead to the reduction of costs, other reforms may create new points at which costs need to be incurred, off-setting or possibly even exceeding the costs saved as a result of the other changes. For example, the introduction of pre-action protocols by Lord Woolf is sometimes said to have increased rather than reduced costs. This is discussed further below.

197.2 Secondly, changes to the procedural rules cannot *in themselves* be expected to result in a general reduction in litigation costs. Reforms are again only a necessary but not a sufficient factor in the lowering of litigation costs. Such costs are determined by the level of legal fees which in our system are market-driven.

198. Subject to these caveats, changes to the civil justice system aimed at lowering costs can and should be proposed. These are reforms which seek to eliminate rules which generate unnecessary expense, reforms which discourage profligacy and which give the court more powers to prevent oppressive conduct by richer litigants and to require procedural economy generally. Such reforms also aim at facilitating operation of the market by increasing transparency and the flow of information.

199. To take a handful of examples these include proposals seeking :-

- to give overriding prominence to the objective of countering the deficiencies of excessive cost, delay and complexity identified above;

- to change rules which impose blanket interlocutory obligations often disproportionate to the issues in a particular case;
- to discourage practices, such as the proliferation of interlocutory applications or the overworking of witness statements or expert reports, which unnecessarily or disproportionately increase costs;
- to facilitate early settlement by requiring greater openness between the parties and by increasing the parties' options in making effective offers for settlement;
- to make the parties' potential liability to costs, both vis-à-vis their own lawyers and the other side's costs, more transparent and easier to assess;
- to devise a system of incentives and sanctions aimed at facilitating and enforcing procedural economy by the parties and their legal representatives;
- to reduce the need for the expense of costs taxations.

H2.1. Pre-action protocols and "front-end loading" of costs

200. To return to the first of the caveats mentioned above, namely, the difficulty in determining if and to what extent reforms result in the saving of costs, one controversy which has arisen in assessments of Lord Woolf's reforms is instructive. This involves discussion of the costs consequences of pre-action protocols.

201. Pre-action protocols (discussed further below) are guidelines as to reasonable conduct by parties to a dispute before proceedings are commenced. They promote openness between the parties with a view to facilitating early settlement and, if no settlement occurs, making progress of the case in court more efficient and its case management more effective. Failure to observe pre-action protocols may lead to costs sanctions if the case subsequently goes to court.

202. A recurrent criticism of these measures is that they have resulted in a "front-end loading" of costs, that is, in the parties having to incur costs at an earlier stage of the proceedings. The complaint is that in the many cases which settle shortly after commencement of proceedings, the costs of observing pre-action protocols are unnecessarily incurred. This was one of Professor Zander QC's main objections to the reforms :-

> "The single most important element of the Woolf reforms I suppose was to reduce the costs of litigation. One of my chief reasons for opposing the reforms was my belief that they will instead raise costs. The main reason is that the new rules require or encourage the parties to do more work earlier than before. The front-loading of costs bites on most cases – those that settle as much as those that go all the way to trial. It affects even cases where no legal proceedings are ever started."[150]

203. After some experience of the CPR in operation, some practitioners have expressed the view that pre-action protocols have indeed led to a front-end loading of costs, although not necessarily to increased or wasted costs. This was, for instance, the view of the City solicitors' firm Freshfields, in their assessment of the first year of operation of the Woolf reforms :-

> "In order to comply with the spirit of pre-action protocols and the accompanying practice direction, parties to a dispute must now cooperate with each other prior to the commencement of proceedings by providing sufficient information to enable a claim to be properly evaluated and for attempts to be made to resolve the dispute without recourse to proceedings. This will involve the parties in significant front-loading of costs and time spent on a dispute as parties are required to analyse and exchange information relating to the key issues in dispute at a much earlier stage."[151]

204. After two years of the CPR in operation, Mr E P Greeno, a litigation partner of Herbert Smith, another City firm of solicitors, made a similar assessment in relation to pre-action protocols in the context of commercial litigation :-

> "For commercial litigation there does not appear to have been a decrease in costs and even where claims are settled early, the significant front-loading of costs has, if anything, increased the costs of actions which settle. This front-loading is caused by the requirements of pre-action protocols, namely the obligations to plead cases more fully, which must be accurate as they are verified by a statement of truth; the need to plan and duties to search for disclosure; the need to spend more time considering one's own documents to be disclosed and to look for gaps in the disclosure of the other party....."[152]

205. On the other hand, Mr Greeno also points out that :-

Notes

150 Michael Zander QC, *"The State of Justice – The Hamlyn Lectures, 1999"* (Sweet & Maxwell, London 2000), p 41.

151 *"The Civil Justice Reforms One Year On – Freshfields Assess their Progress"* M Bramley & A Gouge (Butterworths, London 2000), p 10.

152 Herbert Smith, Mr E P Greeno, *Commerce And Industry Group Annual Legal Update: 15th March 2001.*

"There is evidence of a reduction in the number of claims issued. This is perceived to be due to pre-action protocols and the increased use of pre-action disclosure."[153]

206. The Lord Chancellor's Department has indeed confirmed that :-

- There has been a fall in the number of cases commenced in the County Court with a lower overall trend (supported by legislation excluding claims from the High Court unless they exceed £15,000).[154]

- There has been a similar reduction in cases commenced in the Queen's Bench Division of the High Court, with some evidential basis for suggesting that this is due to introduction of the CPR.[155]

The Department's assessment adds (in relation to personal injury cases) :-

"Early indications show that the introduction of Pre-Action protocols has been key in encouraging a new settlement culture. A survey of their members by the Association of Personal Injury Lawyers showed that 48% of respondents felt that earlier settlement had been reached and 33% of cases avoided litigation."[156]

207. Mr Geoffrey Reed, assessing the Woolf reforms from the viewpoint of a personal injury lawyer for defendants, was of a like opinion :-

"For years insurance companies have been trying to persuade claimants' solicitors to tell them at the earliest possible opportunity what claim they have to face, the allegations that are being made against their insured, what injuries and losses the claimant has suffered and what evidence they have to support that claim. An essential component of the new Rules is the protocol that requires the claimant to provide this information in good time before proceedings are commenced. The protocols are universally supported by the insurers.

The protocols do, of course, also require the insurers to respond to the claim that has been presented to them. If they do not accept liability they must undertake proper investigations, obtaining material documents and witness statements at a very early stage. This has resulted in significant front end loading of costs but insurers can at least make an informed assessment before such enquiries are carried out whether the

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153 *Ibid.*

154 EF, §3.3 and §3.4.

155 EF, §§3.5 to 3.9.

156 EF §3.15. Anecdotal evidence from solicitors firms such as Marineau Johnson and Lovells is also quoted to similar effect: EF, §3.10.

> cost of an investigation is justified. If they decide that it is not they can make an admission and ensure that the claimant does not incur any further unnecessary costs in investigating an aspect of the case that is not worth arguing about.
>
> Pre-action protocols really do appear to have had the desired effect particularly so far as the routine smaller claims are concerned. There has been a substantial reduction in the number of new proceedings being issued since April 26."[157]

208. These differences of view illustrate the difficulty of assessing the costs impact of pre-action protocols.

208.1 Despite the "front-end loading", costs may be saved or at least no additional expense overall may be incurred if the case is in any event one not likely to settle shortly after the start of proceedings.

208.2 Many such cases can only be expected to settle after the issues are crystallized and the legal advisers have felt able to assess the strength of each others' cases, so that costs have to be incurred before that point is reached. The settlement may come only after the expense of pleadings, discovery and exchange of expert reports and witness statements.

208.3 The front-end loading of costs in such cases therefore does not mean additional costs but merely costs (in the same or a lesser amount) being incurred at an earlier stage.

208.4 If the reforms lead to an early settlement this may well mean that notwithstanding the costs incurred, savings in costs overall are achieved, although that would necessarily be conjecture to some extent since one cannot know for sure how much would have been spent if the case had gone on without adherence to the pre-action protocol. Even if the costs bill were to be the same, the parties would benefit from the earlier disposal of the dispute. The court too would benefit either from the dispute settling before action is brought or from early disposal of the action.

209. The debate also illustrates the fact that a particular reform may increase costs in some cases (those that would quickly have settled anyway) but may have reduced costs in other cases (where parties settle early or without starting proceedings). It follows that some may favour the reform as a cost-saver while others are critical of the additional expense. The net effect on costs from the system's overall point of view is hard to

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157 Geoffrey Reed, *"Review of the Civil Procedure Rules from the Perspective of a Defendant Personal Injury Lawyer"* [2000] JPIL 13 at 14.

assess since it is hard to measure what costs would otherwise have had to be incurred.[158]

210. Where the case does not settle but fights to the trial's conclusion, the early requirement of precision in the formulation of the parties' respective cases is likely to be beneficial and may save costs at the interlocutory stage.

210.1 Slack practices such as uninformative pleadings and unfocussed discovery are more likely to be avoided, reducing the number of false issues, the production of irrelevant documents, the need for requests for particulars and specific discovery, as well as interlocutory applications to enforce such requests.

210.2 With earlier crystallization of the issues, the case file is likely to be less cluttered with irrelevant materials making interlocutory steps and ultimately the trial more efficient and less costly.

211. The fact however remains that the overall impact of a complex set of reforms on litigation costs is difficult to assess and quantify. This has led The Lord Chancellor's Department in assessing of two years' performance of the reforms to state cautiously :-

> "It is too early to provide a definitive view on costs. The picture is still unclear with statistics difficult to obtain and conflicting anecdotal evidence."[159]

H2.2. Reforms and the legal fees market

212. Further mention should also be made of the second caveat referred to above. Changes in the rules aimed at reducing the number of case events or simplifying them cannot control the extent of work done nor the fees charged by solicitors and counsel outside the court's precincts. It is plainly not beyond the ingenuity of certain lawyers to find an apparent justification for a very large number of hours spent preparing, say, for a case management hearing, however streamlined the court system has become. As the examination of taxed bills suggests, even cases which result in default judgments and have involved no court

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158 Research into the effect of pre-action protocols in England and Wales has been commissioned by the Department through the Institute of Advanced Legal Studies and the University of Westminster: EF, §3.16.

159 EF, Executive Summary.

events other than issue of a writ can give rise to a significant bill of costs, presumably on account of pre-action work done by the lawyers.

213. The assumption in our system is that overall fee levels are regulated by market forces. Yet, it is clear from the materials discussed above that businesses as well as the general public often consider legal fees uneconomic. Competition has therefore not had the effect of bringing fees down in Hong Kong to levels generally thought to be affordable or cost-effective. Where fees are considered unacceptably high :-

- The litigant may be unwilling or unable to pay them and may either write off a claim or settle it on unfavourable terms rather than engage in litigation.

- The litigant may end up unrepresented in the litigation, nursing a sense of grievance (especially where the other side is represented).

- The business litigant who has a choice of how to deal with the dispute may opt for arbitration or litigation in another country chosen for the economy of its legal services. Here, the market operates in the form of competition between systems (rather than among lawyers within a single system), with Hong Kong (and the legal profession here) losing out.

- The business litigant may object to the fees but may have no alternative but to pay them although he may, for future purposes, take steps to avoid litigating here, for example by stipulating for arbitration or for compulsory foreign jurisdiction in his contracts. If litigation is an important recurring overhead, he may even move his business to a different jurisdiction.

214. It is obvious that consequences such as these are highly detrimental to the litigants, to the reputation and attractiveness of Hong Kong as a place to do business and also to the interests of the local legal profession. However, some legal practitioners do not acknowledge the existence or importance of these issues. It is tempting for the practitioner who secures agreement to fees at the levels presently charged to conclude that there is no market resistance to his fees. That is, however, to ignore the fact that market resistance is in fact leading to a loss of work in favour of lawyers in or from other jurisdictions. Some practitioners may have secured slices of the cake but the profession as a whole ought to recognize that the overall size of the cake is shrinking because of what the market perceives to be unacceptable litigation costs.

215. Those practitioners who are securing work at rates which routinely attract criticism are doing so in a market that works inefficiently. Market information is in particular lacking since it is in practice very difficult to get reliable information about legal fees, particularly in respect of barristers.

215.1 The legal profession has certain monopolies relating to the civil justice system. Good reasons exist for this, including the need for close regulation of a profession which often assumes a fiduciary position in relation to clients, the need for competent advocacy in court and also the need to nurture a profession which performs constitutionally important functions as an independent body committed to upholding the rule of law.

215.2 However, the monopolies also mean that the available pool of qualified professionals, and hence the size of the professional market, is limited by law. This must be approached with responsibility if the benefits justifying the market restriction are not to be undermined by the unrestrained pursuit of self-interest in the form of fees perceived by users to be unaffordable or even exorbitant.

215.3 In the case of the Bar Association, despite repeated initiatives by the Bar Council, the membership has resisted any change to professional etiquette rules which restrict dissemination of such information. This distorts and limits the market so far as clients who wish to "shop around" are concerned.

215.4 Large repeat users, such as insurance companies and banks may be better supplied with information. Some will take steps to promote competition by undertaking what are sometimes called "beauty contests" in which different firms are asked to bid for litigation instructions, tendering information about counsel that they intend to use.

215.5 Most other litigants lack the sophistication or ability to do anything comparable. They will generally be unable to judge for themselves whether they are being charged reasonable fees and unable to monitor the justification for incurring particular charges as the case progresses. They may indeed have little idea as to the overall exposure to fees and costs that they face in the litigation. In itself, such uncertainty may well dissuade potential litigants from suing.

215.6 While many clients will receive helpful guidance from solicitors when instructing counsel, some solicitors are themselves ill-informed as to comparative expertise and fees amongst barristers, contenting themselves with loyally instructing someone from the same handful of counsel every time a barrister is needed.

215.7 The practice also makes it difficult for an individual barrister who wishes to position himself competitively in the market to judge what fees to charge. He generally has a very imperfect knowledge of what other counsel with comparable credentials are charging. Work is not infrequently lost without the barrister knowing it. A solicitor may quote the anticipated charging rate for a particular barrister to the client who then decides to go elsewhere because the fee is thought too high, without the barrister ever being told that this has occurred and without anyone knowing whether the quoted estimate of his fees was accurate or might not have been subject to downward negotiation.

215.8 While solicitors will obviously know how much the barrister is being paid, the barrister is usually ignorant of the amount charged by the solicitor. He therefore usually does not know the overall fees being charged for the case, what percentage his fees represent or what the client's reaction is to such fees. He may be pricing himself out of the market without knowing it.

215.9 Such lack of transparency has occasionally lent itself to being exploited by a small minority of unscrupulous solicitors or solicitors' clerks. Some such solicitors will charge far more than the barrister while leaving the real work to him and acting as no more than a post office. Other such solicitors or their clerks may even indulge in serious malpractice and misrepresent the position as to fees both to the client and to the barrister, with a view to making secret profits as middle man. In short, resistance to openness about fees and skills may not only make it difficult for the client to shop around for value, it may also be quite contrary to the interests of individual barristers .

216. In some jurisdictions, the approach has been to fix lawyers' fees by legislation or to permit the court to intervene where fees are unreasonable. Consideration is given below to rules allowing the court to intervene. However, the primary approach which the Working Party adopts in relation to high litigation costs is to propose reforms aimed (i) at simplifying procedures and eliminating procedural requirements likely to add unnecessarily to costs; (ii) at arming the court with effective case management powers aimed at deterring the wasting of costs or the incurring of disproportionate expense by the parties and their lawyers; (iii) at giving to clients more information about their own lawyers' and the other side's fees in order to help them assess the justification for certain charges and their overall exposure to costs; and (iv) at encouraging earlier settlements so that ultimately unneeded trial preparation costs may be avoided. Such an approach should be accompanied by changes to professional rules to introduce greater transparency enabling clients to make a more informed choice of legal

representatives. Possible specific reforms in this context are discussed later in this Report.

I. THE WOOLF REFORMS AS A USEFUL FRAMEWORK

217. We are fortunate in Hong Kong to have access to the work on civil justice system reform done in a number of jurisdictions. The reforms that have attracted much discussion in many countries are the reforms proposed by Lord Woolf which have, to a large extent, been implemented in the CPR. Those reforms are of particular relevance to Hong Kong for the following reasons :-

- They are based on two detailed reports drawing together current strands of thought and with the benefit of extensive consultation in England and Wales.
- Those reports have sought to tackle the problems on a wide front and led to a total of 303 recommendations for fundamental and far-reaching changes to the civil justice system.
- The adopted recommendations have been translated into a comprehensive set of procedural rules (the CPR) with accompanying practice directions, specialist court user guidance notes and, presently with five pre-action protocols issued. One therefore has the advantage of specific rules, directions and protocols providing focal points for discussion.
- The Rules of the Supreme Court replaced by the CPR are in many respects identical to the HCR presently in use in Hong Kong.
- The bulk of the CPR came into operation on 26 April 1999 and so allow an assessment of their operation over the last two years.

218. The Woolf reforms themselves drew on much work on civil justice systems that had preceded them. However, in the current era, they are pre-eminent in the field. Other reforms being discussed, and in some cases, already implemented have drawn heavily on Woolf concepts and rules expressed as part of the CPR. It therefore follows that any consideration of possible reform options for Hong Kong can usefully commence by examining the range of changes resulting from the Woolf reforms, a process likely to encompass most other reform initiatives, and then supplementing those changes by reference to ideas or rules from other jurisdictions.

219. At the outset, much of the criticism directed at the Woolf reforms were of a transitional nature. Many complained that too little time had been

allowed for the transition and that numerous changes in the first few months had made it hard to keep up with them or even to ascertain what the latest position regarding the CPR or the associated practice directions was.

220. However, after that initial period and over the first two years of their operation, the CPR have generally been favourably received in England and Wales. Referring to various surveys on the CPR, the Lord Chancellor's Department points out that :-

- The Law Society sent a questionnaire to members of its Woolf Network. Respondents believed that the rules were working quite well when the responses were published in September 1999.[160]

- Wragge and Co, in their survey of Legal Heads of FTSE 1000 companies showed that 89% of respondents were in favour of the reforms.[161]

- The Centre for Dispute Resolution conducted a MORI poll of practitioners, with an 80% level of satisfaction amongst respondents to their survey.[162]

- Key aspects of the reforms were welcomed by the Association for Personal Injury Lawyers (APIL) and the Forum Of Insurance Lawyers (FOIL) who distributed a questionnaire amongst their members.[163]

- Eversheds Access to Justice survey shows that 54% of its respondents said that the litigation process had improved.[164]

- A survey by the firm of solicitors, Lovells, of their litigation lawyers confirmed that parties are now treating litigation as a last

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160 EF, §9.6.

161 EF, §9.2.

162 EF, §9.3.

163 EF, §9.4.

164 EF, §9.5.

> resort and are going to greater lengths to try and resolve disputes without recourse to legal proceedings.[165]

221. With a few notable exceptions (particularly Professor Zander), individual published comments have also generally been favourable.

221.1 This was true of Freshfields' general comment after the first year :-

> "..... initial reports from the courts and practitioners suggest that the changes have proved to be less disruptive than was feared and that despites some minor problems, the CPR are generally working well in practice. .....
>
> It appears that the antagonistic, adversarial culture deprecated by Lord Woolf is in decline and that in its place there is a new degree of cooperation between the parties. A new partnership is emerging between the parties, their advisers and the court. The new rules offer greater flexibility, and during the initial 'transitional phase' at least, the courts have been exercising their wide discretion with restraint. The new case management procedures are succeeding in defining the real issues earlier, and resulting in earlier settlements." [166]

221.2 Similarly, in an article published in the New Law Journal in February 2000, Iain Goldrein QC and Margaret de Haas QC expressed support for the CPR in the context of personal injury litigation and conditional fees, arguing that it made costs and pricing more certain :-

> "'Woolf' is to be welcomed by both litigant and litigator. For the litigant, it provides in addition to more effective dispute resolution transparency of price and procedure. For the litigator, it secures through judicial case-management a litigation highway cleared not only of obstructions created by other parties, but also geared up for the speedy resolution of the discrete issue upon which the case is going to turn. The new procedural reforms can be interpreted as a recognition that restrictions on funding spell litigator insolvency if disputes are to be resolved by the traditional 'big-bang' oral trial.
>
> An unobstructed litigation highway which is orientated to the early resolution of disputes is a crucial pre-requisite to litigating to a margin when working in a fixed fee regime, or under a conditional fee agreement."[167]

221.3 Also in the personal injury field, but this time from the defendant's perspective, Geoffrey Reed generally welcomed the CPR :-

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165 *Ibid.*

166 *"The Civil Justice Reforms One Year On – Freshfields Assess their Progress"* M Bramley & A Gouge (Butterworths, London 2000), p 2.

167 Iain Goldrein QC and Margaret de Haas QC, *"Winning on a conditional fee – PI and clinical negligence"* (2000) 150 JLJ 224.

"Overall I consider the implementation of the new Rules has gone very well indeed. We are coping. Particularly, I think we are seeing some real benefits from the changes as well. There is undoubtedly a need for some refinement of the procedures but the benefits are already there to be seen."[168]

221.4 In an article principally discussing the single joint expert in personal injury cases (discussed later), Carol Jackson commented generally :-

"There are few practitioners who would do other than endorse the new CPR and find it a refreshing breath of fresh air, implementing reforms which were much needed."[169]

222. The Lord Chancellor's Department's overall comment relating to the first two years is as follows :-

"The view of practitioners and judges, with a few exceptions, is that the Civil Procedure Rules are working well. There are specific areas singled out for praise in the surveys, such as the change in culture from an adversarial climate to a more co-operative climate and a reduction in litigation. Although there is criticism from some quarters about litigation becoming slower and more costly, this is not felt by the majority of those who have expressed an opinion. Both judges and lawyers are in favour of the changes. Attempting to change many of the most significant features and the culture of the civil justice system is a huge task and it would be surprising if everything worked well from the start. In spite of the far reaching changes and the increase in workload resulting from case management which the courts have absorbed there is a feeling that the new system is running smoothly and that all the participants; court staff, judges, lawyers and other users are working to fulfil Lord Woolf's vision of a new civil justice system."[170]

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168 Geoffrey Reed, *"Review of the Civil Procedure Rules from the Perspective of a Defendant Personal Injury Lawyer"* [2000] JPIL 13. See also EF, § 9.7 for other anecdotal quotations, mainly favourable.

169 Carol Jackson, *The Uses and Abuses of Experts and Their Evidence* [2000] J.P.I.L. 19, 30.

170 EF, §9.8.

J. THE MAIN CONCEPTS UNDERLYING THE WOOLF REFORMS

223. In this section, two of the key concepts underlying the Woolf and other reforms are discussed. In Section K, a series of possible reforms addressing more detailed procedural questions, drawn from the CPR and elsewhere will then be discussed with a view to identifying measures for possible selection as reforms to be adopted in Hong Kong.

224. The two key concepts are :-

224.1 Adoption of an explicit overriding objective for the system, complemented by a new set of procedural rules to be operated in accordance with the overriding objective; and,

224.2 Adoption of a comprehensive case management approach to civil procedure.

J1. Overriding objective and CPR

J1.1. The purpose of the overriding objective

225. In his Final Report, Lord Woolf explained the idea behind the overriding objective in the CPR in these terms :-

> "Every word in the rules should have a purpose, but every word cannot sensibly be given a minutely exact meaning. Civil procedure involves more judgment and knowledge than the rules can directly express. In this respect, rules of court are not like an instruction manual for operating a piece of machinery. Ultimately their purpose is to guide the court and the litigants towards the just resolution of the case. Although the rules can offer detailed directions for the technical steps to be taken, the effectiveness of those steps depends upon the spirit in which they are carried out. That in turn depends on an understanding of the fundamental purpose of the rules and of the underlying system of procedure.
>
> In order to identify that purpose at the outset, I have placed at the very beginning of the rules a statement of their overriding objective. This is intended to govern the operation of all the rules and in particular the choices which the court makes in managing each case and in interpreting the rules.....…"[171]

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171 WFR, p 274, §§10 and 11.

226. As Lord Woolf put it a little later in his Report, the overriding objective contained in Rule 1 of the CPR, is intended to provide "a compass to guide courts and litigants and legal advisers as to their general course."[172] The relevant parts of this rule may conveniently be set out as follows :-

> "1.1 (1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.
>
> (2) Dealing with a case justly includes, so far as is practicable –
>
> (a) ensuring that the parties are on an equal footing;
>
> (b) saving expense;
>
> (c) dealing with the case in ways which are proportionate –
>
> (i) to the amount of money involved;
>
> (ii) to the importance of the case;
>
> (iii) to the complexity of the issues; and
>
> (iv) to the financial position of each party;
>
> (d) ensuring that it is dealt with expeditiously and fairly; and
>
> (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.
>
> 1.2 The court must seek to give effect to the overriding objective when it-
>
> (a) exercises any power given to it by the Rules; or
>
> (b) interprets any rule.
>
> 1.3 The parties are required to help the court to further the overriding objective."[173]

227. As noted above in the section on "The Complexity of the Civil Justice System", the second fundamental reason for replacing the RSC with the CPR is to establish a new methodology for approaching procedural questions. This involves using more broadly drafted rules construed purposively in accordance with the overriding objective. An important aim is to minimise encrustation of the rules with case-law seeking closely to construe each individual provision.

228. Such an approach is not without precedent. In a 1993 article, Mr Justice L T Olsson of the South Australian Supreme Court drew attention to a

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172 WFR, p 275, §12.

173 Rule 1.4 deals with the court's duty to manage cases and is dealt with in this Paper in the subsequent section on case management.

provision which requires that State's Supreme Court Rules to be construed in similar manner :-

"The fundamental concept upon which all procedures and processes are based now finds expression in Rule 2 of the *Supreme Court Rules* (SCR), which stipulates :-

'2.01 These Rules are made for the purpose of establishing orderly procedures for the conduct of litigation in the Court and of promoting the just and efficient determination of such litigation. They are not intended to defeat a proper claim or defence of a litigant who is genuinely endeavouring to comply with the procedures of the Court, and are to be interpreted and applied with the above purpose in view.

2.02 With the object of -

(a) promoting the just determination of litigation;

(b) disposing efficiently of the business of the Court;

(c) maximising the efficient use of available judicial and administrative resources; and

(d) facilitating the timely disposal of business at a cost affordable by parties;

actions in the Court will be managed and supervised in accordance with a system of positive case flow management. These Rules are to be construed and applied and the processes and procedures of the Court conducted so as best to ensure the attainment of the above objects.

2.03 The practice, procedure and interlocutory processes of the Court shall have as their goal the elimination of any lapse of time from the date of initiation of proceedings to their final determination beyond that reasonably required for pleadings, discovery and other interlocutory activities essential to the fair and just determination of the issues bona fide in contention between the parties, and the preparation of the case for trial."[174]

229. Since promulgation of the CPR, a similar rule (among other amendments) has been adopted in New South Wales.[175] It provides as follows :-

"Overriding purpose

1.3. (1) The overriding purpose of these rules, in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in such proceedings.

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174 The Honourable Justice L T Olsson (S Ct, S Australia), *Civil Caseflow Management in the Supreme Court of South Australia – Some Winds of Change* (1993) JJA 3 at 7-8. The other sub-rules of r 2 deal in greater detail with aspects of case management.

175 Supreme Court Rules (amendment No 337) 2000, made by the Rules Committee on 20 December 1999.

(2) The Court must seek to give effect to the overriding purpose when it exercises any power given to it by the rules or when interpreting any rule.

(3) A party to civil proceedings is under a duty to assist the Court to further the overriding purpose and, to that effect, to participate in the processes of the Court and to comply with directions and orders of the Court.

(4) A solicitor or barrister shall not, by his or her conduct, cause his or her client to be put in breach of the duty identified in (3).

(5) The Court may take into account any failure to comply with (3) or (4) in exercising a discretion with respect to costs."

230. The LRCWA has published recommendations that Western Australia adopt a similar approach :-

"5. The civil justice system should be managed in order to be expeditious, proportionate, and both procedurally and substantively just.

6. Legislation should be enacted applying the objects clause [above] to all legislation impacting upon civil justice, including Rules of Court, so that the principles on which the civil justice system rests are clearly set out."[176]

231. The overriding objective is not intended to be an abstract aspirational statement, but to represent a set of principles to be projected into all procedural rules, guiding their interpretation in a dynamic and purposive way. Case-law on the CPR has been relatively sparse (as intended). However, the decided cases tend to indicate that the courts have taken the purpose of the overriding objective to heart and that it is generally being used as a beacon guiding construction of the broad language of the CPR.[177] This has been brought home to practitioners, as Geoffrey Reed indicates :-

"On numerous occasions ..... the Court has made it abundantly clear that the overriding objective is a good deal more than a hollow declaration of intention. The repeated reference to the overriding objective has made us all stop and think from time to time just what we are trying to achieve."[178]

232. The overriding objective appears to have proved a useful and fundamental source of guidance for the operation of the system as a

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176 WAR – Recommendations 5 and 6.

177 Eg, *Burstein v Times Newspapers Ltd* [2001] EMLR 14; *Securum Finance Ltd v. Ashton* [2000] 3 WLR 1400 (CA) Chadwick LJ and Rattee J.

178 Geoffrey Reed, *"Review of the Civil Procedure Rules from the Perspective of a Defendant Personal Injury Lawyer"* [2000] JPIL 13.

whole. It is likely to be an essential part of any reforms, whether or not a new set of procedural rules is adopted. One may note, for instance, that an overriding objective was adopted in New South Wales where the rules were not subjected to a complete re-drafting.

233. Readers are asked whether the Hong Kong civil justice system should adopt an overriding objective and the accompanying methodology: **Proposal 1**.

J2. Case management and the CPR

J2.1. Case management: a response to adversarial excesses

234. As discussed in Section B5, the main ills of civil justice systems are thought mainly to be due to procedural distortions arising out of the adversarial design of the system. Well before the Woolf reforms, the answer to adversarial excesses was seen to be the adoption of more proactive case management by the courts – an approach pioneered by courts in the United States.

235. In England and Wales calls for case management were made in some of the many studies commissioned into civil justice reform. One such report published in 1988,[179] quickly received the support of the House of Lords in *Department of Transport v Chris Smaller Ltd* [1989] AC 1197.[180]

236. In the absence of a legislative framework, the initiative was taken by judges who handed down decisions establishing the court's power to exercise case management. The courts were no longer happy simply to leave the progress and procedural conduct of a case in the hands of the parties. In 1991, the House of Lords declared its support for judges who took necessary case management measures, declaring that appellate courts should be unwilling to entertain complaints about such decisions: *Banque Financière de la Cité SA v Skandia Insurance Co Ltd* [1991] 2 AC 249.[181]

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179 Civil Justice Review, Report of the Review Body on Civil Justice (1988) (Cmnd. 394).

180 Lord Griffiths recommended: "..... a radical overhaul of the whole civil procedural process and the introduction of court controlled case management techniques designed to ensure that once a litigant has entered the litigation process his case proceeds in accordance with a time table as prescribed by Rules of Court or as modified by a judge....." (at 1207)

181 Lord Templeman (at 280-1): "Proceedings in which all or some of the litigants indulge in over-

cont'd .....

237. By 1995, case management had become subject to a practice direction which commenced with the following two paragraphs :-

> "1. The paramount importance of reducing the cost and delay of civil litigation makes it necessary for judges sitting at first instance to assert greater control over the preparation for and conduct of hearings than has hitherto been customary. Failure by practitioners to conduct cases economically will be visited by appropriate orders for costs, including wasted costs orders.
>
> 2. The court will accordingly exercise its discretion to limit (a) discovery; (b) the length of oral submissions; (c) the time allowed for the examination and cross-examination of witnesses; (d) the issues on which it wishes to be addressed; (e) reading aloud from documents and authorities."[182]

238. Similar developments have occurred in Hong Kong. In *Cheung Yee-mong v So Kwok-yan* [1996] 2 HKLR 48, the Court of Appeal held that the giving of pre-trial directions :-

> "..... is a matter of case management peculiarly within the province of the judge of first instance. This court will not review decisions of a judge of first instance on matters of case management unless it is satisfied that the judge's decision was plainly wrong. Only then it is the duty of this court to interfere with it, and only then is this court entitled to substitute its own view as to what is reasonable for that of the judge. The judge's decision must fall outside the ambit of possible reasonable decisions before this court will interfere with it."[183]

239. Rogers JA put it in these terms :-

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elaboration cause difficulties to judges at all levels in the achievement of a just result. Such proceedings obstruct the hearing of other litigation. A litigant faced with expense and delay on the part of his opponent which threaten to rival the excesses of Jarndyce v Jarndyce must perforce compromise or withdraw with a real grievance. In the present case the burdens placed on Steyn J and the Court of Appeal were very great. The problems were complex but the resolution of these problems was not assisted by the length of the hearings or the complexity of the oral evidence and oral argument. The costs must be formidable. I have no doubt that every effort was made in the courts below to alleviate the ordeal but the history of these proceedings is disquieting. The present practice is to allow every litigant unlimited time and unlimited scope so that the litigant and his advisers are able to conduct their case in all respects in the way which seems best to them. The results not infrequently are torrents of words, written and oral, which are oppressive and which the judge must examine in an attempt to eliminate everything which is not relevant, helpful and persuasive. The remedy lies in the judge taking time to read in advance pleadings, documents certified by counsel to be necessary, proofs of witnesses certified by counsel to be necessary, and short skeleton arguments of counsel, and for the judge then, after a short discussion in open court, to limit the time and scope of oral evidence and the time and scope of oral argument. The appellate courts should be unwilling to entertain complaints concerning the results of this practice."

182 [1995] 1 WLR 508

183 Per Godfrey JA, at 49.

"Unless it can be shown that the Judge has clearly erred and justice will not be done, it is not for this Court to interfere with a judge's assessment of how a case should be conducted in front of him, how he should control his own court and how he should manage the case in front of him."[184]

J2.2. Case management: part of the overriding objective of the CPR

240. The need for effective case management has been embraced as one of the central features of the Woolf reforms. Rule 1.4, defines the elements of case management and makes "active case management" the court's duty, forming part of the overriding objective of the CPR :-

"1.4 (1) The court must further the overriding objective by actively managing cases.

(2) Active case management includes –

(a) encouraging the parties to co-operate with each other in the conduct of the proceedings;

(b) identifying the issues at an early stage;

(c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;

(d) deciding the order in which issues are to be resolved;

(e) encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure;

(f) helping the parties to settle the whole or part of the case;

(g) fixing timetables or otherwise controlling the progress of the case;

(h) considering whether the likely benefits of taking a particular step justify the cost of taking it;

(i) dealing with as many aspects of the case as it can on the same occasion;

(j) dealing with the case without the parties needing to attend at court;

(k) making use of technology; and

(l) giving directions to ensure that the trial of a case proceeds quickly and efficiently."

Notes

184 In *Cheung Chi Hung v Konivon Development Ltd* [2000] 2 HKLRD 367 at 369. See also, to similar effect *Lee Tak Yee v Chen Park Kuen* [2001] HKLRD 401 at 403-404.

241. In Part 3, the CPR also spell out the case management powers, general and specific, which a court may exercise, making it clear that these are in addition to[185] other powers enjoyed by the court. The powers listed in rule 3.1(2) are as follows :-

> "3.1(2) Except where these Rules provide otherwise, the court may –
>
> (a) extend or shorten the time for compliance with any rule, practice direction or court order (even if an application for extension is made after the time for compliance has expired) ;
>
> (b) adjourn or bring forward a hearing;
>
> (c) require a party or a party's legal representative to attend the court;
>
> (d) hold a hearing and receive evidence by telephone or by using any other method of direct oral communication;
>
> (e) direct that part of any proceedings (such as a counterclaim) be dealt with as separate proceedings;
>
> (f) stay the whole or part of any proceedings or judgment either generally or until a specified date or event;
>
> (g) consolidate proceedings;
>
> (h) try two or more claims on the same occasion;
>
> (i) direct a separate trial of any issue;
>
> (j) decide the order in which issues are to be tried;
>
> (k) exclude an issue from consideration;
>
> (l) dismiss or give judgment on a claim after a decision on a preliminary issue;
>
> (m) take any other step or make any other order for the purpose of managing the case and furthering the overriding objective."

242. A particular facet of the court's case management powers under the CPR is rule 3.3 which authorizes the court to exercise those powers of its own initiative. If it chooses to do so, it may give any person likely to be affected by the order an opportunity to make representations[186] although it does not have to do so.[187] However, a party affected who has not

Notes

185 CPR 3.1(1).

186 CPR 3.3(2)(a).

187 CPR 3.3(4).

been heard is given the right to apply to set aside the order (which will contain a statement informing such a party of this right).[188]

243. Where the CPR go further than the earlier case-law initiatives is that case management powers in the CPR are intended to operate as part of a series of mutually-supporting reforms advancing on a broad front. Additionally, by making express and detailed provision for the existence and scope of such powers and by requiring their deployment in pursuit of the overriding objective, procedural intervention by the judges is placed on a proper statutory basis.

244. It is of interest to note that the New South Wales Supreme Court has adopted similar express case management powers in the following terms[189] :-

"Directions and orders

26.1. The Court may, at any time and from time to time, give such directions and make such orders for the conduct of any proceedings as appears convenient (whether or not inconsistent with the rules) for the just, quick and cheap disposal of the proceedings.

26.2 .....

Case management by the Court

26.3. Without limiting the generality of rule 1, orders and directions may relate to:

(a) the filing of pleadings;

(b) the defining of issues, including requiring counsel or the parties to exchange memoranda in order to clarify issues;

(c) the provision of any essential particulars;

(d) the making of admissions;

(e) the filing of lists of documents, either generally or with respect to specific matters;

(f) the delivery or exchange of experts' reports and the holding of conferences of experts;

(g) the provision of copies of documents, including the provision in electronic form;

(h) the administration and answering of interrogatories, either generally or with respect to specific matters;

(i) the service and filing of affidavits or statements of evidence or documents to be relied on by a specified date or dates;

Notes

188 CPR 3.3(5).

189 Supreme Court Rules (Amendment No 337) 2000, Part 26.3.

(j) the giving of evidence at the hearing, including whether evidence of witnesses in chief shall be given orally, or by affidavit or statement, or both;

(k) the use of telephone or video conference facilities, video tapes, film projection, computer and other equipment and technology;

(l) the provision of affidavit evidence by specified persons in support of an application for an adjournment;

a timetable with respect to any matters to be dealt with."

J2.3. Objections to case management

245. This fundamental aspect of the Woolf and other reforms has not escaped criticism. Those who oppose case management tend to raise two objections: first, that it gives excessive discretion to judges, resulting in inconsistency and unfairness and, secondly, that it increases rather than reduces the expense of litigation.

246. At the forefront of the critics is once again Professor Zander QC. In a *Modern Law Review* article he states :-

> "[Judicial case management] massively increases discretionary decision making by judges. This will mean a consequential massive increase also in inconsistent judicial decision."[190]

Professor Zander expands on this theme in his 1999 Hamlyn Lectures :-

> "The problem of inconsistency of approach by the judges creating unfairness applies equally to a whole raft of new discretions given to the judges by the new rules. Under Lord Woolf's judicial case management, the judge who is managing the case knows only what is presented to him by the parties. He has to make snap decisions based often on inadequate information. Inevitably, through no fault of his, he will sometimes make decisions that are unwise or inappropriate. But it will be difficult to appeal such discretionary decisions since the appeal courts, understandably, will not want to second-guess the procedural judge .....
>
> So the move to judicial case management not only greatly increases the risk of inappropriate decisions resulting from the judge's lack of familiarity with the case, but equally increases the volume of low-level, inconsistent discretionary decisions that are in practice unappealable. That again seems to me a step backward for fairness."[191]

Notes

190 Michael Zander QC, "*The Government's Plans on Civil Justice"* (1998) 61 MLR 382 at 387.

191 Michael Zander QC, *"The State of Justice – The Hamlyn Lectures, 1999"* (Sweet & Maxwell, London 2000), p 44-45.

247. Turning to the second objection, Professor Zander argues that "the greater hands-on case management for Multi-track cases ..... with two pre-trial hearings, will generate even greater additional costs."[192]

248. There is no doubt that these objections deserve serious attention and that care must be exercised to avoid additional expense due to the adoption of case management. However, an examination of the literature and of the safeguards consciously built into relevant provisions indicates that these problems are manageable. Many commentators regard case management as far preferable to the excesses of unbridled adversarial practices and regard Professor Zander as holding very much a minority view.

249. It is true, as the ALRC points out, that some judges may be better managers than others: some may intervene too little, others may prove overbearing and be seen excessively to "run the show".[193] Nonetheless, to say that judges will be given broad managerial powers does not necessarily mean that unfairness will result. The guiding principles of the overriding objective provide a framework and common basis for argument. Such inconsistency as there is will be over the application of those principles to particular cases and not inconsistency born of judicial arbitrariness. Such inconsistency is unavoidable whenever there is room for debate as to how an established principle, whether substantive or procedural, should operate on a given set of facts.

250. It may persuasively be argued that any disadvantages are clearly outweighed by the benefits of case management.[194] The deleterious effects of unbridled adversarial practices are the realistic alternative, resulting in the seriously objectionable consequences discussed above.

J2.4. Case management and costs

251. The concern about case management adding to costs deserves further mention. An important aim of case management is to save costs by preventing parties or their advisers spinning out proceedings. However, there is clearly a risk that case management may lead to more court

Notes

192 *Ibid,* p. 42.

193 ALRC No 89, §6.17.

194 As Mr Justice Ipp concluded, after a detailed discussion of objections to case management in principle: Mr Justice D A Ipp, *"Reforms to the Adversarial Process in Civil Litigation"*, Pt I (1995) 69 ALJ 705; Pt II 69 ALJ 790; at 717 *et seq*.

hearings or other case events which may require the incurring of additional costs.

252. This risk must be recognized[195] and steps taken to contain it. For example, judges can be trained and rules designed :-

- To keep case management conferences to a minimum and only where they are considered truly necessary.
- So far as possible, to provide for self-executing sanctions in orders made so that hearings to enforce case management directions or compliance with the rules are made unnecessary.
- To encourage the parties to reach reasonable agreements on procedural matters without need for court approval of their agreed arrangement.
- To provide for effective sanctions where a court hearing has been made unavoidable because of unreasonableness or incompetence on the part of one party or his advisers.

Many examples of rules with aims such as these will be mentioned in Section K below.

253. The expense necessitated by an exercise of case management should only be accepted (both for the purposes of rule design and court practice) where it is reasonable to believe that such expense can be justified by the benefits it will produce. This was Lord Woolf's approach :-

> "..... the procedural judge must bear in mind the costs of case management conferences, in terms of both the parties' costs and of court resources, and they should not be ordered unless they would clearly be of value. ....."[196]

254. The case management rules may therefore be designed, for example to put into effect a procedural system with features like the following :-

254.1 A judge or master designated to act as procedural judge is given an early look at the nature of the case as disclosed in a written form filed by the parties. The form indicates the features of the dispute (its nature, the scope of relevant documents, the number of likely witnesses, any need for experts, etc). The parties are also required to state on the form what

Notes

195 As Lord Woolf did: WIR p 32, §21(a).

196 WFR, p 60, §7.

directions they consider necessary (agreeing them if possible). With this information the judge gives directions in writing (without any court attendance) fixing a timetable which takes the case from the beginning to the next phase considered realistically susceptible to early procedural management.

254.2 The procedural judge has great flexibility in deciding what directions to give. If the case looks simple, he may confine himself to a pleadings and discovery timetable without any case management conference, immediately fixing a trial date or a "window period" for trial. On the other hand, if it is a complex case involving many parties, documents, witnesses and experts, he may set a timetable with dates for a case management conference and a pre-trial review to focus the parties' efforts at each stage. He may or may not consider it worth fixing a "trial window" at the outset.

254.3 Once a timetable is devised, the court holds the parties firmly to its "milestone" dates but encourages the parties to agree as much as they can in between such dates and to reserve to the scheduled hearings any interlocutory disputes, hoping to reduce the number of interlocutory summonses issued.

255. While (as previously discussed) it is always difficult to assess the net costs implications of particular reforms, the ALRC[197] has pointed to some evidence in Australia that case management achieves net cost savings from promoting efficient management of court business and early settlement, although it considers the evidence inconclusive so that "the jury is still out" on this point. Many of the observations made as to assessing the costs implications of pre-action protocols apply equally to the costs implications of case management.

256. Readers are consulted as to whether provisions making case management part of the overriding objective and setting out the court's case management powers should be adopted: **Proposals 2 and 3**.

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197 ALRC No 89, §6.30-§6.31.

K. POSSIBLE REFORMS IN SPECIFIC AREAS

257. In this section, reforms in particular areas are described and proposed for consultation. Readers are asked for their opinions on each proposal.

K1. Pre-action protocols

K1.1. The problems addressed

258. Before the Woolf reforms, the courts had little to say about how the parties had conducted themselves before the start of proceedings. It has however increasingly come to be realised that the parties' pre-action attitudes and conduct have an important bearing on the progress and outcome of the dispute.

258.1 Sometimes parties are too quick off the mark and institute proceedings before properly exploring ways of resolving the dispute without going to law. Once a writ has been fired off, the parties may feel locked in to the litigation, running up costs and burdening the system, when in reality, both sides want to settle and probably could have settled without starting proceedings.

258.2 Others may start an action without having made sufficient inquiry of their own or the other side's case, later regretting having sued at all, or having brought the proceedings on an incorrect or flawed basis.

258.3 Both parties may wish to settle but feel unable to do so until they have fuller information about the other side's case which may not emerge until significant levels of costs have been incurred.

258.4 Parties may wish to negotiate possible settlement but each may be reluctant to initiate discussion for fear of such a move being considered a sign of weakness.

K1.2. The idea behind pre-action protocols

259. In Lord Woolf's Final Report, he proposes the introduction of pre-action protocols[198] "to build on and increase the benefits of early but

Notes

198 Defined in the CPR's Glossary as: "Statements of understanding between legal practitioners and others about pre-action practice and which are approved by a relevant practice direction."

well-informed settlements which genuinely satisfy both parties to a dispute."[199] This is something of a new departure since it involves the court assuming a degree of control (albeit *ex post facto*) over the parties' conduct which occurs before the start of the proceedings and so before the court's jurisdiction is invoked.

260. The idea is to develop codes of practice (pre-action protocols) on how disputes should reasonably be handled before taking the step of instituting proceedings and, if action is commenced, to penalise in costs and other disincentives, parties who had unreasonably failed to observe the protocol.

261. Such protocols are intended to be developed in specific areas of practice and drawn up with the active cooperation and agreement of business, professional, consumer and other groups interested in litigation in that area. Pre-action protocols are intended :-

> "(a) to focus the attention of litigants on the desirability of resolving disputes without litigation;
>
> (b) to enable them to obtain the information they reasonably need in order to enter into an appropriate settlement; or
>
> (c) to make an appropriate offer (of a kind which can have costs consequences if litigation ensues); and
>
> (d) if a pre-action settlement is not achievable, to lay the ground for expeditious conduct of proceedings." [200]

K1.3. Implemented by the CPR

262. Lord Woolf's recommendations are implemented by certain provisions of the CPR[201] and a Practice Direction on pre-action protocols[202] setting out the principles upon which the protocols operate and listing in its Schedule, those protocols which have been approved. The first two protocols, approved[203] at the time the CPR came into effect, apply to

Notes

199 WFR, p 107, §1.

200 *Ibid.*

201 CPR 3.1(4), 3.1(5), 3.9(e), 44.3(5), 48.1 and 48.2.

202 White Book, C1-001; or on the LCD's Website.

203 Entering into force on 26 April 1999.

personal injury and clinical negligence litigation. Since then,[204] three further protocols, dealing with defamation, construction and engineering disputes and professional negligence, have been approved.[205] Further protocols are subject to consultation and development.

(a) Operation of pre-action protocol illustrated

263. The Clinical Negligence Protocol can be taken as an example of how pre-action protocols are intended to work. It was developed by a multi-disciplinary Forum to deal with disputes involving healthcare and medical treatment.

264. It was recognized that a climate of mistrust often impedes the proper resolution of such disputes.

264.1 The patient may fail to raise complaints as early as possible and, when making a claim, may "play his cards close to his chest" in the belief that this is tactically desirable, making it hard for the defendant to respond to or assess the claim with a view to its resolution.

264.2 Conversely, healthcare givers may not be forthcoming when threatened with a claim, and may fail to give needed information and explanations to allow the plaintiff's advisers to assess the claim.

264.3 Such attitudes obviously obstruct early settlement and encourage litigation.

265. This protocol therefore seeks to :-

- encourage greater openness between the parties;
- encourage parties to find the most appropriate way of resolving the particular dispute;
- reduce delay and costs;
- reduce the need for litigation.

266. It does so by identifying the steps that should be taken before starting proceedings, setting a timetable for such steps and setting standards

Notes

204 As from 2 October 2000.

205 All the pre-action protocols may be read or downloaded from the LCD's Website.

(with standard forms and precedents) as to the types of information, documents and medical records that should be made available by each side.

266.1 It is envisaged, for instance, that a patient who complains of an adverse outcome in his treatment, will wish to obtain the relevant health records. The Protocol requires him to be as specific as possible to enable the records to be retrieved and to alert the healthcare provider of the possible adverse outcome. A standard of 40 days is set as the time for reply.

266.2 A letter of claim by the patient is then envisaged, the Protocol prescribing that it should state the facts and identify the alleged adverse outcome with the main allegations of negligence. It should also describe the patient's injuries, condition, prognosis and alleged financial loss. Health records should be enclosed or referred to.

266.3 The recipient of the complaint is required to acknowledge receipt within 14 days, but then the Protocol prescribes a 3 month hiatus after the claim letter before starting any proceedings. This is to give the potential defendant time to retrieve his own records, to seek advice and to respond, possibly disposing of the case without proceedings.

266.4 Standards as to the contents of the response are also laid down. Thus, if the claim or part of the claim is admitted the healthcare provider is to say so in clear terms. If it is denied, specific comments on the allegations of negligence and the opposing version of any disputed facts should be given, with any additional documents relied upon.

266.5 By providing a known timetable for responses, the premature launching of proceedings may be avoided. The defendant's lack of response during the period that he is allowed for assessing the claim is not mistaken for a refusal to negotiate.

(b) Non-compliance and the CPR

267. Where non-compliance with a protocol is relevant, the court can take this into account in deciding what case management directions to give, including a direction requiring the non-complying party to pay money into court.[206] More importantly, in deciding on costs orders, the court is required to have regard to all the circumstances, including the conduct of

Notes

206 CPR 3.1(4) and (5).

all the parties, which specifically includes conduct "before, as well as during, the proceedings and in particular the extent to which the parties followed any relevant pre-action protocol."[207]

268. The Practice Direction makes it clear that in exercising these powers in relation to non-compliance with pre-action protocols, orders having serious financial consequences may be made, including orders regarding interest on the sums claimed. Paragraph 2.3 of the Practice Direction states :-

> "If, in the opinion of the court, non-compliance has led to the commencement of proceedings which might otherwise not have needed to be commenced, or has led to costs being incurred in the proceedings that might otherwise not have been incurred, the orders the court may make include :
>
> 1) an order that the party at fault pay the costs of the proceedings, or part of those costs, of the other party or parties;
>
> 2) an order that the party at fault pay those costs on an indemnity basis;
>
> 3) if the party at fault is a claimant in whose favour an order for the payment of damages or some specified sum is subsequently made, an order depriving that party of interest on such sum and in respect of such period as may be specified, and/or awarding interest at a lower rate than that at which interest would otherwise have been awarded;
>
> 4) if the party at fault is a defendant and an order for the payment of damages or some specified sum is subsequently made in favour of the claimant, an order awarding interest on such sum and in respect of such period as may be specified at a higher rate, not exceeding 10% above base rate (cf. CPR 36.21(2)), than the rate at which interest would otherwise have been awarded."

269. Since the preparation of protocols covering particular fields of litigation takes time (being based on consensus and acceptance among interested parties in that field), the Practice Direction on protocols provides[208] that in cases not covered by an approved protocol :-

> "..... the court will expect the parties, in accordance with the overriding objective and the matters referred to in CPR 1.1(2)(a), (b) and (c), to act reasonably in exchanging information and documents relevant to the claim and generally in trying to avoid the necessity for the start of proceedings."

Notes

207 CPR 44.3(4) and (5).

208 At §4.

K1.4. Experience of the pre-action protocols

270. As discussed in section H2.1 above, pre-action protocols have been criticised for increasing costs in relation to those cases which settle shortly after commencement of proceedings. Comments have also been made that in some cases, the protocols have generated unwelcome solicitors' correspondence of a self-serving character purporting to show an adherence to the protocols and the overriding objective, a phenomenon which in itself increases unproductive costs.[209]

271. However, it is also clear that the protocols have led to a significant number of cases never being started – which is one of their purposes. As pointed out above, lawyers acting for insurance companies have welcomed pre-action protocols notwithstanding their front-end loading of costs since the greater information made available allows insurers to make an informed assessment as to whether to incur investigation costs and whether to engage in legal proceedings. This has apparently resulted in a substantial reduction in the number of new proceedings being issued.[210] This conclusion accords with the findings reported by The Lord Chancellor's Department.[211]

272. In Hong Kong, the figures in Appendix B[212] suggest that a significant front-end loading of costs occurs in any event, with large bills issued in respect of cases concluding on a default judgment. It is questionable whether complying with pre-action protocols would further increase such pre-action costs.

273. Moreover, as previously argued, in cases that do not in any event settle shortly after the start of proceedings, front-end loaded costs incurred in complying with pre-action protocols are likely to be money well spent, leading to more sharply defined issues and enabling the case to be more efficiently dealt with.

274. During his visit to Hong Kong in April 2000, Lord Woolf pointed to indications that pre-action protocols were having the desirable effect of

Notes

209 Harry Anderson, of Herbert Smith, London, at a Sweet & Maxwell Asia Conference, *"Civil Procedure: Latest Developments and Prospects of Change" Hong Kong on 8 June 2001.*

210 Geoffrey Reed, *"Review of the Civil Procedure Rules from the Perspective of a Defendant Personal Injury Lawyer"* [2000] JPIL 13 at 14.

211 EF, §3.15. Research on the impact of pre-action protocols has been commissioned.

212 Tables 7, 8 and 11 to 14.

modifying institutional conduct aimed at meeting the standards set by the protocols. Some healthcare givers were, for instance, re-organizing their systems of record keeping and retrieval to make it easier to respond to protocol letters.

275. Readers are asked for their views as to whether steps should be taken to develop pre-action protocols and supporting procedural rules in Hong Kong: **Proposals 4 and 5**.

K2. Mode of commencing proceedings

276. One of the objectives of the Woolf reforms was simplification by providing for only one procedural form for the commencement of proceedings. This has partly been implemented under the CPR which provide for two methods of commencement.

276.1 Part 7 of the CPR provides for claims to be started by issue of a "claim form" in place of "the plethora of originating process previously available in the High Court (writ, originating summons, originating motion and petition) and in the county court ....."[213]

276.2 By Part 8 of the CPR, an alternative procedure is set up which is available to a litigant who "seeks the court's decision on a question which is unlikely to involve a substantial dispute of fact" or where this procedure is expressly sanctioned by a rule or practice direction.

277. Readers are consulted as to whether the mode of commencing proceedings should be simplified to involve only two forms of commencement, abolishing distinctions between writs, originating summonses, originating motions and petitions: **Proposal 6**.

K3. Disputing the court's jurisdiction

278. Part 11 of the CPR conveniently sets out simply and clearly important rules relating to applications to challenge the court's jurisdiction or to invite it, as a matter of discretion, not to exercise jurisdiction which it possesses. Many of these rules had been developed in judicial decisions and so had to be gleaned from scattered case reports. Readers are consulted as to whether such a rule should be adopted: **Proposal 7**.

Notes

213 White Book 7.2.1.

K4. Default judgments and admissions

279. As the figures examined in Appendix C Table 6 show, a large proportion of cases end in default judgments. In many cases, the defendant accepts that there is no defence and but seeks time to pay or wishes to dispute the amount of interest due or to raise similar issues of detail. At present, dealing with such questions may require one or more appearances before a master and scope appears to exist for streamlining the process in such cases.

280. Part 14 of the CPR aims to provide such streamlining. It has two objectives.

280.1 First, it provides a simple and flexible set of rules to allow binding admissions to be made regarding all or any part of the other side's case, narrowing the issues between the parties and so saving costs.[214] The court is also given a discretion to allow admissions to be withdrawn on terms so that making an admission is perhaps less daunting since it is not absolutely irreversible.

280.2 Secondly, it sets out a procedure for debt or money claims whereby the defendant is allowed to admit the claim and to make proposals for payment by instalments. If accepted, a judgment incorporating those terms can be entered administratively without the expense of a hearing or involving a judicial officer.

281. As this provides an interesting example of procedural streamlining, it may be worth looking at a little of the detail in relation to such money claims.

- When the plaintiff serves particulars of his claim, it is accompanied by a practice form which the defendant can use if he wants to make admissions under Part 14. If he wants to avail himself of this procedure, he has to do so within 14 days,[215] or else the procedure may become a source of delay.

- The rules cater for both liquidated claims (referred to as claims for specified amounts)[216] and unliquidated claims (where no

Notes

214 CPR 14.1.

215 CPR 14.2.

216 CPR 14.4 and 14.5.

amount is specified)[217] as well as for defendants who wish to admit the whole or only part of the claim.

- To take the simplest case, namely, where the claim is for a specified amount (including a calculated sum of interest within statutory limits) and the defendant admits the whole of it but wants time to pay, the defendant accompanies his admission with proposals for payment by instalments, stating the rate and time for such payments.[218] If the plaintiff decides to accept, he simply asks the Registry to enter judgment in those terms without any intervention of a master or judge.

- Where partial agreement is reached, Part 14 provides for the non-agreed aspects (eg, as to the quantum or number of the instalments) to be determined by a court official for claims up to £50,000 or by a judge if a larger amount is involved, stipulating that the judge may make a determination "without a hearing". Parties can however request a hearing for questions to be re-determined where dissatisfied.[219]

282. These changes appear to be a sensible attempt at saving costs and merit consideration for adoption. Readers are consulted accordingly: **Proposal 8**.

283. The techniques (which may be emulated in other contexts) involve :-

- Encouraging the parties to agree on all or some of the necessary arrangements, so as to eliminate or limit the scope of argument.

- Making provision for obviously foreseeable alternative scenarios so that the parties can deal with each case with minimal debate and without reference to the court.

- Providing standard forms to make it easier for a litigant to activate the rule.

- Letting the court determine outstanding issues on paper, but providing for a hearing if desired by the parties.

Notes

217 CPR 14.6 and 14.7.

218 CPR 14.9.

219 CPR 14.13.

K5. Pleadings and statements of truth

K5.1. The problems with pleadings

284. As Lord Woolf noted, pleadings, intended as a procedural tool to promote fair and efficient litigation, have become subverted from their proper purpose :-

> "Whether through incompetence or deliberation, pleadings often fail to state the facts as the rules require. This leads to a fundamental deficiency, namely the failure to establish the issues in the case at a reasonably early stage, from which many problems result." [220]

285. Some of the particular defects with the present practice of pleadings were identified as follows :-

> "▪ They often fail to set out the facts clearly and so impede identification of the issues;
>
> ▪ they concentrate too much on causes of action and defences, rather than on facts, which in turn contributes to over-use of alternative positions; defences in particular are deliberately framed to keep all options open for as long as possible;
>
> ▪ affirmative defences are not pleaded;
>
> ▪ longwindedness; and
>
> ▪ the original pleadings get out of date as they are superseded by amendments and further and better particulars; after the exchange of witness statements, they become less relevant for the purpose of the trial agenda."[221]

286. Similar difficulties have been reported in Australia, with a couple of additional points :-

> "▪ Inexact pleading and frequent amendment of pleadings is allowed by courts and there is no incentive for respondents to define the issues too closely as they are entitled to put the applicant to proof on each matter pleaded
>
> 'Such ease [in amending pleadings] permits and indeed encourages inexact pleadings; an applicant is aware that pleadings can be developed, reformulated and "tidied up" in due course, and as a consequence less care and less specificity than would otherwise be the case ensues.'
>
> ▪ lawyers frequently use pleadings in counter-productive ways: for example, by failing to admit matters pleaded that they know from their instructions to

Notes

220 WIR p 8, §8.

221 WIR p 153, §4.

be true or making allegations that they cannot prove at trial." [222]

287. Experience indicates that all of these deficiencies are frequently encountered in relation to pleadings filed in this jurisdiction and that improvements are clearly called for.

K5.2. The main responses in the CPR

288. The CPR reforms seek to meet these deficiencies, first, by attempting to bring the focus of the claim form and particulars of claim back to the key facts of the dispute. They seek to discourage a style of pleading determined by causes of action and numerous alternatives.[223]

288.1 CPR 16.2(a) provides that the claim form "must contain a concise statement of the nature of the claim" and CPR 16.4(1) states that the particulars of claim (which should either accompany the claim form or be served shortly afterwards) must include "a concise statement of the facts on which the claimant relies".[224]

288.2 The accompanying Practice Direction[225] expands on this, stating that a party may :-

> "(1) refer in his statement of case to any point of law on which his claim or defence, as the case may be, is based,
>
> (2) give in his statement of case the name of any witness he proposes to call, and
>
> (3) attach to or serve with this statement of case a copy of any document which he considers is necessary to his claim or defence, as the case may be (including any expert's report to be filed in accordance with Part 35)."

289. Secondly, the CPR requires substantive defence pleadings intended to expose the real issues between the parties and not merely "stonewalling" denials or non-admissions.[226] The defendant must state which of the allegations in the particulars of claim he denies; which of them he is

Notes

222 GTC, p 96-97, citing ALRC No 62, §10.89 *et seq*.

223 A similar approach is recommended by the LRCWA: WAR – Project Summary, p 17.

224 It must also include details of any interest and aggravated damages etc claimed and any other details stipulated by applicable Practice Directions (eg in personal injury actions, where limitation defences are raised, and so on): CPR 16.4.

225 16PD §14.3.

226 CPR 16.5.

unable to admit or deny, but which he requires the claimant to prove; and which allegations he admits. If he denies the allegation, he must state his reasons and if he intends to put forward his own version, he must state what it is.

290. Thirdly, the CPR have introduced the requirement that the allegations in all statements of case be verified by a "statement of truth", ie, a statement by the party putting forward the document that he believes the facts stated in the document are true, signed by that party or by his legal representative on his behalf.[227]

290.1 This requirement extends to amendments and further particulars (referred to as clarification or information). Failure to verify the document puts it at risk of being struck out.[228]

290.2 Where a legal representative signs the statement of truth :-

> "..... his signature will be taken by the court as his statement (1) that the client on whose behalf he has signed had authorised him to do so, (2) that before signing he had explained to the client that in signing the statement of truth he would be confirming the client's belief that the facts stated in the document were true, and (3) that before signing he had informed the client of the possible consequences to the client if it should subsequently appear that the client did not have an honest belief in the truth of those facts."[229]

290.3 Making a statement of truth without an honest belief in its truth is punishable by contempt in proceedings brought with the court's leave.[230]

291. The NSW Supreme Court has also adopted rules[231] requiring verification of pleadings, in support of the broad principle stated in its rules as follows :-

> "(1) A party to proceedings must not in a pleading or at a trial or hearing make, or put in issue, an allegation of fact unless it is reasonable to do so.

Notes

227 CPR 22.1. In the case of a company, it must be signed by a "person holding a senior position" such as a director, the treasurer, secretary, chief executive, manager or other officer of the company: 22PD §§3.4 and 3.5.

228 CPR 22.2.

229 22PD §3.8.

230 CPR 32.14.

231 Supreme Court Rules (amendment No 337) 2000, r 15.23.

> (2) A party to proceedings who has in a pleading or at a trial or hearing made, or put in issue, an allegation of fact must not maintain that allegation or its controversion unless it is reasonable to do so."[232]

292. The complaint has sometimes been aired that rules requiring a statement of truth also result in a front-end loading of costs because they require the parties to invest enough effort and expense at the pleadings stage to be sufficiently sure of their case to comply. This is not an impressive complaint :-

292.1 One is concerned in this context with a case that is not going by default and has at least to go through the pleadings stage. The expense of preparing and filing pleadings therefore has to be incurred in any event.

292.2 If filing pleadings that are carefully and accurately drawn costs more than pleadings which merely "fudge" the position and may not reflect the party's true position, the lower expense is not a true measure of what is required. The "additional" cost may be no more than what is actually needed if one is to adopt a proper approach to the litigation.

292.3 Moreover, the "lower cost" of an ill-instructed pleading is likely to be a false economy since any inaccuracies and superfluous allegations will often generate irrelevant work and useless expense as the case proceeds.

293. Fourthly, Lord Woolf concluded that many of these deficiencies were due to the absence of judicial scrutiny in the pleading process.[233] One of his recommendations was therefore for the introduction of such scrutiny. He envisaged the procedural judge examining the claim and defence to see whether the issues can readily be identified. If he thinks not, he can give directions to clarify particular points in the claim or defence, without a hearing or by a telephone conference. If the difficulties are not straightforward, he might require a case management conference to elucidate the issues and to deal with any other matters requiring treatment. [234]

294. This recommendation has been implemented in CPR 18.1 which provides as follows :-

Notes

232 *Ibid*, r 15A.1.

233 WIR p 154, §7.

234 WIR p 156, §10 and §11.

> "(1) The court may at any time order a party to clarify any matter which is in dispute in the proceedings; or give additional information in relation to any such matter, whether or not the matter is contained or referred to in a statement of case.
>
> (2) Paragraph (1) is subject to any rule of law to the contrary.
>
> (3) Where the court makes an order under paragraph (1), the party against whom it is made must file his response; and serve it on the other parties, within the time specified by the court."

K5.3. *Requests for further and better particulars*

295. CPR 18 also provides the basis for the equivalent of a request for further and better particulars under the existing system.

295.1 The associated Practice Direction stipulates that a party who seeks clarification or information about some matter in a claim or defence should seek it first by correspondence and if this is not forthcoming, apply to the court for a Part 18 order.[235]

295.2 If the other party objects to providing the information or clarification, he gives reasons why, including a reason based on overriding objective, eg, that the request is disproportionate.[236]

295.3 If the court makes an order, it may at the same time (as is generally encouraged)[237] provide for the consequences of non-compliance. Such an order takes effect automatically unless the defaulting party applies for and obtains relief from the sanction.[238]

K5.4. *Amendment*

296. The White Book points out that amendments are less readily approved by the court because of "the increased attention the court now gives to statements of case."[239] The thrust of the rules is to require precision and a more advanced appreciation of one's case before pleading it (hence the

Notes

235 18PD §1.1.

236 18PD §4.

237 CPR 3.1(3).

238 CPR 3.8(1).

239 White Book 17.0.2.

complaints about front-end loading of costs) so that early crystallization of the issues improving the chances of early settlement and more efficient case management. It would run counter to these objectives to allow a party to put in a slipshod statement of case in the knowledge that it can be placed on a more permanent footing later.

297. Accordingly, under the CPR one amendment without leave is allowed before the document is served, but thereafter, either the leave of the court or the written consent of all the parties is required for an amendment. The consent option is unavailable and the court's permission is required where the amendment is to change the parties. [240]

298. Readers are consulted as to the possible adoption of measures similar to those discussed in relation to pleadings, statements of truth, amendments and requests for further information: **Proposals 9 to 13**.

K6. Summary disposal of cases or issues in cases

K6.1. The changes proposed and their aims

299. Two major objectives lie beneath the Lord Woolf's proposals regarding the summary disposal of actions.

299.1 First, he argued that cases which have no real prospects of success, whether mounted by plaintiff or defendant, should be eliminated at an early stage.[241] This involves adopting a lower standard for elimination. Instead of requiring the plaintiff to show that a defendant has no arguable defence before granting him summary judgment, it should be enough to show that the defendant has no real prospect of success in his defence.

299.2 Secondly, before the CPR in England and Wales (as is presently the case in Hong Kong), different rules and standards applied depending on whether the application was :-

(a) for setting aside a default judgment (HCR Order 13, rule 9),

(b) for summary judgment and determination of a point of law (HCR Orders 14, 14A and Order 86); or,

Notes

240 CPR 17.1.

241 WIR, p 37, §17; WFR, p 123, §32.

(c) for striking out pleadings for no cause of action (HCR Order 18, rule 19).

299.3 Lord Woolf favoured a single test – in substance a "no real prospect of success" test – in all procedural contexts where summary disposal of the proceedings or any issue in the proceedings may ensue. As his Lordship puts it :-

> "The test for making an order would be that the court considered that a party had no realistic prospect of succeeding at trial on the whole case or on a particular issue. A party seeking to resist such an order would have to show more than a merely arguable case; it would have to be one which he had a real prospect of winning. Exceptionally the court could allow a case or an issue to continue although it did not satisfy this test, if it considered that there was a public interest in the matter being tried."[242]

299.4 Those were objectives which found support in Victoria[243] and in Western Australia.[244]

300. Use of these powers were to be facilitated by procedural enhancements. These are changes :-

- Allowing the court to initiate the procedure of its own motion and at any time when reviewing the case.
- Allowing either party to initiate the procedure from the very beginning. Thus, a plaintiff can issue an application at the same time as serving his statement of case and a defendant can do so even before filing a defence.
- Allowing the court to allow oral or written evidence to be adduced if adopting that course could dispose of the case more economically than at a full trial.[245]

K6.2. As Implemented

301. In relation to striking out, CPR 3.4(2) provides :-

> "The court may strike out a statement of case if it appears to the court –

Notes

242 WFR, p 123, §34.

243 GTC, p 120.

244 WAR – Recommendation 98.

245 WFR, p 124, §36.

(a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;

(b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or

(c) that there has been a failure to comply with a rule, practice direction or court order."

302. It follows that :-

- Under paragraph (a), to survive a striking out application, a claim or a defence must be more than merely arguable – they must rest on reasonable grounds.
- Paragraph (b) maintains the court's inherent jurisdiction to strike out proceedings which are an abuse.
- However, under paragraph (c), the English Court of Appeal[246] has stressed that a striking out should not be the first port of call where there has been non-compliance with time-limits or other rules or orders. Many other available alternatives exist and should first be considered.

303. In the context of setting aside default judgments, the present distinction between judgments that have been regularly and irregularly obtained has been maintained. Where a judgment has been obtained without due observance of specified rules, the court must set it aside.[247] In other cases, the court has a discretion and may set aside or vary the judgment applying the "real prospect of success" test :-

"(a) the defendant has a real prospect of successfully defending the claim; or

(b) it appears to the court that there is some other good reason why –

(i) the judgment should be set aside or varied; or

(ii) the defendant should be allowed to defend the claim."[248]

304. Summary judgments are dealt with by Part 24 which establishes "a procedure by which the court may decide a claim or a particular issue

Notes

246 *Biguzzi v Rank Leisure plc* [1999] 1 WLR 1926.

247 CPR 13.2.

248 CPR 13.3.

without a trial."[249]

305. The test is again the real prospect of success test, applicable either to the plaintiff's or the defendant's case and formulated as follows :-

> "The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if –
>
> (a) it considers that -
>
> (i) that claimant has no real prospect of succeeding on the claim or issue; or
>
> (ii) that defendant has no real prospect of successfully defending the claim or issue; and
>
> (b) there is no other compelling reason why the case or issue should be disposed of at a trial."[250]

306. This is on its face a less stringent test than presently exists in Hong Kong under Order 14 or Order 18 r 19. The House of Lords took comfort in the availability of this broader power as a means of dispatching unmeritorious claims which disgruntled clients might be tempted to institute against their barristers following loss by advocates of their immunity from suit as a result of *Arthur J S Hall & Co v Simons* [2000] 3 WLR 543.

306.1 Lord Steyn states :-

> "Unmeritorious claims against barristers will be struck out. The new Civil Procedure Rules 1999, have made it easier to dispose summarily of such claims: rules 3.4(2)(a) and 24.2."[251]

306.2 Lord Hoffmann puts it as follows :-

> "Under the old rules, a defendant faced with what appeared to be a bad claim had a very heavy burden to satisfy the court that it was 'frivolous and vexatious' and ought to be struck out. Now rule 24.2 provides that the court may give summary judgment in favour of a defendant if it considers that 'the claimant has no real prospect of succeeding on the claim.' The defendant may file written evidence in support of his application. In *Swain v Hillman*,[252] Lord Woolf MR encouraged judges to make use of

Notes

249 CPR 24.1. Special provisions applicable to defamation claims are dealt with by CPR 53.2 made necessary by the right to trial by jury.

250 CPR 24.2.

251 At 554.

252 The Times, 4 November 1999; Court of Appeal (Civil Division) Transcript No 1732 of 1999.

> this 'very salutary power ... It saved expense; it achieved expedition; it avoided the court's resources being used up in cases where it would serve no purpose; and, generally, was in the interests of justice.' "[253]

307. However, it has been suggested[254] that the new rules have had little impact, possibly because elaboration of the "real prospect of success" test by Lord Woolf in *Swain v Hillman* (applied in subsequent cases) has meant that such test does not significantly differ from the test previously applicable. Lord Woolf stated :-

> "Under r 24.2, the court now has a very salutary power, both to be exercised in a claimant's favour or, where appropriate, in a defendant's favour. It enables the court to dispose summarily of both claims or defences which have no real prospect of being successful. The words 'no real prospect of being successful or succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success or, as Mr Bidder QC submits, they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success."[255]

If one can succeed summarily only where the other side's case is "fanciful", one may well ask whether this differs from requiring the other side's case to be unarguable or less than triable. On the other hand, the citation of Lord Hoffmann above clearly shows that his Lordship considered the present test to impose a lighter burden than that previously applicable.

308. In any event, the learned editors of the White Book point out that the "real prospect of success" test does not require a plaintiff or defendant to show that his claim or defence will probably succeed at trial. It may have a real prospect of success even if it is improbable, although in such a case, the court may allow the case to proceed subject to the imposition of conditions.[256]

Notes

253 At 562-3.

254 Harry Anderson, Herbert Smith, Conference on *"Civil Procedure: Latest Developments and Prospects of Change" Hong Kong on 8 June 2001.*

255 The House of Lords in *Three Rivers District Council and others v Bank of England (No 3)* [2001] 2 All ER 513 cited this test with apparent approval. See also *Royal Brompton Hospital National Health Service Trust v Hammond* [2001] EWCA Civ 550 (11 April 2001).

256 White Book 24.2.3. Conditions may be imposed pursuant to CPR 3.1(3), as indicated in CPR 24.6.

309. The rules envisage the possibility, in exceptional cases, of oral evidence being permitted (by order of the court) within the summary procedure. Written evidence is generally permitted.[257]

K6.3. Should the changes be adopted in Hong Kong?

310. The changes discussed above may be thought to have much to recommend them provided that the new rules are construed in practice as effecting a lower standard for summary disposal and provided that lawyers and litigants use the rules intelligently.

311. It is attractive in principle to have a rule which enables the court to curtail proceedings, with their attendant financial, psychological and social costs, where they lack any real chance of success. The present regime, which preserves cases so long as a key issue can be shown to be merely triable, may be thought to approach justice between the parties on too theoretical a basis.

312. On the other hand, there is obviously some danger of injustice inherent in all summary procedures. Without the benefit of a full trial, it is possible that the court may misapprehend the merits at the interlocutory stage. The development of the law could be stultified if cases are stopped so that the law's existing limits are not tested.

313. Adoption of the new procedures would therefore require the court to recognize the dangers and the benefits and to steer an appropriate course.

314. Intelligent application of the rules by users is essential since, as previously pointed out, a poorly judged attempt at securing summary relief may lead to significant delays and wasted costs.

314.1 The figures in Appendix C Table 7 suggest a success rate at present of some 30% to 40% where summary judgment is sought in HCAs applying the HCR's "no triable issue" approach. In the 60% to 70% of failed applications, additional costs and delays have been incurred.

314.2 A less stringent test for disposing summarily of proceedings may mean that the success rate would be greater. The danger, however, is that a larger number of untenable applications may also be encouraged, with counter-productive results in terms of cost and delay. However, with

Notes

257 White Book 24.5.2.

continuing efforts at procedural education as well as the imposition of sanctions where unwarranted applications are made, it is probable that improper use of the procedures would soon be discouraged.

315. Two incidental points may be noted.

315.1 The new procedure provides another illustration of a situation where procedural and substantive rules intermingle such that case-law relevant under the RSC (and the HCR) is likely to continue to be relevant. This is so in relation to distinctions drawn between set-offs and counterclaims and the need to treat cheques and bills of exchange as the equivalent of cash. The learned editors of the White Book suggest that the practice may change under the CPR, but this, with respect, seems somewhat unlikely.[258]

315.2 Secondly, it has been pointed out that adoption of a lower threshold for summary disposal of actions may raise issues under Article 6 of the European Convention on Human Rights, concerning the right of access to the court.[259] Attempts to raise similar issues in Hong Kong under Article 35 of the Basic Law cannot be ruled out.

316. Readers are asked for their views as to whether a unified approach to summary disposal of proceedings in all procedural contexts, employing a "no reasonable prospects of success" test, should be adopted: **Proposal 14**.

K7. Offers of settlement and payment into court

317. Under Order 22 of the HCR, a defendant is given a means of placing some pressure on the plaintiff to accept a reasonable offer of settlement and to bring the proceedings to an early end.

317.1 Where the action is for a debt or damages, he is allowed to pay money into court in satisfaction of all or any of the plaintiff's causes of action. He is also able to make written offers known as "Calderbank offers" to settle the case or any issue in it 'without prejudice save as to costs' where protection cannot be achieved by payment into court.

Notes

258 White Book 24.2.6-7

259 White Book 24.2.3.

317.2 By Order 62 r 6, the court must take into account such payments into court and such Calderbank offers when deciding on the proper order as to costs at the end of a trial. In practice, the discretion is exercised by reference to whether the plaintiff has recovered more than the amount paid into court or achieved a judgment more favourable than the settlement offered in the Calderbank offer. If not, then he is likely only to get his costs up to the date of the payment in and thereafter to be ordered to pay all the defendant's costs.

318. Such a procedural device is much in line with an important policy of the Woolf reforms, namely, to encourage reasonable and early settlement of proceedings.[260] However, the existing rules were seen to be too narrow and too inflexible. After wide consultation leading to modification of some of the initial proposals in Lord Woolf's Interim[261] and Final[262] Reports, Part 36 of the CPR was promulgated.

K7.1. The main changes effected by Part 36

319. The principal changes made by Part 36 are as follows :-

- For the first time, a plaintiff is able to make an offer of settlement which puts a defendant who unreasonably rejects it at risk as to costs and further financial penalty.
- Part 36 offers made even before commencement of proceedings can subsequently be taken into account by the court in relation to pre-action costs.
- More flexibility is introduced by limiting the compulsory requirement of actual payment into court to cases where the defendant seeks to settle a money claim, and allowing appropriate terms of settlement to be proposed in respect of non-money claims.

320. The machinery of Part 36 offers and payments operates as follows :-

Notes

260 WIR, p 194, §1.

261 WIR, pp 194-198.

262 WFR, pp 112-115.

320.1 A distinction is drawn between a Part 36 payment and a Part 36 offer, the former being the same as a payment into court under the HCR.[263]

320.2 Where a defendant wants the benefits of Part 36 in offering to settle a money claim, he must do so by making a Part 36 payment.[264]

320.3 Prescribed information must be contained in a Part 36 offer so that the other party knows exactly what is being proposed, eg, as to whether it takes any counterclaim into account, what it says about interest, etc.[265]

320.4 If the offer or notice of payment is not clear, the offeree is allowed, within 7 days, to seek clarification.[266]

320.5 If a potential defendant makes an offer of settlement which satisfies certain requirements (as to its duration and contents), the court "will take that offer into account when making any order as to costs."[267]

320.6 Where a plaintiff accepts a Part 36 offer or a Part 36 payment made by the defendant then (ignoring refinements) he is entitled to his costs up to the date of giving notice of acceptance.[268] If settlement of the whole claim is reached by the plaintiff taking a Part 36 payment, the action is thereupon stayed. If the stay is on the terms of the accepted offer, that offer can be enforced without fresh proceedings being started.[269]

320.7 Where a defendant accepts a plaintiff's Part 36 offer, the plaintiff becomes entitled to his costs of the proceedings up to the date of the acceptance.[270]

Notes

263 CPR 36.2.

264 CPR 36.3. Where only part of the claim against him is a money claim, he must make a Part 36 payment in respect thereof and can make a Part 36 offer regarding the rest of the claim: CPR 36.4.

265 CPR 36.5.

266 CPR 36.9.

267 CPR 36.10.

268 CPR 36.13.

269 CPR 36.15.

270 CPR 36.14.

321. Important consequences may bite where the offer or payment is not accepted.

321.1 Where a defendant has pitched his Part 36 offer or payment wisely and the plaintiff has failed to obtain a more favourable award at trial, CPR 36.20 provides as follows :-

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

This is a consequence similar to that arising under the current rules.

321.2 Where a plaintiff has made an offer to settle for less than the amount claimed and after its rejection by the defendant, recovers more at trial than he had offered to accept, CPR 36.21 prescribes the consequences as follows :-

> "(1) This rule applies where at trial –
>
> (a) a defendant is held liable for more; or
>
> (b) the judgment against a defendant is more advantageous to the claimant,
>
> than the proposals contained in a claimant's Part 36 offer.
>
> (2) The court may order interest on the whole or part of any sum of money (excluding interest) awarded to the claimant at a rate not exceeding 10% above base rate for some or all of the period starting with the latest date on which the defendant could have accepted the offer without needing the permission of the court.
>
> (3) The court may also order that the claimant is entitled to –
>
> (a) his costs on the indemnity basis from the latest date when the defendant could have accepted the offer without needing the permission of the court; and
>
> (b) interest on those costs at a rate not exceeding 10% above base rate.
>
> (4) Where this rule applies, the court will make the orders referred to in paragraphs (2) and (3) unless it considers it unjust to do so.
>
> (5) In considering whether it would be unjust to make the orders referred to in paragraphs (2) and (3) above, the court will take into account all the circumstances of the case including –

(a) the terms of any Part 36 offer;

(b) the stage in the proceedings when any Part 36 offer or Part 36 payment was made;

(c) the information available to the parties at the time when the Part 36 offer or Part 36 payment was made; and

(d) the conduct of the parties with regard to the giving or refusing to give information for the purposes of enabling the offer or payment into court to be made or evaluated.

(6) Where the court awards interest under this rule and also awards interest on the same sum and for the same period under any other power, the total rate of interest may not exceed 10% above base rate."

321.3 The innovation of allowing a *plaintiff* to make an offer of settlement has to be backed by a sanction going beyond making the defendant pay the costs where he recovers less than what was on offer at trial.[271] Under the ordinary rule of costs following the event, his liability to pay such costs would in any case have resulted. Part 36 therefore introduces in such cases the potential twin sanctions of having to pay costs on an indemnity basis as well as interest on sums awarded at rates of up to 10% above base rate over the period when the defendant could have, but did not, accept the offer. The rule also makes it plain that such an award will be made unless the court considers it unjust to do so.

321.4 Plainly, for this regime to operate fairly, the court must be able to take into account, where necessary, any special circumstances relevant to a party deciding to reject a Part 36 payment or offer. The rule, for example, expressly recognizes that such a decision may depend on the information available at the time when the offer or payment was made; and the conduct of either or both of the parties with regard to the giving or withholding of such information.[272] The court's general discretion as to costs provided for by CPR 44.3 applies in this context.[273]

Notes

271 Because of the opening words of CPR 36.21, this rule applies only to recoveries made at trial and not by way of summary judgment: *Petrotrade Inc v Texaco Ltd* (Unreported, 23 May 2000; paragraphs 58, 61).

272 As stressed by Lord Woolf in *Ford v GKR Construction Ltd* [2000] 1 WLR 1397, 1403.

273 See *Amber v Stacey* [2001] 2 All ER 88.

K7.2. Operation of Part 36 in practice

322. There appears to be little doubt that Part 36 payments and offers have been one of the most successful features of the Woolf reforms.

322.1 The Lord Chancellor's Department notes that it "has been welcomed by all interested groups as a means of resolving claims more quickly".[274] While the Department recognizes that it is "extremely difficult to obtain figures on disputes where no claim is issued [and therefore] difficult to know exactly how often Part 36 has been used in cases which have not proceeded,"[275] reports from the legal profession indicate that it is regularly and effectively used.

322.2 This is borne out by reports published by solicitors' firms in London.

(a) Freshfields, reporting on the first year's experience of the reforms, noted :-

> "Whilst Pt 36 has only been in operation for 12 months, and there have as yet been relatively few reported decisions on the application of the new rule, the preliminary indications are that Pt 36 offers are being made in practice on a regular basis (particularly by claimants). In many cases this is leading to realistic settlements being achieved well in advance of trial (and in some instances, without the need for proceedings to be commenced)."[276]

(b) Writing from the perspective of personal injury insurers, Mr Geoffrey Reed notes that the flexibility of Part 36 payments and offers has been welcomed. He also notes that even the ability of claimants to make Part 36 offers has been viewed positively, such offers serving "to concentrate an insurer's mind wonderfully" and actually to "help an insurer to quantify the risk he is facing: and to assess the economics of continuing to contest the claim." He reports that "Part 36 offers from claimants have often led to an expeditious settlement."[277]

Notes

274 EF, Key Findings.

275 EF, §4.8.

276 *"The Civil Justice Reforms One Year On – Freshfields Assess their Progress"* M Bramley & A Gouge (Butterworths, London 2000), p 70.

277 Geoffrey Reed, *"Review of the Civil Procedure Rules from the Perspective of a Defendant Personal Injury Lawyer"* [2000] JPIL 13, 16.

(c) Mr E P Greeno of Messrs Herbert Smith, writing on the first two years' experience of the reforms,[278] comments as follows :-

> "Litigators have taken quickly to this innovation, particularly claimants who are likely to be in a position to make a sensible Part 36 offer shortly after commencement of proceedings (due to the increased work required under the CPR prior to proceedings being commenced). The defendant is then under pressure to accept the offer at a time when he may be much less well prepared to assess the claimant's claim accurately."

322.3 Similar rules have been adopted in New South Wales.[279]

322.4 It may be noted that even Professor Zander, the arch-critic of the Woolf reforms, has expressed himself to be wholly in favour of the Part 36 procedure, regarding it as "a gain in terms of fairness" and likely to result in more early settlements.[280]

323. The favourable reception of Part 36 strongly suggests that similar provisions should be adopted in Hong Kong. Readers are asked to express their views on **Proposal 15**.

K8. Interim remedies and security for costs

324. Part 25 of the CPR is primarily a streamlining provision. Over the years, various interim remedies have been developed piecemeal by the courts. This has notably occurred in relation to use of interlocutory injunctions to secure evidence or assets targeted by the plaintiff in proceedings (in the *Mareva* and *Anton Piller* jurisdictions[281]). Part 25 helpfully lists together the main types of such interim relief (while preserving the court's inherent jurisdiction to regulate its own procedure[282]). In the accompanying Practice Direction on interim injunctions, forms setting out *Mareva* and *Anton Piller* orders, exceptions, undertakings, etc,

Notes

278 Herbert Smith, Mr E P Greeno, *Commerce And Industry Group Annual Legal Update: 15th March 2001*.

279 New South Wales, Supreme Court Rules 1970, see especially rr 22.2, 52 and 52A.

280 Michael Zander QC, *"The State of Justice – The Hamlyn Lectures, 1999"* (Sweet & Maxwell, London 2000), p 42-43.

281 Referred to in the CPR as the power to grant a "freezing injunction" and a "search order" respectively.

282 CPR 25.1(3).

reflecting many years of development in the case-law, are conveniently set out.

325. Like the rest of the rules in the CPR, the grant of such relief is subject to the overriding objective. Again, some of the pre-existing case-law, in relation to such issues as the position of third parties, self-incrimination and so forth, will inevitably have to be referred to.[283]

326. CPR 25.4 would represent an extension of the court's jurisdiction in Hong Kong. It permits interim remedies, including *Mareva* relief, to be granted where the remedy is "sought in relation to proceedings which are taking place, or will take place, outside the jurisdiction." As the Privy Council held in *Mercedes Benz AG v Leiduck* [1996] 1 AC 284, such relief is presently unavailable. This may be thought to be a desirable power given the fact that transactions and assets increasingly span several jurisdictions.

327. Orders for security for costs are covered by CPR 25.13 which restricts such orders to familiar classes of case[284] and where such orders would be just in the circumstances.

328. CPR 25.14 is new and enables a defendant to seek an order for security against someone other than the claimant if that person has assigned the right to the claim to the plaintiff with a view to avoiding the possibility of a costs order being made against him; or has contributed or agreed to contribute to the claimant's costs in return for a share of any money or property which the claimant may recover in the proceedings. This was a power thought useful where the circumstances did not support the making of an award directly against the plaintiff.[285]

329. It is however doubtful whether that extension could be applied to Hong Kong without legislative amendment to section 52A(2) of the High Court Ordinance (Cap 4) which excludes an award of costs against non-parties. That subsection qualifies section 52A(1) in manner that does not apparently exist in relation to the relevant UK legislation.[286]

Notes

283 See eg, White Book 25.1.23-25.

284 Eg, where the plaintiff is an individual ordinarily resident abroad; or a foreign company; or a local company which may be unable to pay the defendant's costs, and so forth.

285 See, eg, *Abraham v Thompson* [1997] 4 All ER 362

286 Section 51 of the Supreme Court Act 1981, as substituted by s 4(1) of the Courts and Legal

cont'd .....

330. Part 25 also covers the power to order interim payments, identifying the conditions to be satisfied for such payments and limiting their quantum to a reasonable proportion of the likely amount of the final judgment.[287]

331. Readers are asked for their views on the desirability of adopting a streamlining provision on interim relief and interim payments along the lines of Part 25, including a rule extending interim relief in aid of foreign proceedings: **Proposals 16 and 17**.

K9. Case management – timetabling and milestones

K9.1. The current position in Hong Kong

332. The HCR contain a timetable for litigation, specifying the periods by which sequences of litigation events ought to occur. The timetable is, however, not observed in practice.

332.1 The rules say that discovery is to take place automatically and without order of the court within 14 days after the pleadings in the action are deemed to be closed,[288] but if the parties do not take the necessary steps, nothing happens unless and until the matter is brought before the court for an order that such steps be taken.

332.2 The same is true of the rule[289] stipulating that within a month after close of pleadings a summons for directions be taken out "with a view to providing ..... an occasion for the consideration by the Court of the preparation for the trial of the action, so that (a) all matters which must or can be dealt with on interlocutory applications ..... may so far as possible be dealt with, and (b) such directions may be given as to the future course of the action as appear best adapted to secure the just, expeditious and economical disposal thereof." However, unless and until one or other of the parties takes out this summons, the court does not get to give the case any such consideration.

332.3 When eventually the summons for directions is heard (at a 3 minute hearing), the practice is generally for the various orders sought to be

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Services Act 1990. See *Aiden Shipping Co Ltd v Interbulk Ltd* [1986] 1 AC 965.

287 CPR 25.7.

288 HCR O 24 r 2.

289 HCR O 25 r 1.

made except for the direction setting down the case for trial. The court adjourns the case to a further "listing hearing" at which the court checks to see that the outstanding preparations have in fact been attended to. If not, the setting of a date for trial is again deferred.

332.4 When preparations are finally thought to be complete, the listing master gives the parties permission to set the case down for trial. It is only then that the case is listed, on attendance before the Clerk of the Court, either in the fixture list (which, unless particular cause is shown, is reserved for trials estimated to run for 6 days or more) or in the running list (for trials estimated to last less than 6 days).

333. The present system obviously allows delays to result from the parties' own lack of readiness for trial. While many parties and their lawyers conscientiously press cases ahead without delay, the party or lawyer who wants to drag his feet can easily bring about substantial delays. In any event, it is clear that the timetables prescribed by the HCR are generally ignored and that the periods prescribed by the rules for particular steps in the action far exceeded. Several factors contribute to this.

333.1 First, the timetable involves standards set in the rules and not tailor-made to take into account the needs of particular cases. There is therefore, perhaps understandably, a tendency to regard the time limits as optimal standards appropriate to simple cases and an assumption that longer limits in reality apply.

333.2 Secondly, as indicated above, where a time limit set by the rules is ignored, nothing happens unless and until the other party decides to compel compliance. This involves effort and expense. In practice, quite reasonably with a view to avoiding the costs of a hearing, the party who wants the case to progress will write, often more than once, requiring the other party to take the necessary step and threatening an application to the court if this is not done. During such correspondence, the case usually makes no progress.

333.3 Thirdly, where it proves necessary to take out an interlocutory application, a certain waiting period for a hearing is inevitable. Not infrequently, a recalcitrant party will consent to the order sought only at the door of the judge's or master's chambers and after several weeks of delay have been incurred.

333.4 Fourthly, whatever their clients may wish about the speedy disposal of a case, lawyers may often be prepared to accommodate each other with agreed extensions of time. This often suits both sets of legal representatives, particularly where they are heavily engaged on other matters. These are extensions agreed without any incentive or

requirement to "catch up" on the progress of a case by speeding up events thereafter.

333.5 Fifthly, the court has tended to be lenient and, certainly at the first hearing, has tended to grant an extension of time on slender justification for the failure to comply with the rules. Sometimes the leniency is plainly excessive, with repeated extensions being granted.

333.6 Sixthly, the court has tended to give very great (and often excessive) weight to ensuring that the parties are completely ready for the trial, refusing to set down a case for trial or vacating the trial date where, for instance, one party is not ready with an expert report or has not obtained an advice on evidence from counsel, notwithstanding that such deficiency was of that party's or his lawyers' own making.

334. Underlying this unsatisfactory state of affairs is the adversarial design of the civil justice system which leaves it entirely up to the parties to progress the case without any time tables set or enforced by the court. Moreover, viewing itself as the impartial umpire, the court has adopted the policy of putting off the trial until it is sure that the parties are both quite ready to do battle.

335. The desire to ensure that the parties are ready is laudable. It makes for procedural fairness and avoids adjournments after the start of the trial. However, the approach described above unfortunately allows a defendant who is playing for time ample latitude to put off his trial by months or even years. In such cases, it also runs up costs since enforcing each procedural obligation requires action by lawyers, by correspondence and/or applications to the court. Although the dilatory defendant may have interlocutory costs orders made against him, these are usually made "in any event", meaning that they do not need to be paid until after completion of the trial and so provide little deterrence.

K9.2. The need for timetables initiated and supervised by the court

336. Part of the overriding objective of the CPR involves the court undertaking the proactive management of cases. As CPR 1.4(1)(g) provides, this involves the court "fixing timetables or otherwise controlling the progress of the case." The fixing by the court of timetables with firm milestone dates at an early stage of the proceedings is a central feature of efforts to counteract delays and distortions arising from misuse of the adversarial process. The timetable lays down the framework in which the court exercises its case management powers.

337. The parties to a dispute also benefit from a clear timetable. It gives them an appreciation of where they have got to in the litigation and greater certainty as to what is to happen next and by when. Knowing when to expect a response from the other side also lessens misunderstanding. In the context of pre-action protocols, as discussed, the premature launching of proceedings through mis-construing the absence of a response from the other side may be avoided. Timetables also give a time frame for assessing the costs incurred and likely to be incurred.

338. Fixing a timetable involves determining by when particular steps in the proceedings must be taken and when important case events are to take place. Accordingly, if a timetable is to be effective and to provide a workable basis for proper case management, the person fixing it must have some knowledge of the nature and dimensions of the case. This means that the rules should, in the first place, require the parties to provide the procedural judge with such knowledge.

K9.3. Timetabling and the allocation process under the CPR

339. In the CPR the court is informed about the case by the parties filing an "allocation questionnaire" after all defendants have filed their defences.[290] As appears from the Form in the White Book,[291] the questionnaire seeks information from the parties on such matters as the following :-

- Whether they want the case to be stayed for a month to try to settle it.
- Whether an application for summary judgment is intended.
- Who the known witnesses of fact are likely to be.
- Whether expert evidence is desired, with details of the field of expertise and whether a joint expert is proposed.
- Whether they expect to be represented by counsel or solicitors.
- How long the trial is estimated to take.

Notes

290 CPR 26.3. Case management and timetabling are only necessary where the case is not disposed of by a default or summary judgment. The filing of a defence is an indication that the defendant aims to put up a fight and that the case may need management.

291 F1-024.

- An estimate of costs incurred to date and the estimated likely overall costs.
- Whether any facts are known which may affect the timetable for the case.

340. The parties are encouraged to submit any key documents relevant to allocating the case and to try to agree any directions they consider are needed. If the court requires further information about the case, it may require this from the parties.[292]

341. In England and Wales, this process is intended in the first place to help the procedural judge to decide which "track" the case should be allocated to, different procedural regimes existing for the small claims track[293], the fast track[294] and the multi-track[295] respectively. No such streaming is required in Hong Kong because, as has been pointed out, the Small Claims Tribunal and the District Court already exercise an equivalent jurisdiction over smaller claims as defined by Ordinance. In this context, the CPR's multi-track provisions in Part 29 of the CPR are the most pertinent and the discussion which follows is confined to such provisions.

K9.4. A case management questionnaire and bilingual proceedings

342. If the Hong Kong court is to exercise systematic case management, a process similar to the allocation questionnaire process is needed to provide early information about the case to enable the giving of appropriate directions and for a timetable to be established. The questionnaire should also contain sufficient information to allow the court to assess the extent to which bilingual court resources will be needed and to fashion directions for treatment of any language issues, guided by the overriding objective.

343. One might pause to note that the framework for directions on bilingual proceedings is well-established.

Notes

292 CPR 26.5(3).

293 For claims of up to £5000.

294 For claims of between £5001 and £15,000.

295 For claims of over £15,000.

343.1 Article 9 of the Basic Law provides for English to be used by the judiciary and others, in addition to Chinese, as an official language. This is reflected in s 3 of the Official Languages Ordinance (Cap 5).

343.2 By s 5 of that Ordinance :-

> "(1) A judge, magistrate or other judicial officer may use either or both of the official languages in any proceedings or a part of any proceedings before him as he thinks fit.
>
> (2) The decision of a judge, magistrate or other judicial officer under subsection (1) is final.
>
> (3) Notwithstanding subsection (1), a party to or a witness in any proceedings or a part of any proceedings may-
>
> (a) use either or both of the official languages; and
>
> (b) address the court or testify in any language.
>
> (4) Notwithstanding subsection (1), a legal representative in any proceedings or a part of any proceedings may use either or both of the official languages.
>
> (5) The Chief Justice may make rules and issue practice directions to regulate the use of the official languages in the courts."

343.3 Rule 3 of the High Court Civil Procedure (Use of Language) Rules, made under s 5(5) of the Ordinance, provides :-

> "(1) In deciding to use either or both of the official languages in any proceedings or a part of any proceedings under section 5(1) of the Ordinance, a judge shall give paramount consideration to the just and expeditious disposal of the proceedings or the part of the proceedings, as the case may be.
>
> (2) A decision under section 5(1) of the Ordinance may be made by a judge at any stage of-
>
> (a) the proceedings before him; or
>
> (b) any part of the proceedings before him,
>
> on his own initiative or upon an application of any party to the proceedings.
>
> (3) A judge who has made a decision under section 5(1) of the Ordinance may give such direction in relation to the decision as may be necessary for giving effect to it."

343.4 Rule 5 deals with the translation of documents served in the course of court proceedings, giving a party who is unfamiliar with the official language in which such a document is written the prima facie right to its translation into the other official language by the party serving the

document. This right is enforceable by application to the court subject to the court's view that the request is reasonable.[296]

343.5 The court has a similar discretion under rule 1 of the Official Languages (Translation) Rules in relation to ordering or dispensing with translations of documents used as evidence in proceedings.

343.6 These rules are plainly aimed at giving judges maximum flexibility in deciding how far and in what manner Chinese and English should be used in any particular case. Guidelines[297] issued within the Judiciary dated 28 January 1998 for the exercise of this discretion have now been published :-

(a) Judges are reminded of the rights of the parties under the provisions cited above and told :-

> "Under no circumstance should a judge or judicial officer pressurise or encourage or be seen to pressurise or encourage any person to use a language other than the one that person chooses."

(b) Subject to the principal objective of "the just and expeditious disposal of the cause or matter", the judge is asked to take into account a list of factors[298] in deciding how to proceed. A similar list applies in relation to the use of Chinese and English in appeals in the Court of Appeal.[299]

343.7 In giving case management directions for the conduct of bilingual proceedings, a judge would plainly wish to take into account paragraph 13 of the guidelines which states :-

> "Where at the outset of a hearing, after taking into account the relevant factors involved, the judge ..... considers that it is appropriate to conduct part of but not the entire hearing in Chinese, he can adopt a pragmatic approach and decide at the outset

Notes

296 See also HKCP 2001 C3/5/1.

297 HKCP 2001 C3/3/4 to C3/3/13.

298 HKCP 2001 C3/3/6, including: the language ability of the litigants, the witnesses' language, the wishes of the litigants; the lawyers' language ability; the factual and legal issues in dispute, the volume and language of the documents and the judge's own language abilities.

299 HKCP 2001 C3/3/8.

that part of the hearing would be conducted in Chinese (eg, the evidence or part of the evidence) and part of it in English (eg, legal submissions)."[300]

344. Armed with information supplied by the parties through the questionnaire, the procedural judge may take various courses, depending on the adequacy of the information and his assessment of the case. This is reflected in CPR 29.2 which provides as follows :-

> "(1) ..... the court will –
>
> (a) give directions for the management of the case and set a timetable for the steps to be taken between the giving of directions and the trial; or
>
> (b) fix –
>
> (i) a case management conference; or
>
> (ii) a pre-trial review,
>
> or both, and give such other directions relating to the management of the case as it sees fit.
>
> (2) The court will fix the trial date or the period in which the trial is to take place as soon as practicable."

345. The case management options which the court has are worth examining in a little further since they provide a good example of flexible rules aimed at enabling the court to tailor directions to the needs of the case at hand with a view to avoiding unnecessary court events and attendant costs – one of the potential dangers of case management stressed by Professor Zander and others. They also illustrate a constant theme of the reforms, namely, that for savings of money, time and effort to result from using the new rules, they must be intelligently applied.

346. The first option arises where the parties – using the rules intelligently – have put forward agreed directions for the case. If the court approves them and considers them sufficient, it proceeds to fix the timetable and to give directions in the terms agreed without a hearing, thus effecting savings.[301] The associated Practice Direction expressly encourages the parties to take this course and helps by listing the types of directions that the court is likely to require them to have agreed.[302]

Notes

300 HKCP 2001 C3/3/13.

301 CPR 29.4.

302 29PD §§4.6 to 4.8.

347. If the case is simple, CPR 29.2(1) empowers the procedural judge similarly to fix the timetable and to give directions up to trial without a hearing. The Practice Direction indicates the nature of directions likely to be given in such a case.[303]

348. If the trial is not so simple, or where, for instance, the views of the parties differ substantially as to the required directions, the judge may fix a case management conference before deciding on the appropriate directions.[304] Where this is necessary, the rules seek to ensure that the hearing is taken seriously by the legal representatives and that issues raised can effectively be resolved. CPR 29.3(2) accordingly provides :-

> "If a party has a legal representative, a representative –
>
> (a) familiar with the case; and
>
> (b) with sufficient authority to deal with any issues that are likely to arise,
>
> must attend case management conferences and pre-trial reviews."

If the court should consider it desirable that the lay clients be present, power to order their attendance is contained in CPR 3.1(2)(c).

349. In many cases, it will be possible, with or without a case management conference, to fix a date for the parties to file a "listing questionnaire" which enables the court to assess the extent to which directions previously given have been complied with and the readiness of the parties for trial.[305]

350. Upon the filing of the listing questionnaire, the court will generally fix the date for trial and give any necessary directions for the conduct of the trial.[306] If the listing questionnaire is deficient or further information is still required, the court may consider it necessary to fix a listing hearing to finalise trial directions.[307] If the case is of a complexity that requires further consideration of the parties' readiness for trial, the court may fix a pre-trial review.[308] On the other hand, the listing questionnaire may

Notes

303 29PD §§4.5, 4.10.

304 29PD §4.12.

305 CPR 29.2(3)(b), 29.6(2).

306 CPR 29.8, 29.9.

307 CPR 29.8.

308 CPR 29.2(1)(b), 29.3(1)(b) and 29.7.

show that a previously arranged pre-trial review is unnecessary and the court is then expressly empowered to cancel that hearing.[309]

K9.5. Timetabling and saving costs

351. The flexibility of the rules enables costs to be saved. The scheme encourages the court to aim for procedural proportionality, avoiding the expense of court events where the case can be managed without them, and tailoring all needed directions and hearings where this is required in more complex cases.

352. Moreover, as Appendix B, Table 10 indicates, in a large percentage of cases, applications for extensions of time are made to comply with the rules or directions given.[310] The CPR contain an interesting attempt to reduce the need for such applications while at the same time holding the parties firmly to a timetable. This involves two rules operating in conjunction.

353. The first is CPR 29.5 which states :-

> (1) A party must apply to the court if he wishes to vary the date which the court has fixed for –
>
> (a) a case management conference;
>
> (b) a pre-trial review;
>
> (c) the return of a listing questionnaire under rule 29.6;
>
> (d) the trial; or
>
> (e) the trial period.
>
> (2) Any date set by the court or these Rules for doing any act may not be varied by the parties if the variation would make it necessary to vary any of the dates mentioned in paragraph (1)."

354. The second is CPR 2.11 which provides :-

> "Unless these Rules or a practice direction provides otherwise or the court orders otherwise, the time specified by a rule or by the court for a person to do any act may be varied by the written agreement of the parties."

Notes

309 CPR 29.7.

310 In the HCAs whose bills were being taxed time applications were made in 89 (44%) of 202 cases.

355. By their combined effect, parties are given ample latitude to agree extensions of time without any need to go to court provided that the timetable for the milestone events identified in CPR 29.5 is not affected. A party who is late in complying with some direction can therefore, with the other side's agreement, make up time to ensure that the next milestone event is met.

K9.6. Timetabling sanctions and additional resources

356. For timetables to be effective, a change to the court's approach to time extensions and adjournments must take place.

356.1 The milestone dates (such as the date of the case management conference, if one is directed, the pre-trial review and the trial date) must be immovable save in the most exceptional cases.

356.2 Where a party is not ready, he can no longer expect the court and the other side to wait upon his preparation. Except in the rarest of cases, he must expect the case to move on despite his lack of readiness, to his detriment.

356.3 Non-compliance with the timetable attracts sanctions that fit flexibly with the party's default. Thus, if he has not secured expert evidence to exchange in time, it is *his* loss as the case proceeds on the basis of a direction that he be debarred from adducing such evidence. If he fails to serve certain particulars of his pleading, he may have certain parts of those pleadings struck out.

356.4 In extremis, where he is so severely in default that the case could not be allowed to proceed, he might have his case struck out or possibly struck out unless he remedies the position within a stated (short) period.

356.5 In other words, a party's lack of readiness is no reason to delay progress of the action but may take effect to his detriment. Once this message gets home, the need for ensuring readiness and for planning to meet the milestone dates will become a key consideration in all litigation.

357. Adoption of a system of case management where the court sets and enforces timetables may well have resource implications both at first instance and in the Court of Appeal.

357.1 The court must ensure that a sufficient number of judges will be available to try cases as and when they reach the timetabled trial date. The system would not be credible if the court finds itself unable to accommodate the parties after having enforced a timetabling discipline

on them. The court must take whatever steps are needed, including use of suitable deputy judges from the legal profession and the District Court to cope with any potential congestion.

357.2 On the other hand, a system of early timetabling will give the Registry a better ability to plan so that it may well be possible to avoid congestion using the timetabling process itself or, if congestion is seen to be inevitable, to make provision for the necessary judicial resources to be in place.

357.3 Additional resources at the Court of Appeal level may be needed to cope swiftly with any interlocutory appeals which otherwise have the potential of disrupting any timetable. If allied to proposed changes discouraging unnecessary interlocutory applications in the first place, to changes requiring the parties to have leave for interlocutory appeals and to development of a practice limiting the grant of leave to cases where points of principle arise or where the interlocutory issue may be crucial to the outcome of the case, all but a relatively small number of cases are likely to be kept to the timetable.

357.4 Some unused court trial days may result from early timetabling by the court. As described above, trial dates are not presently fixed until the end of the entire interlocutory and trial preparation process. Cases which settle before this time therefore presently do not create gaps in the court's trial diary. If early timetabling is adopted, a longer period ensues between the fixing of dates and the trial date itself. One may therefore expect a larger proportion of fixed dates to be ineffective as cases settle in the meantime. However, it will often be possible to fill the vacancy with a different case that is ready for trial. Moreover, various measures to minimise unused trial dates have been adopted elsewhere, including :-

(a) fixing dates initially in the form of a fixed window period (say a specified calendar month) for trial, refining it to a particular starting date within that month when the action has reached a later stage;

(b) allowing parties who may be anxious for an early determination of their case to bid for earlier dates which come available, perhaps with the court regularly advertising such vacant slots on the judiciary's website as they arise;

(c) timetabling certain types of (simple) cases to enter a relatively short running list at a fixed time.

358. Readers are asked whether a system of case management timetabling similar to that operated under the CPR with appropriate modifications to suit Hong Kong conditions should be adopted: **Proposals 18 and 19**.

K10. A docket system

359. A docket system was considered but rejected by Lord Woolf as unsuitable for England and Wales.[311] However, such systems have strong adherents in other common law countries and are worthy of mention as offering a possible alternative approach to case management and timetabling.

360. Mr Justice Ipp is one of its supporters. He regards docket systems as one of two broad varieties of case management systems, which he contrasts as follows :-

> "There are many different permutations in the techniques of pre-trial case management. There are, however, two basic models, and all pre-trial management techniques are, in some form or other, adaptations of them. These two models are, first, management involving continuous control by a judge, who personally monitors each case on an ad hoc basis, and, secondly, management where control is exercised by requiring the parties to report to the court (often in the form of a master or registrar) at a few, fixed, strategically determined, intervals or occurrences (sometimes called 'milestones') and where the management of the case is part of the routine and structured control by the court over all or most of the cases in its registry." [312]

361. Case management by the docket system falls within the first category. Mr Justice Ipp was particularly impressed by the success of what has become generally known as the "Rocket Docket" system operating in the United States District Court for the Eastern District of Virginia, which he describes as follows :-

> "It is worthy of mention that there is a form of this model which has proved to be extraordinarily successful for the management of all kinds of cases, and not only complex litigation. That is the case management system implemented by the United States District Court for the Eastern District of Virginia, known throughout the United States as the 'Rocket Docket'. The Rocket Docket procedure of the Eastern Virginia District Court has kept to its system of firm trial dates for 30 years. It handles twice the national average of civil and criminal cases, disposing of the equivalent of 647 cases per judge, with an average of 59 civil and criminal cases going to trial each year. Each year that court is among the two or three fastest courts in the

Notes

311 WIR, p 63, §2-4.

312 Mr Justice D A Ipp, *"Reforms to the Adversarial Process in Civil Litigation"*, (1995) 69 ALJ 790.

United States federal system for resolving civil cases. The court maintains this ranking even though the district encompasses three major metropolitan areas (the Washington DC suburbs of Northern Virginia, Richmond and the Tidewater area), two large ports of entry (Norfolk, Virginia and Dulles International Airport), and contains many federal Government agencies and contractors which generate much complex civil and criminal litigation."[313]

362. An overview of how the "Rocket Docket" works is given :-

"The pre-trial process begins with a pre-trial conference usually handled by a registry officer held within weeks of the first responsive pleading or motion. All counsel must be present and must provide suggested trial dates not more than six months ahead. Once set the date is immutable. Working backwards from the trial date other dates are set. These dates are embodied in a court order. The deadlines established are graven in stone. Extensions or adjournments are granted only for matters such as the serious illness of counsel (even then there has to be a good reason why another counsel cannot be a replacement). This system puts the case under the court's control but does not require the judge to learn details of the case beforehand and the litigation is not taken out of the hands of the lawyers. Every Friday is motions day and the judges take the Bench fully prepared having read the papers beforehand. Motions are resolved on the day. Arguments seldom take longer than 10 minutes a hearing. The early fixing of a trial date, the immutability of that date, and the availability of the judge to hear interlocutory motions are the keys to the success of the Rocket Docket. The system is renowned for its simplicity and effectiveness."[314]

363. Docket systems are in operation in many courts in the United States. A similar system (known as the "Individual Docket system" or IDS) has also met with much success in the Australian Federal Court. How it operates has been described in detail by the ALRC in its Discussion Paper No 62.[315] Having canvassed opinion on the system, the ALRC reports :-

"There was unanimous positive feedback in consultations and submissions about the operation of IDS. This is a significant accolade. The Commission consulted with several hundred practitioners from around Australia, experienced in Federal Court litigation, with expert witnesses, some litigants and judges and administrative staff from the Court. Submissions and consultations were overwhelmingly supportive and complimentary of IDS, although practitioners did record some areas of concern."[316]

Notes

313 *Ibid*, 790-791.

314 *Ibid*, p 791.

315 ALRC, Discussion Paper No 62, pp 285-297.

316 ALRC No 89, p 447, §7.6.

364. There was "consistent high praise about the quality judging and effective management of the Federal Court." The benefits, attributable to the fact that "the same judge deals with and manages a case from start to finish" were thought to include :-

> "..... discouraging unnecessary court appearances, making interlocutory hearings more productive, allowing the early exchange of information, and narrowing issues in dispute; and helping to make case resolution more efficient and effective, including appropriate referral of cases to mediation."[317]

365. The key features of a docket system therefore involve (i) the handling of the case by the same judge from beginning to end; (ii) the early fixing of a near-immutable trial date; (iii) case management by the judge himself fixing the timetable and giving relevant directions in the pre-trial period; and (iv) the judge trying the case if it goes as far as trial.

366. Such a system has undoubted advantages. A common complaint from the parties is that the case makes slow and expensive progress because interlocutory hearings are fixed before different judges who each have to be educated on the facts and issues in the case. After such a hearing, parties are frequently feel that nothing useful has been achieved. When before a different judge, lawyers may attempt to re-open matters already ruled on previously in favour of the other side. With one judge in charge of the case, such complaint are much less likely to arise.

367. In their Discussion Paper on Civil Justice in Victoria, Peter Sallmann and Richard Wright list the perceived advantages of the docket system as follows :-

> "Among its advantages are said to be the following:
>
> - Early and clear identification of issues
> - Early resolution of cases
> - Early identification of suitability for ADR
> - Better management through increased and early familiarity of the judge with individual cases and, as part of this, better judicial performance generally
> - Avoidance of the need for a case to be explained afresh on a number of different occasions
> - Improved communications between the court and the lawyers involved in a case
> - Minimisation of interlocutory proceedings and often resolution of such issues without the need for a hearing

Notes

317 *Ibid*, p 15.

- Improved capacity of judges to manage their own time, calendars, caseloads and reserved judgments
- Lower costs and savings in time
- Work value and task variety of court and judges' staff are enhanced
- Courts become more efficient and accountable
- Better trial management
- Overall, the kind of modern project management required for dealing with litigation
- Improved capacity for a court to calculate its judicial and other resource needs because of the ability to measure case dispositions per judge on a firm and clear basis."[318]

368. Their recommendation for the State of Victoria was that careful consideration be given to adoption of a docket system in the light of the enthusiasm shown by many for the Federal Court's system.[319]

369. Why then did Lord Woolf consider a docket system unsuitable? He mentioned four grounds[320] :-

- A docket system would provide continuity and commitment, but only "at the cost of flexibility and the efficient deployment of judges."
- It would require a significant increase in the number of judges.
- It would not allow for the flexible movement of cases between tiers of the legal system.
- It would lead to a far more specialised judiciary whereas a preference exists for generalist judges especially in appellate courts.

370. In the light of the foregoing discussion, readers are asked to give consideration to the exploration of a docket system in Hong Kong as an alternative to Proposals 18 and 19: **Proposal 20**. It is perhaps worth noting that when he was Chairman of the Bar Association, Mr Ronny KW Tong SC expressed the view that such a system "is not necessarily unsuitable for Hong Kong" in the context of a suggestion that High Court masters should be done away with altogether.[321] It may be that

Notes

318 GTC, p 79.

319 GTC, p 82.

320 WIR, p 65-66.

321 W&B, p 192.

given present case-loads, a docket system would be appropriate only for specialist lists.

K11. Specialist Lists

371. The case management needs of particular types of cases may differ, especially in relation to cases requiring a specialist judge. In Hong Kong, this is to some extent provided for by the establishment of specialist lists. Pursuant to Order 72 of the HCR, cases falling within the relevant classes are assigned to four specialist lists, namely, the Commercial, Construction and Arbitration, Administrative and Constitutional and the Personal Injuries Lists. Admiralty proceedings are also subject to special regulation under Order 75. Contentious Probate Proceedings, which are rare, are dealt with in accordance with Order 76. Companies Winding-up, Bankruptcy and Matrimonial Causes cases proceed according to Rules made under relevant Ordinances.[322]

372. The need for specialist courts to modify CPR procedures to suit the needs of their case-loads is recognized by CPR 49 in relation to admiralty, arbitration, commercial and mercantile, Companies Act and contentious probate proceedings, as well as for the business of the Patents Court and the Technology and Construction Court. The CPR are made applicable subject to the provisions of relevant Practice Directions which apply in such proceedings.

373. To take the Commercial Court by way of illustration, a Practice Direction has been issued [323] which, among other matters, defines "commercial claims" and prescribes that the practice of the Commercial Court to be followed as from 26 April 1999 (when the CPR came into operation) should be as set out in the Commercial Court Guide (which was prepared with the approval of the Judges of the Commercial Court).

374. The Commercial Court Guide sets out in detail how the CPR are to apply in the context of the Commercial Court. In some instances,

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322 Although in some of these lists, the judge is given charge of all interlocutory applications, eliminating hearings before the master, they do not operate as full docket systems since the judge is not given full control of timetabling and firm trial dates are not fixed early in the proceedings.

323 Practice Direction – Commercial Court, White Book Vol 2, 2C-3.

provisions of the CPR are disapplied and in others, additional requirements are imposed.[324]

375. It would appear sensible for the HKSAR to make similar provision preserving a degree of procedural autonomy for specialist lists if general reforms are to be adopted. Readers are consulted on the desirability of such a proposal: **Proposal 21**.

376. Another suggestion is that consideration should be given to establishing further specialist lists in relation to classes of proceedings which may benefit. It has, for instance, been suggested by the LRCWA that thought be given to the establishment of special lists for complex cases and for unrepresented litigants. One could think of other possible lists, such as a list for cases where group litigation orders (discussed below) have been made. Readers are consulted on whether the establishment of further specialist lists should be explored: **Proposal 22**.

K12. Multi-party Litigation

377. Special case management needs arise in relation to cases with numerous parties or potential litigants. The procedural issues arise in two main situations.

378. The first, involving situations which in the United States may be dealt with by "class actions", is presently not catered for by our system. However, strong arguments exist in favour of establishing procedures for this type of litigation as a means of giving access to legal remedies presently unattainable in practice. Lord Woolf, for instance, advocated new procedures which would :-

> "..... provide access to justice where large numbers of people have been affected by another's conduct, but individual loss is so small that it makes an individual action economically unviable."[325]

379. The absence of such procedures tends to be felt particularly by those concerned with consumer protection, as was reflected in the submission

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[324] The Commercial Court Guide is set out in the White Book Vol 2, 2C-15, et seq. It can also be read and downloaded from the LCD's Website. Other Guides issued include the Chancery Division Guide, the Queen's Bench Guide and the Mercantile Courts Guide.

[325] WFR, p 223, §2(a).

made to Lord Woolf by the UK's National Consumer Council, as follows :-

> "As we become an increasingly mass producing and mass consuming society, one product or service with a flaw has the potential to injure or cause other loss to more and more people. Yet our civil justice system has not adapted to mass legal actions. We still largely treat them as a collection of individual cases, with the findings in one case having only limited relevance in law to all of the others."[326]

380. It is argued that procedures should be established to allow a large number of small claims to be grouped together and effectively pursued in a single action, assisted by special case management measures. If this can be achieved, not only would small claimants acquire legal access previously denied, defendants such as large corporate wrongdoers in product liability and other cases would be faced with proceedings to be taken seriously, leading to long-term social benefits in the form of higher safety standards vis-à-vis consumers and others.

381. The other main multi-party situation does not involve problems of legal access. It arises because, for some reason or other, a large number of similar or related claims (each of which may be individually viable in financial terms) are instituted at about the same time, posing challenges to the court's ability to deal efficiently with such a multiplicity of proceedings. Lord Woolf describes this kind of situation as one requiring the civil justice system to :-

> "..... provide expeditious, effective and proportionate methods of resolving cases, where individual damages are large enough to justify individual action but where the number of claimants and the nature of the issues involved mean that the cases cannot be managed satisfactorily in accordance with normal procedure....."[327]

382. Either, or indeed, both, of the situations mentioned above can emerge in various different contexts. Examples given include :-

> "..... local housing and environmental actions, consumer cases, financial actions such as the Lloyds litigation, single 'one-off' disasters and large scale complex environmental actions and product liability actions, including pharmaceutical and medical cases."[328]

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326 WFR, p 223, §1.

327 WFR, p 223, §2(b).

328 WFR, p 228, §21.

In the public law context, the right of abode litigation involving thousands of applicants provides another obvious example.

K12.1. The main approaches to multi-party litigation

383. If resources were no object and cases, however numerous, could be expeditiously and economically processed, every person having a claim could simply have his proceedings tried individually. In reality, this is obviously untenable. A more cost-effective means of disposing of such groups of claims has to be found if the court is not to be swamped and if the parties are not to wait endlessly in a queue for relief.

384. The machinery in the HCR for dealing with multi-party litigation is currently confined to the representative claim rules in Order 15 r 12 which provides as follows :-

> "(1) Where numerous persons have the same interest in any proceedings, not being such proceedings as are mentioned in rule 13, the proceedings may be begun, and, unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.
>
> (2) At any stage of proceedings under this rule the Court may, on the application of the plaintiff, and on such terms, if any, as it thinks fit, appoint any one or more of the defendants or other persons as representing whom the defendants are sued to represent all, or all except one or more, of those persons in the proceedings; and where, in exercise of the power conferred by this paragraph, the Court appoints a person not named as a defendant, it shall make an order under rule 6 adding that person as a defendant.
>
> (3) A judgment or order given in proceedings under this rule shall be binding on all the persons as representing whom the plaintiffs sue or, as the case may be, the defendants are sued, but shall not be enforced against any person not a party to the proceedings except with the leave of the Court. .....
>
> (5) Notwithstanding that a judgment or order to which any such application relates is binding on the person against whom the application is made, that person may dispute liability to have the judgment or order enforced against him on the ground that by reason of facts and matters particular to his case he is entitled to be exempted from such liability.
>
> (6) The Court hearing an application for the grant of leave under paragraph (3) may order the question whether the judgment or order is enforceable against the person against whom the application is made to be tried and determined in any manner in which any issue or question in an action may be tried and determined."

385. The limitations of these provisions are self-evident. While they are helpful and merit retention in the context of cases involving a relatively small number of parties closely concerned in the same proceedings for

such cases, they are inadequate as a framework for dealing with large-scale multi-party situations.

386. In the first place, the availability of representation orders is narrowly defined and subject to considerable technicality.[329] Secondly, even where a representation order has been made and the case has proceeded to judgment, finality is not necessarily achieved. Individuals affected by the representation order are still free to challenge enforcement and to re-open the proceedings on the basis that facts and matters peculiar to his case exist. Thirdly, the rule makes no specific provision for handling the special problems of multi-party litigation (discussed further below).

387. Without rules designed to deal specifically with group litigation, the courts in England and Wales and in Hong Kong have had to proceed on an ad hoc basis, giving such directions as appear appropriate and seeking, so far as possible, agreement among parties or potential parties to be bound by the outcome of test cases. Such limited expedients have met with varying degrees of success.[330]

K12.2. Issues inherent in multi-party litigation

388. If litigation in a multi-party situation is to be dealt with effectively, it is necessary for certain compromises and adjustments to be made in respect of the procedural rights of plaintiffs and defendants. As Lord Woolf points out, the rules must :-

> "..... achieve a balance between the normal rights of claimants and defendants, to pursue and defend cases individually, and the interests of a group of parties to litigate the action as a whole in an effective manner."[331]

389. It is also necessary to provide mechanisms for moulding members of a class of potential plaintiffs into a workable group, with the court, if necessary, taking decisions on issues where agreement cannot be reached within the class. Issues which the rules must address include the following[332] :-

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329 See the discussion of the rule's requirements in HKCP 2001, 15/12/2-4 and 15/12/7-46.

330 See HKCP 2001, 15/12/6.

331 WFR, p 223, §2(c).

332 Lord Woolf discusses the problems of multi-party situations at WFR, pp 225-6, §8-§14. Proposed responses are considered at WFR, pp 226-249, §15-§87.

- What should the criteria for recognition by the court of a multi-party situation be?
- Who should be allowed in as members of the group?
- To what extent can differences in the interests of sub-groups of members be tolerated?
- Can agreement be reached as to the lawyers who should represent the group, avoiding duplication of costs?
- How should the lawyers be supervised and given instructions in the course of the proceedings?
- How should costs to be dealt with?
- Which members' cases should be selected as lead cases to be tried?
- Which issues should be tried and in what order?
- Should certain cases be removed from the register as hopeless or too weak?
- How should offers of settlement be dealt with?
- How should the proceeds of any settlement or recovery be dealt with?
- What safeguards should there be for such proceeds to be properly distributed?

390. These are all issues which, among others, require forceful case management by the judge seized of the case. He would plainly have conflicts to resolve. For instance, those with strong cases might wish to eliminate those with weak cases from the proceedings for fear of them prejudicing their own claims. The judge would have to decide whether a filter should be adopted and the criteria for elimination. Where members of the group are unable to reach agreement on any particular step to take, the court might have to direct the decision in the interests of the group as a whole, overriding any remaining objections. The court would obviously have to be careful that such proactive case management does not impinge on its actual or perceived impartiality and its ability to try the case.

K12.3. The CPR Group Litigation Order provisions

391. The CPR have now sought to address multi-party litigation by creation of procedures where the court makes a Group Litigation Order ("GLO"). This is defined[333] as "an order made under rule 19.11 to provide for the case management of claims which give rise to common or related issues of fact or law ('the GLO issues')".

392. CPR 19.11 empowers the court to make a GLO "where there are or are likely to be a number of claims giving rise to the GLO issues." Guidance is given by the relevant Practice Direction as to the information required on an application for a GLO.[334] Where the court decides to make a GLO of its own initiative, the Practice Direction provides that consent of the relevant senior judge should first be obtained.[335]

393. Once a GLO is made, the procedure envisaged by the CPR may be summarised as follows :-

- The GLO itself specifies the GLO issues which in turn identify the cases which will be part of the group. It also specifies the court which will manage the case and directs establishment of a group register. If other cases have been started, the GLO may order them to be transferred to the management court or stayed until further order or entered on the group register. It may also set a date by which claims raising one or more of the GLO issues should be started in the management court and entered on the register.[336]

- The judge exercises case management using, in addition to the usual powers of the court, powers expressly conferred by CPR 19.13 to give directions :-

  "(a) varying the GLO issues;

  (b) providing for one or more claims on the group register to proceed as test claims;

Notes

333 By CPR 19.10.

334 19BPD §3.2: as to the nature of the litigation, number and nature of claims already issued, number of parties likely, the GLO issues, whether there are sub-groups.

335 19BPD §3.3 and §4.

336 CPR 19.11(2)-(3).

(c) appointing the solicitor of one or more parties to be the lead solicitor for the claimants or defendants;

(d) specifying the details to be included in a statement of case in order to show that the criteria for entry of the claim on the group register have been met;

(e) specifying a date after which no claim may be added to the group register unless the court gives permission; and

(f) for the entry of any particular claim which meets one or more of the GLO issues on the group register."

394. The Practice Direction supplements those case management powers with other powers designed to facilitate the proceedings. For instance :-

- The court may give directions "about how the costs of resolving common issues or the costs of claims proceeding as test claims are to be borne or shared between the claimants on the Group Register."[337]

- "Group Particulars of Claim" may be filed containing general allegations relating to all claims and a schedule relating to specific claimants.[338]

- Directions may be given for the trial of common issues and separate directions for the trial of individual issues.[339]

395. The effect of proceedings conducted pursuant to a GLO is provided for by CPR 19.12 as follows :-

"(1) Where a judgment or order is given or made in a claim on the group register in relation to one or more GLO issues –

(a) that judgment or order is binding on the parties to all other claims that are on the group register at the time the judgment is given or the order is made unless the court orders otherwise; and

(b) the court may give directions as to the extent to which that judgment or order is binding on the parties to any claim which is subsequently entered on the group register.

(2) Unless paragraph (3) applies, any party who is adversely affected by a judgment or order which is binding on him may seek permission to appeal the order. ....."

Notes

337 19BPD §12.4.

338 19BPD §14.

339 19BPD §15.1.

396. Special costs rules apply where a GLO has been made. CPR 48.6A distinguishes between "individual costs" and "common costs", the latter being defined to mean the costs incurred in relation to the GLO issues, incurred in a test claim, and incurred by the lead solicitor in administering the group litigation. As a general rule, common costs incurred are shared equally among members of the group. Each member is to pay the individual costs of his own claim. Where necessary, the court can apportion particular costs orders between common and individual costs.

K12.4. Certain matters not provided for

397. It appears that the CPR group litigation provisions cover significantly less ground than envisaged in Lord Woolf's Final Report.

398. If the benefits of multi-party litigation are to be enjoyed, ways must be found to strike acceptable balances among the interests of group plaintiffs, defendants and the public (whose concern is for the fair and efficient administration of justice). As Lord Woolf puts it :-

> "The rationale behind multi-party actions is that the diminution of the individual rights of claimants and defendants makes the overall action more practicable and less costly to progress. But there is a need to ensure that those rights are protected: for defendants by the perceived fairness of the balance between generic issues and by establishing effective criteria for entry to the action. For claimants, the court has a more explicit role in ensuring that their interests are protected :-
>
> (a) in supervising the activity of lawyers;
>
> (b) in ensuring the effective representation of their interests through the appointment of a trustee in appropriate cases;
>
> (c) in approving settlement."[340]

399. The gaps in the existing treatment of GLOs in the CPR result in some of the key questions mentioned above remaining unanswered. Conspicuously, no rules appear to have been promulgated in relation to Lord Woolf's recommendations that :-

> "▪ The court should have power to progress the MPS on an "opt-out" or "opt-in" basis, whichever contributes best to the effective and efficient disposition of the case.[341]

Notes

340 WFR, p 242, §69.

341 WFR, p 235-6, §42-§46.

- The court should be responsible for determining whether the action has merit and should proceed and the criteria which must be met by those wishing to join the action.[342]
- The court has a duty to protect the interests of claimants, especially those unidentified or unborn.[343]
- In appropriate cases the court should appoint a trustee.[344]
- Multi-party settlements should be approved by the court especially where the defendant offers a lump sum settlement.[345]
- The court should require an identified and finite group of claimants to have in place from the outset a constitution including provisions relating to acceptance of settlement."[346]

400. It is recognized that since multi-party situations require the lawyers to take the initiative in the conduct of proceedings, measures must be taken to ensure their proper supervision. In the nature of group litigation, the individual member of the class is likely to be ill equipped to perform that role. It would be difficult for the court to assume a more proactive role in this regard while preserving the legal professional privilege enjoyed by the individual clients. A trustee might therefore be appointed to provide the necessary supervision.

401. While some of the abovementioned concerns may possibly be met simply by exercising case management, it would be preferable and would promote consistency if the nature and basis of the court's powers in relation to such matters were made the subject-matter of rules.

402. In the light of the foregoing discussion, any decision to adopt a group litigation scheme in Hong Kong probably requires further investigation of models in other jurisdictions, such as the class action procedures which have been adopted in Australia by the Federal Court[347] and Victoria.[348] Readers are therefore asked whether a group litigation

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342 WFR, p 237-8, §51-§55

343 WFR, p 242, §69.

344 WFR, p 244, §77-§78.

345 WFR, p 245-246, §79-§82.

346 WFR, p 248-9.

347 Under the Federal Court of Australia Act 1976 (Cth).

348 Under its Supreme Court Act 1986. See generally Bernard C Cairns, *Australian Civil Procedure,*

cont'd .....

scheme should in principle be adopted, but subject to further investigation of appropriate models in other jurisdictions: **Proposal 23.**

K12.5. *Derivative actions*

403. A straightforward and self-contained issue concerning derivative actions may also be addressed.

403.1 Before the Woolf reforms were enacted, there had been inserted into the RSC, Order 15 r 12A dealing with derivative actions. This made procedural provision for an action brought by a member of a company on behalf of the company for a wrong done to the company in circumstances where there has been a fraud on the minority or an abuse of power by the majority.[349]

403.2 This has now been re-enacted (and extended to legal entities other than companies) by CPR 19.9. Recognizing that a shareholder may not have an indefeasible right to sue on the company's behalf, the procedure requires continuation of a derivative action to be subject to the court's permission.

403.3 The HCR do not contain any express treatment of derivative actions. Readers are asked whether a similar provision should be adopted in Hong Kong: **Proposal 24**.

K13. Discovery

K13.1. *The nature of the problem*

404. In many jurisdictions, the practice of discovery, particularly in larger, more complex cases, has given rise to serious complaint. It is said to be a major source of litigation expense.[350] It lengthens trials and is amenable to use as an oppressive weapon by richer litigants to delay,

4th Ed (LBC), 337-344.

349 See, eg, *Estmanco (Kilner House) Ltd v GLC* [1982] 1 WLR 2; *Smith v Croft (No 2)* [1988] Ch 114; *Anglo-Eastern (1985) Ltd v Karl Knutz* [1988] 1 HKLR 322.

350 WIR, p 164-5, §§3, 4, 8 and 9.

harass and exhaust the financial resources of poorer opponents.[351] Lord Woolf shared these concerns, stating :-

> "The scale of discovery, at least in the larger cases, is completely out of control. The principle of full, candid disclosure in the interests of justice has been devalued because discovery is pursued without sufficient regard to economy and efficiency in terms of the usefulness of the information which is likely to be obtained from the documents disclosed."[352]

405. Nonetheless, Lord Woolf,[353] along with many others,[354] affirms the need for a discovery procedure as part of a fair and effective civil justice system. If such a procedure – requiring the parties (subject to necessary limitations) to inform and show each other relevant documents bearing on the issues in dispute – did not exist, there would often be difficulty ensuring that justice is done. A party denied access to crucial documents in the control of the other side may in practice find it impossible to proceed. Discovery is therefore an important means for establishing a greater equality of arms between parties with unequal resources.

406. Criticisms and reforms have focussed most strongly on the scope of the obligation to make disclosure. At present in Hong Kong (and prior to the CPR in England and Wales), the test of whether a document must be disclosed is the *Peruvian Guano* test of relevance, covering every document which "relates to the matters in question in the action".[355] This derives from *Compagnie Financiere du Pacifique v Peruvian Guano Company* (1882) 11 QBD 55, and in particular, the following passage from the judgment of Brett LJ :-

> "It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which *may* - not which *must* - either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words 'either directly or indirectly', because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences ..... In order to

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351 GTC, p 107, citing the ALRC; see also Mr Justice Ipp, *op cit* (1995) 69 ALJ 790 at 793-4.

352 WIR, p 8, §10.

353 WIR, p 167, §18.

354 Eg, GTC, p 106 and 112.

355 As reflected in HCR O 24 rr 1, 2, 3 and 7. See HKCP 2001, 24/2/10.

determine whether certain documents are within that description, it is necessary to consider what are the questions in the action: the Court must look, not only at the statement of claim and the plaintiffs' case, but also at the statement of defence and the defendants' case."[356]

407. This test is thought to be unnecessarily wide, catching too many documents in the great majority of cases. As Lord Woolf puts it :-

"It distinguishes between direct and indirect relevance. It is the inclusion in the test of documents which are indirectly relevant which causes most of the present problems."[357]

In consequence :-

"The result of the Peruvian Guano decision was to make virtually unlimited the range of potentially relevant (and therefore discoverable) documents, which parties and their lawyers are obliged to review and list, and which the other side is obliged to read, against the knowledge that only a handful of such documents will affect the outcome of the case. In that sense, it is a monumentally inefficient process, especially in the larger cases. The more conscientiously it is carried out, the more inefficient it is."[358]

K13.2. Cutting down the scope of the obligation

408. It is obviously true that the net thrown by the *Peruvian Guano* test is extremely wide. Lord Woolf points out that it encompasses four classes of document, namely :-

- The parties' own documents: these are documents which a party relies upon in support of his contentions in the proceedings.
- Adverse documents: these are documents of which a party is aware and which to a material extent adversely affect his own case or support another party's case.
- The relevant documents: these are documents which are relevant to the issues in the proceedings, but which do not fall into categories 1 or 2 because they do not obviously support or undermine either side's case. They are part of the "story" or background. The category includes documents which, though relevant, may not be necessary for the fair disposal of the case. It is fair to say that this category produces proportionately the greatest number of documents disclosed and to least effect.

Notes

356 At 63-64.

357 WIR, p 167, §16.

358 WIR, p 167, §17.

- Train of inquiry documents: these are the documents referred to by Brett LJ in the *Peruvian Guano* case.[359]

409. The main change proposed by Lord Woolf was to limit the obligation to disclosing documents in the first two categories, subject to the court ordering wider disclosure if demanded by the circumstances of the case.[360] A similar approach, abandoning *Peruvian Guano* and adopting a narrower test of relevance, has been implemented or advocated in many jurisdictions, including Queensland,[361] Western Australia[362] and the Australian Federal Court.[363] Having reviewed the position in other states, Sallmann and Wright conclude that "discovery is too important to be abolished" but that in Victoria, as elsewhere :-

> "..... it needs more effective control and that on that basis *Peruvian Guano* has outlived its usefulness as the general test. It should be replaced by the 'direct relevance' test. The courts should probably retain a residual discretion to enlarge the ambit of discovery where necessary."[364]

K13.3. Disclosure under the CPR

410. The approach mentioned above has been implemented in the CPR. While the court retains jurisdiction to order full *Peruvian Guano* style discovery in an appropriate case, the usual disclosure obligation is to make what is called "standard disclosure". This requires a party to disclose only the documents which are or have been in his control[365] being :-

> "(a) the documents on which he relies; and

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359 WIR, p 168, §22.

360 WIR, p 170, §32; WFR, p 125 .

361 GTC, 109; under the Uniform Civil Procedure Rule 211, adopting the test of "direct relevance".

362 GTC, p 109-110, citing the LRCWA Consultation Paper on Discovery (December, 1998) which proposes that discovery "should be confined to documents that are directly relevant to the issues in dispute, subject to the Court having a residual discretion to enlarge the ambit of discovery where thought necessary."

363 GTC, p 111-2; ALRC No 89, p 417, §6.69.

364 GTC, pp 112-3.

365 CPR 31.8.

(b) the documents which –

(i) adversely affect his own case;

(ii) adversely affect another party's case; or

(iii) support another party's case; and

(c) the documents which he is required to disclose by a relevant practice direction."[366]

411. Moreover, a party is not required to leave no stone unturned in searching for disclosable adverse or required documents. He is required merely to make "a reasonable search", the reasonableness of the search being judged by :-

"(a) the number of documents involved;

(b) the nature and complexity of the proceedings;

(c) the ease and expense of retrieval of any particular document; and

(d) the significance of any document which is likely to be located during the search."[367]

412. Disclosure is by exchanging lists of documents accompanied by a "disclosure statement" made by the party giving disclosure :-

"(a) setting out the extent of the search that has been made to locate documents which he is required to disclose;

(b) certifying that he understands the duty to disclose documents; and

(c) certifying that to the best of his knowledge he has carried out that duty."[368]

False disclosure is punishable as a contempt.[369]

413. As with other aspects of the CPR, the court is to assume a more proactive role and, where necessary, it should case manage the disclosure process. With the overriding objective in mind, it may be proportionate for example, to order disclosure to take place in stages or in respect of a key preliminary issue which may be dispositive of the case before the expense of full-scale disclosure is incurred. This is expressly catered for by CPR 31.13.

Notes

366 CPR 31.6.

367 CPR 31.7(2).

368 CPR 31.10(6).

369 CPR 31.23.

414. The parties are also given a wide scope for making agreements as to disclosure, including agreements in writing to make disclosure without a list and without having to make a disclosure statement.[370] In preparing the list, large numbers of documents falling into a particular category may be disclosed by category without laboriously describing each document.[371]

415. Two special powers to order disclosure may be mentioned.

415.1 Where proceedings involving the applicant and respondent are likely to ensue, the court has power to order disclosure before commencement of those proceedings of documents which would be disclosable provided that such disclosure :-

> "..... is desirable in order to –
>
> (i) dispose fairly of the anticipated proceedings;
>
> (ii) assist the dispute to be resolved without proceedings; or
>
> (iii) save costs."[372]

415.2 There is also a power to order disclosure by a person who is not a party to the proceedings where :-

> "(a) the documents of which disclosure is sought are likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings; and
>
> (b) disclosure is necessary in order to dispose fairly of the claim or to save costs."[373]

This is a significantly wider than the powers presently limited to personal injury actions by section 41 and 42 of the High Court Ordinance and O 24 r 7A of the HCR.[374]

Notes

370 CPR 31.10(8).

371 31PD §3.2.

372 CPR 31.16(3)(d).

373 CPR 31.17(3).

374 HKCP 2001, 24/7A/1-8.

K13.4. The effect of the changes

416. One risk posed by the changes, acknowledged by Lord Woolf,[375] is the risk that the narrower initial obligation may spawn increased numbers of interlocutory applications for specific disclosure and attendant increases in cost and delay. However, after two years of operation, reports in England and Wales suggest that this has not materialized, possibly because of the court's discouragement of and sanctions against unnecessary interlocutory applications.[376]

417. A more substantive concern is that the narrowness of the obligation may, in certain cases, mean that important documents do not come to light. Thus, the standard disclosure obligation compels disclosure only of documents which affect (not *may affect*) adversely a party's own case or support (not *may support)* the other side's case. Moreover, in excluding documents which may lead the other side on a train of inquiry resulting in the discovery of documents with the abovementioned consequences, it is at least arguable that disclosure is limited to documents directly relevant *to the pleaded case*. Thus, for instance, it is arguable that while documents bearing on breaches of duty particularised have to be disclosed, those which would clearly show other, unpleaded, breaches, do not. The precise scope of the new test awaits judicial decision.

418. Another concern is that unscrupulous litigants or unscrupulous lawyers may be more likely to get away with improper disclosure under the new rules. Plainly, as the ALRC puts it :-

> "Parties may obstruct or subvert disclosure, refusing to provide or destroy or conceal relevant documentation which might have assisted the other side."[377]

Litigants and lawyers with such proclivities exist under the present discovery regime. No doubt such improper conduct would also sometimes occur if the CPR approach were adopted. However, in the nature of things, it is extremely difficult to estimate the size of this actual or potential problem. It is possible that a dishonest party may find it easier to hide his tracks by emphasising the narrowness of the standard

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375 WIR, p 171, §35.

376 An impression reported by Mr Andrew Jeffries of Allen & Overy, at a Conference on *"Civil Procedure: Latest Developments and Prospects of Change"* in Hong Kong on 8 June 2001.

377 ALRC No 89, p 416, §6.68.

disclosure obligation but no evidence has emerged to suggest that the problem has intensified.

419. Views differ as to whether the new disclosure rules increase or reduce costs. One suggestion[378] is that costs are increased because the need to identify the directly relevant documents and to exclude the chaff requires greater discrimination and judgment and therefore engagement of more senior lawyers on the task. The contrary suggestion[379] is that costs have been reduced because the process results in the disclosure and subsequent handling of fewer documents. The selection process is argued not to be a problem since the narrower obligation allows large categories of documents to be excluded without detailed consideration.

K13.5. A different approach

420. Part 23 of the Supreme Court Rules 1970 of New South Wales provides a different approach to the regulation of discovery which may be considered by way of contrast.

421. No automatic discovery is provided for. Instead, rule 23.2(1) gives each party the right to serve a notice requiring discovery from another party, presumably only if he chooses to do so. What a party is entitled to seek by way of such a notice is limited to production of non-privileged documents referred to in the other party's originating process, pleading, affidavit or witness statement and :-

> "any other specific document (other than a privileged document) clearly identified in the notice, relevant to a fact in issue."

However, in relation to this latter class, the requesting party is limited to obtaining 50 documents under this rule.

422. By rule 23.1(d) :-

> "a document or matter is to be taken to be relevant to a fact in issue if it could, or contains material which could, rationally affect the assessment of the probability of the existence of that fact (otherwise than by relating solely to the credibility of a witness), regardless of whether the document or matter would be admissible in evidence."

Notes

378 Harry Anderson, Herbert Smith, Conference on *"Civil Procedure: Latest Developments and Prospects of Change" Hong Kong on 8 June 2001.*

379 Andrew Jeffries of Allen & Overy at the abovementioned Conference.

423. If, after getting the discovery by request, more documents are sought, an order of the court must be sought. Such an order might identify the documents to be produced by relevance to one or more facts in issue; by description of the nature of the documents and the period within which they were brought into existence; or in some other way. The party against whom the order is made has to serve a list of such documents within his possession, custody or power.

424. The court is given wide and flexible powers.[380] It may, for instance, on the application of a party or of its own motion, discharge, vary or extend any of the obligations arising under the abovementioned rules. It is also vested with extensive powers of sanction where there is non-compliance with discovery orders.

425. In the light of the foregoing discussion, readers are asked whether any of the abovementioned changes relating to discovery should be adopted in Hong Kong: **Proposals 25 to 29**.[381]

K14. Interlocutory applications

K14.1. The problems and countermeasures

426. Contested interlocutory hearings introduce substantial delays and increases in costs. Such hearings are, of course, sometimes inevitable. One party may reasonably consider itself entitled to a certain procedural benefit to ensure fairness of the trial whereas the opposition may, with equal reasonableness, disagree. Such applications, if proportionate to the needs of the case, are unobjectionable and nothing should be done to deter parties from making them.

427. However, interlocutory applications can also present an opportunity for abuse. One party may seek to make repeated use of such applications as a tactical weapon, pumping up costs and inducing delays.[382] In other

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380 By rule 23.3.

381 Additionally, although outside the Working Party's remit, thought might be given to amending the Personal Data (Privacy) Ordinance, Ch 486, to eliminate any possible suggestion that discovery procedures have been inhibited in respect of documents concerning information qualifying as "personal data" within that Ordinance. Mr Robin McLeish has pointed to apt exemptions provided in the comparable United Kingdom legislation: *Discovery and Data Protection* (2001) 31 HKLJ 48, 56.

382 WIR, p 14, §41.

cases, the excesses of the adversarial system may lead to furious – and costly – interlocutory contests going from master to judge to Court of Appeal, but bringing the parties little benefit in terms of progressing the substantive dispute.

428. Sometimes unnecessary interlocutory applications result from poor organization or incompetence so that a matter which should obviously have been dealt with by agreement from the outset has not been agreed. Often the ill-prepared party eventually comes to realise that resistance cannot be justified, but only at the courtroom door, after a summons has been issued, the court has set aside time for the hearing and costs have been incurred. Mr Martin Rogers describes such experiences and their effects as follows :-

> "Interlocutory applications, for example for further and better particulars, are usually listed for a short initial hearing (in the 'three minutes list') but then adjourned for argument to a much longer hearing before a Master, for example for an hour long hearing. Typically such an adjourned hearing will not take place for several weeks, if not one or two months, because of the heavy workload of the Master. Frequently, one then finds that shortly before the adjourned hearing the opposing party agrees to the order sought, or at least a substantial part of it. The result is then that there has been an unnecessary delay. This only has to happen twice in the early stages of a case to cause several months' delay."[383]

429. Three main objectives may be pursued in response to such problems. First, reforms may aim to reduce the number of times when interlocutory applications are required. Secondly, where they cannot be avoided, reforms may aim at streamlining the process for dealing with applications. Thirdly, more effective sanctions against misuse of interlocutory applications, deliberate or otherwise, could be introduced. These strategies are adopted in the CPR. Readers are asked whether similar strategies, discussed in greater detail below, ought to be adopted in Hong Kong: **Proposals 30 to 32.**

K14.2. Reducing the need for interlocutory applications

430. The aim of reducing the need for interlocutory applications is part of the overriding objective of the CPR. Thus, CPR 1.4(2) requires the court actively to manage a case by, amongst other things :-

> "(i) dealing with as many aspects of the case as it can on the same occasion; [and]

Notes

383 W&B, p 239.

(j) dealing with the case without the parties needing to attend at court....."

(a) Leaving matters to the parties to agree without involvement of the court

431. Avoiding applications by encouraging the parties to agree to sensible procedural arrangements is part of the overriding objective. Thus, CPR 1.4(2)(a) includes in the court's case management duties encouragement of the parties "to co-operate with each other in the conduct of the proceedings". CPR 1.3 places an obligation on the parties to "help the court to further the overriding objective". Plainly, bloody-mindedness or simple unreasonableness which leads to an interlocutory application puts the unreasonable party at risk as to the costs of that application.

432. Agreement is sometimes specifically encouraged in particular contexts. Thus, while the rules stress the firmness and general immovability of milestone dates in the timetable, CPR 2.11 authorises the parties to agree extensions of time (in relation to the rules, practice directions or orders of the court) without any need for an application to or approval by the court, provided that the dates for the milestone events identified in CPR 29.5 are not affected. Such a rule ought significantly to cut down the need for time summonses.

(b) Court acting on own initiative

433. Another measure aimed at reducing the number of interlocutories is the power given to the court to deal with matters of its own initiative :-

"Except where a rule or some other enactment provides otherwise, the court may exercise its powers on an application or of its own initiative."[384]

434. Where it decides to do so, it is specifically absolved from any duty to hear the parties.[385] However, if, after having made the order, a party affected may, within a specified time, apply for the order to be set aside, varied or stayed, the right to make this application being stated in the court's order.[386]

Notes

384 CPR 3.3(1).

385 CPR 3.3(4): "The court may make an order of its own initiative, without hearing the parties or giving them an opportunity to make representations."

386 CPR 3.3(5).

435. This is a useful power which, if used wisely in cases where the order is plainly needed and unlikely to lead to a contentious hearing, could avoid interlocutory hearings and save the parties costs.

(c) Making orders "self-executing"

436. At present, if faced with a defaulting or dilatory opponent who fails to comply with the rules or with the court's interlocutory orders, the other party must take out a summons to enforce compliance. This may take more than one hearing, with the master or judge first extending time for compliance and then making a "final order" or an "unless order" before finally being driven to a more drastic sanction, such as striking out the defence or claim where non-compliance persists.

437. The CPR's approach is to relieve the innocent party of this burden of enforcement and to reduce the number of applications needed. This change was explained by Lord Woolf as follows :-

> "I would stress four important principles.
>
> (a) The primary object of sanctions is prevention, not punishment.
>
> (b) It should be for the rules themselves, in the first instance, to provide an effective debarring order where there has been a breach, for example that a party may not use evidence which he has not disclosed.
>
> (c) All directions orders should in any event include an automatic sanction for non-compliance unless an extension of time has been obtained prospectively.
>
> (d) The onus should be on the defaulter to apply for relief, not on the other party to seek a penalty."[387]

438. It was emphasised that the sanction should be relevant to the non-compliance and tailored to be proportionate to the importance of the breach in the context of the action as a whole.[388] A wide range of sanctions allows for flexibility in this context.

439. In implementing this approach, if practicable, rules, practice directions and court orders should specify the consequences of non-compliance. Thus, in relation to the court's general powers of case management, the CPR provide that :-

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387 WFR, p 72, §3.

388 WFR, p 74, §10.

"When the court makes an order, it may –

(a) make it subject to conditions, including a condition to pay a sum of money into court; and

(b) specify the consequence of failure to comply with the order or a condition."[389]

440. If such an order is made, then the consequence takes effect without need for a further order, placing the onus on the party guilty of non-compliance to seek relief :-

"Where a party has failed to comply with a rule, practice direction or court order, any sanction for failure to comply imposed by the rule, practice direction or court order has effect unless the party in default applies for and obtains relief from the sanction."[390]

441. The party who has failed to comply cannot count on being granted relief. The court is enjoined by CPR 3.9 to consider all the circumstances including the following :-

"(a) the interests of the administration of justice;

(b) whether the application for relief has been made promptly;

(c) whether the failure to comply was intentional;

(d) whether there is a good explanation for the failure;

(e) the extent to which the party in default has complied with other rules, practice directions, court orders and any relevant pre-action protocol;

(f) whether the failure to comply was caused by the party or his legal representative;

(g) whether the trial date or the likely trial date can still be met if relief is granted;

(h) the effect which the failure to comply had on each party; and

(i) the effect which the granting of relief would have on each party."

K14.3. Streamlining interlocutory applications

442. Where an interlocutory application has to be made, considerable scope appears to exist for cost savings by a streamlining of the process.

Notes

389 CPR 3.1(3).

390 CPR 3.8(1). The rule permitting the parties to vary time limits by agreement does not apply in such cases: CPR 3.8(3); and where the sanction is an order as to costs, relief can only be sought by way of appeal against such order: CPR 3.8(2).

(a) Dealing with the application on paper

443. In many cases, the court will be able to deal with an application without a hearing. This is provided for by CPR 23.8 in the following terms :-

> "The court may deal with an application without a hearing if –
>
> (a) the parties agree as to the terms of the order sought;
>
> (b) the parties agree that the court should dispose of the application without a hearing, or
>
> (c) the court does not consider that a hearing would be appropriate."

(b) Skipping the hearing before the master

444. At present, leaving aside the specialist lists, the making of an interlocutory application is a cumbersome and time-consuming process. The summons is set down first in a master's "three minute list". What then follows has been described in Hong Kong Civil Procedure 2001 :-

> "During the hearing, if it appears to the master that the application cannot be resolved within three minutes, or if the application is contested, eg objection to provide further and better particulars ..... the hearing will be adjourned to a date to be fixed. The master will ask the representatives attending the hearing the estimated time required ....., whether affidavits are to be filed, etc. The master will then give directions as to the adjourned hearing ..... The party who issued the summons will then contact the other party to arrange for a mutually convenient time to attend the Clerk of the Court to fix a date in consultation with the parties' (and their respective Counsel .....) ..... for the hearing."[391]

445. At present, HCR O 58 r 1, gives an unqualified right of appeal to the judge in chambers from any judgment, order or decision of a master. This is a rehearing, with the judge not being bound by the master's decision and treating the matter as if it was before the court for the first time. Additional evidence is often admitted.[392]

446. In a significant number of cases, the overwhelming likelihood is that the master's decision will be appealed. The hearing before the master then becomes effectively a dress rehearsal for the hearing before the judge. In such cases, the three minute hearing and the eventual contested hearing before the master involve delays and costs which serve no purpose in terms of progressing the action. At most, the hearing before the master

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391 HKCP 2001, 32/6/11.

392 HKCP 2001, 58/1/2.

may enable one or other of the parties to repair evidential deficiencies and to trim his sails before the hearing in front of the judge. Moreover, a party intent on delaying the proceedings presently has a right of appeal to the Court of Appeal even in respect of interlocutory rulings by the judge, potentially turning a single contested interlocutory question into a major source of delay and cost.

447. There is, in these circumstances, much to be said in favour of masters being relieved of contested applications and certainly of applications taking more than say, half a day. The primary role of the High Court masters should be to keep the procedural wheels turning for cases advancing across the board. They should not be bogged down dealing with individual cases. This is doubly obvious where the result of the hearing is likely to be rendered academic by one of the parties taking the matter to the judge on appeal.

448. Readers are accordingly consulted on the desirability of measures which allow the first round of hearings before the master,[393] in appropriate circumstances, to be dispensed with and for the application to be listed directly before the judge. This could be done in relation to all or certain classes of contested applications.

(c) Use of telephone and other means of communication

449. Although less of a consideration than in jurisdictions where travel to court may involve a significant journey, a certain amount of unproductive time and money is undoubtedly spent on requiring solicitors physically to attend minor hearings. Time spent waiting outside the master's or judge's chambers for the hearing to be called on is likely to be much less productive than time spent in the office.

450. If the matter cannot be dealt with by agreement or on paper, but requires the court's decision on what is a relatively simple question, rules could be formulated to allow applications made without leaving the office by telephone or perhaps by video conferencing, if such facilities become more widely used. The Practice Direction associated with CPR 23[394] makes such provision (where the parties consent) for an application to be dealt with by a telephone or video conference. It provides examples

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393 Readers will also be consulted on whether appeals should be subject to leave, discussed later.

394 23PD §§6.1 to 7, covering telephone and video conferencing.

of the safeguards and other matters that have to be dealt with if such conferences are to work.

K14.4. Deterring unnecessary or abusive interlocutory applications

(a) Summary assessment of costs

451. An important feature of the Woolf reforms involves use of the court's power to make a summary assessment of costs after hearing an interlocutory application, with such costs ordered to be paid forthwith. This saves the effort and cost of a detailed taxation, but, more importantly, has become widely regarded as a general deterrent against making interlocutory applications that may not be necessary. It is certainly also an appropriate sanction to discourage abusive use of interlocutory applications.

452. A similar power, referred to as a power to make a gross sum assessment of costs, existed previously in England and Wales and is presently provided for in Hong Kong by HCR O 62 r 9(4)(b).[395] While that power is often used by Masters in this jurisdiction in relation to small items such as time summonses,[396] its use is otherwise highly exceptional, with only a few judges being inclined to make such assessments.[397] In contrast, summary assessments under the CPR are extensively made and widely regarded as a real deterrent against unnecessary and unmeritorious interlocutory applications.

453. The relevant provisions include the following :-

453.1 CPR 43.3 defines "summary assessment" as "the procedure by which the court, when making an order about costs, orders payment of a sum of money instead of fixed costs or 'detailed assessment'."

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395 "The Court in awarding costs to any person may direct that, instead of taxed costs, that person shall be entitled ..... to a gross sum so specified in lieu of taxed costs [with special provisions in respect of litigants in person]."

396 In July 2001, a list of proposed awards by way of "lump sum assessment" was issued by the Masters for adoption on a voluntary and experimental basis. They cover costs for such matters as simple charging orders nisi and absolute, mortgagee actions and garnishee proceedings. Parties are invited to adopt the figures and so avoid any taxation, or to agree to a summary assessment putting forward alternative figures. They may otherwise opt for a full taxation.

397 HKCP 2001, 62/9/10.

453.2 CPR 44.7 gives the court a general option of ordering either a summary or detailed assessment. However, the associated practice direction provides that the court should, as a rule, make a summary assessment of the costs where the hearing has lasted not more than one day, unless there is good reason not to do so.[398]

453.3 Accordingly, the parties, who are under a duty to help the judge make a summary assessment, must come to the hearing prepared with a signed schedule showing the costs he intends to claim and containing the prescribed details.[399]

453.4 The rules seek to ensure that the client is made aware of any such order made. By CPR 44.2 :-

> "Where –
>
> (a) the court makes a costs order against a legally represented party; and
>
> (b) the party is not present when the order is made,
>
> the party's solicitor must notify his client in writing of the costs order no later than 7 days after the solicitor receives notice of the order."

454. The Practice Direction on Appeals indicates that summary assessment of costs is also likely to be used in the Court of Appeal in certain cases and requires the parties to be prepared to deal with such an assessment.[400]

(b) Moving away from "costs follow the event"

455. In championing the widespread use of summary assessments, Lord Woolf consciously moved away from the principle, still pervasively applicable in Hong Kong, that the costs should generally follow the event.

455.1 Under that principle, the party who turns out to be the loser after trial is basically considered responsible for all the costs. It is considered fair that the costs should "follow the event" and be ordered against the losing party since he is, after all, the wrongdoer, whose wrongdoing made the action necessary.

Notes

398 44PD §13.2.

399 44PD §13.5.

400 52PD §14.1.

455.2 In line with that principle, even where the ultimately victorious party misbehaves procedurally at an interlocutory stage, the court tends not to exact payment from him then and there, but allows the parties to settle their respective costs liabilities at the final taking of accounts. The winner is then able to set off what he owes in interlocutory costs against the trial award, including the overall costs award.

456. While there is obviously logic in the abovementioned approach, the practice of allowing parties to defer until the end of the case payment of costs orders made against them in interlocutory applications can be criticised as lacking in realism and as doing little to curb interlocutory excesses. Lord Woolf reported that many respondents to his Interim Report asked for more effective costs sanctions against parties using interlocutory applications as tactics.[401]

457. Faced with an order to pay the costs of the interlocutory hearing "in any event", ie, whichever party ultimately wins, but payable only at the end of the case, the party or the legal advisers concerned are unlikely to be deterred from making similar interlocutory applications since the financial impact of the order may well never be felt. Liability "in any event" tends to look a long way off. Even if the case does not settle, the order may eventually be set off against other costs orders or may simply be aggregated with a larger liability. In either case, the costs order makes no impact as a specific financial sanction at the interlocutory stage.

458. As the available figures demonstrate, the vast majority of cases do not go to trial but are disposed of at some earlier stage, by settlement or otherwise. Where the case settles, earlier costs orders tend to be swept up in the settlement and are again never felt as individual sanctions.

459. Things take on a very different complexion if a speculative or ill-advised interlocutory application leads to an order immediately requiring the client (or, in a wasted costs situation, the adviser) to reach for his cheque book in order to pay a sum to the other side, whatever the ultimate outcome of the case.

(c) Reaction to summary assessment of costs

460. Publication of Lord Woolf's proposal for use of summary assessment as a sanction against unjustified interlocutory applications met with a favourable response in Hong Kong. Professor Wilkinson thought this

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401 WFR, p 83, §23.

would be a good idea,[402] as did Mr Justice Waung.[403] Mr Ronny Tong SC, when chairman of the Bar Association, stated :-

> "In our view, our rules can be easily amended and updated in such a way as to encourage more 'fixed costs' orders and to facilitate more immediate enforcement and payment of such orders. Our courts should also be given a flexible power to order immediate taxation and payment of costs orders in complicated and lengthy applications. We do not see great difficulties in modelling our new rules in this regard upon the Civil Procedure Rules in England supplemented perhaps by a provision or Practice Direction that the parties do reveal their costs in their skeleton submissions to the Court."[404]

461. After a period of operation, the reaction to summary assessment of costs in England and Wales has been more mixed.

461.1 In the personal injury context, Mr Geoffrey Reed expressed the view last year that summary assessment of costs was not working well :-

> "Preparation of costs schedules is not a simple and straightforward task. It is often quite time consuming. So very often the costs orders made at the hearing render the costs schedule inappropriate regardless of the outcome of the application. It is often very difficult to separate the costs of the application from the costs of the Action generally."[405]

461.2 Also looking at the first year's operation, Freshfields reported some initial complaints of an inconsistent judicial approach,[406] but went on to state :-

> "Preliminary indications from the courts (including the specialist lists) are that the summary assessment provisions have discouraged litigants and their lawyers from making obstructive or time-wasting applications, and that this is one of the most productive areas of the reforms in terms of its immediate effect on litigants' behaviour. It is also popular with many litigants, who are opting for summary assessment in order to recover some proportion of their costs immediately even

Notes

402 W&B, pp 32-34.

403 W&B, p 203.

404 W&B, p 192.

405 Geoffrey Reed, *Review of the Civil Procedure Rules from the Perspective of a Defendant Personal Injury Lawyer* [2000] JPIL 13, 18.

406 *"The Civil Justice Reforms One Year On – Freshfields Assess their Progress"* M Bramley & A Gouge (Butterworths, London 2000), p 153.

though in some cases they might obtain a greater sum if they proceeded to detailed assessment."[407]

461.3 Reviewing two years' experience of the Woolf reforms, Mr Harry Anderson concluded that summary assessment is a qualified success. It has had a salutary effect on spurious applications but the operation of the rule has not been consistent.[408]

461.4 The Lord Chancellor's Department's evaluation of the first two years acknowledges that these rules have provoked controversy, commenting :-

"Commentators are unsure as to whether the costs are fair and how difficult it is for judges to make an informed assessment."[409]

However, it expresses the view that "it is likely that [the controversy] will decrease over time as judges and practitioners become more familiar with the new rules." [410]

462. Problems of inconsistency are encountered in every context in which costs are awarded. This may be exacerbated in the context of summary assessment of costs first, because the judge, at least initially, will lack expertise in assessing costs; and secondly because the procedure is a summary one, requiring a rough and ready approach. Nonetheless, initial inconsistencies do not appear to be a good reason for rejecting summary assessment, which has otherwise proved an effective deterrent to unjustified interlocutory applications.

462.1 As discussed later, one response to the problem of inconsistency is, if possible, to prepare and publish a periodically revised table of benchmark costs for the guidance of all concerned. This has encountered delays in England and Wales due to difficulty in getting reliable information as to costs.[411] However, assuming that such figures can be produced, less inconsistency can be expected.

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407 *Ibid*, p 154.

408 Harry Anderson, Conference on *"Civil Procedure: Latest Developments and Prospects of Change" Hong Kong on 8 June 2001.*

409 EF, §7.9.

410 EF, §7.3.

411 EF §7.8

462.2 Even without benchmark costs, the development of consistency in judicial decisions (whether as to levels of sentencing, of costs awards or otherwise) is achievable over time through judicial conferences and other forms of continuing judicial education.

K14.5. Wasted costs orders

463. An order for the summary assessment of costs generally penalises the party against whom it is made. However, the fault may lie entirely with the party's legal advisers rather than with any instructions given by the party himself. With the advisers being required[412] to inform their client in writing of an adverse costs order, the financial penalty on the client may result in his demanding an indemnity from his lawyers or in his having them replaced. Such possible indirect penalties on the lawyers may be effective in some cases, but where the client lacks sophistication, he is likely to find himself not only paying for shoddy legal services but also paying the other side's costs. There is accordingly clearly a case for making the lawyers, rather than the client, personally liable for wasted costs.

464. In Hong Kong power exists to make a solicitor personally liable for such wasted costs. Order 62 r 8(1) of the HCR provides :-

> "..... where in any proceedings costs are incurred improperly or without reasonable cause or are wasted by undue delay or by any other misconduct or default, the Court may make against any solicitor whom it considers to be responsible whether personally or through a servant or agent an order-
>
> (a) disallowing the costs as between the solicitor and his client; and
>
> (b) directing the solicitor to repay to his client costs which the client has been ordered to pay to other parties to the proceedings; or
>
> (c) directing the solicitor personally to indemnify such other parties against costs payable by them."

The solicitor generally must be given a reasonable opportunity to appear before the Court to show cause why the order should not be made. The Court may direct that notice of such proceedings or such order be given to the client.[413]

Notes

412 By CPR 44.2.

413 The principles developed by the courts in the exercise of this jurisdiction are discussed at HKCP 2001, 62/8/1-8.

465. A similar jurisdiction is preserved in the CPR 48.7, pursuant to s 51(6) of the Supreme Court Act 1981 as amended by s 4 of the Courts and Legal Services Act 1996[414] in England and Wales. It is however of wider application in two respects :-

465.1 First, it bears what appears to be a wider definition of the circumstances in which a wasted costs order may be made, namely, where costs are incurred by a party :-

> "(a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative; or
>
> (b) which, 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."

465.2 Secondly, unlike the Hong Kong rule, it is not confined to orders against solicitors. It applies to the party's "legal or other representative" and includes barristers. In Hong Kong, the liability of barristers for wasted costs arises only in the limited circumstances covered by the Costs in Criminal Cases Ordinance Cap 492.[415]

466. Case-law has developed in England and Wales exploring the standards to be applied and circumstances in which wasted costs orders should be made against legal representatives. The White Book[416] summarises the test for making such orders as a three stage test :-

- Had the legal representative of whom complaint was made acted improperly, unreasonably or negligently?
- If so, did such conduct cause the applicant to incur unnecessary costs?
- If so, was it, in all the circumstances, just to order the legal representative to compensate the applicant for the whole or part of the relevant costs?[417]

467. It is appropriate that the existing wasted costs jurisdiction should be preserved and regarded as one of the sanctions against misuse of

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414 "In [the specified proceedings] the court may disallow, or (as the case may be) order the legal or other representative concerned to meet, the whole of any wasted costs or such part of them as may be determined in accordance with rules of court."

415 Sections 2 and 18. A "legal representative" is defined to include "any person who has a right of audience or a right to conduct litigation on behalf of any party to the proceedings or who is exercising any such right".

416 White Book 48.7.3 – 48.7.17.

417 White Book 48.7.3.

interlocutory applications. It is arguable that the Hong Kong definition turns on conduct approaching misconduct (as opposed to the English test which stresses unreasonableness or negligence), making it too high a threshold for wasted costs orders. Readers are consulted as to whether the English test should be adopted in preference to the existing O 62 r 8(1) test: **Proposal 33**.

468. The question also arises as to whether the power to make wasted costs orders should apply to barristers. There is undeniable force in the argument that where the costs wasted are due to the default of the barrister, no justification exists for penalising only the solicitor. On the other hand, arguments of policy against extending the penalty to barristers exist. They are (i) that the public interest in barristers fearlessly conducting the case as they see best requires their immunity from any form of liability arising out of the manner in which they conduct the case; and (ii) that wasted costs proceedings in general (whether against solicitors or barristers) tend to be hotly contested and constitute unproductive and costly satellite litigation. Readers are consulted as to whether the power to make wasted costs orders should apply to barristers: **Proposal 34**.

K15. Witness statements

469. It is now standard practice for the parties to be required to exchange witness statements. These are "written statements of the oral evidence which the party intends to adduce on any issues of fact to be decided at the trial."[418] It is also standard practice, unless the court otherwise orders, for such statements to stand as the witness's evidence in chief.[419]

470. There is no doubt that in principle, the practice of exchanging witness statements is desirable.

470.1 Order 38A r 2A itself states the objectives of such exchange as follows :-

> "The powers of the Court under this rule shall be exercised for the purpose of disposing fairly and expeditiously of the cause or matter before it, and saving costs, having regard to all the circumstances of the case....."[420]

Notes

418 HCR O 38 r 2A(2).

419 As envisaged in HCR O 38 r 2A(7)(a).

420 HCR O 38 r 2A(1).

470.2 Lord Woolf explains :-

> "It was considered that the exchange of statements in accordance with the rule would avoid the element of surprise at the trial, that it would promote fair settlement and assist in the identification of issues, and in this way reduce the length of trials."[421]

470.3 This is a view that Lord Woolf endorses :-

> "I firmly endorse the practice of requiring the exchange of witness statements. They ensure that the parties are fully aware before the trial of the strengths and weaknesses of the case which they have to meet. The sooner a party is aware of this, the more likely it is that the outcome of the dispute will be a just one, whether it is settled or tried. In many situations, the exchange of witness statements will obviate the need to develop pleadings or to seek to administer interrogatories. Exchange of statements should help to achieve settlements well before trial....."[422]

K15.1. Problems have developed

471. However, it is widely recognized that the practice which has developed in relation to witness statements, reflecting adversarial excesses, has seriously tarnished the benefits of the procedure, particularly in heavy cases. Witness statements have become regarded as documents to be carefully crafted by counsel, going through several drafts, covering every detail and with every nuance discussed in conference with the client. Lord Woolf reported that Commercial Court practitioners were finding that the practice "was having a devastating effect on costs."[423] He quotes a Commercial judge in the following terms :-

> "From the court's point of view they may save time and reduce costs, but there are downsides. First, an enormous amount of time is now spent by lawyers ironing and massaging witness statements; that is extremely expensive for clients, and the statements can bear very little relation to what a witness of fact would actually say. Second, they can produce an unfair result because a witness can be unfairly caught saying something contrary to that which a lawyer has put in his statement. It may not be dishonesty, but inexperience in checking lengthy statements, that leads to being caught, and time is taken up in the trial trying to resolve which it is. Third, the exchange also allows lawyers to spend hours preparing cross-examination and can thus lead to prolix cross-examination. That prolixity is compounded by the fact that the statement crosses every 't' in the first place and those 'ts' cannot be left unchallenged."

Notes

421 WIR, p 175 §2.

422 WIR, p 177, §10.

423 WIR, p 176, §6.

472. Experience in Hong Kong and elsewhere[424] has been the same. The problem therefore is: how can the practice of over-working witness statements, and indeed, the whole manner in which such statements are presently perceived and approached by the legal profession, be changed, while retaining their undoubted benefits?

473. Pursuant to Lord Woolf's recommendations, the CPR appear to have adopted three strategies in an effort to dampen enthusiasm for over-elaborate witness statements :-

- Adopting rules giving the court greater powers to regulate and limit the evidence to be adduced by the parties.
- Introducing greater flexibility in the treatment of witness statements, allowing them to be reasonably supplemented by the witness's oral evidence or in a supplemental statement.
- Deterring over-elaboration by appropriate costs orders.

K15.2. Greater powers to regulate the evidence

474. CPR 32.1 is in apparently far-reaching terms and provides as follows :-

> "(1) The court may control the evidence by giving directions as to –
>
> (a) the issues on which it requires evidence;
>
> (b) the nature of the evidence which it requires to decide those issues; and
>
> (c) the way in which the evidence is to be placed before the court.
>
> (2) The court may use its power under this rule to exclude evidence that would otherwise be admissible.
>
> (3) The court may limit cross-examination."

475. A rule of court of such width is potentially controversial. As the White Book[425] points out :-

> "Traditionally, rules of court have been confined to a narrow aspect of the law of evidence and have concentrated on matters falling on the border between rules of evidence and rules of procedure (the best example being rules relating to the manner in which evidence may be given). Further, they have provided very good illustrations of the ways in which the 'mixture of rules' may be varied at 'different stages in the

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424 See eg GTC pp 147-150.

425 At 32.0.2.

> proceedings'. But the lines that divide these two bodies of legal rules (evidence and procedure) and which separate them from substantive legal rules are not clear cut. The question as to the extent to which power to make court rules relating to practice and procedure permits the making of rules on evidentiary matters has been much debated (even in the days when rule-making was the province of judges and judges alone). Generally, the suggestion that, what could be called, the substantive law of evidence could be altered by court rules has been resisted."

476. However, in England and Wales, the Civil Procedure Act 1997 appears to resolve the controversy in favour of broader procedural rule-making powers which may impinge upon the substantive rules of evidence. Schedule 1, para 4 of that Act states :-

> "Civil Procedure Rules may modify the rules of evidence as they apply to proceedings in court within the scope of the rules."

477. The White Book comments, with some justification, that "the scope of this paragraph is not immediately apparent." [426] However, some clarification was provided by the English Court of Appeal in *GKR Karate (UK) Ltd v Yorkshire Post Newspapers Ltd* [2000] 2 All ER 931; where May LJ stated :-

> "[CPR 32.1] means, in my judgment, that the parties no longer have any absolute right to insist on the calling of any evidence they choose provided only that it is admissible and arguably relevant. The court may exclude admissible and relevant evidence or cross-examination which is disproportionately expensive or time-consuming, provided that to do so accords with the overriding objective."[427]

478. Such a power is likely to be a useful part of the court's case management armoury. It enables the court to address directly the problems of prolixity and disproportionate expense in relation to witness statements and in cross-examination. As discussed in the later section on Expert Evidence, it is important that the court should have a well-founded power to exclude inappropriate or excessive expert evidence. Accordingly, provided, as May LJ stressed, its employment accords with the overriding objective of dealing with cases justly, it is a power which should be considered for adoption.

479. However, if it is to be introduced in Hong Kong, an amendment to the High Court Ordinance, Cap 4, may be needed. It is arguable that the present rule-making power is sufficiently wide, [428] but it would be

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426 White Book Vol 2, 9A-832.

427 At §14.

428 High Court Ordinance, Cap 4, ss 54 and 55B, especially s 55B(9) and (10).

prudent to ensure that the power is placed on a proper legal footing by enacting a provision dealing expressly with the power. Readers are consulted as to the desirability of such a development: **Proposals 35 and 36**.

K15.3. Greater flexibility in the treatment of witness statements

480. If a witness will not be allowed to add to his witness statement, or if he will be criticised if he needs to correct any errors or ambiguities in it, conscientious legal advisers will quite properly consider it their duty to make the statement as comprehensive as possible, covering numerous possible lines of inquiry and minutely checking the statement for errors. Lord Woolf suggested that these concerns were a principal reason for the excessive detail found in witness statements.[429]

481. It follows that such fears need assuaging to encourage abatement of the excesses. A change in the court's approach is required :-

> "If the courts are flexible about allowing a reasonable degree of amplification of witness statements at trial, then they can expect the lawyers to be less concerned to draft absolutely comprehensive statements. This is not to be taken as encouragement deliberately to omit relevant material, but simply to rein back the excessive effort now devoted to gilding the lily."[430]

482. Although a witness is still expected to give evidence confined to what is fairly within his statement, the desired flexibility is provided for by CPR 32.5(3) and (4) which are in the following terms :-

> "(3) A witness giving oral evidence at trial may with the permission of the court –
>
> (a) amplify his witness statement; and
>
> (b) give evidence in relation to new matters which have arisen since the witness statement was served on the other parties.
>
> (4) The court will give permission under paragraph (3) only if it considers that there is good reason not to confine the evidence of the witness to the contents of his witness statement."

483. The rule in the HCR is contained in O 38 r 2A(7)(b) and is somewhat narrower. It provides :-

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429 WFR, p 129 §55.

430 WFR, p 129 §58.

> "..... where the party serving the statement does call such a witness at the trial –
>
> (b) the party may not without the consent of the other parties or the leave of the Court adduce evidence from that witness the substance of which is not included in the statement served, except-
>
> (i) where the Court's directions under paragraph (2) or (17) specify that statements should be exchanged in relation to only some issues of fact, in relation to any other issues;
>
> (ii) in relation to new matters which have arisen since the statement was served on the other party ....."

Readers are consulted as to whether a rule providing for greater flexibility along the lines of CPR 32.5(3) and (4) should be adopted: **Proposal 37**.

K15.4. Deterring over-elaboration by costs orders

484. Little needs to be said regarding this third strategy aimed at diminishing objectionable excesses in witness statements. The costs for preparation of an overblown witness statement can be expected to be disallowed as disproportionate, even if the party relying on it wins the case. This is but an aspect of applying the overriding objective to a question of costs.

K16. Expert evidence

K16.1. The problem

485. The way that experts are in practice used as witnesses gives rise to much complaint. Lord Woolf reported that "apart from discovery it was the subject which caused the most concern"[431] and that, in his respondents' view :-

> "The need to engage experts was a source of excessive expense, delay and, in some cases, increased complexity through the excessive or inappropriate use of experts. Concern was also expressed as to their failure to maintain their independence from the party by whom they had been instructed."[432]

486. These problems provide an example of the distortions caused by the excesses of our adversarial system. To quote Lord Woolf again :-

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431 WIR, p 181 §1.

432 *Ibid.*

"The purpose of the adversarial system is to achieve just results. All too often it is used by one party or the other to achieve something which is inconsistent with justice by taking advantage of the other side's lack of resources or ignorance of relevant facts or opinions. Expert evidence is one of the principal weapons used by litigators who adopt this approach."[433]

487. Use of experts as an adversarial weapon led Counsel magazine[434] to editorialise as follows :-

"Expert witnesses used to be genuinely independent experts. Men of outstanding eminence in their field. Today they are in practice hired guns: there is a new breed of litigation hangers on, whose main expertise is to craft reports which will conceal anything that might be to the disadvantage of their clients. The disclosure of expert reports, which originally seemed eminently sensible, has degenerated into a costly second tier of written advocacy. Costs of experts have probably risen faster than any other element of litigation costs in the last 20 years. This deplorable development has been unwittingly encouraged by a generation of judges who want to pre-read experts' reports before coming into court, and by practice directions stipulating that the reports be lodged in court to enable them to do so. What litigant can ignore an opportunity to implant his case in the judge's mind before the hearing begins?"

488. Similar concerns are reported by the ALRC[435] :-

"Some of the criticism of the present use of expert evidence is based on claims that the use of expert evidence is a source of unwarranted cost, delay and inconvenience in court and tribunal proceedings. Other mischiefs frequently associated with expert evidence include that

- the court hears not the most expert opinions, but those most favourable to the respective parties and partisan experts who frequently appear for one side
- experts are paid for their services, and instructed by one party only; some bias is inevitable and corruption a greater possibility
- questioning by lawyers may lead to the presentation of an inaccurate picture, which will mislead the court and frustrate the expert
- where a substantial disagreement concerning a field of expertise arises, it is irrational to ask a judge to resolve it; the judge has no criteria by which to evaluate the opinions
- success may depend on the plausibility or self-confidence of the expert, rather than the expert's professional competence."

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433 WFR, p 138 §7.

434 November/December 1994, cited at WIR, p 183 §10.

435 ALRC No 89, p 418 §6.75.

489. The two major deficiencies which the civil justice system needs to address are therefore :-

- The inappropriate or excessive use of experts, which increases costs, the duration of proceedings and their complexity.
- Partisanship and a lack of independence amongst experts, devaluing their role in the judicial process.

K16.2. Inappropriate or excessive use of experts

490. Experts once tended to come only from certain professions, such as doctors, accountants, engineers or architects. The courts now encounter witnesses tendered as experts in almost every conceivable field of human endeavour. That is no bad thing in itself provided the discipline and expertise are real and provided the court is actually assisted by such evidence. However, in many cases, expert evidence is adduced where none is called for and on occasion, the existence of the allegedly expert discipline is doubtful. Frequently, too many experts are deployed addressing too many issues, when such evidence is really only needed or helpful on one or two key matters.

491. A problem of this nature suggests the need for case management. However, such a course was inhibited by doubts as to whether the court could, on procedural grounds, exclude expert evidence where the parties wished to use it.[436] As previously discussed in connection with witness statements, this kind of difficulty has now been overcome in England and Wales. The express rule-making power conferred by the Civil Procedure Act 1997 Schedule 1, para 4, has led to the promulgation of various rules including CPR 32.1 and CPR 35.1 giving the court powers to control the scope of the evidence on particular issues and to exclude evidence that would otherwise be admissible. Also as previously noted, if similar judicial powers are to be provided for in Hong Kong, it would be desirable for a similar legislative amendment to be made.

492. To counter the problem of inappropriate or excessive use of experts, Lord Woolf proposed that the court should have "complete control over the use of evidence, including expert evidence."[437] This is reflected in CPR 35.1 which states :-

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436 WIR, p 185 §17.

437 WFR, p 139 §13.

"Expert evidence shall be restricted to that which is reasonably required to resolve the proceedings."

CPR 35.4 goes on to provide :-

"(1) No party may call an expert or put in evidence an expert's report without the court's permission.

(2) When a party applies for permission under this rule he must identify –

(a) the field in which he wishes to rely on expert evidence; and

(b) where practicable the expert in that field on whose evidence he wishes to rely.

(3) If permission is granted under this rule it shall be in relation only to the expert named or the field identified under paragraph (2)."

These are powers which enable the court, on application or of its own motion, to disallow objectionable, unnecessary or excessive expert evidence. Moreover, where the parties both want to put in expert evidence, the court has power under CPR 35.7(1) to direct that a single joint expert be appointed,[438] a power discussed further later.

493. Supporting rules aimed at encouraging useful and proportionate expert reports, at restricting costs and at promoting an equality of arms include the following :-

- CPR 35.4(4) which allows the court to limit the amount of expert fees and expenses which one side may recover from the other.

- CPR 35.6 which allows a party one opportunity to put to the other side's expert (or a single joint expert, if one has been appointed) written questions about his report with a view to clarifying it. This appears to be a useful and economical power.

- CPR 35.9 which enables a party to seek the court's direction for access to information held by the other side but not reasonably available to himself.

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438 CPR 35.7(1): "Where two or more parties wish to submit expert evidence on a particular issue, the court may direct that the evidence on that issue is to given by one expert only."

K16.3. Partisan experts

494. Where experts are used as "hired guns" the consequences are counter-productive and unacceptable. Far from helping the court to resolve expert issues, competing partisan experts tend to make resolution of such issues more difficult and confusing. The court may sometimes be compelled to try to evaluate to some degree the *credibility* of each expert – an exercise that should have no place in the assessment of expert evidence.

495. Such difficulties have of course been recognized for a long time. Before the CPR came into effect in England and Wales, the duties of experts were summarised by Cresswell J in the *The Ikarian Refeer* [1993] 2 Lloyds Rep 68. His Lordship stressed the expert's need to be independent, to confine himself to his area of expertise and to cooperate openly with the opposing side's experts.

496. After the CPR came into operation, in the English Court of Appeal's decision in *Stevens v Gullis* [2000] 1 All ER 527, Lord Woolf pointed out that the duties in *The Ikarian Refeer* continue to be reflected in, and given emphasis by, the new rules.

497. Reforms adopted in various jurisdictions all begin with the same premise, namely, that the function of the expert is to help the court by providing independent and impartial advice – not to act as an advocate for his client.[439] This is reflected in rules which emphasise that the expert's duty to the court overrides his duty to his client.

498. Thus, CPR 35.3 states :-

> "(1) It is the duty of an expert to help the court on the matters within his expertise.
>
> (2) This duty overrides any obligation to the person from whom he has received instructions or by whom he is paid."

499. The Australian Federal Court's *Guidelines for expert witnesses* similarly provide :-

- an expert witness has an overriding duty to assist the Court on matters relevant to the expert's area of expertise
- an expert witness is not an advocate for a party and

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439 WFR, p 139 §11, §25.

- the expert witness's paramount duty is to the Court and not to the person retaining the expert.[440]

500. The NSW rules are similar. They embody an "Expert Witness Code of Conduct", which states, among other things, as follows :-

> "An expert witness has an overriding duty to assist the Court impartially on matters relevant to the expert's area of expertise.
>
> An expert witness's paramount duty is to the Court and not to the person retaining the expert.
>
> An expert witness is not an advocate for a party." [441]

501. To reinforce this duty, the rules in these jurisdictions tend to require the expert to acknowledge the duty and to agree to adhere to a code of conduct which aims to promote independence and impartiality.

- CPR 35.10(2) requires the expert report to state that the expert understands his duty to the court and that he has complied with that duty.

- Part 39 of the NSW rules provides that an expert report shall not be admitted into evidence unless it contains an acknowledgment by the expert that he or she has read the code and agrees to be bound by it. Similarly, oral expert evidence cannot be received without a similar acknowledgement in writing.

502. Moreover, to enhance the expert's independence and to help him comply with his undertaking to the court, the CPR permit an expert witness to approach the court for guidance in his own capacity without giving notice to the parties, the expense of such an application being made part of the costs of the proceedings.[442]

503. In case parties may seek to inhibit the expert's impartiality by the nature of the instructions given, CPR 35.10(3) and (4) seek to reveal any such attempts, providing as follows :-

> "(3) The expert's report must state the substance of all material instructions, whether written or oral, on the basis of which the report was written.

Notes

440 See GTC, pp 143

441 NSW Supreme Court Rules, Schd K.

442 CPR 35.14.

(4) The instructions referred to in paragraph (3) shall not be privileged against disclosure but the court will not, in relation to those instructions –

(a) order disclosure of any specific document; or

(b) permit any questioning in court, other than by the party who instructed the expert,

unless it is satisfied that there are reasonable grounds to consider the statement of instructions given under paragraph (3) to be inaccurate or incomplete."

504. It is suggested in the White Book[443] that the rule abrogating privilege should be construed as relating only to instructions given in relation to reports prepared for use of the court. It cannot have been intended to require disclosure of all instructions to experts including those relating to reports commissioned for private use. Such instructions in relation to reports commissioned in contemplation of litigation have traditionally been protected by legal professional privilege and general abrogation of such privilege cannot have been intended.

505. Reports tendered to the court are in a different category. As indicated above, the function of such reports is to assist the court, given on the footing that the expert's paramount duty is to the court and not to the client. There could accordingly be no objection to disclosure of the instructions upon which the report is based. Indeed, without knowledge of the substance of the instructions, the report could be misleading.[444]

506. It is worth noting in passing that professional associations have been working to enhance the professionalism of experts as witnesses and providing infrastructural support for reforms. One such association is the Academy of Experts which is based in London but which regularly conducts training and education sessions in Hong Kong. Such associations have an important role to play in countering unsatisfactory practices, by offering continuing education and developing codes of practice for their members as well as making available advice on specific issues of professional ethics where needed.

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443 White Book 35.10.5.

444 It is most unlikely that a rule requiring such disclosure could be said to infringe the right to confidential legal advice conferred by article 35 of the Basic Law.

K16.4. Single joint experts

507. An important innovation aimed at avoiding partisanship altogether and at saving costs is the power given to the court to appoint a single joint expert. CPR 35.7 provides :-

> "(1) Where two or more parties wish to submit expert evidence on a particular issue, the court may direct that the evidence on that issue is to given by one expert only.
>
> (2) The parties wishing to submit the expert evidence are called 'the instructing parties'.
>
> (3) Where the instructing parties cannot agree who should be the expert, the court may –
>
> (a) select the expert from a list prepared or identified by the instructing parties; or
>
> (b) direct that the expert be selected in such other manner as the court may direct."

508. It is noteworthy that such an expert is not a court-appointed expert. The court is likely to direct that such an expert should be appointed but then to leave it to the parties to select the expert by agreement or at least to agree a shortlist of experts. Professional associations like the Academy of Experts are again helpful in this context. They maintain directories and databases of available experts to assist those looking for experts and can provide a neutral and independent selection service if required.

509. By letting the parties pick the expert, the court preserves some of the beneficial aspects of the adversarial system and avoids, for instance, being seen to descend into the arena in its choice of expert or in the formulation of his instructions. The CPR leaves the instruction and remuneration of the single joint expert to the parties :-

> "(1) Where the court gives a direction under rule 35.7 for a single joint expert to be used, each instructing party may give instructions to the expert.
>
> (2) When an instructing party gives instructions to the expert he must, at the same time, send a copy of the instructions to the other instructing parties.
>
> (3) The court may give directions about –
>
> (a) the payment of the expert's fees and expenses; and
>
> (b) any inspection, examination or experiments which the expert wishes to carry out.
>
> (4) The court may, before an expert is instructed –
>
> (a) limit the amount that can be paid by way of fees and expenses to the expert; and
>
> (b) direct that the instructing parties pay that amount into court.

(5) Unless the court otherwise directs, the instructing parties are jointly and severally liable for the payment of the expert's fees and expenses."[445]

K16.5. How the reforms have been received

510. During his visit to Hong Kong in April 2000, Lord Woolf spoke enthusiastically about the introduction of single joint experts. He expressed the view that the new provisions could bring about a far-reaching cultural change amongst experts. It enhances an expert's appointability as a single joint expert if his opinions are known for their independence and objectivity. This becomes a strong incentive to avoid partisanship.

511. According to the White Book :-

"There is some evidence that within a short time of the implementation of the CPR lawyers, experts and the courts were accepting and applying the objectives of Part 35. In a survey carried out by an expert witness training organisation in December 1999, experts reported that workloads were down by 35%, 65% had been appointed as single joint experts, 64% had received written questions on their reports, and requests to give oral evidence were down by 30%."[446]

512. After two years' operation, the Lord Chancellor's Department reported that post-CPR joint expert witnesses were used in 41% of cases involving any expert witnesses and a reduction in cases overall where at least one expert witness was instructed by each side; 11% in 2000 compared with 15% in 1997. In general, the Department reported :-

"The use of single joint experts appears to have worked well. It is likely that their use has contributed to a less adversarial culture, earlier settlement and may have cut costs."[447]

513. The Lord Chancellor's Department does, however, acknowledge that there is "some doubt about the cost if parties do appoint their own experts."[448] This doubt is certainly reflected by certain City firms in relation to heavy litigation.[449] In such cases, if the court directs

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445 CPR35.8.

446 White Book 35.0.2.

447 EF §4.16.

448 EF §4.26.

449 Freshfields, *"The Civil Justice Reforms One Year On – Freshfields Assess their Progress"* M Bramley & *cont'd .....*

appointment of a single joint expert, the parties have tended to appoint their own "shadow" experts who will advise them (in terms protected by privilege and pursuant to non-disclosable instructions) on how to deal with the joint expert. This process is likely to mean increased costs (although some savings may nonetheless be achieved through a shortening of the trial).

514. It is obviously important to recognize that if a single joint expert procedure is introduced, it must be operated intelligently and that directions should be given only in appropriate cases. Where the expert issue arises in a well-trodden area, such as in relation to quantum in straightforward personal injury cases,[450] one can readily see that a single joint expert may well be appropriate and cost-effective. Single joint experts may also function well, for instance, on uncontroversial questions of foreign law or for straightforward property or share valuations.

515. However, appointing a single joint expert in relation to a highly contentious expert issue is likely to be inappropriate and may lead to additional costs and delays being incurred. Genuine room may exist for serious expert debate among skilled and impartial experts. Justice is best served in such cases by allowing the parties to call their own experts.

516. This is illustrated by the English Court of Appeal decision in *Daniels v Walker* [2000] 1 WLR 1382. There, an occupational therapist was appointed joint expert to deal with a contentious question as to the care regime which an accident victim would require. The resulting report was hotly disputed and led to much solicitors' correspondence and the defendant eventually applying to the court for permission to call a further expert. The court allowed the application. Lord Woolf, giving

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A Gouge (Butterworths, London 2000), p 133; Herbert Smith, Mr E P Greeno, *Commerce And Industry Group Annual Legal Update: 15th March 2001*; and Mr Andrew Jeffries, Allen & Overy, and Mr Harry Anderson, Herbert Smith, both at Conference on *"Civil Procedure: Latest Developments and Prospects of Change" Hong Kong, 8 June 2001.*

450 "Used correctly, the single joint expert streamlines procedures, promotes settlement and expedites the conclusion of the case. Delay is offensive, and the majority of cases with simple medical issues can be competently dealt with by a good, joint expert. This type of case, such as a simple whiplash injury, (but not to suggest that all whiplash injuries are simple) litigated or otherwise forms the vast majority of personal injury work, in respect of which the reforms are welcomed and well suited. Thus to a very large extent, the new CPR has proved to be acceptable for the bulk of personal injury work." Carol Jackson, *The Uses and Abuses of Experts and Their Evidence* [2000] J.P.I.L. 19, 21.

the judgment, made it clear that appointment of a single joint expert did not preclude a further expert being appointed :-

> "If, having obtained a joint expert's report, a party, for reasons which are not fanciful, wishes to obtain further information before making a decision as to whether or not there is a particular part (or indeed the whole) of the expert's report which he or she may wish to challenge....."

In such cases, the single joint expert direction will most probably have increased costs and delay.

517. In interesting articles posted on the Internet, Mr S Clive Freedman, a barrister at 3 Verulam Buildings in Gray's Inn, describes some other practical difficulties that may be encountered with single joint expert directions. These include :-

- Difficulties in getting agreement on who to select or how the selection is to be made, giving rise to much solicitors' correspondence (which of course runs up costs).
- Difficulties getting agreement as to the single joint expert's fees.
- Problems agreeing the expert's instructions and the scope of the report.
- Where the parties do not agree his instructions, the prescribed procedure is for each party to give him separate instructions or to supplement the other side's instructions. This obviously can cause the expert difficulty and may increase costs.
- Difficulties have also sometimes arisen in getting the expert provided with the necessary information and in getting agreement over things like tests, site visits, and so on.
- A single joint expert may sometimes be subject to badgering by each side making representations on how he should proceed.

518. Notwithstanding such problems, it seems clear that where single joint expert directions are appropriately given, the parties are likely to benefit and the court to be better served by independent and reliable expert assistance. Partisan conflicting views are avoided and only one set of fees and expenses incurred. These are important benefits making the single joint expert innovation one that clearly merits consideration for adoption. Readers are consulted on whether reforms should be adopted to address the problems of inappropriate, excessive and partisan expert evidence discussed above, and as to whether single joint expert directions should be introduced in Hong Kong: **Proposals 38 to 40.**

K17. Trials and case management

519. It is often difficult to predict how long a trial will last. This causes problems for the system.

519.1 If a trial is given too generous an estimate, the court may find itself without a case booked for hearing when the case goes short – a waste of court resources.

519.2 On the other hand, if a trial overruns its estimate, other trials scheduled for hearing before the trial judge must be placed with a different judge who may lack the intended judge's pre-trial involvement and familiarity with case or, worse still, may lead to the scheduled case having to be adjourned because no other judge is available to hear it on the date fixed. If this happens it tends to result in wasted costs, delay and inconvenience to the parties and their witnesses.

519.3 Unrealistic initial estimates, prolixity, whether due to the calling of unnecessary evidence, to excessive cross-examination, to pursuing too many points or to unnecessarily long opening or final submissions are some of the causes of a trial overrunning.

520. The two main problems with managing trials are therefore unpredictability and prolixity. Lord Woolf puts the problem in these terms :-

> "There is no certainty at present in relation to the time that a hearing will last. Although time estimates are provided by parties and may be confirmed by the judge, these bear insufficient relation to reality. This approach is wasteful for all concerned. It results in adjournments for other cases and consequential delay. It undermines the planned arrangements of judges, legal representatives and experts. Most important of all, it contributes to additional expense for litigants. This occurs because there is seldom any plan or programme for the hearing, or any attempt to concentrate on key issues and key evidence. Lawyers insist that parties require them to cover every detailed issue in the case. Judges fail to intervene to curtail longwindedness or to focus presentation of the case, lest they give grounds for appeal.
>
> Excessively and unexpectedly long hearing times eat into preparation time for judges and lawyers alike. There is no effective planning of hearings. Nor is there sufficiently planned use of judges' time when they are not sitting in court."[451]

521. These are of course familiar problems and much pre-date the CPR. It is increasingly accepted, as Mr Justice Ipp points out, that the problem calls for proactive case management :-

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451 WIR, p 15 §§42-43.

> "It is now fairly acceptable for judges to intervene at trial in the definition of issues, the questioning of witnesses in the interests of justice (and not merely to clarify evidence), the limiting of cross-examination, the calling of witnesses (in exceptional circumstances), and the limiting of time for addresses. Trials would not lose their basic adversarial character if judges intervened to a greater but still limited extent in these ways. .....
>
> The extent to which a judge may intervene in the trial is plainly a matter for judicial discretion. The judge of her or his own motion may disallow evidence, require the adoption of procedures designed to shorten the trial (such as the utilisation of written statements of witnesses as evidence in chief), and shorten the time for opening or closing addresses. The steps to be taken will depend on the circumstances and the ingenuity and determination of the judge concerned."[452]

522. While judges have tended to have the support of the appellate courts and the occasional practice direction,[453] it is plainly better that such powers should be placed on an explicit and incontestable footing as part of the rules. As Sallmann and Wright put it :-

> "However extensive that power may be it is clear that, generally speaking, perhaps because of the adversarial nature of our system and the traditional, detached role of judicial officers, judges have often been reluctant to intervene and to be too actively involved in the actual conduct of trials."[454]

523. It is desirable that time limits on the adducing of evidence, cross-examination and submissions should be imposed, not merely to counter the uncertainty, but also, as Mr Justice Ipp points out, because this is likely to improve the advocacy of counsel appearing :-

> "Limiting the time for oral argument would compel counsel to concentrate on their best points, discourage them from arguing every issue including those that have no or little prospect of success, and, generally, would raise the standard of advocacy. Disorganised, unstructured arguments would be less frequent. There would be little incentive for counsel to ramble on in all directions, in the hope that eventually a persuasive point will be revealed. Counsel would not be able to afford time in tedious reading of authorities and passages from the transcript."[455]

Notes

452 Mr Justice D A Ipp, *"Reforms to the Adversarial Process in Civil Litigation", (1995) Pt II 69 ALJ 790 at 805*.

453 Eg, *Practice Direction (Civil Litigation: Case Management)* [1995] 1 WLR 262: which calls for skeleton arguments for trial, and requires succinctness in opening, and, in closing, a brief amplification of the skeleton argument.

454 GTC, p 134.

455 *Op cit,* at 816.

524. In many jurisdictions, express powers have been enacted to support case management at the trial. For example :-

524.1 In Western Australia, the Rules[456] gives such powers while reminding the court of the need to ensure elementary procedural justice :-

> "(1) A Judge may at any time by direction –
>
> (a) limit the time to be taken in examining, cross-examining or re-examining a witness;
>
> (b) limit the number of witnesses (including expert witnesses) that a party may call on a particular issue;
>
> (c) limit the time to be taken in making any oral submission;
>
> (d) limit the time to be taken by a party in presenting its case;
>
> (e) limit the time to be taken by the trial;
>
> (f) amend any such limitation;
>
> (2) In deciding whether to make any such direction, a Judge shall have regard to these matters in addition to any other matters that may be relevant :-
>
> (a) the time limited for a trial must be reasonable;
>
> (b) any such direction must not detract from the principle that each party is entitled to a fair trial;
>
> (c) any such direction must not detract from the principle that each party must be given a reasonable opportunity to lead evidence and cross-examine witnesses;
>
> (d) the complexity or simplicity of the case;
>
> (e) the number of witnesses to be called by the parties;
>
> (f) the volume and character of the evidence to be led;
>
> (g) the state of the Court lists;
>
> (h) the time expected to be taken for the trial; and
>
> (i) the importance of the issues and the case as a whole."

525. Sallmann and Wright note that positive reports have been received from the Western Australia bench as to the operation of these powers :-

> "Western Australian judges have told us that it is rare for the power to be exercised in the actual conduct of a trial but that its ready availability has, in their view, been a potent influence on lawyers' conduct of trials. They also mentioned that the existence of the Rule has been extremely useful and influential at pre-trial and trial management conferences. At such meetings the trial judge, having examined the file, might, for example, mention to counsel that there appear to be far too many witnesses due to

Notes

456 Order 34 r 5A of the Supreme Court Rules.

give evidence in relation to a particular point or issue. The judge might mention Rule 5A and its possible use in relation to the matter. The judges told us that it has been remarkable to observe, after such conferences, how the lists of witnesses have been trimmed for the actual trial."[457]

526. A provision to similar effect has been adopted in New South Wales.[458] An additional power aimed at costs transparency in this context enables the court to direct a solicitor or barrister for a party :-

"..... to give to the party a memorandum stating:

(a) the estimated length of the trial and the estimated costs and disbursements of the solicitor or barrister;

(b) the estimated costs that would be payable by the party to another party if the party were unsuccessful at trial."[459]

527. In England and Wales, the CPR have sought to address the problems in three ways :-

- They require trial dates to be fixed early,[460] allowing proper planning by the parties and the court.
- Once fixed, time tables are treated as firm and rarely-moveable milestones. Thus, while parties can generally vary time limits by agreement,[461] this does not apply where a milestone, including a trial date, must move in consequence.[462] Similarly, one of the considerations that must be taken into account in deciding whether a party in default should be relieved from a prescribed sanction is whether relief would mean upsetting the trial date.[463]
- The CPR also require the court to exercise case management in relation to the trial. Thus, as part of the overriding objective, CPR 1.4(1) envisages the court "giving directions to ensure that

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457 GTC p 137.

458 Rule 34.6AA of the NSW Supreme Court Rules.

459 Rule 34.6AA(4).

460 CPR 29.2(2): Trial dates or periods are fixed at the allocation stage or as soon as practicable.

461 CPR 2.11.

462 CPR 29.5.

463 CPR 3.9(g).

> the trial of a case proceeds quickly and efficiently." Moreover, as previously discussed, CPR 32.1 empowers the court to control the evidence by, among other things, excluding evidence which would otherwise be admissible and limiting cross-examination. At case management conferences and pre-trial reviews, the court works out a programme to which the parties must adhere and generally takes better charge of the trial.

528. Readers are consulted as to whether rules giving the court such powers of trial management, subject to necessary safeguards, should be adopted: **Proposal 41**. As previously mentioned, rules conferring powers to exclude evidence should prudently be supported by an amendment to the High Court Ordinance to put such a rule-making power beyond question.[464]

K18. Appeals

529. Procedural reforms in the context of appeals have focussed on :-

- A requirement or additional requirements of a party obtaining the court's leave before being allowed to appeal.
- The test for when leave to appeal should be granted.
- Case management to improve efficiency in the hearing of appeals and applications for leave.
- The role of the appellate court and the legal tests for determining appeals.
- Mediation in relation to appeals.

K18.1. Requiring leave to appeal

530. The importance of having an appeals procedure is universally recognized. Human frailties and the vicissitudes of litigation contribute to an inevitable risk that justice may miscarry in particular cases. The appellate jurisdiction exists to correct such errors. Appellate courts also

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464 Along the lines of the Civil Procedure Act 1997, Sch 1 para 4.

perform the essential function of setting precedents, resolving conflicting lower court decisions and developing the law.[465]

531. Nonetheless, the appellate process, may be abused, particularly by a party seeking to delay the trial by launching appeals against interlocutory decisions of the CFI judge. This is a very real danger in Hong Kong where, unlike other comparable systems, interlocutory appeals may be lodged as of right and without any requirement for leave.[466] As mentioned above, the Hong Kong Court of Appeal has accorded primacy to the case management decisions of the first instance judge and repeatedly stated that it will not interfere with his exercise of discretion in the absence of error.[467] However, this has not prevented interlocutory appeals from being brought, often at considerable expense. As Appendix B, Table 30 indicates, of the 13 taxed bills for interlocutory appeals to the Court of Appeal studied, the lowest amount of costs claimed was $127,600, the highest $801,500 and the median $189,500.

532. A requirement of leave to appeal filters out unmeritorious appeals and protects parties from abusive use of appeals and unnecessary costs.[468] Readers are accordingly consulted as to whether rules importing such a requirement in respect of interlocutory appeals, should be adopted: **Proposal 42.**

533. Reforms elsewhere have gone further. In his Final Report, Lord Woolf recommended :-

> "..... that there should be a procedure involving the preliminary consideration of all appeals to the Court of Appeal, with the power to dispose of appeals with no merit summarily. The preliminary consideration could be by a single judge."[469]

534. As enacted, the CPR have taken the step of requiring permission to appeal in *all* cases, both in respect of interlocutory and final decisions, subject to a few exceptions.

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465 See WFR, p 153, §2.

466 High Court Ordinance, Cap 4, s 14(1): "Subject to subsection (3) an appeal shall lie as of right to the Court of Appeal from every judgment or order of the Court of First Instance in any civil cause or matter." Subsection (3) deals with certain specific cases where appeals are excluded.

467 Eg, *Cheung Yee-mong v So Kwok-yan* [1996] 2 HKLR 48.

468 As pointed out in the White Book 52.3.1.

469 WFR, p 158 §24.

534.1 CPR 52.3(1) lays down the requirement in the following terms :-

> "An appellant or respondent requires permission to appeal –
>
> (a) where the appeal is from a decision of a judge in a county court or the High Court, except where the appeal is against –
>
> (i) a committal order;
>
> (ii) a refusal to grant habeas corpus; or
>
> (iii) a secure accommodation order made under section 25 of the Children Act 1989; or
>
> (b) as provided by the relevant practice direction."

534.2 Where permission is given, it may be limited to specified issues or made subject to conditions.[470]

534.3 Readers are asked whether rules adopting a leave requirement encompassing final as well as interlocutory appeals should be adopted: **Proposal 43**.

K18.2. The test for granting leave to appeal

535. The primary test for granting permission to appeal under the CPR is the "real prospect of success" test, ie, the same test as that used in several different contexts in the CPR. Thus CPR 52.3(6) provides :-

> "Permission to appeal will only be given where –
>
> (a) the court considers that the appeal would have a real prospect of success; or
>
> (b) there is some other compelling reason why the appeal should be heard."

536. While this appears a useful test, it will be recalled, that in the summary judgment context, it has received a narrow interpretation by the English Court of Appeal so that a party's case should be considered to have real prospect of success if it was not "fanciful".[471] Such a construction may not serve as a sufficient filter since the threshold may prove too low. Accordingly, if a "real prospect of success" test or something similar (eg, "a substantial prospect of success") is adopted, it ought to convey a

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470 CPR 52.3(7).

471 *Swain v Hillman,* The Times, 4 November 1999; Court of Appeal (Civil Division) Transcript No 1732 of 1999. It has also been pointed out that Lord Hoffmann, on the other hand, plainly views the test as importing a significantly lower threshold than the strict tests presently applicable for the summary disposal of proceedings: Arthur J S Hall & Co v Simons [2000] 3 WLR 543 at 562-3.

standard requiring appeals to have more substance than merely being "not fanciful" to justify the grant of leave.

537. The reluctance to interfere with first instance case management decisions is stressed in the Practice Direction on Appeals which permits costs and procedural economy to be put into the balance when considering whether to grant leave :-

> "Where the application is for permission to appeal from a case management decision, the court dealing with the application may take into account whether:
>
> (1) the issue is of sufficient significance to justify the costs of an appeal;
>
> (2) the procedural consequences of an appeal (e.g. loss of trial date) outweigh the significance of the case management decision;
>
> (3) it would be more convenient to determine the issue at or after trial."[472]

538. The CPR also make it clear that leave is more difficult to obtain in relation to a second appeal, eg, from the High Court judge to the Court of Appeal where the original decision was by the master. In such cases, the Court of Appeal will refuse permission unless it considers that the appeal would raise an important point of principle or practice; or there is some other compelling reason to hear it.[473]

539. Readers are consulted on whether similar tests for the grant of leave to appeal should be adopted: **Proposals 44 to 46**.

K18.3. Case managing appeals and efficiency

540. It is important that a requirement of leave to appeal should generally not cause the parties to incur more or as much in costs as they would incur in a system where appeals do not require leave. To this end, the following rules and practice directions have been adopted in England and Wales :-

540.1 It is provided that an application for leave should be made orally at the hearing at which the decision to be appealed against is made.[474] Such an application is unlikely to add to the costs incurred.

Notes

472 52PD §4.5.

473 CPR 52.13.

474 52PD §4.6.

540.2 If leave is refused and the intended appellant wishes to seek leave from the Court of Appeal, that court can[475] (and usually will[476]) deal with the application without a hearing.

540.3 However, if leave is refused on paper, the would-be appellant is entitled to seek an oral hearing before the Court of Appeal on his application for leave. As the learned editors of the White Book put it :-

> "The overall effect of these provisions is that every disappointed litigant at first instance can, one way or another, achieve at least a brief hearing in the appeal court, so that the main thrust of his complaint can be ventilated orally."[477]

540.4 If the matter comes before the Court of Appeal for an oral hearing, it may decide that the respondent is not required to attend and may not even inform him that the hearing is taking place.[478]

540.5 Such oral hearings are generally of a limited duration.[479]

541. There may be a case for going further. Experience shows that in a relatively small but still a not insignificant number of cases, the appeal is so plainly and obviously unmeritorious that its pursuit in the Court of Appeal is tantamount to an abuse of the appeal process. In such cases, a dismissal of the application for leave without affording the applicant an oral hearing may be justified.

541.1 The court is entitled to protect its own processes from abuse. In such cases, an appropriate procedure to dispose of it without a hearing spares the other party the expense – commonly irrecoverable in practice – of attending (often by counsel) at the leave application where it is almost certain that he would not be called on to answer the applicant.

Notes

475 52PD §4.11.

476 White Book 52.3.7.

477 White Book 52.3.8.

478 *Ibid.*

479 White Book 52.3.30. Prior to implementation of the CPR, the Court of Appeal issued a Consolidated Practice Direction providing, in §2.5 as follows*:* "In the absence of specific directions, the Court of Appeal will expect oral argument in support of applications for permission to appeal, or renewed applications for permission to apply for judicial review, to be confined to a maximum of 20 minutes." [1999] 1 WLR 1027 at 1032.

541.2 There is some precedent in rule 7 of the Hong Kong Court of Final Appeal Rules which enables the Registrar of his own motion or on that of the respondent, to require the applicant to show cause why the application should not be dismissed. If an attempt is made to show cause (this being done in writing) the document is considered by the Appeal Committee which either permits the application to proceed to an oral hearing or dismisses it on the papers.

541.3 It is true that in cases involving applications to the Court of Final Appeal the applicant will already have had two hearings (before the CFI and Court of Appeal), whereas the party seeking leave to appeal to the Court of Appeal will only have had one bite at the cherry. However, the existence of such a power may still be justified in those cases where entertaining the application would be a misuse of the Court of Appeal's process.

541.4 Readers are consulted as to the desirability of giving the Court of Appeal power to refuse leave to appeal to itself without a hearing (on the assumption that a requirement of leave is introduced): **Proposal 47.**

542. Where leave is given, it is important that the substantive hearing of an appeal should be efficiently managed so that the parties come fully prepared and take no longer than necessary in arguing the appeal.

542.1 Under the CPR, on fixing a date for the appeal, the Court of Appeal sends a questionnaire to the appellant who must return it providing the court with information as to the state of preparation for the appeal and, if the appellant is legally represented, the time estimate for the hearing of the appeal provided by the advocate who is to argue the appeal.[480] The respondent (who receives a copy of the questionnaire) must promptly give notice of any disagreement as to the time estimate.

542.2 The learned editors of the White Book stress the crucial importance of accurate time estimates for the efficient planning and listing of hearings but acknowledge that it is difficult to be accurate in such estimates. They go on to state :-

> "Despite these handicaps, the opposing advocates must exercise judgement, draw on their own experience and, most importantly, talk to each other about the likely course

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480 52PD §§6.5 and 6.6.

and length of the hearing. Advocates who make no serious effort to estimate the length of an appeal hearing are in dereliction of their duty to the court."[481]

542.3 Where judgment is reserved and the Court of Appeal expects to be addressed as to consequential orders when handing down judgment, the practice direction sets out a procedure for a copy of the judgment to be given to the legal advisers about two days in advance, with an embargo against the contents being communicated to the parties themselves until an hour before the listed time for pronouncement of the judgment. This is aimed at ensuring that when the court convenes, the advocates will be ready to deal efficiently with the outstanding points.[482]

543. Readers are consulted as to whether similar rules aimed at improving efficiency in the hearing of substantive appeals should be adopted: **Proposal 48**.

K18.4. The role of the appellate court and the test for determining appeals

544. Lord Woolf distinguished among three broad functions that appellate courts might perform in dealing with appeals :-

"There are three broad categories of review or appeal.

(a) A complete rehearing, in the sense that the whole matter is heard de novo (although the appellant, not the original applicant, opens it). The appellate court is not bound by the exercise of the lower court's discretion. Where the appeal is from a trial, the oral evidence would be heard again (as happens in criminal appeals to the Crown Court). Arguably, this is not an appeal at all but a second hearing.

(b) A rehearing, in the sense used in RSC Order 59, rule 3(1), in that although the issues in the appeal are narrowed by the requirement for grounds of appeal to be given, the whole of the evidence and the course of the trial may be reviewed on the documents, and the appellate court may substitute its own decision for that of the court or judge below. But oral evidence is not heard and fresh evidence only allowed in limited circumstances.

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481 White Book 52.3.32.

482 52PD §§15.12 to 15.14. All such advance judgments are marked "Unapproved judgment: No permission is given to copy or use in court" and a litigant in person is given the advance copy at the same time as legal advisers receive them.

(c) A review of the decision, which, if held to be defective, is then remitted to the court below for the matter to be heard again. This is more akin to judicial review or to the civil law cassation."[483]

545. In Hong Kong :-

545.1 By virtue of HCR Order 59 r 3(1), the Court of Appeal performs function (b), appeals being by way of rehearing (as was the case in England and Wales before the CPR). A significant body of jurisprudence has built up regarding the principles upon which the Court of Appeal acts in this context.[484]

545.2 The CFI, hearing appeals from the master under HCR Order 58 r 1, performs function (a). The appeal is approached largely as if the matter is being ventilated for the first time, "save that the party appealing, even though the original application was not by him but against him, has the right as well as the obligation to open the appeal".[485] Fresh evidence is generally admitted, subject to costs.

546. The CPR have now :-

- shifted the appellate function of all courts in England and Wales markedly towards option (c), limiting appeals to a review of the lower court's decision, although the court has a discretion to revert to treating the appeal as a re-hearing; and,
- applied the new approach to *all* courts.

547. CPR 52.11 provides :-

"(1) Every appeal will be limited to a review of the decision of the lower court unless –

(a) a practice direction makes different provision for a particular category of appeal; or

(b) the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing.

(2) Unless it orders otherwise, the appeal court will not receive –

(a) oral evidence; or

Notes

483 WFR, p 161, §32.

484 HKCP 2001, 59/1/48-52.

485 See cases cited at HKCP 2001, 58/1/2.

(b) evidence which was not before the lower court.

(3) The appeal court will allow an appeal where the decision of the lower court was –

(a) wrong; or

(b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court.

(4) The appeal court may draw any inference of fact which it considers justified on the evidence. ....."

548. The learned editors of the White Book comment that :-

"The changes made in 2000 are so fundamental that citation of authority on the former rules is unlikely to assist the court in resolving questions which arise concerning pt 52."[486]

549. However, the CPR changes did not come into effect until May 2000[487] and do not appear to have attracted much comment to date. Their impact is therefore not clear. The White Book indicates that "the most radical change made by rule 52.11 is to unify the approach of all appeal courts." It is not clear, for example, whether this means that the master should now give reasons for his decision (something not presently done in Hong Kong) since an appeal from him to the judge in chambers is by way of review and not a full rehearing.

550. It has been suggested in the discussion of possible reforms to procedures for interlocutory applications that consideration be given to dispensing with the hearing before the master where the application is likely to go on appeal to the judge in chambers. If that proposal is adopted, the impact of a rule like CPR 52.11 would be diminished. It would however still apply where the matter is dealt with by the master but, perhaps unexpectedly, one of the parties then decides to appeal the master's decision.

551. Readers are consulted as to whether the appellate function should be limited to a review of the decision of the lower court, subject to the appellate court's discretion to permit the appeal to proceed as on a re-hearing and as to whether all appellate tribunals should adopt a uniform approach to the determination of appeals: **Proposals 49 and 50**.

Notes

486 White Book 52.0.12.

487 White Book 52.0.10.

K19. Costs

K19.1. The role of costs orders in our present system

552. In our system, as in many others, a person who litigates faces potential exposure to two sets of expenses if he loses: the costs payable to his own lawyers and the sums that he may be ordered to pay to the other side on account of the costs they have incurred.[488] Liability for the first set of costs is obvious, representing payment for professional services engaged. Liability to pay all or part of the other side's costs is the consequence of the rule applicable in Hong Kong (as in England and Wales, Australia and elsewhere, but generally not in the United States) requiring the losing party to pay the winning party's costs. This is sometimes referred to as a "cost-shifting" rule.

553. The procedural rules perform different functions when dealing with these two types of costs. In relation to a party's own costs, the present rules constitute essentially a *laisser-faire* system, relying on market forces to regulate fees.

553.1 The court's intervention to disallow excessive fees charged by one's own lawyers is generally limited to cases where the client seeks a solicitor and own client taxation of the solicitor's bill.

553.2 On such taxations, the applicable rule[489] places a high hurdle in the way of intervention. The starting point is permissive of the costs charged, prescribing that "all costs shall be allowed except in so far as they are of an unreasonable amount or have been unreasonably incurred". It goes on to provide that "all costs incurred with the express or implied approval of the client" are conclusively presumed to have been reasonable in amount. There is a presumption – this time rebuttable – against reasonableness only where costs are "of an unusual nature" such as would be disallowed on a common fund taxation.

553.3 It is plain that such a rule aims only at disallowing fees that are unjustifiably incurred or significantly excessive when compared to the general run of fees charged. It does not address or encourage any reduction of the general run of fees.

Notes

488 If a litigant wins, he may have to pay or have set off certain orders as to costs incurred in the course of the proceedings. He may also have to absorb a proportion of his own lawyer's costs where the costs recovered from the other side do not cover them in full.

489 Under HCR O 62 r 29.

553.4 The *laisser-faire* approach is further reflected in provisions[490] of the Legal Practitioners Ordinance, Cap 159, which allow a solicitor to enter into a contentious business agreement with his client to be "remunerated either by a gross sum or by a salary, or otherwise, and at either a greater or a less rate than that at which he would otherwise have been entitled to be remunerated." Where such an agreement exists, the solicitors' costs are generally not subject to taxation by the court. They are only taxed where, on the client's application, the court sets aside the agreement on the ground that it is unfair or unreasonable.

553.5 The only other power of the court affecting the fees which a solicitor may charge his own client is the power[491] to order a solicitor to bear costs personally in relation to costs "incurred improperly or without reasonable cause or ..... wasted by undue delay or by any other misconduct or default". Such an order can only be made after the solicitor is given a reasonable opportunity to show cause why it should not be made. Generally, there must be a serious dereliction of duty amounting to professional misconduct before the penalty is imposed.[492] This is obviously again not a power addressing costs generally, as opposed to penalising individual misconduct by solicitors.[493]

554. Our present provisions imposing liability to pay the other side's costs have two main functions. First, they give effect to the "cost-shifting" principle. Thus, while acknowledging that the court has a broad discretion in relation to making costs orders, O 62 r 3(2) lays it down that costs should normally follow the event, ie, be paid by the losing party to the winner. Secondly, the rules are designed to enable costs orders to compensate a party and to act as a sanction against the other side, where the other side has taken a procedural step which is wasteful, misconceived or in the nature of misconduct.[494]

Notes

490 Sections 58 to 62, modelled on ss 59 and 61 of the Solicitors Act 1974 in the UK.

491 Under HCR O 62 r 8.

492 HKCP 2001, 62/8/2.

493 As previously discussed, the present sanctions apply only to solicitors in civil cases and it is a matter for consultation as to whether barristers should be made subject to wasted costs orders.

494 HCR O 62 r 7.

K19.2. A different emphasis in the reforms

555. Reforms implemented and being discussed in jurisdictions comparable to our own also envisage different functions for costs rules relating to the two separate sets of costs. In respect of costs charged by a party's own lawyers, the reforms tend to adopt a more interventionist (and less of a *laisser-faire*) approach, having as their principal aim, the reining in of such costs generally or at least promoting proportionality between the value of the claim and the legal costs incurred to pursue it.

556. Orders to pay the other side's costs also constitute a prominent feature of such reforms. As we have seen, under the CPR, the incentive to abide by pre-action protocols is the threat of costs orders which may subsequently be made. Part 36 offers similarly hold out the threat of indemnity costs (stiffened by substantial interest sanctions, in the case of offers by the plaintiff). Unnecessary interlocutory applications are discouraged by costs orders made on a summary assessment by the court. Indeed, the sanction of adverse costs orders fundamentally underpins all of the CPR's innovations and is intended as a general deterrent to procedural unreasonableness.

556.1 CPR 44.5(3)(a) provides that in exercising its discretion in making costs orders, the court :-

> "..... must ..... have regard to the conduct of all the parties, including in particular (i) conduct before, as well as during, the proceedings; and (ii) the efforts made, if any, before and during the proceedings in order to try to resolve the dispute."

556.2 CPR 44.14 allows the court to make adverse costs orders as well as wasted costs orders against the legal representatives where :-

> "..... it appears to the court that the conduct of a party or his legal representative, before or during the proceedings which gave rise to the assessment proceedings, was unreasonable or improper."

557. Although cost-shifting has been retained as a principle,[495] the CPR reforms place less emphasis on the "costs follow the event" principle and a greater reliance on the flexible use of costs orders throughout the proceedings as an incentive for reasonable litigant behaviour. Readers are consulted on whether costs provisions effecting a similar shift in emphasis, in particular, requiring the court generally to take into account

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495 CPR 44.3(2): "If the court decides to make an order about costs the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but the court may make a different order."

the reasonableness of the parties' conduct before and during the proceedings, should be adopted: **Proposal 51**.

K19.3. Factors contributing to the cost of litigation

558. The more ambitious – and undoubtedly more difficult and less certain – objective of reducing costs or promoting proportionality of costs requires at least a degree of success in the reforms as a whole. It is not an objective that can be achieved merely by changing the rules on costs. As the ALRC points out, three key factors influence the level of costs in a case :-

> "The Commission's empirical research showed that the complexity of cases, the number of court or tribunal case events and lawyers' charging practices were the most significant influences in determining the amount of private costs."[496]

559. While similar empirical research does not exist in Hong Kong, it is reasonable to assume that those three factors – complexity, number of case events and level of fees – are equally important in determining how much litigation will cost in any particular case. They apply both to a party's own costs and to his potential liability for the other side's costs.

560. No more needs to be said here about the first two factors. Much of this Report has already been devoted to discussing procedural reforms aimed at reducing complexity and cutting down on the frequency of court events. To the extent that such ends are achieved, it is to be hoped that a reduction in the overall cost of litigation results.

561. One may add in passing that the focus on the three factors mentioned is not intended to suggest that other factors may not have an equally or even more important bearing on the overall cost of litigation. Issues such as the extent to which foreign-qualified lawyers are admitted to appear before the local courts; how far rights of audience may be extended; the availability of conditional or contingency fee arrangements and the scope of legal aid, among others, are all questions with a possibly significant impact on litigation costs. However, such questions fall outside the Working Party's remit.

Notes

496 ALRC No 89, p 11.

K19.4. Costs payable to a party's own lawyers

562. The reforms touching on the third factor, the fee levels and fee charging practices of lawyers, can conveniently be considered first in relation to a party's own lawyers. Reforms in this area tend to proceed on two broad fronts. First, as an extension to the *laisser-faire* approach mentioned above, some of the changes aim at promoting transparency and efficiency in the legal services market. The aim is for the client to have better information as to the performance of his lawyers and less uncertainty as to his exposure on costs. Secondly, other reforms aim at greater regulation or at least guidance from the court as to acceptable fee levels.

(a) Promoting transparency, client control and consumer choice

563. The proposition that fee levels are regulated by market forces is correct but subject to qualification. While it is true that counsel and solicitors of high repute will generally command higher fees, being more in demand than their less fortunate counterparts, the market operates on the basis of very unevenly distributed and imperfect consumer knowledge of what any particular piece of litigation is going to cost and as to whether a better bargain may be offered by other lawyers.

564. The uncertainty as to what litigation is going to cost reflects a general lack of reliable estimates as to likely costs and so an apparently open-ended exposure in a particular case. The difficulty in shopping around for better deals arises from a lack of information as to the fees and abilities of solicitors and counsel generally, exacerbated by professional rules inhibiting dissemination of certain relevant information.

565. As noted by the ALRC, regular "players" will be far better equipped than infrequent litigants with information both as to likely overall costs and what competitors might charge :-

> "This type of information is already available to institutional consumers of legal services such as government departments and agencies, insurance companies and other large corporations who are repeat players. It assists them to compare, assess and negotiate fees, and to drive hard and effective bargains with lawyers. Major repeat purchasers of legal services are also in a position to seek tenders for legal work, or to establish their own inhouse legal offices." [497]

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497 ALRC No 89, p 279 §4.66.

566. Even solicitors in smaller firms, not specialising in litigation, will face difficulty identifying competitive candidates for a brief to counsel, and will seldom stray beyond a small range of those regularly instructed. A lay person without any litigation experience would obviously be much worse off. The effect of such imperfect knowledge was noted by the ALRC :-

> "The lack of consumer information on the costs of legal services is a major factor inhibiting downward pressure on legal fees, and thus retarding access to justice. Consumers informed about the range of legal services available and the likely charges and time commitments are in a better position to negotiate fee agreements and make informed choices about legal advisors."[498]

567. In Australia, to help clients get a better idea of their own costs exposure, many States have taken steps to require lawyers to provide their clients with specified information as to costs. The ALRC recommended that this be a uniform requirement :-

> "Practice rules and legislation impose guidelines and restrictions on the charging practices of lawyers. In most jurisdictions, lawyers are required to disclose to clients the basis upon which costs are to be calculated, and in some States lawyers are required to provide an early estimate of costs. The Commission recommends that all States and Territories enact uniform legislation requiring lawyers (solicitors and barristers) to provide estimates of costs to their clients early, and on an ongoing basis."[499]

568. The Legal Profession Act 1987 of New South Wales provides one example of such legislation.

568.1 As part of a section indicating broadly the "rights of any client of a barrister or a solicitor", it is provided that :-

> "the client is to be given information about how a barrister or solicitor will charge for costs for legal services and an estimate of the likely cost of legal services." [500]

568.2 More detailed obligations are then set out :-

> "(1) A barrister or solicitor must disclose to a client ..... the basis of the costs of legal services to be provided to the client by the barrister or solicitor.
>
> (2) The following matters are to be disclosed to the client:

Notes

498 ALRC No 89, p 279 §4.65.

499 ALRC No 89, p 11. The varying disclosure requirements existing in all the States and in the ACT (but not in Northern Territory) are described at §§4.27 to 4.31.

500 Section 174(1)(a).

(a) the amount of the costs, if known,

(b) if the amount of the costs is not known, the basis of calculating the costs,

(c) the billing arrangements,

(d) the client's rights under Division 6 in relation to a review of costs,

(e) the client's rights under Division 4 to receive a bill of costs,

(f) any other matter required to be disclosed by the regulations."[501]

568.3 Such disclosure is usually to be made before the lawyer is retained[502] "in writing and be expressed in clear plain language."[503]

568.4 A failure to disclose the basis of costs is dealt with as follows :-

"(1) If a barrister or solicitor fails to make a disclosure to a client in accordance with this Division of the matters required to be disclosed by section 175 in relation to costs, the client need not pay the costs of the legal services unless the costs have been assessed under Division 6.

(2) A barrister or solicitor who fails to make a disclosure in accordance with this Division of the matters required to be disclosed by section 175 or 176 in relation to costs may not maintain proceedings for the recovery of the costs unless the costs have been assessed under Division 6.

(3) The costs of any assessment referred to in this section (including the costs of the costs assessor) are payable by the barrister or solicitor seeking to recover costs.

(4) Any failure referred to in this section does not of itself amount to a breach of this Act. However, the failure is capable of being unsatisfactory professional conduct or professional misconduct."[504]

568.5 Failure to provide an estimate of costs is treated as follows :-

"(1) A failure by a barrister or solicitor to make a disclosure ..... of an estimate of the likely amount of the costs of legal services to be provided by the barrister or solicitor (or any significant increase in the estimate) does not of itself amount to a breach of this Act.

(2) However, the failure is capable of being unsatisfactory professional conduct

Notes

501 Section 175(1) and (2).

502 Section 178(1).

503 Section 179(1).

504 Section 182.

or professional misconduct."[505]

569. A similar approach has been adopted in England and Wales. To improve clients' knowledge of what the proceedings have cost them to date and are likely to cost them in future, Lord Woolf recommended that :-

- "..... it should be a mandatory requirement for a solicitor to tell prospective clients how fees are to be calculated and what the overall costs might be; and to give reasonable notice when that estimate is likely to be exceeded and the reasons."[506]
- "..... clients should be present at case management conferences and pre-trial reviews, where the judge will be informed about the level of costs incurred to date and the likely amount of future costs that would be incurred by the programme of work that he is setting at the conference."[507]

570. Armed with such information, Lord Woolf thought the client might exert better control over his lawyers' conduct of the proceedings and believed, perhaps optimistically, that such control might enable the client to :-

"(a) prevent major litigation strategies without instructions;

(b) eliminate unnecessary research and detail;

(c) control the hiring and use of barristers and experts;

(d) forbid interlocutory/discovery activities without prior approval;

(e) prevent convening of meetings when telephone calls will suffice;

(f) control the level of manning;

(g) agree the level and method of charging;

(h) emphasise that the case belongs to the client."[508]

571. In England and Wales, these recommendations have been implemented by the combined effect of two sets of provisions.

571.1 Under the Solicitors' Practice Rules 1990, solicitors are obliged to give clients information about costs and other matters in accordance with a

Notes

505 Section 183.

506 WFR, p 84 §28.

507 WFR, p 84 §29.

508 WFR, p 84-85 §30.

professional code made by the Council of the Law Society with the concurrence of the master of the Rolls.[509]

571.2 The relevant code is presently the Solicitors' Costs Information and Client Care Code 1999 [510] which sets out in detail, the types of information that must be provided and kept current.

571.3 Under the CPR, duties are placed on solicitors to inform their clients in writing of adverse costs orders made in their clients' absence, whether made against the client[511] or the solicitors personally.[512]

572. In Western Australia, the LRCWA has recommended changes to import a duty of disclosure both as to estimates of costs and adverse costs orders, backed up by sanctions, as follows[513] :-

> "121. The Legal Practitioners Act should be amended to impose an obligation on solicitors to advise their clients from time to time, and not less than once every 12 months, of an estimate of the likely cost of resolving the dispute.
>
> 122. Should a solicitor fail to comply with the obligation to advise a client of the likely cost of resolving a dispute, the Legal Practitioners Act should prohibit the solicitor from recovering fees from the client.
>
> 149. The Legal Practitioners Act should be amended to require solicitors to inform their clients of all costs orders made against the client and the reasons for making those orders.
>
> 150. Should a solicitor not comply with the obligation to advise a client of a costs order, the solicitor should be personally liable for those costs.
>
> 151. If a practitioner asserts that the reason for a default leading to a costs order to be paid immediately relates to the conduct of the client the practitioner should be required to prove to the court that notice of the assertion was given to the client."

573. Readers are asked whether rules requiring similar disclosures to be made by solicitors and barristers to their clients should be adopted in Hong Kong: **Proposal 52**.

Notes

509 Rule 15.

510 White Book Vol 2, 7C-170 et seq.

511 CPR 44.2.

512 CPR 44.14(3).

513 WAR, Recommendations 121, 122 and 149 to 151.

574. Beyond being given proper information by his solicitor and barrister as to how much he is going to be charged in the litigation, the client should have access, if desired, to how much competing lawyers might charge. The ALRC recommends that :-

> "Legal professional associations, and legal services commissioners or ombudsmen should collect information on, and publish in a public, accessible form, the range of charge rates for lawyers in different specialities, firm sizes ..... and fees charged by barristers of varying experience."[514]

575. There is plainly a public interest in encouraging reasonable transparency and competition in the legal services market. Accordingly, where professional rules prevent dissemination of such information, the professional associations should be persuaded to change them. In default, consideration should be given to amending the Legal Practitioners Ordinance to allow and regulate publication of relevant information by the professional associations or in some other appropriate manner. Readers are consulted as to whether appropriate steps, including, if necessary, legislation, should be taken to enable lawyers' professional associations to provide to the public reasonable information as to lawyers' fees, claimed expertise and experience: **Proposal 53**.

(b) Restricting fees by regulation

576. As noted above, the court in Hong Kong presently possesses a limited power to intervene and to disallow fees deemed excessive on a solicitor and own client taxation, employing the criteria stated in HCR O 62 r 29. Reforms in other jurisdictions have sought to broaden the basis of such regulation in various ways.

577. The ALRC describes the position in Australia as follows :-

> "All Australian jurisdictions regulate the contractual arrangements between lawyers and their clients. Legislation variously provides for lawyers to inform clients about potential costs and allows costs agreements to be cancelled or varied, or prevents enforcement of costs agreements which are unfair or unreasonable. In addition, professional practice standards provide that gross overcharging may amount to professional misconduct."[515]

Notes

514 ALRC No 89, p 283 Recommendation 30.

515 ALRC No 89, p 263.

578. Costs agreements are evidently common in Australia. Provision is often made by statute and regulation as to the contents of such agreements and, if the requirements are satisfied and the charges in accordance with the agreement's terms, the costs payable escape taxation or "assessment" by the court or cost assessors. Where a particular term of the costs agreement is itself unjust, it may be challenged. [516]

579. Procedures have also been introduced in some jurisdictions to make challenging one's lawyers' bill a more accessible option. For example, in New South Wales, the Chief Justice is empowered to appoint costs assessors (who are not officers of the court) with powers to assess bills.[517] The client's right to dispute the bill (in cases not covered by costs agreements) is provided for in the following terms :-

> "..... if the client disputes the barrister's or solicitor's bill, or is ordered to pay costs in proceedings, the client may apply to have the bill or costs assessed by a costs assessor (Division 6). The client has no right to have a bill as to costs that are covered by a costs agreement assessed unless there is some inequality affecting the agreement as set out in Division 6."[518]

580. On an application by a client for an assessment, the assessor's powers are as follows :-

> "Section 208A :-
>
> (1) When considering an application relating to a bill of costs, the costs assessor must consider:
>
> (a) whether or not it was reasonable to carry out the work to which the costs relate, and
>
> (b) whether or not the work was carried out in a reasonable manner, and
>
> (c) the fairness and reasonableness of the amount of the costs in relation to that work.
>
> (2) A costs assessor is to determine the application by confirming the bill of costs or, if the assessor is satisfied that the disputed costs are unfair or unreasonable, by substituting for the amount of the costs an amount that, in his or her opinion, is a fair and reasonable amount.
>
> (3) Any amount substituted for the amount of the costs may include an allowance for any fee paid or payable for the application by the applicant.

Notes

516 Eg, in New South Wales, see Legal Profession Act 1987, ss 184, 185, 208C and 208D.

517 Legal Profession Act 1987, s 208S.

518 Section 174(f).

(4) If the barrister or solicitor is liable under section 182 (3) to pay the costs of the costs assessment (including the costs of the costs assessor), the costs assessor is to determine the amount of those costs. The costs incurred by the client are to be deducted from the amount payable under the bill of costs and the costs of the costs assessor are to be paid to the proper officer of the Supreme Court.

Section 208B :-

In assessing what is a fair and reasonable amount of costs, a costs assessor may have regard to any or all of the following matters:

(a) whether the barrister or solicitor complied with any relevant regulation, barristers rule, solicitors rule or joint rule,

(b) whether the barrister or solicitor disclosed the basis of the costs or an estimate of the costs under Division 2 and any disclosures made,

(c) any relevant advertisement as to the barrister's or solicitor's costs or skills,

(d) any relevant costs agreement (subject to section 208C),

(e) the skill, labour and responsibility displayed on the part of the barrister or solicitor responsible for the matter,

(f) the instructions and whether the work done was within the scope of the instructions,

(g) the complexity, novelty or difficulty of the matter,

(h) the quality of the work done,

(i) the place where and circumstances in which the legal services were provided,

(j) the time within which the work was required to be done."

581. It will be noted that this approach to intervention does not start on the premise that all the costs billed are reasonable. Instead, the need for the work, how it was done and the "fairness and reasonableness of the amount of the costs in relation to that work" are all subject to assessment. This removes the high hurdles barring the way of the client under the present rules for solicitor and own client taxations, and appears a fairer standard to adopt. Readers are consulted as to whether similar procedures and standards should be adopted in respect of possible challenges by clients to their lawyers' bills: **Proposal 54**.

582. A welcome development worth noting is the generation in some jurisdictions by professional societies of guidelines on reasonable levels of fees. In Western Australia, for instance, the Law Society's Conduct Rules provide :-

"A practitioner shall charge no more than is reasonable by way of costs for his services having regard to the complexity of the matter, the time and skill involved, any

scale costs that might be applicable and any agreements to costs between the practitioner and his client."[519]

583. The ALRC has proposed in this context that a professional standard similar to that the American Bar Association's Model Rules of Professional Conduct be adopted. The American rule reads :-

"A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

- the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- the fee customarily charged in the locality for similar legal services;
- the amount involved and the results obtained;
- the time limitations imposed by the client or by the circumstances;
- the nature and length of the professional relationship with the client;
- the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- whether the fee is fixed or contingent."[520]

(c) Benchmark costs

584. Another initiative aimed at restraining legal costs involves the compilation of "benchmark costs" comprising scales of fees for definable categories of work. Where such benchmarks can be devised, they may, as Sallmann and Wright point out, be put to various useful functions :-

"
- to act as a yardstick by which clients can measure the fees charged by their lawyers,
- to provide guidance to lawyers when charging clients,
- where the lawyer and client have not entered a fee agreement, to provide the standard, on a taxation of the lawyer's bill, by which the lawyer's allowable charges can be assessed, and
- to provide the standard, on a taxation of costs as between party and party, of

Notes

519 Quoted in ALRC No 89, p 271 n 108.

520 Cited in ALRC No 89, p 272 §4.48.

the costs that will be allowed to the successful party."[521]

585. One may add to the list the function of providing a broad guide for the court when making a summary assessment of costs, going some way towards meeting the criticism of inconsistency in such assessments.

586. The attraction of having such a benchmark is plain. Lord Woolf recommended[522] an attempt at compiling such a scale in relation to multi-track proceedings of a type having a limited and fairly constant procedure. He envisaged the court, with the assistance of user groups, building up over time figures indicating a standard or guideline cost or a range of costs for a class of proceedings. He saw cases brought by originating summons or simple judicial review proceedings as possible candidates for determining benchmark costs, these being cases where :-

"The steps taken in the majority of cases are standard. Variations are limited to the number of affidavits on either side and the difficulty of the point involved."[523]

Once compiled and subsequently kept up to date, benchmark costs would provide guidance as to acceptable levels of costs both as between a solicitor and his own client and in party and party claims.

587. Readers are consulted as to whether, in principle, steps should be taken to compile benchmark costs in Hong Kong for the uses of the type discussed: **Proposal 55**.

588. It should however be emphasised that this proposal is highly tentative and contingent on it being possible to compile reasonably accurate and usable scale of benchmark costs. Experience has shown that this is a difficult task. It may be instructive to consider some attempts.

589. In England and Wales in November 2000, the Senior Costs Judge reported that judges consulted expressed "widespread and understandable apprehension about the introduction of benchmark costs" and that nevertheless "those responding did suggest over 100 different procedures suitable for benchmarking".[524]

Notes

521 GTC p 156.

522 WFR, p 86 §35-37.

523 WFR, p 86 §36.

524 *< http://www.courtservice.gov.uk/notices/scco/gscj_des.htm>*

590. One consultation exercise by the English Supreme Court Costs Office ("SCCO") which took place between March and May 2001 was conducted by reference to a catalogue of case categories and related costs. These may be viewed at the website[525] maintained by Mr L J West-Knights QC, who describes the SCCO's approach as follows :-

> "This is all about benchmark costs - the idea that, absent special circumstances, instead of assessing the costs of certain types of application/proceeding, there is a 'benchmark' figure which the winner will get. ..... Leaving aside the detail (i.e. amounts) there is some controversy over the whole idea, and its inter-relation with the (already eroding) concept of the indemnity principle. At the moment there are 20 types of proceedings which have been chosen for this. Figures are given (for consulting purposes) for 50 (FIFTY) different places in the jurisdiction. There are detailed files ..... setting out the assumptions and calculations for every single suggestion - 50 times 20.... They are also set out by district/circuit, and by type of application."

591. As indicated above, the exercise produced benchmarks of considerable complexity.

591.1 The proposed list of proceedings thought to be suitable for benchmarking comprised 20 items including the following 14 items in non-family cases :-

"*Court of Appeal*

1 Appeals on quantum.

2 Simple applications for security for costs.

3 Applications by solicitors to come off the record.

High Court

4 Simple appeals from Masters/District Judges.

Masters/District Judges

5 Applications for an extension of time.

6 Applications by solicitors to come off the record.

7 Simple applications for security for costs.

8 Simple applications without notice.

Bankruptcy Registrars/District Judges

9 Applications for substituted service of bankruptcy petitions.

10 Bankruptcy hearings adjourned to another appointment.

Notes

525 < *http://www.lawonline.cc/locked/cpr/scco/bm.htm*>

11 Dismissal of bankruptcy petition with costs payable by the debtor.

Costs Judges and District Judges

12 Applications to set aside default costs certificates.

13 Part 8 applications under Part III of the Solicitors Act 1974.

14 Detailed assessment proceedings between parties."

591.2 The assumptions and calculations for each set of benchmark costs[526] are complex. They may be viewed at Appendix 5 to the consultation document.[527]

592. Meanwhile, the Court Service in England and Wales has issued guideline figures for the summary assessment of costs. These adopt a much simpler approach, suggesting :-

- Hourly charging rates for solicitors in a table differentiating among (i) court locations in the different regional circuits; and (ii) three "grades of fee-earners."

- Counsel's fees according to (i) the seniority of counsel (three levels of seniority among junior counsel being given – Queen's Counsel presumably not being expected to appear at hearings of the relevant type); (ii) whether the hearing is a 1 hour or ½ day hearing; and (iii) the civil division in which the hearing takes place (Queen's Bench, Chancery and Administrative Court).

593. To take a few examples from these guidelines :-

593.1 The suggested hourly charging rate for a partner attending a hearing in Royal Courts of Justice in the City is £265, whereas that for a solicitor of less than 4 years post-qualification experience in Sheffield is £75.

593.2 The guideline for junior counsel of 10 or more years of call in the Queen's Bench Division is £500 for a one hour hearing and £1,000 for a half day hearing, the comparable sums in the Chancery Division being £650 and £1,200, and in the Administrative Court being £850 and £1,500 respectively. The comparable figures for juniors of up to 5 years'

Notes

526 Listed in Appendix 6 to the consultation document, but not shown here.

527 *< http://www.lawonline.cc/locked/cpr/scco/bm.htm>*

call are £220 and £385 (Queen's Bench); £250 and £475 (Chancery) respectively.[528]

594. Much interest in benchmark costs is also being shown in Australia. This has been stimulated by a report prepared by Professor Phillip Williams, commissioned by the Commonwealth Attorney-General's Department.[529] The report represents yet another approach to benchmarking, described by the ALRC as follows :-

> "The Williams report, ... proposed a fixed costs scheme with charges fixed for work of varying complexity as at particular case events. The scheme is to determine party–party costs and, if there is no enforceable fee agreement, the solicitor–client costs. The proposed scheme envisages a judge deciding at an initial directions hearing the category of complexity for a particular case. For each category, costs are set and calculated by reference to stages in the process. For example, cost stages recommended for the Federal Court scale were
>
> - instructions and close of pleadings
> - close of pleadings and completion of discovery
> - completion of discovery and fixing date for trial
> - fixing date and start of trial
> - during trial or at judgment.
>
> This categorisation allows litigants to know from the outset the amount they will receive towards their legal costs from the other party if they are successful. This is expected to create incentives for litigants to control litigation costs because each litigant will have to bear the full cost of any extra expenditure they incur. The set fees proposed allow proportionately higher costs for work done in the early stages of the litigation, with recoverable costs decreasing as the case continues in order to encourage early settlement. If the case goes to hearing a daily amount would be added."[530]

595. As Sallmann and Wright explain,[531] the proposed Federal Court Scale was constructed on the basis of analysing data obtained from a survey of law firms, to obtain the following cost scales :-

Notes

528 The figures given for the Administrative Court appear to be erroneous: £650 for 1 hour and £500 for ½ day.

529 P Williams et al *Report of the review of scales of legal professional fees in federal jurisdiction* A-G's Dept (Cth) Canberra 1998.

530 ALRC No 89, p 285-6 §§4.88-4.89.

531 GTC p 159-160.

PROPOSED FEDERAL COURT SCALE

	WEIGHT OF MATTERS AT ISSUE				
TIME OF DISPOSITION	1	2	3	4	5
Disposed of between instructions and the close of pleadings	$2,000	$2,485	$4,690	$12,760	$20,650
Disposed of between close of pleadings and completion of discovery	$2,335	$6,645	$10,955	$29,600	$48,245
Disposed of between completion of discovery and fixing of trial date	$10,930	$14,910	$18,890	$36,280	$53,670
Disposed of between fixing of trial date and start of trial	$19,520	$23,175	$26,825	$42,965	$59,100
Disposed of during trial or judgment	$19,520 plus $3,800 for each day after the first.	$23,175 plus $3,800 for each day after the first.	$26,825 plus $3,800 for each day after the first.	$42,965 plus $3,800 for each day after the first.	$59,100 plus $3,800 for each day after the first.

596. It is worth noting that such an "events based" approach to scale fees has considerable benefits over the "work item" approach to be found in currently prescribed scale fees used in the taxation of costs. This approach is pointed out and recommended by the ALRC :-

> "Under the proposal by Professor Williams, court fee scales will be changed from charges for particular items, such as photocopying or drafting documents to 'event based scales', with charges fixed for work at particular stages of the process. Such charges will be set at varying complexity for different case types. The new scale will not reward practices such as photocopying and can provide greater certainty about costs for clients. The Commission considers that the Williams report provides a useful model for the reform of fee scales, and has recommended the introduction of event based fee scales in the Federal Court and Family Court with some refined features."[532]

597. As the foregoing discussion shows, many possible approaches to compiling benchmark costs exist, none of them free from difficulty or controversy. It is essential to have reliable information on costs upon which benchmark costs can be based. The absence of such data was a

Notes

532 ALRC No 89, p 12.

deficiency noted in the Lord Chancellor's Department's "Emerging Findings" assessment of the first two years of the Woolf reforms :-

> "A scoping study into the development of benchmark costs[533] found that existing court systems held little useful data about costs and that the validity of any benchmark derived from existing data would be questionable."[534]

Further study is accordingly being undertaken.[535]

598. Despite such difficulties, the consensus appears to be that benchmark costs are well worth pursuing, provided one bears in mind the limitations inherent in such a scheme. This was emphasised by the Senior Costs Judge in the following terms :-

> "There will undoubtedly be arguments to the effect that, variable circumstances may make it impossible to arrive at sensible assumptions on which to base the benchmark figure. It should be borne in mind that the benchmark figure is intended to reflect a reasonable figure for carrying out a piece of work with a limited and constant procedure. If circumstances in a particular case take the proceeding out of that category, the benchmark figure will not be apt, but it will still serve as a starting point from which the Judge may arrive at an appropriate figure given the particular circumstances of the case."[536]

K19.5. Costs orders in favour of the other side

599. Many of the issues discussed in connection with solicitor and own client costs also bear on costs which may be payable to the other side. In some cases, the issues are not significantly different. Thus, benchmark costs and scale fees can provide guidance to the appropriate level of costs in either case. Other issues apply with some modification. Thus, while judicial intervention to cap or disallow costs as between a solicitor and his own client is currently exceptional and subject to a high threshold test, such judicial intervention in the form of taxing party and party costs is commonplace. In contrast, under the present rules, there is little or no transparency regarding the costs being incurred by the other side, a feature of litigation which introduces a potentially intimidating and uncertain financial exposure.

Notes

533 JSB Journal 2000, Case Management on the Road Ahead, Issue 10.4

534 EF §7.11.

535 EF §7.12.

536 < *http://www.courtservice.gov.uk/notices/scco/gscj_des.htm*> Senior Costs Judge, 24 November 2000.

(a) Transparency of the other side's costs

600. Lord Woolf recommended greater transparency regarding the costs incurred by both sides, the sums incurred and to be incurred being disclosed to the court :-

> "On the multi-track I recommended that at case management conferences and pre-trial reviews, the information available for the hearing should include an estimate of the amount of costs already incurred and the costs which would be incurred if the case proceeded to trial."[537]

601. He considered it important that a court should have this information to help it make cost-effective case management decisions.[538] Such disclosures were also regarded as an important means of informing the clients on each side of their potential exposure in respect of the other's side's costs, reducing the uncertainty they face :-

> "[To counter the uncertainty] I am recommending that clients should be present at case management conferences and pre-trial reviews, where the judge will be informed about the level of costs incurred to date and the likely amount of future costs that would be incurred by the programme of work that he is setting at the conference. The presence of the client should be a powerful incentive to adopt a realistic approach."[539]

602. This has been implemented in the CPR by the Costs Practice Direction requiring the parties to file estimates of costs already incurred and likely to be incurred.[540] This is done at the early, allocation questionnaire stage,[541] again when filing a listing questionnaire[542] and at any stage of the case, if so ordered.[543] The precedent annexed to the practice direction indicates the detail which the estimate must contain.[544] However, observance of the obligation plainly is not intended to

Notes

537 WFR, p 79 §7.

538 WFR, p 85 §32.

539 WFR, p 84 §29.

540 43PD §§6.1-6.6.

541 White Book 26.3.4, 43PD §6.4(1).

542 43PD §6.4(2).

543 43PD §6.3.

544 White Book Vol 1, p 949, Schedule of Costs Precedents, Precedent H.

undermine legal professional privilege and the details given can no doubt be presented in a manner consistent with protection of the privilege.

603. Tactical over-statements or under-statements of costs (particularly in the context of summary assessments) are discouraged by the provision that :-

> "On an assessment of the costs of a party the court may have regard to any estimate previously filed by that party, or by any other party in the same proceedings. Such an estimate may be taken into account as a factor among others, when assessing the reasonableness of any costs claimed."[545]

604. Readers are consulted as to whether 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: **Proposal 56**.

(b) Taxation of costs

605. Although in a taxation, the taxing master will often "tax down" and in that sense, moderate the costs claimable *inter partes*, the process of taxation itself is not one where the court seeks to regulate the level of the costs as a whole in a particular case or to regulate the level of costs charged generally. Lord Woolf put this in the following terms :-

> "The function of taxation is not to undertake an independent assessment of the charges claimed as a whole but to resolve disputes over items between the paying and receiving party. The process therefore depends upon the paying party identifying those items on the bill which are capable of being challenged effectively. The taxing officer or Master does not give his opinion of the reasonableness of the bill as a whole. Thus there is no objective assessment of what would have been a reasonable sum for conducting a particular case; instead, it is a retrospective check on the reasonableness of the costs in fact incurred by a party over the course of the litigation. As long as a party, judged by the conventions of current practice, was acting reasonably in the way in which he conducted the case and the charges for the actual work done were reasonable in the circumstances, the taxing process does not intervene. The taxing system is therefore not a method of controlling costs absolutely but a safeguard against claims for costs which can be shown to be out of line with the norm. Taxation provides no encouragement to litigants to conduct litigation in the most economical manner."[546]

606. Taxation is therefore the process whereby costs claimed by the winning side can be disputed by the losing side and assessed and regulated by the

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545 43PD §6.6.

546 WFR, p 87 §41.

court. It remains an essential aspect of the civil justice system. If the cost-shifting rule is to operate fairly, the scope and quantum of costs recoverable by the winning party from the losing party must be subject to the court's supervision and, if necessary, moderation. Such judicial intervention is also necessary to promote equality of arms between parties of different financial resources. A winning party who chooses to incur costs extravagantly and unnecessarily cannot be stopped from so doing. However, his claim for costs against the losing party can and should be restricted to the costs it was reasonably necessary to incur (even if judged only against the prevailing norm). Otherwise rich parties could pose an oppressive litigation risk against the other side simply by running up disproportionately high costs.

607. One specific instance within the existing HCR has attracted criticism because of its tendency to remove or dilute the court's power to keep to within reasonable levels the costs to be shifted by one party to the other.

607.1 Para 2(5) of Pt II of the 1st Schedule to Order 62 of the HCR, a homegrown provision, stipulates that "Every fee paid to counsel shall be allowed in full on taxation, unless the taxing master is satisfied that the same is excessive and unreasonable, in which event the taxing master shall exercise his discretion having regard to all the relevant circumstances ....."

607.2 In requiring the taxing master to approach counsel's fees paid with the presumption that they are not to be taxed down unless shown to be "excessive and unreasonable," this rule effectively adopts a "solicitor and own client" basis for a "party and party" taxation in relation to such fees.[547] It is difficult to see any justification for this exceptional shift in basis. It may also encourage solicitors to pay counsel's fees without questioning them, on the footing that their clients are likely to recover such fees from the other side without their being taxed down.

607.3 Readers are consulted as to whether this exception should be deleted: **Proposal 57**.

Notes

547 Order 62 r 29(1) prescribes as the solicitor and own client basis, the allowing of all costs "except in so far as they are of an unreasonable amount or have been unreasonably incurred." On a party and party basis, the costs which are allowed are those which "were necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being taxed", putting the onus on the party seeking such costs to justify them in the abovementioned terms (O 62 r 28(2)).

608. Returning to the process of taxation in general, experienced court officers report that the process is beset by certain inter-related problems :-

- The process itself appears disproportionately expensive. As Appendix B, Tables 1 to 5 show and as discussed in Section D5 above, the costs of taxation constitute a disproportionate cost when compared with amounts recovered and considered as an element of the total costs bill.

- Although the current Practice Direction[548] on taxation requires the parties to aim at reaching "agreement either on the whole of the bill or on as many items as possible" before coming to court, experience suggests that this usually does not take place. Lists of objections to bills served are often not served beforehand but only produced at the hearing.

- Bills are presently prepared in a format that is cumbersome, expensive and potentially misleading. Officers with taxation experience have commented :-

> "Minor items like mechanical items and correspondence are generally listed individually and thus take up pages. For clarity and simplicity, they can be grouped together under convenient heads. On the other hand, costs incurred for major events are scattered in various places in the bill. It is difficult to apprehend the importance of information presented in such a way. For taxation purposes, it is desirable that the total costs for a particular event should be known and that items connected with that event are considered in context. This gives a sense of proportionality of the costs for an event and the distribution of costs in the bill. The present format also provides room for duplication of costs claimed for the same item of work."

609. These complaints indicate that reforms ought to be directed :-

- at avoiding the need for taxation in as many cases as possible;

- where a taxation is needed, at streamlining the procedures; and

- at enforcing better standards of practice.

Notes

548 Practice Direction 14.3.

(i) Avoiding taxations

610. The most satisfactory way of avoiding a taxation is for the parties to agree as to the quantum of costs payable. This Report has discussed ways in which the rules may encourage settlement generally. The same approaches apply to the settlement of a liability to costs.

611. At present, the HCR and related case-law provide for the use of *Calderbank* letters, that is, offers of sums by way of settlement made without prejudice save as to costs, in the context of taxations.[549] Such an offer, made by the party liable to pay, can be taken into account in determining who should pay the costs of the taxation process itself if the receiving party does not do better than the offer. A similar provision is found in CPR 47.19. However, court officers report that the *Calderbank* procedure is insufficiently used.

612. A reform that appears worthy of consideration is the express application of CPR Part 36 offers to taxations. Either party may avail himself of that procedure. However, it enables, in particular, the party entitled to receive payment of the costs to take the initiative by making an offer to settle the costs liability, putting the other party at risk of the expense of the taxation if the offer turns out to be less than the amount he is ordered to pay after a taxation. A rule of this nature has been adopted in New South Wales.[550] Readers are consulted as to the desirability of such a rule in the taxation context: **Proposal 58**.

613. Another means of avoiding a taxation process is use of the procedure for the summary assessment of costs. This procedure has been discussed above primarily in the context of providing effective sanctions against unnecessary interlocutory applications. However, summary assessments can effect savings in overall litigation costs.

614. Taxations would also be avoided if it were possible to prescribe fixed costs for certain specific categories of cases. It has been suggested, for instance, that fixed costs might be provided for mortgagee actions, uncontested winding-up and bankruptcy petitions and all types of charging orders. Indeed, as previously noted, in July 2001, an experimental voluntary scheme was introduced by the Registry whereby taxations might be avoided if parties accepted proposed sums by way of "lump sum assessment" for simple applications such as for charging

Notes

549 By O 22 r 14. See HKCP 2001 62/5/3 and 62/21/5.

550 Supreme Court Rules, r 22.10.

orders nisi and absolute, mortgagee actions and garnishee proceedings. Parties are invited to adopt the figures and so avoid any taxation. If they choose not to do so, they may agree to a summary assessment but put forward alternative figures or they may opt for a full taxation.

615. Benchmark costs have been discussed above. If an effective scale of benchmark costs can be compiled, these could be used by taxing masters as representing the presumptive amounts allowable in taxations, departing from them only where some exceptional ground for doing so is made out. A rule could then be devised to deter unnecessary taxations by penalising in costs parties who pursue taxation of any item covered by a benchmark but fail to do better than the benchmark sum. Readers are consulted as to whether, contingent upon benchmark costs being successfully compiled, such a rule should be adopted: **Proposal 59**.

(ii) Streamlining the process of taxation

616. If a taxation cannot wholly be avoided, it may be possible at least to avoid an oral hearing. A useful procedure presently applied in Hong Kong is for provisional taxations under HCR O 62 r 21(4) which provides as follows :-

> "In proceedings for the taxation of costs of, or arising out of, a cause or matter in which the amount of the bill of costs does not exceed the sum of $100,000, the taxing master may by notice inform the party commencing the proceedings for taxation the amount which the taxing master proposes to allow in respect of the costs to be taxed and further, the taxing master shall not [give notice of an appointment for a taxation hearing] unless, within 14 days after serving notice of the amount he proposes to allow, any person entitled to be heard on taxation applies to the taxing master for an appointment to tax."

617. A procedure extending the provisional taxation scheme to cover cases where bills of costs and objections to items in the bill have been filed merits consideration. The court, having studied the papers, could, at its discretion, decide to conduct a provisional taxation and to notify the parties of the result in the hope that this would be accepted and a hearing avoided.[551] A party who did not accept the provisional taxation would be entitled to a hearing but might have to bear the costs if he failed to do better at the hearing. Readers are consulted as to whether some such procedure should be adopted: **Proposal 60**.

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551 A similar proposal is made by the LRCWA, modelled on Order 62 rule 46 of the Federal Court Rules (Cth)*:* WAR, Recommendation 136 and Final Report §16.31.

(iii) Improving practice standards in relation to taxations

618. To make taxations – whether carried out on the papers or at an oral hearing – more cost-effective, rules may be needed requiring the parties to file documents in proper form, with bills of costs supported by and cross-referenced to a taxation bundle and any objections to items in such bills taken on grounds that are clearly stated. Such rules could provide for simpler and more coherent bills of costs following prescribed forms or precedents.

619. Specific costs sanctions could be designed to encourage such improvements. CPR 47.18 may serve as an example (referring to a full taxation as a "detailed assessment") as follows :-

> "(1) The receiving party is entitled to his costs of the detailed assessment proceedings except where –
>
> (a) the provisions of any Act, any of these Rules or any relevant practice direction provide otherwise; or
>
> (b) the court makes some other order in relation to all or part of the costs of the detailed assessment proceedings.
>
> (2) In deciding whether to make some other order, the court must have regard to all the circumstances, including –
>
> (a) the conduct of all the parties;
>
> (b) the amount, if any, by which the bill of costs has been reduced; and
>
> (c) whether it was reasonable for a party to claim the costs of a particular item or to dispute that item."

It could be made clear that "conduct" in such a rule would include any failure to provide proper information or documents so as to inhibit the court's ability to deal with the taxation on the papers. Readers are consulted as to the desirability of adopting rules appropriate to the aims discussed in this section: **Proposal 61**.

K20. The CPR Schedules of provisions from the RSC

620. Far-reaching though Lord Woolf's reforms are, a substantial body of rules from the otherwise superseded RSC remains in force in England and Wales, as provided for by CPR 50.1.

621. These rules appear as items in Schedule 1 to the CPR and span various categories.[552] These include, for instance, rules relating to the enforcement of judgments and orders (receivers, writs of *fieri facias*, examinations of judgment debtors, garnishee proceedings, committals, etc), rules dealing with special procedural cases (certain possession of land cases, interpleaders, administration actions, etc), special jurisdictional cases (service of foreign proceedings, enforcing foreign judgments, Crown proceedings, bail, etc) and particular proceedings under specific statutes.

622. Similar provisions exist under the HCR. Plainly, there is considerable complexity in some of these rules, as well as language that is occasionally archaic. It seems likely that in due course simplification and modernisation will be attempted. In the meantime, it would appear sufficient to allow these rules to continue in force, little affected by more general procedural reforms, save where consequential amendments may be necessary, monitoring developments in this area in other jurisdictions. Readers are consulted as to this proposed course: **Proposal 62**.

K21. Possible reforms and ADR

K21.1. Litigation vs ADR

623. The courts exercise a compulsory jurisdiction over civil disputes. If one party to the dispute validly invokes that jurisdiction by issuing a writ and serving it on the other party, the defendant has no choice but to become involved in the legal process. If he chooses to ignore the writ, he is likely to find himself subject to a default judgment and to the execution of that judgment against himself and his property.

624. However, the parties to a dispute do not have to invoke the court's jurisdiction. They can seek to resolve their dispute by some other means. Obviously, in some cases, they may be able to achieve a negotiated settlement unassisted by anyone else. Where this is not possible, they can resort to a range of other dispute resolution processes. These are usually referred to generically as "alternative dispute resolution" or "ADR". Generally, however, in contrast to the compulsory jurisdiction of the court, the ADR process requires the disputants' willingness to participate. A party cannot generally force ADR on any other party.

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552 White Book 50.2.

K21.2. Types of ADR

625. ADR processes fall into two main categories: the adjudicatory ("where the third party neutral makes a binding determination of the issues") and the consensual ("where the parties retain the power to control the outcome and any terms of resolution").[553]

626. The two main forms of adjudicatory ADR are arbitration and expert determination.

626.1 Arbitration involves the parties privately choosing the adjudicator or an adjudicating panel who then proceed to make a legally binding determination, subject to rules laid down by an arbitral organization or by statute. The award can be enforced through the courts. Some court supervision also exists against excess of jurisdiction or serious irregularity.

626.2 Little more needs to be said about arbitration, which is well-established in Hong Kong. Since its foundation in 1985, the Hong Kong International Arbitration Centre ("HKIAC") has played an increasingly important role in providing support and facilities for arbitration here. Training courses and Chartered Institute certification are available and the HKIAC presently has over 300 arbitrators on its panel. In the year 2000, 298 arbitration cases, local and international, were referred to the HKIAC concerning disputes involving sums ranging from $353,400 to $300 million. This is a substantial case-load which may be compared with the current figure of 600 to 650 civil cases annually going to a full trial in the High Court. In addition, very substantial arbitrations are known to take place outside the HKIAC. Thus, the Working Party has been told that the Government was recently engaged in two arbitrations, each involving claims in excess of HK$1 billion. In neither case was the HKIAC involved in appointing the arbitrator, although in one case, the hearing took place partly at the Centre.

626.3 Expert determination is a process whereby the parties appoint an expert, often pursuant to a contractual term, to make a binding decision or appraisal in accordance with agreed instructions, without necessarily conducting any enquiry or following adjudicatory rules. The

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553 The quotations are from B&M at §2-025. See also LCD-DP §2.4.

determination is contractually binding and is enforced by an action on the contract.[554]

627. Consensual ADR processes include the following[555] :-

627.1 The commissioning of a non-binding neutral fact-finding expert's report as the possible basis of the parties' reaching a settlement.

627.2 Submitting the dispute to a neutral evaluation of the merits. Where this is court-annexed, it is often referred to as early neutral evaluation or "ENE", the "earliness" being a reference to the stage in the litigation when the evaluation takes place. Again, the evaluation may be used as the basis of a settlement.

627.3 Mediation by a neutral aimed at assisting the parties to arrive at a contractually binding settlement. Conciliation is generally considered to be the same as mediation.

628. ADR may involve a combination of these processes and variations in the arrangements. Thus, what has become known as "Med-Arb" involves a neutral acting as mediator and, if the parties fail to agree, becoming an arbitrator with power to make a binding award. A mediator may or may not also provide an evaluation of the merits, and so forth.[556]

K21.3. ADR as an adjunct to court proceedings

629. Increasingly, ADR has been seen as potentially a useful element in the civil justice system to be used in appropriate cases as an alternative or adjunct to civil proceedings. Thus in setting out the overriding objective, CPR 1.4(e) provides :-

> "Active case management includes ..... encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure."

630. In Hong Kong, whether a court-annexed mediation scheme should be introduced was explored as long ago as in August 1993. A Committee

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554 B&M §23-023. See also LCD-DP §2.2 and Annex A.

555 See B&M pp 17-20, from which these items are drawn.

556 LCD-DP §2.4.

chaired by Kaplan J reported on the question to the then Chief Justice. The committee took a tentative view. It stated :-

"Whilst being attracted to a compulsory mediation scheme the Committee is of the opinion that more extensive consultation would be desirable before this is introduced."[557]

631. Its immediate recommendation was that litigants should be given information about "the benefits and procedure of mediation" but that mediation should remain voluntary.[558] For the longer term, it recommended that :-

"..... following a much wider consultation, further consideration be given to the following :-

(i) The Court should have power in all cases it thinks appropriate to order the parties to attend a mediation procedure.

(ii) The Court should have the power to refuse to set down cases they think may be amenable to mediation until after mediation has been attempted.

(iii) The power referred to in (ii) above should be coercive i.e. on the application of one party despite the opposition of the other(s)."[559]

632. The interest in making ADR a part of the civil justice system rests on the potential benefits seen to flow from its use in appropriate cases. It is often said that ADR can be simpler, cheaper and quicker. It can be more flexible and custom-designed for the dispute in question. It can be less antagonistic and less stressful than a court case and so less damaging to a possible on-going relationship between the parties.

633. The Court Service website of the Lord Chancellor's Department lists the following virtues of ADR :-

"The settlement of disputes by means of ADR can :-

(1) significantly help litigants to save costs;

(2) save litigants the delay of litigation in reaching finality in their disputes;

(3) enable litigants to achieve settlement of their disputes while preserving their existing commercial relationships and market reputation;

(4) provide litigants with a wider range of solutions than those offered by litigation; and

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557 Report, p 15.

558 Report, p 3.

559 Report, p 4. This recommendation does not appear to have been acted upon.

(5) make a substantial contribution to the more efficient use of judicial resources."

634. In its Discussion Paper, The Lord Chancellor's Department explains the beneficial features of ADR as follows :-

> "..... Procedures may be simpler, and closer to normal business activity. There may be less, or better focused, paperwork. The work done in preparing disputes for the resolution process may be less, or simpler. Parties may choose an arbitrator or mediator for special knowledge or expertise. It may be possible to find earlier or more convenient dates for ADR than court lists permit....."[560]

> "..... Procedures and locations are usually much less formal, and less stressful for that reason alone. Mediations, in particular, often start by giving the parties themselves the chance to tell their own stories, and identify the issues important to them, in their own way. The processes might be considered more constructive: rather than looking for weaknesses in the other side's case, there is a greater concentration on what would constitute a mutually satisfactory solution. Parties therefore review what is really important to them, and what they are prepared to give up. Many ADR processes do not have the stark result of litigation, with one party getting everything and the other nothing; they lead to a settlement with benefits for both sides. Mediated settlements can also include elements which could not form part of a court judgement, such as an apology or an agreed way to handle any future disputes."[561]

635. While evidence from other jurisdictions lends support to some of these assertions, it is important not to overstate the case for ADR. As Brown and Marriott state :-

> "ADR assists with the process of dispute resolution, but is not a panacea that will remedy all the ills, actual or perceived, of litigation. Indeed, there are circumstances when ADR processes would be inappropriate, or in which ADR forms, once commenced, might need to be discontinued. Sometimes they should be employed only with the utmost circumspection. ADR practitioners need to be alive to the cautions and reservations applicable to ADR processes, so that they can be employed only when they are proper and appropriate."[562]

636. Some cases will obviously not be proper candidates for ADR at all or for the continuation of ADR where the process has begun. Brown and Marriott[563] include in this class, cases :-

- raising constitutional issues;

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560 LCD-DP §4.1.

561 LCD-DP §4.6.

562 B&M §18-097.

563 B&M §18-112.

- where rights are being tested, establishing principles and precedents;
- where a successful invocation of ADR requires the parties to arrive at a contractual settlement, but where one of the parties lacks legal capacity to contract (eg, because a minor or a patient);
- where the power imbalance between the parties is such that no fair agreement can be expected to result from the process; and
- where a party shows by conduct that ADR is being abused to the prejudice of the other party, eg, where ADR is being used as a fishing expedition to discover weaknesses in the other side's case or is being used only as a delaying tactic, with no real interest in resolving the dispute.

K21.4. Mandatory ADR?

637. Where ADR processes are enlisted to function as part of the civil justice system, different approaches have been adopted as to whether or to what extent the parties should be compelled by the court to resort to ADR.

638. It is of course not being suggested that the parties should ever be ordered to resort to ADR *in lieu of* having their case decided as proceedings in court. Such an approach would not only be unacceptable since the courts must in principle be open to all, it would most likely fall foul of Article 35 of the Basic Law which confers on Hong Kong residents, among other things, the right of access to the courts. Accordingly, even in its most stringent form, a requirement that the parties must attempt ADR is a requirement that they make such an attempt before being allowed (if ADR should fail) to proceed in court.

639. Several degrees of compulsion or encouragement to use ADR can be discerned in schemes adopted in various jurisdictions. ADR may be :-

- made mandatory by a statutory or court rule for all cases in a defined class;
- made mandatory by an order issued at the court's discretion in cases thought likely to benefit;
- made mandatory by one party electing for ADR;
- made a condition of getting legal aid in certain types of cases;

- voluntary but encouraged by the court, with unreasonable refusal or lack of cooperation running the risk of a costs sanction; or

- entirely voluntary, with the court limiting its role to encouragement and the provision of information and facilities.

Consideration of some existing schemes by way of illustration may be helpful.

(a) ADR made mandatory by rule

640. A good example of this model of ADR can be found in the Ontario Mandatory Mediation Program. This came into effect in Toronto and Ottawa/Carleton on 4 January 1999, pursuant to Rule 24.1 of the Rules of Civil Procedure.[564] It applies to all case managed civil, non-family actions unless the court exempts a party by order. As the Rule itself states, it is :-

> "..... a pilot project for mandatory mediation in case managed actions, in order to reduce cost and delay in litigation and facilitate the early and fair resolution of disputes."[565]

641. The scheme is designed to work as follows :-

641.1 It is initiated upon filing of the first defence. The parties are then given 30 days to select a mediator by agreement. Failing agreement, one is selected by the Local Mediation Coordinator who administers the scheme.

641.2 The mediation itself (which has the status of without prejudice discussions[566]) must generally take place within 90 days from the filing of the first defence.

641.3 The mediator's fees are set by the government and are paid by the parties. The set fees of C$600 (where two parties are involved) to C$825 (where 5 or more parties are involved) cover one hour of preparation time and a mediation session of up to three hours. If the mediation

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564 Added by regulation 194 of the Revised Regulations of Ontario, 1990.

565 Rule 24.1.01.

566 Rule 24.1.14.

takes longer, it can continue with the parties' consent at an agreed rate. The mediator may also charge for his expenses.

641.4 Before the mediation session, each of the parties must provide a statement to the mediator identifying the factual and legal issues and setting out his position in relation to the dispute, with any relevant documents attached. The mediator also has the pleadings.[567]

641.5 The parties and their lawyers (if represented) must attend armed with any necessary authority to settle (if agreement can be reached). If they do not attend, the mediator files a certificate of non-compliance and the case is referred back to the court which then exercises its case management powers as appropriate. The court :-

> "..... may convene a case conference ..... and may,
>
> (a) establish a timetable for the action;
>
> (b) strike out any document filed by a party;
>
> (c) dismiss the action, if the non-complying party is a plaintiff, or strike out the statement of defence, if that party is a defendant;
>
> (d) order a party to pay costs;
>
> (e) make any other order that is just."

641.6 If, on the other hand, the mediation is successful, the resultant agreement is drawn up and failure to perform it is enforceable by a motion for judgment in the terms of the agreement, subject to the judge having a discretion instead to continue the proceedings as if there had been no agreement.[568]

642. After 23 months of the Program's operation, an independent evaluation was published on 12 March 2001. The "overall finding" as stated in the Executive Summary was as follows :-

> "In light of its demonstrated positive impact on the pace, costs and outcomes of litigation, Rule 24.1 must be generally regarded as a successful addition to the case management and dispute resolution mechanisms available through the Ontario Superior Court of Justice in both Toronto and Ottawa. More specifically, the evaluation provides strong evidence that:
>
> - Mandatory mediation under the Rule has resulted in significant reductions in the time taken to dispose of cases.

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567 Rule 24.1.10.

568 Rule 24.1.15(5).

- Mandatory mediation has resulted in decreased costs to the litigants.
- Mandatory mediation has resulted in a high proportion of cases (roughly 40% overall) being completely settled earlier in the litigation process – with other benefits being noted in many of the other cases that do not completely settle.
- In general, litigants and lawyers have expressed considerable satisfaction with the mediation process under Rule 24.1.
- Although there were at times variations from one type of case to another, these positive findings applied generally to all case types – and to cases in both Ottawa and Toronto."

643. In consequence, it was recommended that the Rule be extended beyond the initial pilot period and also extended to other civil cases. It was therefore plainly a successful experiment although, given the shortness of the periods allowed for the mediator's preparation and the initial mediation session itself, it seems designed for relatively simple disputes. Readers are consulted as to whether a scheme along the same lines should be adopted in Hong Kong: **Proposal 63**.

(b) ADR made mandatory by a court order

644. As noted previously, parties often feel inhibited about taking the first step towards settling a case for fear of this being construed as a sign of weakness by the other side. Where the court compels the parties to explore settlement, this connotation is removed. Accordingly, in many jurisdictions, the court has a power to require the parties to resort to ADR where it considers this a worthwhile course.[569] In the United States where ADR was pioneered in the 1970s and 1980s, for instance, federal courts are authorised to compel ADR by statute. Brown and Marriott describe the legislative arrangements as follows :-

"The Civil Justice Reform Act of 1990 required district courts to develop, with the help of an advisory group of local lawyers, scholars and other citizens, a district-specific plan to reduce costs and delay in civil litigation. ADR was one of six case management processes recommended by the statute which led to greater use of ADR in the federal district courts. The most recent legislative step was taken on October 30, 1998 when President Clinton signed the Alternative Disputes Resolution Act of 1998.

This Act requires each federal district court to authorise the use of ADR in all civil cases and to establish its own ADR programme. The Act also requires the district courts to establish procedures for making neutrals available, to adopt local rules

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569 See generally the survey of court-annexed ADR schemes in Canada (B&M §5-047), Australia (B&M §5-062) and New Zealand (B&M §5-072).

regarding confidentiality, compensation, and conflict of interest and to appoint a judge or staff person to administer the programme. The courts must also adopt rules requiring litigants to consider ADR and they are given authority to compel parties to use mediation and early neutral evaluation. The courts are also given authority to exempt cases or categories of cases from using ADR."[570]

645. Readers are consulted as to whether 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: **Proposal 64**.

(c) ADR made mandatory by one party electing for ADR

646. An illustration of such an ADR model can be found in British Columbia in Canada. It originates in a scheme established by regulation[571] in April 1998 for motor vehicle personal injury cases in the Supreme Court. This was a scheme which allowed any party involved in a motor vehicle action to compel all of the other parties to participate in a mediation session by serving a "Notice to Mediate" on them.

647. Although one would have thought that such a scheme might be a recipe for enabling a recalcitrant party to force delays, an independent evaluation of the scheme's operation between April 1998 and February 1999 produced very favourable findings, summarised by the British Columbia Mediator Roster Society[572] as follows :-

"▪ The two main objectives of users of the Notice to Mediate are to speed up the negotiation/settlement process and get the parties talking. 72% of users of the Notice rated their achievement of these objectives at '4' or '5' on a 5-point scale (5 being completely satisfied).

▪ In 71% of cases mediated under the Notice all issues were resolved, and in an additional 4% some issues were resolved. This does not include the cases that were resolved after a Notice was delivered, but prior to the mediation session - estimated by the Insurance Corporation of British Columbia to be a further 10%.

▪ Even in cases where all issues were not resolved, 64% of lawyers felt that there were positive outcomes from the process.

Notes

570 B&M §5-007-§5-008.

571 The Notice To Mediate Regulation (BC Reg 127/98) under the Insurance (Motor Vehicle) Act. Available at <*http://www.ag.gov.bc.ca/dro/regulations.htm*>.

572 <*http://www.mediator-roster.bc.ca*>

- 88% of respondents felt that the Notice to Mediate process could usefully be expanded to include other types of civil, non-family matters."

648. This success led to the scheme being extended to residential construction actions[573] as from May 1999. As described by the Mediator Roster Society[574] :-

"This regulation enables any party involved in a residential construction action in the Supreme Court to compel all other parties to participate in a pre-mediation organizational conference and a mediation session. ..... The Notice to Mediate process can be used in connection with any Supreme Court action involving residential construction, which is broadly defined as "construction, renovation or repair of a building, or a portion of a building, that is intended for residential occupancy".

649. The scheme was further expanded as from February 2001 to cover a wide range of matters by enactment of the Notice to Mediate (General) Regulation.[575] Where a party serves a notice and another party fails to comply, the case is brought before the court which :-

"..... may do any one or more of the following unless the participant in respect of whom the Allegation of Default is filed satisfies the court that the default did not occur or that there is a reasonable excuse for the default :-

(a) adjourn the application and order, on any terms the court considers appropriate, that

  (i) a scheduled pre-mediation conference occur, or

  (ii) a mediation session occur;

(b) adjourn the application and order that a participant attend one or both of a scheduled pre-mediation conference and a mediation session;

(c) adjourn the application and order that a participant provide to the mediator and other participants a Statement of Facts and Issues;

(d) stay the action until the participant in respect of whom the allegation is filed attends one or both of a scheduled pre-mediation conference and a mediation session;

(e) dismiss the action or strike out the statement of defence and grant judgment;

(f) make any order it considers appropriate with respect to costs ....."[576]

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573 By enactment of the Notice to Mediate (Residential Construction) Regulation (BC Reg 152/99) under the Homeowner Protection Act.

574 *<http://www.mediator-roster.bc.ca>*

575 BC Reg 4/2001, enacted under the Law and Equity Act.

576 Reg 34(1).

650. A mediation under this scheme is defined to be concluded when all issues are resolved, or the mediator terminates the mediation.[577]

651. Readers are consulted as to whether a scheme should be introduced 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: **Proposal 65**.

(d) ADR a condition of granting legal aid

652. In some cases, applications are made for legal aid where ADR is or can be made available as an alternative to litigation. In considering the application for legal aid, the Director of Legal Aid has an opportunity to see whether the dispute might benefit from such ADR. If the case looks susceptible to ADR, savings of public funds might be achieved by giving the Director power to require the case to go to say, mediation, and to provide legal aid funding for that purpose. The power could be a power to limit legal aid in the first place to the mediation or a power to make participation in mediation a condition of any subsequent legal aid funding of the proceedings.

653. Family disputes are one such area, both sides often being given legal aid. In England and Wales, family mediation is often a condition of legal aid. The Lord Chancellor's Department explained the position as follows :-

> "Part III of the Family Law Act 1996 allows for the provision of publicly funded mediation in family proceedings. Over 250 mediation services have concluded contracts with the Legal Aid Board and further contracts will be granted to ensure nationwide coverage by autumn 2000. Section 29 of the Act, which requires those seeking legal aid for representation in family proceedings to attend a meeting with a mediator to consider whether mediation might be suitable in their case, has now been implemented in over 60% of the country and is intended to be in force across England and Wales in 2000."[578]

654. This is obviously a limited option since it only arises where the parties can both be directed to ADR. It would however be of greater significance if used in conjunction with either a mandatory ADR scheme or a discretionary power given to the court to require the parties to attempt ADR. Readers are consulted as to the desirability of legislation giving the Director of Legal Aid power to make resort to ADR a

Notes

577 Reg 38.

578 LDC-DP §1.10.

condition of granting legal aid in appropriate types of cases: **Proposal 66**.

(e) ADR voluntary but unreasonable refusal posing risk of costs sanction

655. This model probably represents the position in England and Wales. As noted above, CPR 1.4(e) enjoins the court to encourage and facilitate the parties in the use of ADR if it considers the process appropriate. Additionally, CPR 26.4 allows the court, either on application or of its own motion, to stay proceedings for a limited time to give the parties a chance to attempt ADR. The proceedings resume their course if, at the end of that period (usually one month), the parties do not inform the court that the case has settled.

656. The Lord Chancellor's Department points out in its ADR Discussion Paper that :-

> "In his final report on Access to Justice published in 1996, Lord Woolf recommended that 'where a party has refused unreasonably a proposal by the court that ADR should be attempted, or has acted unco-operatively in the course of ADR, the court should be able to take that into account in deciding what order to make as to costs'."[579]

657. However, the Department suggests :-

> "This has not been directly incorporated into the new rules on costs. However, Part 44 sets out what the court will take into account when exercising its discretion as to costs. 44.3(4) states that the court must have regard to all the circumstances including the conduct of the parties, which is later expanded to include questions of reasonableness of pursuing an issue and the manner in which a party has conducted his case."[580]

658. On the other hand, Brown and Marriott take the view that the CPR clearly provide for sanctions along the lines envisaged by Lord Woolf :-

> "Lord Woolf's views on sanctions find expression in Rule 44.5 where in assessing whether costs were proportionately and reasonably incurred, the court must now have regarded to the conduct of all the parties including in particular [CPR 44.5(3)(a)(ii)] 'the efforts made, if any, before and during the proceedings in order to try to resolve the dispute."[581]

Notes

579 LDC-DP §7.26.

580 LDC-DP §7.27

581 B&M §3-035.

659. Moreover, in its review of the first two years of the CPR's operation, the Lord Chancellor's Department reports an increased use of ADR which it attributes to the introduction of the CPR, presumably because of the potential sanctions for unreasonable refusal :-

> "There has been a rise in the number of cases in which Alternative Dispute Resolution is used, suggesting that since the introduction of the Civil Procedure Rules, parties are more likely to try alternative means of settling claims."[582]

660. It is therefore likely to be the case that under the CPR, an unreasonable refusal of ADR or uncooperativeness during the ADR process may be visited by a costs sanction. In any event, a model adopting this form of compulsion or encouragement of reasonableness towards ADR merits consideration for possible adoption. If adopted, the costs sanctions should be expressly set out. Readers are consulted as to this option: **Proposal 67**.

661. One may note before leaving this discussion that if express costs sanctions are adopted, there will be room for argument as to what, in principle, ought to constitute unreasonable conduct in the context.

661.1 In some of the responses to the Lord Chancellor's Department's Discussion Paper on ADR, for example, it was thought that "there should be a distinction between acting in a way that negates the process (such as attending mediation without anyone who has the necessary authority) and 'tough negotiation'." It was also suggested that "unreasonable behaviour should be more than mere delay and could include failure to agree a mediator or provide adequate information during the mediation".

661.2 While it is clearly desirable that litigants should be encouraged to adopt a reasonable attitude towards assisted settlement of the dispute, compulsory measures to that end must in principle stop short of undermining a person's right ultimately to have his position in a dispute vindicated by the judicial process.

Notes

582 EF §4.10. "Since the introduction of the Civil Procedure Rules, CEDR has recorded a 141% increase in the number of commercial mediations ..... Over 130 ADR orders were made in the Commercial Court between 26 April 1999 and June 2000 compared to 43 in the preceding 12 months" (§§4.12 and 4.13).

(f) Voluntary ADR

662. This is a model involving no element of compulsion. Litigants are given information about the availability and possible benefits of ADR and encouraged to attempt it as a means of avoiding costly and more stressful litigation. This was effectively the pre-CPR position in the UK where litigants were encouraged to use ADR schemes set up as adjuncts to the proceedings in the Central London County Court, the Commercial Court[583] and the Court of Appeal.

663. It has however been noted that such purely voluntary schemes tend to be marked by a very low take-up rate. In relation to the Central London County Court scheme in which mediation takes place only where both parties agree, the Lord Chancellor's Department had this to say :-

> "This scheme has been evaluated by Professor Hazel Genn of University College, London. During the period of her study, mediation was offered in 4,500 cases, but only 160 mediations took place. She found that 62% of mediated cases reached a settlement at the mediation appointment and that mediation achieved earlier settlement."[584]

664. Similarly, in relation to the Court of Appeal scheme, during the 6 month period :-

> "..... from November 1998 to March 1999, parties in 250 cases were sent information about the scheme and, of these, both sides agreed to mediate in 12 cases."[585]

665. The Lord Chancellor's Department commented :-

> "..... Although forms of ADR appear to meet many of the principles for effective civil justice, the proportion of people with legal problems who choose to divert towards them has remained very low, even when there are convenient, and free, schemes available."[586]

Notes

583 The scheme was established by a Practice Statement in 1993 ([1994] 1 WLR 14), by which judges could encourage the use of ADR. A further Practice Statement in 1996 ([1996] 1 WLR 1024), allowed the judge to stay the case to permit the parties to attempt ADR. It also enabled the judge to offer an early neutral evaluation if he thought it would assist settlement. See LDC-DP Annex B.

584 LDC-DP p 4.

585 LDC-DP Annex B.

586 LDC-DP §1.12 .

K21.5. Hong Kong's Pilot Scheme for Mediation in Family Cases

666. It is probable that voluntary ADR schemes fare better in relation to some types of cases rather than others, and achieve a higher take up rate where there is an environment of institutional support for assisted dispute resolution. This appears to be the experience of the Family Pilot Mediation Scheme launched in May 2000 ("the Pilot Scheme").

667. The Pilot Scheme is publicly funded and is entirely voluntary, requiring the consent of both parties. It covers all types of matrimonial issues including custody, access, maintenance, lump sum payments, property and financial disputes. It is available at all stages of litigation. Information sessions are held to inform potential users about the scheme and to assess their suitability for mediation.

668. At the centre of the scheme's organization is a Mediation Coordinator who, while independent of the court, is given an office in the court building. Parties interested in mediation may approach the Coordinator directly. Often, a judge will encourage them to do so. Many referrals are also made by welfare agencies, both governmental and non-governmental. If the parties agree to mediation, they are offered a choice of mediators from a list maintained by the Coordinator. The HKIAC has, for instance, through its Mediator Accreditation Committee, accredited 92 family mediators.

669. The latest available figures show that :-

- From 2 May 2000 to 27 June 2001, information sessions attended by a total of 1298 persons were held. Assessments of suitability for mediation were held in respect of 1128 people.
- A total of 419 cases were referred to the scheme by the Social Welfare Department (122 cases, 29.1%), by non-governmental organizations (144 cases, 34.4%) and mediators in private practice (135 cases, 36.5%).
- About 50 mediators were involved, 2 from the SWD, 23 from NGOs and 25 from private practice. Of these, 28 have professional backgrounds in social work, and 19 in law.
- At total of 308 cases were referred to mediators, of which 265 received mediation services. Of the mediated cases, full settlement was achieved in 186 cases, and partial settlement in 20 cases. No settlement of any kind was achieved in 59 cases. 43 cases, although referred, did not receive mediation services.

- To reach full agreement took on average 10.1 hours of mediation. Partial agreement cases took 11.7 hours on average. Where no agreement at all was reached, 5.3 hours were spent on average.

670. It follows, that of the 308 cases referred to mediators, 186 or 60% achieved full settlement. Another 6.5% were partially settled, leaving about 1/3 of the cases with no result, either because mediation was attempted but without success (59 cases or 22%) or mediation was not pursued. These are encouraging results.

671. Mediation in Singapore has also been reported to have had considerable success. It is actively encouraged by the court's waiver and refund of court hearing fees, which may go some way towards paying for the mediation. Professor Pinsler reports :-

> "The effectiveness of the mediation process is evident from the fact that as at 15 July 1998, 78% of the cases (143 out of 184 cases) mediated under the auspices of the Singapore Mediation Centre were settled. The average monthly settlement rate ranged from 75% to 85%. It is estimated that the settlement of the 143 cases translated to savings of approximately 643.5 court days. On the basis that each court day costs the judiciary about $6,900, the judiciary saved $4,440,150. Applying the general party-and-party basis of costs for a trial day (approximately $10,000) the parties saved about $6,435,000. Mediation is actively encouraged by the waiver and refund of court hearing fees." [587]

672. Readers are consulted as to whether a scheme should be introduced for the court to offer to litigants information about and facilities for mediation on a purely voluntary basis: **Proposal 68**.

K21.6. Choosing among and implementing the alternatives

673. It should also be stressed that in implementing any scheme involving some degree of compulsion on the parties to resort to ADR, the court (assuming it has a discretion in the matter) must be guided by the best interests of the parties. As discussed above, some cases are unsuitable for ADR and are unlikely to benefit from a reference by the court. In such cases, it would be unacceptable for the court to refer a case to ADR to suit the interests, say, of the court's diary, rather than the parties' interests.

Notes

587 Jeffrey Pinsler, "Minimisation of Delay in the course of proceedings: the Singapore experience", W&B p 93 at 128.

674. In general, if the court is to compel or encourage parties to resort to ADR, it must be able to do so without making the parties feel that they are being pressurised to settle on unjust terms or that the court lacks interest in their case and cannot be bothered to deal with it, or that, in pressing for ADR, the judge has indicated a lack of impartiality and a view in favour of one side or the other.

675. Subject to such caveats, a choice among the various options depends on the available infrastructure, funding and considerations of legal policy. Unless a body of appropriately trained and reliably neutral mediators or other ADR practitioners exists, there would be little point in the court contemplating a reference to ADR. The cost of the mediation or other ADR processes must also be such as to make them a practical option. It must be borne in mind that if the parties attempt ADR unsuccessfully, the cost of that attempt is likely to become a cost additional to their other litigation costs.

676. Further investigation into ADR resources available in Hong Kong is therefore needed. It is likely that mediation would be most in demand in any court-annexed scheme so that more mediators, with particular specialisations, must be trained and an appropriate organizational and accreditation system approved by the court. The known resources would however indicate that at least the foundations of a viable court-annexed ADR system are already in place.

676.1 As noted above, the Pilot Scheme has been well received and is serviced by about 50 trained family mediators who come from the NGOs, private practice and the government.

676.2 The HKIAC has been building up experience in mediation. In June 1992, it began administering the Hong Kong Government Airport Core programme's compulsory mediation system applicable to many of the contracts let for the construction and establishment of the airport at Chek Lap Kok.

676.3 In January 1994, the HKIAC established a division now known as the Hong Kong Mediation Council ("HKMC"). As at 5 May 2001, its membership was reported to total 491 with 220 mediators interested in construction mediation, 207 in commercial mediation, 137 in family mediation and 81 in community mediation. HKMC's mediation activities are reportedly primarily in the spheres of construction industry and family disputes.

676.4 The HKMC has so far conducted three 40 hour accredited general training courses for mediators which were attended by a total of 74 participants. It also provides accreditation through the HKIAC's

Accreditation Committee, a total of 160 mediators presently having been accredited (81 general, 79 family).

677. An important question concerns funding, and in particular whether an ADR system can be made available for the smaller cases, especially those with unrepresented litigants, on a financially viable basis. In the United States, court-annexed systems initially drew heavily on the *pro bono* services of attorneys in private practice. For example, many schemes existed where such attorneys joined a roster agreeing to give a stated number of hours of their time each year for free to provide unrepresented litigants with early neutral evaluations of their cases. Many of such schemes are court-annexed and participation has often been regarded as part of a lawyer's ethical duty.

678. *Pro bono* mediation services, with an element of government organisational subvention, may be particularly cost-effective and may yield a better return than, for example, *pro bono* schemes for giving unrepresented litigants legal advice on their cases or general "do-it-yourself" instructions for fighting their cases in court. If the system is successful and if the process is seen to be capable of effecting real savings in costs, it often becomes possible to introduce a fee at a realistic level to make the scheme financially more sustainable.[588]

Notes

588 Brown and Marriott discuss such developments in the United States: B&M §5-013 to §5-032.

L. JUDICIAL REVIEW

679. Judicial review is an area which has been and remains subject to rapid development through case-law. Questions regarding the availability of judicial review remedies, who is entitled to bring proceedings or to be heard, and so forth, straddle issues of substantive and procedural law. The case-law remains important and indispensable.

680. In relation to procedure, the policy in respect of judicial review has generally been to require claims to be brought (i) only with the court's leave; and (ii) promptly after the cause for complaint has arisen. This is so since the institution of judicial review proceedings may itself interfere with the execution of important public duties. Features of the present rules[589] giving effect to such policy have been preserved by the CPR, the court's permission to bring judicial review proceedings being still required,[590] with the application having to be made promptly and in any event not later than 3 months after the grounds for the claim first arose.[591]

681. Where changes have been made in the CPR, they aim first to provide some simplification. For example, CPR 54.1(2)(a) crisply identifies the scope of judicial review claims as follows :-

> "a 'claim for judicial review' means a claim to review the lawfulness of -
>
> (i) an enactment; or
>
> (ii) a decision, action or failure to act in relation to the exercise of a public function."

This may be contrasted with the circumlocution used in the existing rule in the HCR (O 53 r 1).[592]

Notes

589 In Hong Kong, HCR O 53 rr 3 and 4.

590 CPR 54.4.

591 CPR 54.5(1). The time limit is not extendable by agreement: CPR 54.5(2).

592 "O 53 r 1(1) An application for (a) an order of mandamus, prohibition or certiorari, or (b) an injunction under section 21J of the Ordinance restraining a person from acting in any office in which he is not entitled to act, shall be made by way of an application for judicial review in accordance with the provisions of this Order.

(2) An application for a declaration or an injunction (not being an injunction mentioned in paragraph (1)(b)) may be made by way of an application for judicial review, and on such an

cont'd .....

682. The terms used for the remedies are also made more accessible, "mandamus" becoming "a mandatory order", "prohibition" becoming "a prohibiting order" and "certiorari" becoming "a quashing order".[593]

683. The CPR spell out those cases where judicial review procedure *must* be used (by reference to the relief sought being relief of the types mentioned in the previous paragraph)[594] and also cases where it *may* be used (where certain classes of declaration, injunction or damages are sought).[595]

684. The CPR aim also to clarify the position and to facilitate participation of persons interested in the proceedings.

684.1 The rules create a category of "interested parties" defined as including "any person (other than the claimant and defendant) who is directly affected by the claim".[596]

684.2 Where a claimant knows of such persons, he must name them in his claim form[597] and also serve them (as well as the defendant) with the proceedings.[598]

685. Next, the CPR make the important change[599] of requiring defendants who wish to contest the claim to acknowledge service and to serve such acknowledgment on the claimant and other persons named in the claim, setting out "a summary of his grounds" for contesting it. This must be done within 21 days of being served with the claim, this time limit not

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application a judge may grant the declaration or injunction claimed if he considers that, having regard to- (a) the nature of the matters in respect of which relief may be granted by way of an order of mandamus, prohibition or certiorari, (b) the nature of the persons and bodies against whom relief may be granted by way of such an order, and (c) all the circumstances of the case, it would be just and convenient for the declaration or injunction to be granted on an application for judicial review."

593 CPR 54.1(2)(b) to (d).

594 CPR 54.2.

595 CPR 54.3.

596 CPR 54.1(2)(f).

597 CPR 54.6(1)(a).

598 CPR 54.7.

599 CPR 54.8.

being capable of being extended by agreement. If a person interested is served with the claim form and wishes to take part, he must also acknowledge service, serving the document on the claimant and other interested parties named in the claim.

686. This change provides the court with a summary of the defendant's position, when considering the question of whether to grant leave to pursue the judicial review. It helps the court to deal with matter without an oral hearing.[600]

687. The other rules on the application for leave are not much different from those existing in Hong Kong. If the court refuses leave without a hearing, it can be asked to reconsider the matter at an oral hearing. An appeal against refusal lies to the Court of Appeal.

688. Where leave to proceed is given, the defendant and any other person served who wish to participate in the proceedings must serve detailed grounds, including any additional grounds, for contesting or supporting the claim together with any written evidence relied on. [601]

689. Where someone wishes to take part in the proceedings but has not been made an interested party by either claimant or defendant, the CPR allow him to apply for permission to file evidence and to be heard, if the application is made promptly.[602]

690. Finally, note may be taken of CPR 54.19(2) and (3) relating to the court's powers upon quashing a decision. These paragraphs provide as follows :-

> "(2) The court may
>
> (a) remit the matter to the decision-maker; and
>
> (b) direct it to reconsider the matter and reach a decision in accordance with the judgment of the court.
>
> (3) Where the court considers that there is no purpose to be served in remitting the matter to the decision-maker it may, subject to any statutory provision, take the decision itself."

Notes

600 White Book 54.8.2. Power to make a determination without a hearing is in CPR 54.12 (as in HCR O 53 r3(3)).

601 CPR 54.14 to 54.16.

602 CPR 54.17.

691. Sub-rule (2) is uncontroversial. However, the utility of sub-rule (3) has been questioned in the White Book.[603] It is thought likely to be of extremely limited value in the light of substantive principles of administrative law.

692. Readers are consulted as to whether reforms along the lines of the CPR rules discussed above should be adopted :-

692.1 For simplifying description of the scope of judicial review and the terminology for forms of relief: **Proposal 69**.

692.2 To make provision for the participation of persons interested in the proceedings, other than the claimant and defendant: **Proposal 70**.

692.3 To require claims to be served on defendants and other persons known to be interested: **Proposal 71**.

692.4 To require defendants who wish to contest the proceedings to acknowledge service and to summarise the grounds relied on: **Proposal 72**.

692.5 To spell out the court's powers on the quashing of a decision, including power, subject to statutory limitations, to take the decision itself: **Proposal 73**.

Notes

603 White Book 54.19.2.

M. IMPLEMENTING THE REFORMS

693. Assuming that the Working Party recommends a series of reforms for implementation, the question that arises is how best such reforms should be implemented. In particular, how can they best be translated into rules of civil procedure in Hong Kong? Two main approaches fall to be considered. First, it may be advantageous to borrow in large measure from the CPR (and from relevant rules in place in New South Wales and other Australian jurisdictions) to implement the reforms. Alternatively, one may decide largely to retain the existing HCR, but introduce amendments to give effect to each of the recommended reforms.

694. A number of considerations arise in deciding which of these approaches may be preferable. The first of these is as to the amount of effort involved. There can be no doubt that both approaches would require a substantial investment in effort: in preparing the new rules, in educating all involved in the civil justice system and in the system adapting to the practical application of the reforms over time.

695. A huge amount of work was undoubtedly required to replace the RSC with the CPR in England and Wales. Mr Andrew Jeffries of Messrs Allen & Overy was involved at first hand. He states :-

> "This re-write came ..... at a huge cost of re-training of lawyers and judges alike, forced to discard much of their accumulated knowledge and start again. The fact that it took three years to get just the main rules written and into force, and the weeks the writer spent co-ordinating re-training of London litigation colleagues, bear witness to this."[604]

696. The fact that the CPR took some 3 years to prepare indicates that a very substantial effort in terms of the potentially huge task of drafting new rules might be saved if Hong Kong were to borrow from the CPR (and from rules existing in other jurisdictions).

697. If the other option, namely, retaining the HCR and introducing reforms by amendment, were adopted, much fresh drafting would probably be required. Borrowings could no doubt also be made to some degree from the CPR (and elsewhere). However, as previously noted, the drafting styles of the HCR and the CPR are very different so that any borrowed provisions would probably require a significant amount of revision. The

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604 Hong Kong Lawyer, August 2001, p 84.

second option would also require the effort of trying to ensure that the amendments being prepared harmonise with the retained rules.

698. The relative amounts of training required after promulgation of either a set of new rules or of individual amendments respectively must also be considered.

698.1 Plainly, if a new set of CPR-based rules were to be adopted, such rules would have to be learned by all concerned. This would require a very considerable training effort aimed at judges, lawyers, academics, students, court staff and others concerned with the civil justice system. While the amount of work involved should not be minimised, it is fair to point out that in comparison to other jurisdictions that have undergone extensive civil justice reform, Hong Kong's system involves a relatively small number of judges and a relatively smaller legal profession, all to be found in a geographically concentrated area.

698.2 Adopting the amendment option may have the advantage of requiring fewer new rules to be learned. However, the difference in effort is one of degree. Reforms inevitably mean change, however implemented. All the legal professionals involved would still have to receive a significant degree of training to identify the changes and to understand the way the new provisions work.

699. Consideration should also be given to the efficiency likely to be achievable in the operation of reforms implemented by either means.

699.1 In this context, one concern needs to be addressed if Hong Kong retains the HCR but incorporates reforms by amendment. This approach is likely to raise issues about the boundaries between the retained rules and the amendments. To take one example, if a rule stating the overriding objective is adopted by way of reform, the question is likely to arise as to the interplay between the overriding objective and principles established by pre-existing case-law developed in relation to a retained HCR rule. In a particular case, should the parties continue to apply that case-law? Or should it give way to the overriding objective? This kind of debate could generate the unwelcome and costly satellite litigation and could arise with some frequency, particularly in the early years.

699.2 In contrast, if a largely new set of rules along the CPR lines is adopted, making it clear that they are intended to represent a fresh start and that accretions of pre-existing case-law are generally not applicable, such debates are likely to be much rarer.

699.3 It should perhaps be emphasised that it is not being postulated that adoption of a CPR-based set of rules would involve *no* potential

questions requiring judicial resolution. Although pre-existing HCR-based case-law would generally not be relevant and the future accretion of case-law would be discouraged (reliance being placed instead on purposive interpretation of the rules with the aid of the overriding objective) the development of *some* case-law on the new rules is inevitable, particularly where the procedural question is closely related to a question of substantive law.

(a) For instance, it has been found necessary in England and Wales to rule on how the overriding objective applies in the context of established principles regarding the inadvertent disclosure of privileged documents.[605]

(b) To take another example, the English Court of Appeal has had to rule on the continuing applicability of the established principle that a judge who has given judgment has the power to reconsider his conclusion and in effect to reverse his own decision provided that the order recording his earlier decision has not yet been formally completed.[606]

Nevertheless, the experience in England and Wales so far suggests that such case-law developments would be relatively sparse and that numerous case citations in the White Book could be dispensed with.

699.4 One might add in this context that adoption of rules materially similar to the CPR would confer persuasive authority status on English decisions, allowing our system to draw on over two years of practical experience of their operation, once again narrowing the amount of debate and effort required in implementing the reforms.

700. One other consideration arises, namely as to whether unrepresented litigants are likely to benefit either way. One objective of switching to the CPR, was to adopt rules which are more simply drafted in modern and more easily understandable language with a view to making the procedural aspects of litigation more accessible to unrepresented litigants. As previously noted, this is a consideration only indirectly applicable in Hong Kong because the great majority of litigants in person would not refer to the English as opposed to the Chinese text. There is nonetheless ground for believing that simplification of the rules in English would permit a simpler Chinese translation to be adopted,

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605 See White Book 1.3.2.

606 *Stewart v Engel* [2000] 1 WLR 2268; *Charlesworth v Relay Roads Ltd* [2000] 1 W.L.R. 230.

arguing in favour of a migration to a new, simpler set of rules rather than adherence to the existing rules, possibly further complicated by amendment.

701. In the light of the abovementioned considerations, readers are consulted as to whether the civil justice system should, with any necessary modifications, adopt a new set of rules largely along the lines of the CPR (together with relevant rules from other jurisdictions) or whether, instead, it should continue to employ the HCR with amendments to implement recommended reforms: **Proposals 74 and 75**.

N. RESOURCES

702. If a decision is eventually taken to adopt some or all of the reforms discussed in this Report, resources will obviously be needed to prepare and promulgate the necessary new rules (whether as amendments to the HCR or a largely new set of rules based on the CPR) and to work with all interested parties towards drafting necessary practice directions and any pre-action protocols to be adopted. When such efforts have yielded fruit, further resources have to be in place for the practical implementation of the system.

703. The desired characteristics of a civil justice system identified at the beginning of this Report, include the requirement that the system be "effective, adequately resourced and organised". It is obvious that any changes to the system's rules and prescribed procedures will not achieve their aim unless the reforms can be intelligently implemented by a sufficient number of properly trained and equipped judges and judicial staff.

704. This is particularly so since the reforms in question involve making greater demands on judges and masters in the case management of cases – requiring of them the judicious exercise of their discretion and a greater mastery of the main features of proceedings at a relatively early stage. One cannot case manage effectively without first having invested the time and effort necessary to achieve a sound grasp of the nature and the scope of a case. Moreover, as pointed out in the foregoing discussion of judicially set timetables, it is essential that sufficient judicial resources are available to accommodate the parties when they duly arrive, ready for trial, at the trial date fixed by the court: **Proposal 76.**

705. As has been argued above, this is not a question to be solved simply by appointing more judges since such appointments are permanent and can only be made if from among suitably qualified candidates willing to accept appointment. This was also Lord Woolf's view when addressing the resources needed to support his reforms :-

> "I would not be in favour of any additional new appointments to the High Court bench unless this is absolutely necessary, because of the risk of diluting the quality of the judiciary at that level."[607]

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607 WIR, p 95 §2.

706. Many of the proposed rule changes are aimed at cutting down on the number of hearings and other case events required as cases proceed towards trial. Savings in judicial time (as well as court users' costs) are therefore an intended result. Accordingly, while it is likely that some additional judicial resources will be needed, it is not clear to what extent this will be the case or at what level more judicial officers will be required. An important role may have to be played by deputy judges appointed on a temporary basis to help cope with any periods of court congestion.

707. It would appear that a discussion of needed resources ought to focus on four areas :-

- Resource deployment
- Training of judges and staff
- Information technology
- Establishing base-lines and on-going research

N1. Deployment of resources

708. The efficient use of existing resources requires the system to identify how judges, masters and administrative staff should best be deployed in a manner responsive to the needs of the reforms. With changes, traditional roles and case-loads may alter, requiring re-deployment.

709. For instance, there may be a need for more masters to act as procedural judges in order to provide case management on the basis of questionnaires filed by the parties at the initial stage of proceedings. Or it may be that more judges should be deployed to eliminate interlocutory appellate bottle-necks and thereby reduce waiting-times, and so forth.

710. The creation of non-traditional posts with new job-specifications may be required by the reforms. For instance, it may be efficient to appoint lay cost assessors to deal, at least initially, with the taxation of costs. A post may have to be created for an information officer specifically tasked with providing assistance to unrepresented litigants. Redeployments in the High Court Registry may be required if paper applications increase in particular areas. If court-annexed mediation is to be instituted, posts to administer the relevant scheme may have to be designed and created.

711. An analysis of the demands or likely demands made by the system should be conducted before and after any reforms take effect.

Resources should be flexibly matched to the needs identified: **Proposal 77**.

N2. Training

712. Critics of Lord Woolf's reforms, such as Professor Zander, have expressed concern as to the width of judicial discretion arising under the CPR. They argue that this inevitably makes for inconsistency among judicial determinations, leading to injustices very difficult to cure on appeal. They are undoubtedly right to point to such dangers. If reforms are to gain acceptance, it is crucially important that a high quality of judicial decision-making, exhibiting an intelligent application of the discretionary principles, be attained: **Proposal 78.**

713. This means that serious training programmes must be set up for judges, masters and court administrative staff to acquire an understanding of the reforms and to hone the skills needed to administer them. As Lord Woolf pointed out :-

> "The new system of case management will involve new responsibilities, a new ethos and new skills for all members of the judiciary. It will require greater expertise in the handling of civil cases including case management skills. The new skills will require enhanced training. It will rely on team work and liaison between different levels of judges. It will require a new approach to the deployment of judges to ensure a greater element of continuity and consistency."[608]

714. As with the deployment of resources, the content of training programmes should also be sensitive to and directed at the needs of any procedural reforms adopted. To take a few instances :-

- The summary assessment of costs demands a degree of consistency and may benefit from judicial conferences along the lines of sentencing conferences as part of a training programme. Regular newsletters might be circulated indicating the level of summary assessments made.

- If court-annexed mediation were to be adopted, judges would require training to help them identify those cases which may and those unlikely to benefit by a reference to such mediation (or some other form of ADR).

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608 WIR, p 23 §15.

- With the increasing number of litigants in person, judges should be made aware of any measures designed to assist them and also receive training in how to deal sensitively and effectively with such litigants in the course of hearings. Administrative staff will require training on how to assist and deal with litigants in person at the Registry counter, on the telephone, and so forth.

- In so far as information technology is harnessed to civil justice system reforms (see below), the training of judges and all relevant court personnel in the use of such IT systems will be essential.

715. Again, an analysis of any adopted reforms is required to identify specific areas where judges and court officials are likely to profit from training.

N3. Information technology

716. A fundamental feature of civil justice system reforms involves greater proactivity on court's part in the management of litigation. Information technology ("IT") has a potentially vital role to play if the court is efficiently to keep track of the progress of cases and to exercise case management according to firm time-tables. Lord Woolf referred to the United States experience of use of IT in this regard :-

> "I believe IT will become a vital tool for judges in assuming the far greater responsibility for case management which I am recommending. Experience in the United States has demonstrated the successful role that IT can play in judicial case management. These systems allow judges, wherever they may be located, to gain access to up-to-date information about the status of individual cases. Case tracking is possible and, as part of this, for each case such systems produce daily reminders, progress reports, lists of outstanding tasks and notice of who has responsibility for further actions. In this way, information technology can support judges in supervising and controlling cases, from their initial filing through to their final disposal. With these tools and appropriate training, judges should be able to fulfil the case management role more effectively, with the particular advantage of being able to do so from wherever they may be working. ....."[609]

717. As indicated above, the High Court has, since 1998, been operating a system of computerised administrative records. As Lord Woolf points out :-

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609 WIR, p 82 §3.

> "There is a considerable overlap between the information which is held in such case-flow management systems and that stored in the more general, computerised court administration systems. As well as holding information about the progress of judicial cases, these court systems can also handle allocation of the resources within courts, including the scheduling of judges' workloads and the listing of cases, including electronic diarising and the timetabling of cases. As a valuable by-product, management information is created as well - about trends, costs, delays and types of cases being processed. Computer-supported listing can therefore be valuable not only in automating often unwieldy manual systems and so improving the accuracy, accessibility and currency of the listing information but also, more ambitiously and longer term, by gathering statistical information about the courts which should in turn form the basis of decision support systems for listing officers, to help them reduce the likelihood of excessive overbooking.
>
> Court administration systems also deal with accounting, generation of standard correspondence, orders and other documentation. Looking ahead, the data held in case-flow management and court administration systems can also be the source of the kind of information to which legal advisers and the public should eventually have access. In the future, documentation will not need to be reproduced and distributed to all parties but will instead be held in some central system available for appropriate access by the parties. As a result, lawyers and members of the public could themselves monitor the flow of their cases through some additional module designed specifically to offer access to such progress and status reports." [610]

718. As Lord Woolf accepts,[611] the potential of IT applications to support civil justice system reforms spans both what is practicable in the short term to meet the immediate needs of the system and what is appropriate for the longer term. While a move to electronic filing and electronic document-sharing in cases proceeding in the High Court will no doubt have to be addressed in due course, the introduction of such facilities may for the present be viewed as long-term projects. What appears to be worthy of immediate study is the development of the existing computerised system to support possible reforms by accommodating not merely administrative support, but also case-flow management, resource allocation and management statistics functions: **Proposal 79.**

719. Even this limited use of IT may involve significant investment in hardware, software development and training for judges and court staff. Such a use of resources is however likely to be cost-effective. This was acknowledged by Lord Woolf who advocated both the qualitative and financial benefits of an IT system as follows :-

Notes

610 WIR, p 82-83 §§4-5.

611 WFR, p 284 §1.

> "Many of the benefits to be offered by more widespread use of IT in the justice system are essentially qualitative in nature: such as increased access to justice, speedier recourse to the courts, enhanced quality of judicial decision making and increases in substantive justice (including fewer cases being decided in ignorance of earlier appellate rulings). That said, savings are frequently possible. I would therefore expect one or more of the following benefits to accrue in relation to the projects and initiatives I have advocated here :-
>
> (a) cost control or cost savings (perhaps in court time, participants' time or document management or reproduction);
>
> (b) enhanced performance of judges (their productivity, quality, efficiency, consistency and effectiveness);
>
> (c) keeping apace with other jurisdictions and so maintaining our competitive position as a leading forum for the resolution of disputes;
>
> (d) reduction of wastage or duplication of effort in respect of administration and management of documentation and of cases;
>
> (e) the provision of an improved service to citizens; and
>
> (f) the generation of detailed, public information on the use of the civil justice system."[612]

720. The longer term use of IT mentioned above could be built upon such a system. Developments like the introduction of electronic filing and paperless technology courts fit comfortably with a computerised case flow and case load management system. With increasing use of internet-based applications, it will be increasingly easy to connect with other computerised systems, including litigation support systems being used and developed by lawyers in private practice.

721. Plainly, IT initiatives require broad consultation to ensure the appropriateness and compatibility of any court scheme in relation to the IT resources of court users. It is noteworthy that in England and Wales, for instance, a consultation paper on "Modernising the Civil Courts"[613] was launched on 5 January 2001, reflecting part of the Lord Chancellor's Department's stated aim of meeting its targets for electronic service delivery by 2005.

Notes

612 WIR, p 89 §25.

613 See <*http://www.courtservice.gov.uk*>.

N4. Research

722. The experience of preparing this Report has highlighted the importance of continuously monitoring the system and of research into its functioning: **Proposal 80**

- The choice of reforms to adopt needs to be informed by reliable data as to the system's deficiencies encountered in practice.
- Baselines of performance, whether in terms of costs, delays, user-satisfaction or otherwise, need to be established if the success or failure of any subsequent reforms is to be judged.
- The deployment of resources responding intelligently to needs generated by any reforms requires the impact of those reforms to be assessed.
- The performance of judges and court staff in relation to reforms requires to be monitored to enable training to be tailored to their needs and to judge the success or otherwise of the changes.
- Assessing the benefits or disadvantages of particular reforms requires on-going research to be conducted so that informed amendments can be effected or, if necessary, a decision can be made to jettison a reform which, due to unforeseen causes, turns out to be counter-productive .

Appendix A

Report on Survey of Litigation Costs

Introduction

1. The Working Party has decided that a survey of litigation costs be conducted. This survey, based on an examination of all bills of costs submitted for taxation over a 12 month period, is intended to obtain information which may assist in (a) showing the general level of costs of civil litigation in the High Court; and (b) identifying the possible areas in civil litigation which need to be addressed in order to reduce costs and delay.

2. The survey was carried out by a team including a High Court taxing master, Assistant Judiciary Administrator (Quality), the judiciary clerk in charge of taxation in the High Court Registry, five judicial clerks of the High Court masters and members of JISS. The taxing master and the clerks had all been involved in the day-to-day taxation and management of High Court civil and appeal cases. Members of JISS provided the necessary technical support and advice in matters concerning computer programme design, data input, statistical analysis and presentation.

3. The Judiciary has also enlisted Professor Martin Chalkley, University of Dundee to advise on methodology. Professor Chalkley is a renowned statistician, currently advising the UK Government and the English Bar on matters relating to costs.

4. The survey covered the period between 1 July 1999 and 30 June 2000. The total number of bills submitted for taxation during this period is 1,641. Out of them, all the bills in connection with cases that had been concluded are examined. The total number is 1,113. They are categorised as follows:

	Case Type	*No.*
(1)	General Civil Actions	336
(2)	Personal Injury Actions	207
(3)	Uncontested Insolvency Matters	532
(4)	Appeals to the Court of Appeal	38
	Total:	1,113

5. The results of this survey are presented with the following caveats. First, out of all the High Court actions commenced per year (about 25,000) only a very small number of bills of costs were submitted for taxation. Secondly, almost all of the

bills submitted for taxation relate to cases commenced in the previous year or years. Thirdly, all the cases studied share a particular feature, namely, the parties were unable to agree as to the quantum of costs payable to the winner after conclusion of the case and had to refer the matter for a party and party taxation.

6. It is not clear whether the last caveat indicates that the sample is biased in any particular way. It is conceivable that these parties may be more litigious or may get along more poorly with each other than parties in cases where taxations were not needed. If so, it is possible that the cases studied may exhibit a greater than usual inability to reach procedural agreements. All this is however conjectural and mentioned only to stress the need for care in evaluating the data.

7. Accordingly, while the data collected under the survey are relatively hard and objective, they do not necessarily represent the general picture of costs in High Court civil litigation. Nevertheless, we think that some useful observations may be made on the basis of these data provided one recognizes the limitations of the available figures.

8. This report summarizes some of the more important results from the survey. Four kinds of proceedings are involved: (1) general civil actions; (2) personal injuries actions; (3) uncontested insolvency matters; and (4) appeals to the Court of Appeal. Some common terms used in the Tables should be explained:

(1) *Amount Claimed.* This is the amount claimed by the winning party in the action.

(2) *Amount Recovered.* This represents the amount awarded or the settlement sum for a particular action.

(3) *No Quantified Amount Recovered.* This applies to those cases where the award was for damages to be assessed; or some non-monetary relief, e.g., injunction or declaration; or where the case was dismissed.

(4) *Total Costs Claimed & Total Costs Allowed.* These are the total costs claimed by the winning party in its bill and allowed on taxation respectively.

(5) *Profit Costs Claimed & Profit Costs Allowed.* These are the solicitors' profit costs claimed by the winning party in its bill and allowed on taxation respectively. Disbursements are not included.

(6) *Counsel's Fees Claimed & Counsel's Fees Allowed.* These are the counsel's fees claimed by the winning party in its bill and allowed respectively.

(7) *Taxation Costs Claimed & Taxation Costs Allowed.* Taxation costs are the costs incurred in connection with the taxation of the bill. Taxation costs

claimed are the amount of costs claimed by the winning party in its bill. Taxation costs allowed are those allowed on taxation.

(8) *Provisional Bills.* The costs claimed in these bills are less than $100,000. They are taxed by the chief judicial clerk. If a party is dissatisfied with the taxation, he may apply to have the bill taxed by a taxing master.

(9) *Non-provisional Bills.* These bills are taxed by the taxing master. They are either with costs claimed above $100,000 or provisional bills referred to taxation as described above.

Part A – General Civil Actions

Costs and Amount Recovered

9. 164 cases (49%) have a quantified amount recovered. The remaining 172 cases (51%) do not. Below is a breakdown of the cases by amount recovered:

	Amount Recovered	*No.*
(1)	Below $120,000	50
(2)	$120,000 to below $600,000	59
(3)	$600,000 to below $1 million	19
(4)	$1 million to below $3 million	28
(5)	$3 million and above	8
	Sub-total:	164
(6)	Cases with no quantified amount recovered	172
	Total:	336

10. Details of the case type for cases with amount recovered below $120,000 are:

	Case Type	*No.*
(1)	Debt Collections	24
(2)	Property	5
(3)	Intellectual Property	1
(4)	Probate & Administration of Estate	1
(5)	Other General Civil Actions	19
	Total:	50

11. For each category of amount recovered, the range and median of the amount recovered is captured. The following costs data are also captured:

(1) In Table 1, the range and median of total costs and the major costs components, namely, solicitors' profit costs, counsel's fees and taxation costs as claimed and allowed on taxation. The following should be noted when considering the table:

(a) The total number of cases equals the total number of bills submitted for taxation.

(b) Under "Total Costs Allowed", the number of bills actually taxed is given. The number of bills submitted for taxation may not tally with the number of bills taxed. Bills which, having been submitted, were not taxed were disposed of in some other way, e.g., by settlement.

(c) For "Profit Costs Allowed", all the bills involved profit costs but for some of them, such costs were disposed of without taxation, e.g., by settlement. The number of bills taxed here represents the number of bills in which such costs were actually taxed.

(d) In "Counsel's Fees Claimed", not every bill involved counsel's fees. Thus, the number of bills submitted for taxation in which counsel's fees featured does not tally with the number of cases. The number of such bills is given in brackets.

(e) In "Counsel's Fees Allowed", not every bill involved counsel's fees. The number of taxed bills here represents the number of bills in which counsel's fees featured and were actually taxed.

(f) For "Taxation Costs Allowed", all the bills involved taxation costs but for some of them, such costs were disposed of without taxation, e.g., by settlement. The number of bills taxed here represents the number of bills in which such costs were actually taxed.

Table 1. *General Civil Actions – Amount Recovered and Costs Claimed and Costs Allowed [All Bills]*

(2) In Table 2, the ratio of median costs claimed to median costs allowed for total costs and the major costs components. The observations in relation to number of bills taxed in sub-paragraph (1)(b), (c), (e) and (f) above are applicable here.

Table 2. *General Civil Actions – Costs Claimed and Costs Allowed (Categorised by Amount Recovered) [All Bills]*

For cases with a quantified amount recovered, the overall ratio of the median for total costs, profit costs, counsel's fees and taxation costs allowed to costs claimed is 72%, 71%, 99% and 73% respectively. For cases with no quantified amount recovered, the respective ratio is 79%, 73%, 99% and 86%.

12. The ratio of median amount recovered to median costs claimed for total costs and the major costs components gives a general idea of proportionality. The overall ratio of median amount recovered to median total costs claimed, median profit costs, median counsel's fees and median taxation costs as claimed is 34%, 29%, 23% and 6% respectively. For cases with an amount recovered below $120,000, the ratio is significantly higher: 74% for median total costs, 68% for profit costs, 97% for counsel's fees and 15% for taxation costs. For cases with an amount recovered between $120,000 and below $600,000, the ratio for median total costs and median profit costs is also higher than the overall ratio: 52% and 44% respectively. The ratio for median counsel's fees (26%) and median taxation costs (8%) is roughly in line with the overall ratio.

Costs and Amount Claimed

13. In Tables 3 and 4, amounts claimed, to be distinguished from amounts awarded or achieved on settlement ("amount recovered"), are considered. For each category, the median amount claimed is captured. In addition, the following costs data are also captured:

(1) In Table 3, the range and median of total costs and the major costs components, namely, solicitors' profit costs, counsel's fees and taxation costs as claimed and allowed on taxation. The observations in paragraph 9(1)(a) to (f) are applicable here.

Table 3. *General Civil Actions – Amount Claimed and Costs Claimed and Costs Allowed [All Bills]*

(2) In Table 4, the ratio of median costs claimed to median costs allowed for total costs and the major costs components. The observations in relation to number of bills taxed in paragraph 9(1)(b), (c), (e) and (f) above are applicable here.

Table 4. *General Civil Actions – Costs Claimed and Costs Allowed (Categorised by Amount Claimed) [All Bills]*

For cases with a quantified amount claimed, the overall ratio of the median for total costs, profit costs, counsel's fees and taxation costs

allowed is 73%, 71%, 100% and 74% respectively. For cases with no quantified amount claimed, the respective ratio is 79%, 75%, 98% and 86%.

14. The ratio of median amount claimed to median costs claimed for total costs and the major costs components gives a general idea of proportionality. The pattern is similar to that in paragraph 10 above. The overall ratio of median amount claimed to median total costs, median profit costs, median counsel's fees and median taxation costs as claimed is 36%, 26%, 20% and 5% respectively. For claims below $120,000, the respective ratio is 56% for median total costs, 53% for median profit costs, 55% for median counsel's fees and 13% for median taxation costs. The ratio is significantly higher than the overall ratio. For claims between $120,000 and below $600,000, the ratio of median total costs (49%), median profit costs (35%), median counsel's fee (24%) and median taxation costs (8%) is also higher than the overall ratio, though to a lesser extent.

Costs Claimed and Allowed

15. The amounts of costs claimed are divided into different categories. For each category, the median of the total costs claimed and of the major costs components are captured. This gives roughly the distribution of costs as between the major components. The overall ratio for the components is 79% for profit costs, 47% for counsel's fees and 14% for taxation costs.

Table 5. General Civil Actions – Median Costs Claimed [All Bills]

16. In Table 6, for each category of costs claimed, the range and ratio of median total costs claimed and allowed are captured.

Table 6. General Civil Actions – Median Total Costs Claimed and Median Total Costs Allowed [All Bills]

The overall ratio of median total costs allowed is 75% of median total costs claimed.

Disposal Mode

17. Disposal modes are divided into two broad categories: consensual modes and non-consensual modes. Consensual modes include consent order, acceptance of payment into court, settlement without court order. Non-consensual modes include default judgment, striking out, summary judgment, trial for actions begun by writ, substantive hearing for actions begun otherwise than by writ, withdrawal, discontinuance and dismissal. Withdrawal, discontinuance and dismissal are grouped as "Others". A detailed breakdown appears at footnote 3 to Table 7.

18. For cases with a quantified amount recovered, 24% were disposed by consensual modes and 76%, by non-consensual modes. Within the consensual modes, 15% were by consent order, 8% by acceptance of payment into court, 1% by settlement without court order. Within the non-consensual modes, 28% were by default, none by striking out, 19% by summary judgment, 8% by substantive hearing, 10% by trial, and 11% by others. For cases with no quantified amount recovered, 29% were disposed of by consensual means and 71%, by non-consensual modes.

Table 7. General Civil Actions – Mode of Disposal by Amount Recovered [All Bills]

19. For the 61 cases concluded by default, their case types are as follows:

	Case Type	*No.*
(1)	Debt Collection	30
(2)	Property	7
(3)	Intellectual Property	6
(4)	Admiralty	1
(5)	Other General Civil Actions	17
	Total:	61

20. For each category of amount recovered, the number and percentage of cases disposed of by consensual and non-consensual modes are captured. For cases with a quantified amount recovered, the overall percentage of cases disposed of by consensual and non-consensual modes is 24% and 76% respectively.

Table 8. General Civil Actions – Mode of Disposal: Consensual Means vs. Non-Consensual Means [All Bills]

Interlocutory Activity

21. Interlocutory activity is measured in terms of numbers and types of applications. In this connection, only the non-provisional bills are examined. Provisional bills are excluded because the amount of costs is relatively small and the procedural steps involved are usually minimal. For present purposes, the number of interlocutory applications captured represents the actual instances of such applications irrespective of the number of summonses taken out. The following are not included: summonses for directions, pre-trail reviews, applications to represent a limited company by director, applications relating to enforcement of judgment. Apart from applications with dates fixed for hearing (whether the hearing actually took place), applications by way of consent summons are also included.

22. For cases with a quantified amount recovered, 45% had 1 to 3 interlocutory applications, 29% had 4 to 6, and 9% had 7 to 9, and 6% had 10 or more. For cases with no quantified amount recovered, the pattern does not differ much.

Table 9. *General Civil Actions – Interlocutory Activity by Number [Non-Provisional Bills Only]*

23. For cases with a quantified amount recovered, time extensions and pleadings related applications featured most (52% and 39% respectively). It is the same for cases with no quantified amount recovered (39% and 34% respectively). The "Others" category includes miscellaneous types of applications, e.g., security for costs, adding a defendant, leave to serve a concurrent writ outside jurisdiction, interim payment on account of damages. A detail breakdown is annexed to Table 10.

Table 10. *General Civil Actions – Interlocutory Activity by Type [Non-Provisional Bills Only]*

Median Costs and Stages

24. For actions begun by writ, the litigation process is divided into different stages with reference to these milestones: summons for directions, setting down, first trial date and conclusion by trial. The number of cases concluded before and continuing beyond these milestones, the median amount recovered, the median costs incurred for each stage, and the cumulative median costs up to each stage are all captured. Provisional bills are excluded for present purposes.

Table 11. *General Civil Actions with Amount Recovered – Median Costs and Stages for Actions Begun by Writ [Non-Provisional Bills Only]*

25. The number and percentage of cases concluded at the above milestones are captured.

Table 12. *General Civil Actions – Percentage of All Cases Concluded at Various Stages for Actions Begun by Writ [Non-Provisional Bills Only]*

26. A similar exercise has been done for actions begun otherwise than by writ. The litigation process is divided into different stages with reference to these milestones: first hearing where directions for future conduct are normally given, substantive hearing where the matter is fully litigated and conclusion by judgment. The number of cases concluded before and continuing beyond these milestones, the median amount recovered, the median costs incurred for each stage, and the cumulative median total costs incurred up to each stage are all captured.

Table 13. *General Civil Actions with Amount Recovered – Median Costs and Stages for Actions Begun Otherwise Than by Writ [Non-Provisional Bills Only]*

27. The number and percentage of cases concluded at the above milestones are captured.

Table 14. *General Civil Actions – Percentage of All Cases Concluded at Various Stages for Actions Begun Otherwise Than by Writ [Non-Provisional Bills Only]*

Graphs

28. The graphs at pp.21 – 25 of the Tables & Graphs depict the amount recovered profile, total costs claimed profile, amount recovered versus total costs claimed, amount recovered (below $1 million) versus total costs claimed (below $1 million) and amount recovered (below $1 million) and total costs claimed (below $500,000).

Part B – Personal Injury Actions

29. The data collection for personal injury actions closely follows the one carried out for general civil actions. The total number of personal injury bills submitted for taxation for the relevant period is 232. A total of 207 are covered here. The rest are excluded because the cases are still continuing.

Costs and Amount Recovered

30. 203 cases (98%) have a quantified amount recovered. The remaining 4 cases (2%) do not. Below is a breakdown of the cases by amount recovered:

	Amount Recovered	*No.*
(1)	Below $120,000	8
(2)	$120,000 to below $600,000	85
(3)	$600,000 to below $1 million	46
(4)	$1 million to below $3 million	45
(5)	$3 million to below $5 million	12
(6)	$5 million or above	7
	Sub-total:	203
(7)	Case with no quantified amount recovered	4
	Total:	207

31. For each category of amount recovered, the range and median of the amount recovered is captured. The following costs data are also captured:

    (1) In Table 15, the range and median of total costs and the major costs components, namely, solicitors' profit costs, counsel's fees, experts' fees and taxation costs as claimed and allowed on taxation. The observations in paragraph 9(1) above are applicable here. With necessary modifications, they are equally apt for experts' fees.

        Table 15. Personal Injury Actions – Amount Recovered and Costs Claimed and Costs Allowed [All Bills]

    (2) In Table 16, the ratio of median costs claimed to median costs allowed for total costs and the major costs components. The observations in relation to the number of bills taxed in paragraph 9(1)(b), (c), (e) and (f) with necessary modifications to experts' fees are applicable here.

        Table 16. Personal Injury Actions – Costs Claimed and Costs Allowed (Categorised by Amount Recovered) [All Bills]

        For cases with a quantified amount recovered, the overall ratio of the median for total costs, profit costs, counsel's fees, experts and taxation costs allowed is 81%, 79%, 83%, 100% and 90% respectively.

32. The ratio of median amount recovered to median costs claimed for total costs and the major costs components gives a general idea of proportionality. The overall ratio of median amount recovered to median costs claimed, median profit costs, median counsel's fees, median experts' fees and median taxation costs as claimed is 55%, 35%, 12%, 3% and 6% respectively. For cases with an amount recovered below $120,000, the ratio is significantly higher: 127% for median total costs, 87% for median profit costs, 19% for median counsel's fees, 20% for experts' fees and 23% for median taxation costs. The ratio for cases with an amount recovered between $120,000 and below $600,000 is also higher than the overall: 90% for median total costs, 59% for median profit costs, 17% for median counsel's fees, 4% for experts' fees and 11% for median taxation costs.

Costs and Amount Claimed

33. In Tables 17 and 18, amounts claimed as opposed to amounts recovered are considered. For each category, the median amount claimed is captured. In addition, the following costs data are also captured:

    (1) In Table 17, the range and median of total costs and the major costs components, namely, solicitors' profit costs, counsel's fees, experts' fees and taxation costs as claimed and allowed on taxation. The observations

in paragraph 9(1) with the necessary modifications to experts' fees are applicable here.

Table 17. Personal Injury Actions – Amount Claimed and Costs Claimed and Costs Allowed [All Bills]

(2) In Table 18, the ratio of median costs claimed to median costs allowed for total costs and the major costs components. The observations in relation to number of bills taxed in paragraph 9(1)(b), (c), (e) and (f) above with necessary modifications to experts' fees are applicable here.

Table 18. Personal Injury Actions – Costs Claimed and Costs Allowed (Categorised by Amount Claimed) [All Bills]

For cases with quantified amount claimed, the overall ratio of the median for total costs, profit costs, counsel's fees, experts' fees and taxation costs allowed is 81%, 80%, 83%, 100% and 89% respectively. For cases with no quantified amount claimed, the respective ratio is 77%, 71%, 87%, 100% and 91%.

34. The ratio of median amount claimed to median costs claimed for total costs and the major costs components gives a general idea of proportionality. The overall ratio of median amount claimed to median costs claimed, median profit costs, median counsel's fees, median experts' fees and median taxation costs as claimed is 23%, 15%, 5%, 1% and 3% respectively. The ratio for cases with lower claims is significantly higher. For claims below $120,000, the ratio is 931% for median total costs, 707% for median profit costs, 183% for median counsel's fees, 41% for median experts' fees and 95% for median taxation costs. For claims between $120,000 and below $600,000, the respective ratio is 52%, 36%, 10%, 3% and 7%.

Costs Claimed and Allowed

35. For each category of costs claimed, the range and median of the total costs claimed and of the major components are captured. This shows roughly the distribution of costs as between the major components. The overall ratio for the components is 63% for profit costs, 22% for counsel's fees, 5% for experts' fees and 11% for taxation costs.

Table 19. Personal Injury Actions – Median Costs Claimed [All Bills]

36. In Table 20, for each category of costs claimed, the range and ratio of median total costs claimed and allowed are captured.

Table 20. Personal Injury Actions – Median Total Costs Claimed and Median Total Costs Allowed [All Bills]

The overall ratio of median total costs allowed is 81% of median total costs claimed.

Disposal Mode

37. The categorization of disposal modes follows that for general civil actions. 87% were by consensual modes: 71% by consent order, 11% by acceptance of payment into court and 5% by settlement without court order. 13% were by trial. None of the cases were disposed of by default, striking out or summary judgment.

Table 21. *Personal Injury Actions – Mode of Disposal by Amount Recovered [All Bills]*

Table 22. *Personal Injury Actions – Mode of Disposal: Consensual Means vs. Non-consensual Means [All Bills]*

Interlocutory Activity

38. Interlocutory activity is measured in terms of numbers and types of applications. In this connection, only the non-provisional bills are examined. For present purposes, the number of interlocutory applications captured represents the actual instances of such applications irrespective of the number of summonses. Checklist review hearings and those mentioned in paragraph 19 above are not included. For cases with a quantified amount recovered, 51% had 1 to 3 interlocutory applications, 16% had 4 to 6, and 4% had 7 to 9 and 2% had 10 or more.

Table 23. *Personal Injury Actions – Interlocutory Activity by Number [Non-Provisional Bills Only]*

39. For cases with a quantified amount recovered, time extensions, pleadings and discovery related applications featured most (28%, 35% and 24% respectively). The "Others" category includes miscellaneous types of applications. A detailed breakdown is annexed to Table 24.

Table 24. *Personal Injury Actions – Interlocutory Activity by Type [Non-Provisional Bills Only]*

Median Costs and Stages

40. The litigation process is divided into different stages with reference to these milestones: first check list review, setting down, first trial date and conclusion by trial. The number of cases concluded before and continuing beyond these

milestones, the median amount recovered, the median total costs incurred for the stage and the cumulative total costs incurred up to the stage are all captured.

Table 25. *Personal Injury Actions – with Amount Recovered – Median Costs and Stages [Non-Provisional Bills Only]*

41. The number and percentage of cases concluded at the above milestones are captured.

Table 26. *Personal Injury Actions – Percentage of Cases Concluded at Various Stages [Non-Provisional Bills Only]*

Common Fund Costs

42. Common fund costs in the present context mean the own costs of a legally aided party that he had to pay to the lawyers assigned to him. These costs are not recoverable from the paying party. For each category of amount recovered, the median common fund costs and its ratio to the median amount recovered are captured. The overall ratio is 4%.

Table 27. *Personal Injury Actions – Common Fund Costs [All Bills]*

43. The graphs at pp. 46-49 of Tables and Graphs the show the amount recovered profile, total costs claimed profile, amount recovered versus total costs claimed and amount recovered (below $2 million) versus total costs claimed (below $1 million).

Part C – Uncontested Insolvency Matters

44. There are 132 bankruptcy petitions and 400 winding up petitions. The range and median of total costs, profit costs and taxation costs as claimed and allowed are captured.

Table 28. *Uncontested Insolvency Matters – Costs Claimed by Case Type*

Table 29. *Uncontested Insolvency Matters – Costs Allowed by Case Type*

Part D – Appeals to the Court of Appeal

45. There are 25 final appeals and 13 interlocutory appeals. The case type of cases from which the appeals were brought is as follows:

(A) For final appeals:

Original Case Type		*No.*
(1)	General Civil Actions	11
(2)	Constitutional & Administrative Law	1
(3)	Property	7
(4)	Personal Injury	3
(5)	Construction & Arbitration	1
(6)	Winding-up	2
	Total:	25

(B) For interlocutory Appeals:

Original Case Type		*No.*
(1)	General Civil Actions	6
(2)	Constitutional & Administrative Law	2
(3)	Personal Injury	2
(4)	Commercial	1
(5)	Intellectual Property	1
(6)	Shareholders Disputes	1
	Total:	13

46. The range and median of total costs, profit costs, counsel's fees and taxation costs as claimed and allowed are captured.

Table 30. Appeals to the Court of Appeal – Costs Claimed by Case Type

Table 31. Appeals to the Court of Appeal – Costs Allowed by Case Type

47. For each category of costs claimed, the range and median of the total costs claimed and of the major costs components are captured.

Table 32. Appeals to the Court of Appeal – Median Costs Claimed

Appendix B

Table of Contents

Part A – General Civil Actions

Table 1 General Civil Actions – Amount Recovered and Costs Claimed and Costs Allowed [All Bills (1)]

Amount Recovered (2)	Total No. of Cases	Amount Recovered			Total Costs (4)								Profit Costs (7)							
					Claimed				Allowed				Claimed				Allowed			
		Lowest	Highest	Median	Lowest	Highest	Median	No. of Bills Submitted (50)	Lowest	Highest	Median	No. of Bills Taxed (6)	Lowest	Highest	Median	No. of Bills Submitted	Lowest	Highest	Median	No. of Bills Taxed (8)
< $120,000	50	1	119,500	**62,700**	11,800	2,460,900	**46,400**	50	8,200	1,850,000	**29,000**	50	9,100	600,000	**42,700**	50	5,900	223,800	**24,400**	48
$120,000 to < $600,000	59	122,300	598,000	**230,000**	19,900	893,400	**119,400**	59	15,900	580,000	**81,800**	59	18,800	651,700	**100,700**	59	14,900	277,200	**58,800**	57
$600,000 to < $1 M	19	623,500	930,900	**720,000**	29,500	1,146,800	**88,400**	19	20,900	779,600	**66,100**	19	12,800	632,600	**64,800**	19	11,300	474,500	**36,200**	19
$1 M to < $3 M	28	1,000,000	2,814,000	**1,503,000**	47,000	2,263,200	**234,100**	28	37,700	1,517,200	**190,000**	27	38,300	956,100	**150,100**	28	31,400	705,300	**88,000**	25
> $3 M	8	3,049,400	52,728,000	**10,075,300**	40,900	959,300	**289,200**	8	29,600	908,800	**286,600**	8	30,700	835,100	**208,700**	8	22,600	784,600	**202,300**	8
< $1 M	128	1	930,900	**174,100**	11,800	2,460,900	**78,300**	128	8,200	1,850,000	**47,500**	128	9,100	651,700	**65,500**	128	5,900	474,500	**36,100**	124
< $3 M	156	1	2,814,000	**227,500**	11,800	2,460,900	**83,200**	156	8,200	1,850,000	**57,700**	155	9,100	956,100	**73,500**	156	5,900	705,300	**41,200**	149
Sub-Total	164	1	52,728,000	**256,100**	11,800	2,460,900	**86,900**	164	8,200	1,850,000	**61,200**	163	9,100	956,100	**74,500**	164	5,900	784,600	**43,700**	157
No Quantified Amount Recovered (3)	172	N/A	N/A	**N/A**	4,300	12,004,900	**188,900**	172	12,300	11,216,600	**152,200**	170	4,100	5,347,300	**125,800**	172	12,200	5,047,800	**97,400**	164

Amount Recovered	Total No. of Cases	Counsel Fees (9)								Taxation Costs (11)							
		Claimed				Allowed				Claimed				Allowed			
		Lowest	Highest	Median	No. of Bills Submitted	Lowest	Highest	Median	No. of Bills Taxed (10)	Lowest	Highest	Median	No. of Bills Submitted	Lowest	Highest	Median	No. of Bills Taxed (12)
< $120,000	50	11,000	1,750,000	**61,000**	(7)	11,000	65,000	**53,500**	6	3,500	52,400	**9,200**	50	2,000	33,200	**5,200**	47
$120,000 to < $600,000	59	12,000	260,000	**60,000**	(25)	9,000	228,000	**51,000**	21	3,600	50,500	**8,900**	59	1,200	48,700	**9,400**	54
$600,000 to < $1 M	19	10,000	441,800	**41,800**	(10)	23,800	245,800	**41,800**	8	6,800	71,900	**16,700**	19	4,000	71,900	**7,400**	18
$1 M to < $3 M	28	4,800	866,500	**66,500**	(20)	12,500	429,000	**60,000**	13	9,400	117,000	**26,000**	28	5,300	117,000	**17,500**	23
> $3 M	8	9,600	354,000	**62,300**	(6)	9,600	354,000	**62,300**	6	15,100	95,500	**25,500**	8	7,600	95,400	**24,000**	8
< $1 M	128	10,000	1,750,000	**59,500**	(42)	9,000	245,800	**50,400**	35	3,500	71,900	**12,200**	128	1,200	71,900	**6,600**	119
< $3 M	156	4,800	1,750,000	**60,000**	(62)	9,000	429,000	**51,800**	48	3,500	117,000	**13,700**	156	1,200	117,000	**7,000**	142
Sub-Total	164	4,800	1,750,000	**60,000**	(68)	9,000	429,000	**51,800**	54	3,500	117,000	**15,200**	164	1,200	117,000	**7,300**	150
No Quantified Amount Recovered	172	2,000	5,051,000	**66,000**	(109)	2,000	4,880,500	**55,000**	97	600	276,100	**20,900**	172	2,500	276,100	**18,300**	156

Notes: (Notes 1 to 12 are also applicable to personal injury actions)

(1) Include both provisional and non-provisional bills.
(2) Amount recovered is the amount awarded or the settlement sum.
(3) In cases where the award was for damages to be assessed, some non-monetary relief e.g. injunction or declaration where the case was dismissed, there was no quantified amount recovered.
(4) Total costs are the total amount of costs claimed by the winning party against the losing party as per the bill.
(5) This is the number of bills submitted for taxation.
(6) This represents the actual number of bills taxed. Those not taxed are disposed of without taxation.
(7) Profit costs are the solicitors' profit costs. Disbursements are not included.
(8) All the bills involved profit costs but for some of them such costs were disposed of without taxation. The number of bills taxed represents the number of bills in which such costs were taxed.
(9) It should be noted that not every case involved counsel. The figures in bracket represent the number of bills in which counsel's fees featured.
(10) Not every bill involved counsel's fees. The number of taxed bills represents the number of bills in which counsel's fees featured and were actually taxed.
(11) Taxation costs are the costs incurred in connection with taxation. Treated as a separate item, it does not overlap with profit costs.
(12) All the bills involved taxation costs but for some of them such costs were disposed of without taxation. The number of bills taxed represents the number of bills in which such costs were taxed.

Table 2 General Civil Actions - Costs Claimed and Costs Allowed (Categorised by Amount Recovered) [All Bills]

Amount Recovered	Total Costs						Profit Costs					
	Median Claimed	Median Allowed	% of Costs Taxed Off			No. of Bills Taxed (1)	Median Claimed	Median Allowed	% of Costs Taxed Off			No. of Bills Taxed (2)
			Lowest	Highest	Median				Lowest	Highest	Median	
< $120,000	46,400	29,000	**1%**	**57%**	**29%**	50	42,700	24,400	**1%**	**60%**	**30%**	48
$120,000 to < $600,000	119,400	81,800	**0%**	**60%**	**28%**	59	100,700	58,800	**0%**	**62%**	**31%**	57
$600,000 to < $1 M	88,400	66,100	**5%**	**72%**	**31%**	19	64,800	36,200	**4%**	**56%**	**30%**	19
$1 M to < $3 M	234,100	190,000	**0%**	**47%**	**24%**	27	150,100	88,000	**0%**	**52%**	**26%**	25
> $3 M	289,200	286,600	**0%**	**40%**	**3%**	8	208,700	202,300	**0%**	**39%**	**4%**	8
< $1 M	78,300	47,500	**0%**	**72%**	**29%**	128	65,500	36,100	**0%**	**62%**	**30%**	124
< $3 M	83,200	57,700	**0%**	**72%**	**28%**	155	73,500	41,200	**0%**	**62%**	**29%**	149
Sub-Total	86,900	61,200	**0%**	**72%**	**28%**	163	74,500	43,700	**0%**	**62%**	**29%**	157
No Quantified Amount Recovered	188,900	152,200	**0%**	**69%**	**21%**	170	125,800	97,400	**0%**	**70%**	**27%**	164

Amount Recovered	Counsel's Fees						Taxation Costs					
	Median Claimed	Median Allowed	% of Costs Taxed Off			No. of Bills Taxed (3)	Median Claimed	Median Allowed	% of Costs Taxed Off			No. of Bills Taxed (4)
			Lowest	Highest	Median				Lowest	Highest	Median	
< $120,000	61,000	53,500	**0%**	**21%**	**2%**	6	9,200	5,200	**0%**	**78%**	**34%**	47
$120,000 to < $600,000	60,000	51,000	**0%**	**65%**	**6%**	21	18,900	9,400	**0%**	**83%**	**20%**	54
$600,000 to < $1 M	41,800	41,800	**0%**	**75%**	**11%**	8	16,700	7,400	**0%**	**61%**	**31%**	18
$1 M to < $3 M	66,500	60,000	**0%**	**50%**	**0%**	13	26,000	17,500	**0%**	**50%**	**22%**	23
> $3 M	62,300	62,300	**0%**	**0%**	**0%**	6	25,500	24,000	**0%**	**51%**	**6%**	8
< $1 M	59,500	50,400	**0%**	**75%**	**5%**	35	12,200	6,600	**0%**	**83%**	**28%**	119
< $3 M	60,000	51,800	**0%**	**75%**	**4%**	48	13,700	7,000	**0%**	**83%**	**27%**	142
Sub-Total	60,000	51,800	**0%**	**75%**	**1%**	54	15,200	7,300	**0%**	**83%**	**27%**	150
No Quantified Amount Recovered	66,000	55,000	**0%**	**78%**	**1%**	97	20,900	18,300	**0%**	**83%**	**14%**	156

Notes:

(1) See Note 6 at Table 1.
(2) See Note 8 at Table 1.
(3) See Note 10 at Table 1.
(4) See Note 12 at Table 1.

Table 3 General Civil Actions – Amount Claimed and Costs Claimed and Costs Allowed (All Bills)

Quantified Amount Claimed	Total No. of Cases	Amount Claimed			Total Costs [1]								Profit Costs [4]							
					Claimed				Allowed				Claimed				Allowed			
		Lowest	Highest	Median	Lowest	Highest	Median	No. of Bills Submitted [2]	Lowest	Highest	Median	No. of Bills Taxed [3]	Lowest	Highest	Median	No. of Bills Submitted	Lowest	Highest	Median	No. of Bills Taxed [5]
< $120,000	43	4,200	117,600	**70,900**	11,800	358,000	**40,300**	43	8,200	284,700	**27,700**	43	9,100	294,500	**37,400**	43	5,900	223,800	**24,200**	43
$120,000 to < $600,000	65	122,300	598,000	**245,100**	4,300	598,400	**119,400**	65	15,900	574,100	**84,000**	64	4,100	313,900	**85,300**	65	14,900	300,100	**58,400**	62
$600,000 to < $1 M	18	603,300	990,500	**776,900**	29,500	1,146,800	**109,200**	18	18,600	779,600	**66,100**	17	21,900	632,600	**84,900**	18	15,000	474,500	**38,000**	17
$1 M to < $3 M	25	1,030,000	2,700,000	**1,613,700**	43,100	893,400	**228,100**	25	37,200	653,500	**183,500**	25	35,900	651,700	**163,400**	25	21,500	350,000	**109,100**	22
> $3 M	24	3,049,400	99,601,700	**6,076,900**	30,300	4,280,400	**289,200**	24	18,700	4,169,900	**235,100**	24	30,300	2,808,500	**199,100**	24	18,700	2,697,900	**160,400**	22
< $1 M	126	4,200	990,500	**191,400**	4,300	1,146,800	**79,500**	126	8,200	779,600	**48,000**	124	4,100	632,600	**64,100**	126	5,900	474,500	**36,100**	122
< $3 M	151	4,200	2,700,000	**245,100**	4,300	1,146,800	**86,100**	151	8,200	779,600	**62,000**	149	4,100	651,700	**74,500**	151	5,900	474,500	**45,500**	144
Sub-Total	175	4,200	99,601,700	**304,100**	4,300	4,280,400	**109,800**	175	8,200	4,169,900	**77,800**	173	4,100	2,808,500	**77,500**	175	5,900	2,697,900	**50,700**	166
No Quantified Amount Claimed	161	N/A	N/A	**N/A**	18,500	12,004,900	**185,400**	161	12,300	11,216,600	**130,600**	160	12,800	5,347,300	**123,100**	161	11,300	5,047,800	**96,000**	155

Quantified Amount Claimed	Total No. of Cases	Counsel Fees [6]								Taxation Costs [8]							
		Claimed				Allowed				Claimed				Allowed			
		Lowest	Highest	Median	No. of Bills Submitted	Lowest	Highest	Median	No. of Bills Taxed [7]	Lowest	Highest	Median	No. of Bills Submitted	Lowest	Highest	Median	No. of Bills Taxed [9]
< $120,000	43	20,000	71,000	**39,000**	(5)	20,000	59,000	**28,600**	5	3,500	37,400	**9,100**	43	2,000	30,200	**5,200**	43
$120,000 to < $600,000	65	11,600	260,000	**60,000**	(31)	11,600	228,000	**51,800**	26	600	57,400	**18,900**	65	2,600	48,700	**10,600**	57
$600,000 to < $1 M	18	10,000	441,800	**39,800**	(8)	23,800	245,800	**30,400**	6	6,000	71,900	**16,800**	18	4,000	71,900	**7,300**	17
$1 M to < $3 M	25	4,800	405,000	**46,200**	(20)	12,500	405,000	**50,000**	12	5,500	71,500	**24,100**	25	5,100	67,800	**17,500**	19
> $3 M	24	20,000	1,430,200	**134,800**	(16)	17,000	1,430,200	**109,000**	14	7,700	210,300	**23,800**	24	2,500	193,700	**22,600**	21
< $1 M	126	10,000	441,800	**55,700**	(44)	11,600	245,800	**50,100**	37	600	71,900	**13,000**	126	2,000	71,900	**6,700**	117
< $3 M	151	4,800	441,800	**52,500**	(64)	11,600	405,000	**50,100**	49	600	71,900	**14,500**	151	2,000	71,900	**6,800**	136
Sub-Total	175	4,800	1,430,200	**60,000**	(80)	11,600	1,430,200	**51,000**	63	600	210,300	**16,200**	175	2,000	193,700	**7,300**	157
No Quantified Amount Claimed	161	2,000	5,051,000	**68,000**	(97)	2,000	4,880,500	**55,500**	88	3,400	276,100	**20,300**	161	1,200	276,100	**17,200**	149

Notes:

(1) See Note 4 at Table 1.
(2) See Note 5 at Table 1.
(3) See Note 6 at Table 1.
(4) See Note 7 at Table 1.
(5) See Note 8 at Table 1.
(6) See Note 9 at Table 1.
(7) See Note 10 at Table 1.
(8) See Note 11 at Table 1.
(9) See Note 12 at Table 1.

Table 4 General Civil Actions – Costs Claimed and Costs Allowed (Categorised by Amount Claimed) (All Bills)

Quantified Amount Claimed	Total Costs						Profit Costs					
	Median Claimed	Median Allowed	% of Costs Taxed Off			No. of Bills Taxed [1]	Median Claimed	Median Allowed	% of Costs Taxed Off			No. of Bills Taxed [2]
			Lowest	Highest	Median				Lowest	Highest	Median	
< $120,000	40,300	27,700	**1%**	**57%**	**28%**	43	37,400	24,200	**1%**	**60%**	**29%**	43
$120,000 to < $600,000	119,400	84,000	**0%**	**60%**	**28%**	64	85,300	58,400	**0%**	**62%**	**31%**	62
$600,000 to < $1 M	109,200	66,100	**1%**	**58%**	**29%**	17	84,900	38,000	**1%**	**56%**	**30%**	17
$1 M to < $3 M	228,100	183,500	**0%**	**45%**	**24%**	25	163,400	109,100	**0%**	**44%**	**26%**	22
> $3 M	289,200	235,100	**0%**	**53%**	**27%**	24	199,100	160,400	**0%**	**53%**	**30%**	22
< $1 M	79,500	48,000	**0%**	**60%**	**28%**	124	64,100	36,100	**0%**	**62%**	**30%**	122
< $3 M	86,100	62,000	**0%**	**60%**	**27%**	149	74,500	45,500	**0%**	**62%**	**29%**	144
Sub-Total	109,800	77,800	**0%**	**60%**	**27%**	173	77,500	50,700	**0%**	**62%**	**29%**	166
No Quantified Amount Claimed	185,400	130,600	**0%**	**72%**	**21%**	160	123,100	96,000	**0%**	**70%**	**25%**	155

Quantified Amount Claimed	Counsel Fees						Taxation Costs					
	Median Claimed	Median Allowed	% of Costs Taxed Off			No. of Bills Taxed [3]	Median Claimed	Median Allowed	% of Costs Taxed Off			No. of Bills Taxed [4]
			Lowest	Highest	Median				Lowest	Highest	Median	
< $120,000	39,000	28,600	**0%**	**30%**	**21%**	5	9,100	5,200	**4%**	**78%**	**36%**	43
$120,000 to < $600,000	60,000	51,800	**0%**	**65%**	**0%**	26	18,900	10,600	**0%**	**83%**	**19%**	57
$600,000 to < $1 M	39,800	30,400	**0%**	**44%**	**2%**	6	16,800	7,300	**0%**	**61%**	**26%**	17
$1 M to < $3 M	46,200	50,000	**0%**	**32%**	**0%**	12	24,100	17,500	**0%**	**50%**	**18%**	19
> $3 M	134,800	109,000	**0%**	**48%**	**18%**	14	23,800	22,600	**0%**	**80%**	**17%**	21
< $1 M	55,700	50,100	**0%**	**65%**	**3%**	37	13,000	6,700	**0%**	**83%**	**27%**	117
< $3 M	52,500	50,100	**0%**	**65%**	**0%**	49	14,500	6,800	**0%**	**83%**	**26%**	136
Sub-Total	60,000	50,100	**0%**	**65%**	**0%**	63	16,200	7,300	**0%**	**83%**	**26%**	157
No Quantified Amount Claimed	68,000	55,500	**0%**	**78%**	**2%**	88	20,300	17,200	**0%**	**83%**	**14%**	149

Notes:

(1) See Note 6 at Table 1

(2) See Note 8 at Table 1

(3) See Note 10 at Table 1

(4) See Note 12 at Table 1

Table 5 General Civil Actions – Median Costs Claimed [All Bills]

Amount of Cost Claimed	Total No. of Cases	Median Total Costs	Profit Costs		Counsel Fees		Taxation Costs	
			Median	% vs. Total Costs (1)	Median	% vs. Total Costs (2)	Median	% vs. Total Costs (3)
< $100,000	138	51,200	44,600	87%	14,000	27%	9,100	18%
$100,000 to < $250,000	93	158,800	113,400	71%	33,000	21%	21,000	13%
$250,000 to < $500,000	57	337,000	225,800	67%	80,000	24%	30,800	9%
$500,000 to < $750,000	21	598,400	278,100	46%	276,300	46%	35,400	6%
$750,000 to < $1 M	6	840,100	646,000	77%	107,600	13%	64,400	8%
$1 M to < $1.5 M	14	1,148,600	729,800	64%	394,600	34%	69,600	6%
$1.5 M to < $3 M	3	2,460,900	956,100	39%	1,350,000	55%	91,300	4%
$3 M or above	4	5,242,400	2,012,300	38%	4,144,500	79%	154,500	3%
Overall	336	129,100	102,200	79%	61,000	47%	18,600	14%

Notes:

(1) Percentage represents median profit costs over median total costs.

(2) Percentage represents median counsel's fees over median total costs.

(3) Percentage represents median taxation costs over median total costs.

Table 6 General Civil Actions – Median Total Costs Claimed and Median Total Costs Allowed [All Bills]

Amount of Costs Claimed	Total No. of Cases	Median Total Costs Claimed	Median Total Costs Allowed	% of Costs Taxed Off		
				Lowest	Highest	Median
< $100,000	138	51,200	33,000	6%	69%	31%
$100,000 to < $250,000	93	158,800	126,100	0%	60%	15%
$250,000 to < $500,000	57	337,000	272,700	0%	72%	20%
$500,000 to < $750,000	21	598,400	502,500	0%	64%	22%
$750,000 to < $1 M	6	840,100	789,000	0%	35%	8%
$1 M to < $1.5 M	14	1,148,600	903,600	0%	48%	28%
$1.5 M to < $3 M	3	2,460,900	1,850,000	13%	33%	25%
$3 M or above	4	5,242,400	3,564,600	3%	49%	22%
Overall	336	129,100	111,000	0%	72%	25%

Table 7 General Civil Action - Mode of Disposal by Amount Recovered [All Bills]

Amount Recovered	Total No. of Cases	Consensual Means					
		Consent Order		Acceptance of Payment into Court		Settlement Without Court Order	
		No. of Cases	%	No. of Cases	%	No. of Cases	%
< $120,000	50	4	8%	6	12%	1	2%
$120,000 to < $600,000	59	13	22%	2	3%	0	0%
$600,000 to < $1 M	19	3	16%	3	16%	0	0%
$1 M to < $3 M	28	5	18%	2	7%	1	4%
> $3 M	8	0	0%	0	0%	0	0%
< $1 M	128	20	16%	11	9%	1	1%
< $3 M	156	25	16%	13	8%	2	1%
Sub-Total	164	25	15%	13	8%	2	1%
No Quantified Amount Recovered	172	32	19%	0	0%	17	10%

Notes:

(1) The case types of the 61 cases concluded by default:
- . debt collection - 30 cases
- . property - 7 cases
- . intellectual property - 6 cases
- . admiralty - 1 case
- . other general civil action - 17 cases

(2) Substantive hearing is the hearing whereby the matter is fully litigated.

(3) The case types of the 43 cases categorised as others:
- . Action referred to Arbitration – 2 cases
- . By Interlocutory Appeal – 2 cases
- . Discontinuance – 8 cases
- . Judgment on admission – 1 case
- . Setting aside service of Writ – 1 case
- . Stayed – 1 case
- . Dismissal – 1 case
- . Setting aside of D's 3rd party notice – 1 case
- . Summary disposal without argument – 24 cases
- . Claim withdrawn – 2 cases

Amount Recovered	Total No. of Cases	Non-Consensual Means											
		Default (1)		Striking Out		Summary Judgment		Substantive Hearing (Non Writ) (2)		Trial (Writ)		Others (3)	
		No. of Cases	%	No. of Cases	%	No. of Cases	%	No. of Cases	%	No. of Cases	%	No. of Cases	%
< $120,000	50	29	58%	0	0%	2	4%	1	2%	3	6%	4	8%
$120,000 to < $600,000	59	10	17%	0	0%	17	29%	7	12%	4	7%	6	10%
$600,000 to < $1 M	19	1	5%	0	0%	5	26%	1	5%	4	21%	2	11%
$1 M to < $3 M	28	3	11%	0	0%	7	25%	3	11%	2	7%	5	18%
> $3 M	8	2	25%	0	0%	0	0%	1	13%	4	50%	1	13%
< $1 M	128	40	31%	0	0%	24	19%	9	7%	11	9%	12	9%
< $3 M	156	43	28%	0	0%	31	20%	12	8%	13	8%	17	11%
Sub-Total	164	45	28%	0	0%	31	19%	13	8%	17	10%	18	11%
No Quantified Amount Recovered	172	16	9%	16	9%	14	8%	44	26%	8	5%	25	15%

Table 8 General Civil Actions - Mode of Disposal: Consensual Means vs. Non-Consensual Means [All Bills]

Amount Recovered	Total No. of Cases	Consensual Means (1)		Non-Consensual Means (2)	
		No. of Cases	%	No. of Cases	%
< $120,000	50	11	22%	39	78%
$120,000 to < $600,000	59	15	25%	44	75%
$600,000 to < $1 M	19	6	32%	13	68%
$1 M to < $3 M	28	8	29%	20	71%
> $3 M	8	0	0%	8	100%
< $1 M	128	32	25%	96	75%
< $3 M	156	40	26%	116	74%
Sub-Total	164	40	24%	124	76%
No Quantified Amount Recovered	172	49	28%	123	72%

Notes:

(1) Consensual means include consent order, acceptance of payment into court and settlement without court order.

(2) Non-consensual means include default, striking out, summary judgment, substantive hearing (non writ), trial (writ) and others.

Table 9 General Civil Actions – Interlocutory Activity [(1)] by Number [Non-Provisional Bills Only [(2)]]

Amount Recovered	Total No. of Cases	No. of Interlocutory Application [(3)]									
		None		1 to 3		4 to 6		7 to 9		10 or More	
		No. of Cases	%	No. of Cases	%	No. of Cases	%	No. of Cases	%	No. of Cases	%
< $120,000	12	2	17%	5	42%	5	42%	0	0%	0	0%
$120,000 to < $600,000	31	5	16%	15	48%	7	23%	3	10%	1	3%
$600,000 to < $1 M	9	0	0%	5	56%	3	33%	0	0%	1	11%
$1 M to < $3 M	19	1	5%	6	32%	6	32%	3	16%	3	16%
> $3 M	6	0	0%	4	67%	1	17%	1	17%	0	0%
< $1 M	52	7	13%	25	48%	15	29%	3	6%	2	4%
< $3 M	71	8	11%	31	44%	21	30%	6	8%	5	7%
Sub-Total	77	8	10%	35	45%	22	29%	7	9%	5	6%
No Quantified Amount Recovered	125	30	24%	48	38%	25	20%	13	10%	9	7%

Amount Recovered	Total No. of Cases	No. of Interlocutory Appeals					
		None		1		2 or More	
		No. of Cases	%	No. of Cases	%	No. of Cases	%
< $120,000	12	11	92%	1	8%	0	0%
$120,000 to < $600,000	31	28	90%	3	10%	0	0%
$600,000 to < $1 M	9	8	89%	1	11%	0	0%
$1 M to < $3 M	19	17	89%	2	11%	0	0%
> $3 M	6	6	100%	0	0%	0	0%
< $1 M	52	47	90%	5	10%	0	0%
< $3 M	71	64	90%	7	10%	0	0%
Sub-Total	77	70	91%	7	9%	0	0%
No Quantified Amount Recovered	125	109	87%	9	7%	7	6%

Notes:

(1) Does not include summonses for directions, pre-trial reviews, applications to represent a limited company and applications relating to enforcement of judgment. Apart from applications with dates fixed for hearing (whether the hearing actually took place) applications by way of consent summonses are also included.

(2) Non-provisional bills are bills taxed by the taxing masters. They are either with costs over $100,000 or provisional bills referred to the masters for taxation.

(3) The number of interlocutory applications represents the actual instances of such applications irrespective of the number of the summonses taken out.

Table 10 General Civil Actions - Interlocutory Activity [(1)] by Type [Non-Provisional Bills Only]

Amount Recovered	Total No. of Cases	Pleadings		Discovery		Interrogatory		Time		Unless Order	
		No. of Cases	%	No. of Cases	%	No. of Cases	%	No. of Cases	%	No. of Cases	%
< $120,000	12	2	17%	2	17%	0	0%	5	42%	2	17%
$120,000 to < $600,000	31	11	35%	4	13%	1	3%	18	58%	5	16%
$600,000 to < $1 M	9	4	44%	2	22%	0	0%	4	44%	3	33%
$1 M to < $3 M	19	11	58%	3	16%	1	5%	11	58%	2	11%
> $3 M	6	2	33%	2	33%	0	0%	2	33%	2	33%
< $1 M	52	17	33%	8	15%	1	2%	27	52%	10	19%
< $3 M	71	28	39%	11	15%	2	3%	38	54%	12	17%
Sub-Total	77	30	39%	13	17%	2	3%	40	52%	14	18%
No Quantified Amount Recovered	125	43	34%	11	9%	2	2%	49	39%	15	12%

Amount Recovered	Total No. of Cases	Witness Statements		Expert Evidence		Injunction		Others [(2)]		Interlocutory Appeal [(3)]	
		No. of Cases	%	No. of Cases	%	No. of Cases	%	No. of Cases	%	No. of Cases	%
< $120,000	12	1	8%	0	0%	1	8%	5	42%	1	8%
$120,000 to < $600,000	31	1	3%	0	0%	0	0%	12	39%	3	10%
$600,000 to < $1 M	9	1	11%	1	11%	0	0%	5	56%	1	11%
$1 M to < $3 M	19	1	5%	1	5%	1	5%	13	68%	2	11%
> $3 M	6	1	17%	0	0%	0	0%	5	83%	0	0%
< $1 M	52	3	6%	1	2%	1	2%	22	42%	5	10%
< $3 M	71	4	6%	2	3%	2	3%	35	49%	7	10%
Sub-Total	77	5	6%	2	3%	2	3%	40	52%	7	9%
No Quantified Amount Recovered	125	0	0%	1	1%	13	10%	69	55%	16	13%

Notes:

(1) See note 1 at Table 9.

(2) Others: See annex to Table 10.

(3) These are appeals from masters to judges in chambers. Interlocutory appeals from a judge in chambers to the Court of Appeal are dealt with under Part D – Appeals to the Court of Appeal.

Annex to Table 10
Breakdown of the Interlocutory Activities Belonged to "Others" in the General Civil Actions

Categories	No. of Applications
I) Application concerning the title of the parties	
1. Leave to the applicant be appointed to represent the estate of the deceased and carry on the proceedings	2
2. Leave to add an additional defendant	4
II) Vacation or adjournment of hearings	
3. Application to adjourn an application to a date to be fixed and with some directions suggested	6
4. Consent summons to adjourn an application to a long hearing and vacate the hearing	2
5. Application for OIT of the suggested directions	10
6. Consent summons for directions and vacation of the hearing	9
7. Leave to withdraw the summons and vacate hearing	6
8. Consent summons to adjourn the hearing to be heard before a High Court judge	2
9. Application for direction and to be listed for trial	3
10. Application for the issue of liability be tried before the amount of damages to be awarded if liability is established	1
11. Application for directions and to be tried together with another action	1
12. Consent summons to adjourn the appeal and re-fix another hearing	2
III) Various amendments	
13. Leave to amend the originating summons	2
14. Leave to amend the petition	2
15. Leave to amend the summons	4
16. Leave to amend the order	12
17. Leave to amend the hearsay notice	1
18. Leave to amend the judgment	3
IV) Enter judgment	
19. Unsuccessful application to enter judgment	7
20. Consent summons to enter judgment for the plaintiff's claim and stay of proceedings pending the determination of the defendant's counterclaim	1
21. Leave to withdraw a summons and ask to enter judgment on the terms suggested	1
22. Unsuccessful summary judgment application	19
V) Others	
23. Application for an order that the ship be appraised and sold by bailiff by public tender	1
24. Application by the solicitors for leave to cease to act for the party	17
25. Application for committal order	1
26. Application to consolidate the present action with another action	1
27. Application to continue the proceedings as if begun by writ	1
28. Ex-parte application for leave to appeal	2
29. Leave to cross-examine the deponents of the other parties on their respective affirmations at the petition hearing	2
30. Application that the documents lodged by the defendant be examined by the Government Chemist	1
31. Application declaring the writ has not been duly served on the defendant	1
32. Application asking for leave that the order of decree nisi be made absolute	1
33. Leave to discontinue the action	2
34. Application to dismiss the plaintiff's action for want of prosecution	6

	Categories	No. of Applications
35.	Unsuccessful application to dismiss the action	1
36.	Application to file further evidence to support or oppose another application	14
37.	Application to appoint an independent accountant to inquire and inspect the estate of the deceased	1
38.	Application requesting the defendant to make an interim payment on account of damages	2
39.	Application for interim periodic maintenance sum pending suit	1
40.	Ex-parte application to issue a concurrent writ out of jurisdiction	3
41.	Application for leave to apply for judicial review	2
42.	Application to provide the balance of the account (O.43) and verified by an affidavit	1
43.	Ex-parte application for leave to ask the plaintiff or the court to provide the estate account and related documents to the defendant	1
44.	Ex-parte application for leave to release a certified document from court of the probate of the estate	1
45.	Leave to reply to the respondent's notice for affirming the arbitration's award	1
46.	Application requiring the respondent to provide alternative comparable accommodation upon resumption of her existing accommodation	1
47.	Application for an order restraining the advertisement of the petition	1
48.	Application for security for costs	20
49.	Application for an order that the defendant's solicitors to stakehold a certain sum pending the outcome of the action	3
50.	Application to set aside the bankruptcy notice	1
51.	Application to set aside the default judgment	9
52.	Application to set aside the leave for judicial review	1
53.	Application to set aside an order	5
54.	Interim stay of execution pending the determination of a summons	4
55.	Application to stay the proceedings pending the determination of another action	2
56.	Application to stay the proceedings pending the determination of the appeal	9
57.	Application to stay the proceedings upon the plaintiff's undertaking to pay the interlocutory taxed costs in accordance with the schedule	1
58.	Application for an order that no person can open the envelope lodged by the defendant pending the determination of a summons for the trial of a preliminary issue	2
59.	Application to strike out the petition for winding-up order and restrain the advertisement of the petition	1
60.	Ex-parte application for substituted service on the defendant	1
61.	Application to transfer to the construction and arbitration list	2
62.	Application to transfer to the District Court	1
63.	Application of the ancillary relief of the suit be transferred to the High Court	1
64.	Leave to try the case during court vacation	1
65.	Application to vary the costs order	4
66.	Application to vary the order of the maintenance sum	1
67.	Application for an order that notwithstanding the winding-up order, payment made into or out of the bank accounts of the company in the ordinary course of the business and dispositions of property and goods of the company made in the ordinary course of its business for proper value and in good faith between the date of presentation of the petition and the date of judgment shall not be void	1
		Total: 236

Table 11 General Civil Actions with Amount Recovered - Median Costs and Stages for Actions Begun by Writ [Non-Provisional Bills Only]

Stages	No. of Cases	Median Amount Recovered	Median Total Costs for the Stage	% of Costs for the Stage vs. Amount Recovered	Median Total Costs	% of Costs vs. Amount Recovered
Total No. of Cases	63	508,000	N/A	N/A	274,200	54%
					Median Cumulative Total Costs Incurred up to the Stage	**% of Cumulative Costs vs. Amount Recovered**
Concluded before Summons for Directions	29	340,000	129,400	38%	129,400	38%
Continuing after Summons for Directions	34	645,100	64,300	10%	64,300	10%
Concluded before Set Down	13	593,600	100,200	17%	198,300	33%
Continuing after Set Down	21	500,000	63,100	13%	126,100	25%
Concluded before Trial	4	578,800	147,600	26%	315,300	54%
Proceeding to Trial	17	696,500	302,200	43%	400,900	58%
After Commencement of Trial but before Conclusion of Trial	1	200,000	106,900	53%	164,600	82%
Proceeding to Judgment	16	701,800	314,000	45%	414,600	59%

Table 12 General Civil Actions – Percentage of All Cases Concluded at Various Stages for Actions Begun by Writ [Non-Provisional Bills Only]

Stages	No. of Cases	Percentage	Cumulative Percentage
Total No. of Cases	137		
Concluded before Summons for Directions	80	58%	58%
Concluded before Set Down	28	20%	79%
Concluded before Trial	4	3%	82%
After Commencement of Trial but before Conclusion of Trial	2	1%	83%
Concluded by Trial	23	17%	100%

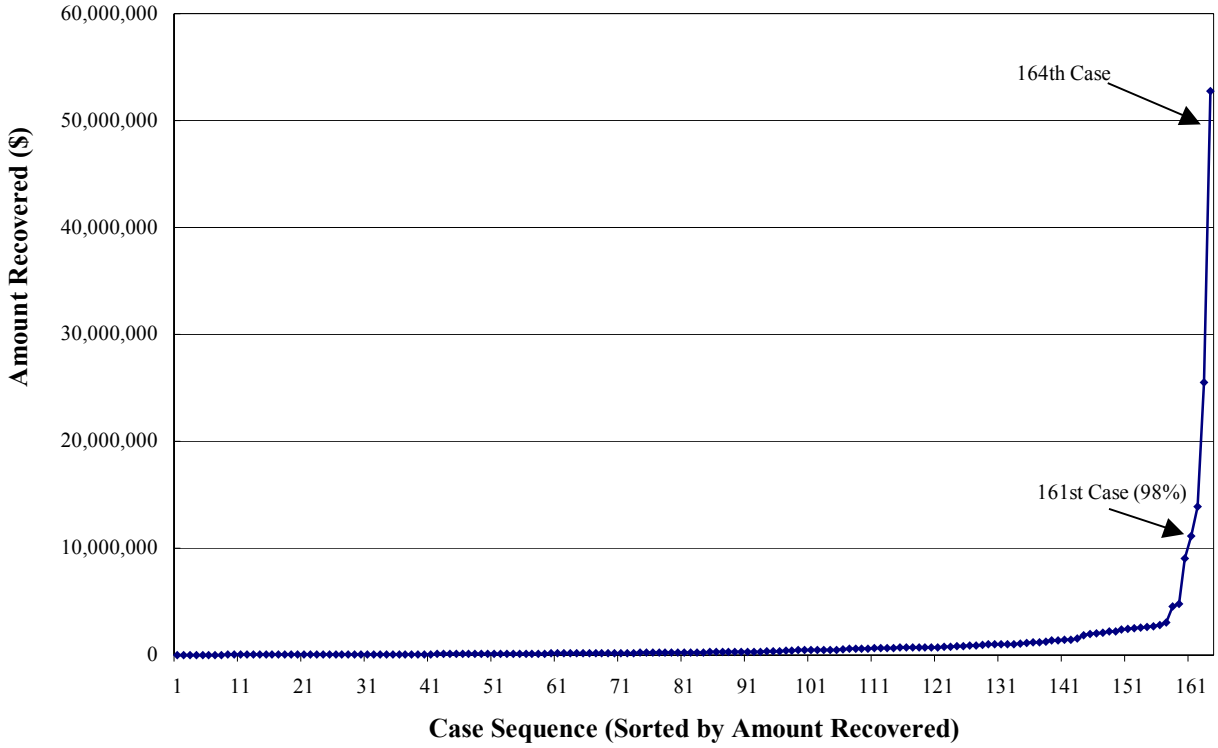
Table 13 General Civil Actions with Amount Recovered - Median Costs and Stages for Actions Begun Otherwise Than by Writ [Non-Provisional Bills Only]

Stages	No. of Cases	Median Amount Recovered	Median Total Costs Incurred for the Stage	% of Costs for The Stage vs. Amount Recovered	Median Total Costs	% of Costs vs. Amount Recovered
Total No. of Cases	14	376,300	N/A	N/A	190,000	50%
					Median Cumulative Total Costs Incurred up to the Stage	**% of Cumulative Costs vs. Amount Recovered**
Concluded before or at 1st Hearing	4	188,400	51,000	27%	51,000	27%
Continuing after 1st Hearing	10	755,300	66,900	9%	66,900	9%
Concluded before Substantive Hearing	0	N/A	N/A	N/A	N/A	N/A
Proceeding to Substantive Hearing	10	755,300	120,600	16%	228,900	30%
After Commencement of Substantive Hearing but before Conclusion	1	720,000	52,700	7%	133,100	18%
Proceeding to Judgment	9	790,600	134,300	17%	266,400	34%

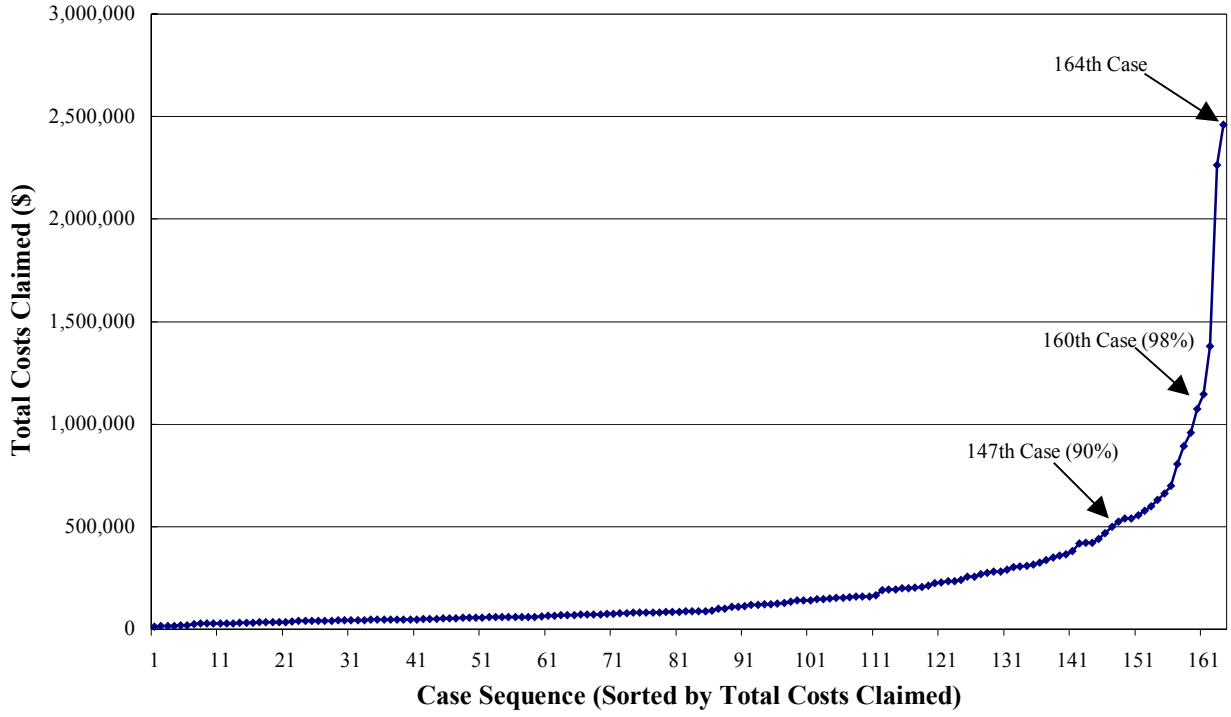
Table 14 General Civil Actions - Percentage of All Cases Concluded at Various Stages for Actions Begun Otherwise Than by Writ [Non-Provisional Bills Only]

Stages	No. of Cases	Percentage	Cumulative Percentage
Total No. of Cases	14		
Concluded before or at 1st Hearing	4	29%	29%
Concluded before Substantive Hearing	0	0%	29%
After Commencement of Substantive Hearing but before Conclusion	1	7%	36%
Proceeding to Judgment	9	64%	100%

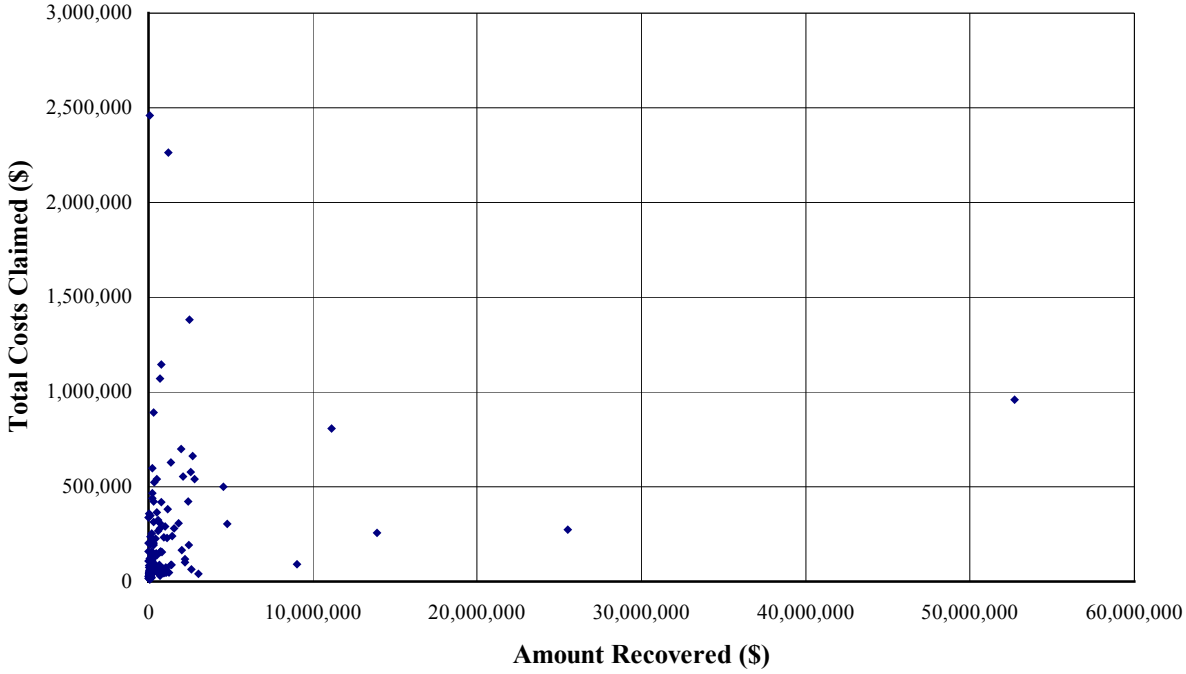
Graph 1: General Civil Actions - Amount Recovered Profile (164 Cases)



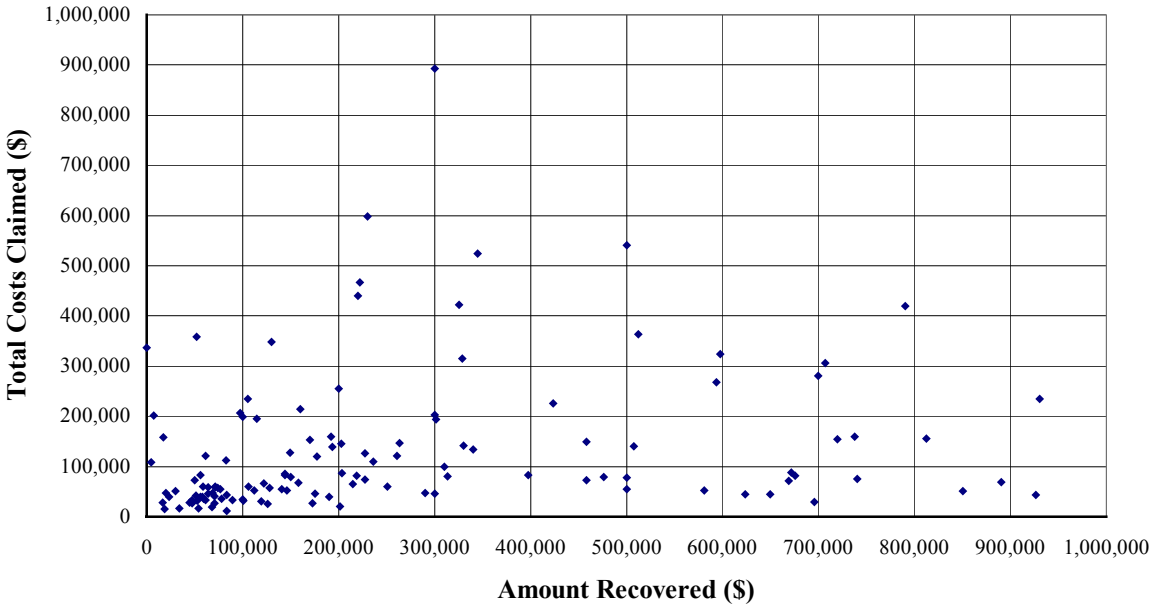
Graph 2: General Civil Actions - Total Costs Claimed Profile



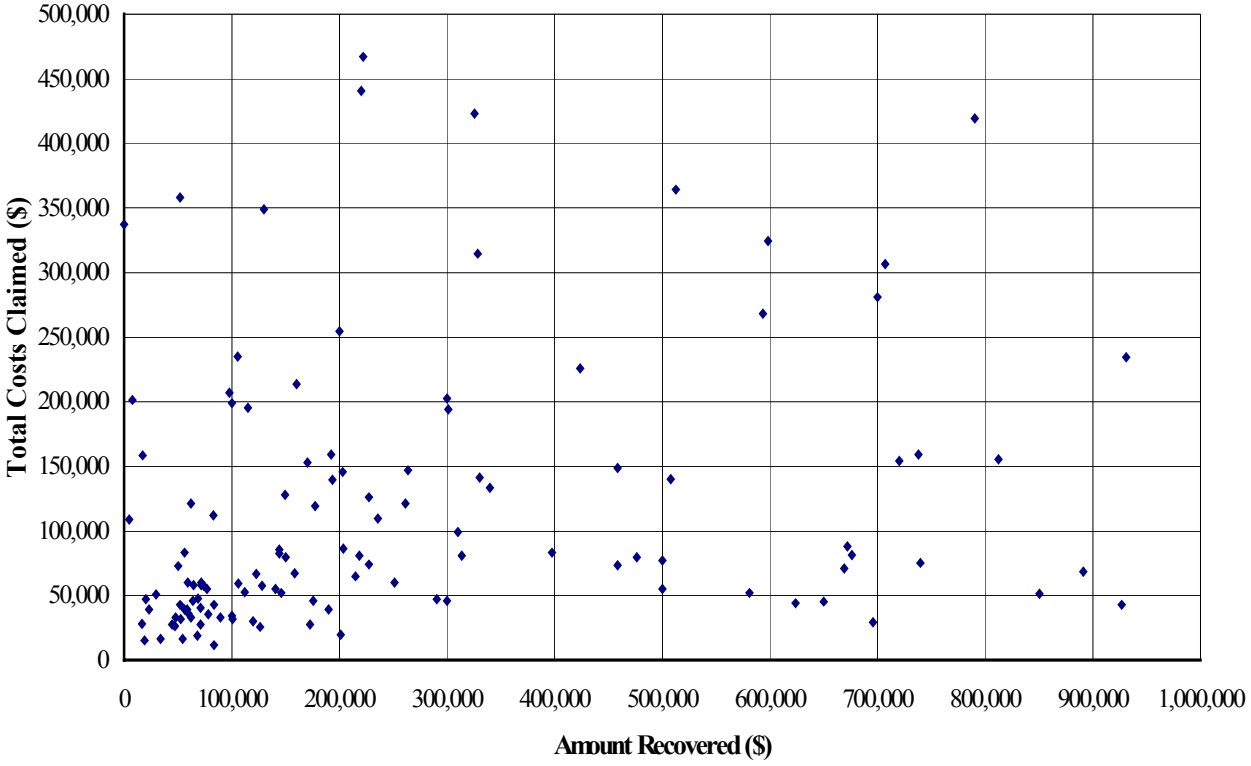
Graph 3 : General Civil Actions - Amount Recovered versus Total Costs Claimed (164 cases)



Graph 4: General Civil Actions - Amount Recovered (under $1M) versus Total Costs Claimed (under $1M) (125 cases)



Graph 5: General Civil Actions - Amount Recovered (under $1M) versus Total Costs Claimed (under $500,000) (121 cases)



Part B - Personal Injury Actions

Table 15 Personal Injury Actions - Amount Recovered and Costs Claimed and Costs Allowed [All Bills]

Amount Recovered [1]	Total No. of Cases	Amount Recovered			Total Costs [3]								Profit Costs [6]							
					Claimed				Allowed				Claimed				Allowed			
		Lowest	Highest	Median	Lowest	Highest	Median	No. of Bills Submitted [4]	Lowest	Highest	Median	No. of Bills Taxed [5]	Lowest	Highest	Median	No. of Bills Submitted	Lowest	Highest	Median	No. of Bills Taxed [7]
< $120,000	8	40,000	100,000	**100,000**	73,600	245,800	**127,100**	8	48,200	194,000	**90,800**	5	63,200	186,200	**86,700**	8	43,000	127,000	**44,300**	3
$120,000 to < $600,000	85	120,000	576,900	**315,000**	76,400	793,700	**284,900**	85	43,600	648,400	**236,400**	46	33,000	439,000	**185,900**	85	26,500	425,500	**152,100**	41
$600,000 to < $1 M	46	600,000	997,900	**793,000**	160,800	1,171,600	**379,700**	46	106,900	611,600	**285,000**	21	105,100	690,000	**243,200**	46	96,200	348,100	**193,500**	19
$1 M to < $3 M	45	1,000,000	2,680,000	**1,364,500**	229,100	1,285,500	**487,500**	45	223,700	1,208,600	**455,200**	22	134,700	723,000	**268,300**	45	110,300	723,000	**272,400**	22
$3 M to < $5 M	12	3,000,000	4,800,000	**3,300,700**	294,000	4,646,800	**879,000**	12	372,900	4,050,400	**630,800**	6	171,900	2,114,700	**468,600**	12	222,500	1,694,000	**342,100**	6
$5 M or above	7	5,000,000	12,250,000	**6,907,900**	542,300	3,816,400	**1,466,200**	7	988,300	3,202,700	**2,316,800**	4	306,500	1,968,600	**693,400**	7	489,700	1,650,000	**669,200**	3
< $1 M	139	40,000	997,900	**400,000**	73,600	1,171,600	**305,000**	139	43,600	648,400	**237,100**	72	33,000	690,000	**201,500**	139	26,500	425,500	**156,500**	63
< $3 M	184	40,000	2,680,000	**575,900**	73,600	1,285,500	**333,200**	184	43,600	1,208,600	**261,900**	94	33,000	723,000	**219,600**	184	26,500	723,000	**179,600**	85
Sub-Total	203	40,000	12,250,000	**650,000**	73,600	4,646,800	**357,500**	203	43,600	4,050,400	**280,600**	104	33,000	2,114,700	**226,200**	203	26,500	1,694,000	**194,800**	94
No Quantified Amount Recovered [2]	4	N/A	N/A	**N/A**	18,200	480,000	**75,200**	4	25,500	480,000	**33,200**	3	13,300	302,000	**47,300**	4	22,400	302,000	**162,200**	2

Amount Recovered	Total No. of Cases	Counsel's Fees [8]								Expert Fees							
		Claimed				Allowed				Claimed				Allowed			
		Lowest	Highest	Median	No. of Bills Submitted	Lowest	Highest	Median	No. of Bills Taxed [9]	Lowest	Highest	Median	No. of Bills Submitted [10]	Lowest	Highest	Median	No. of Bills Taxed [11]
< $120,000	8	18,000	40,000	**18,500**	(4)	25,000	25,000	**25,000**	1	8,800	44,500	**20,100**	(4)	26,300	44,500	**35,400**	2
$120,000 to < $600,000	85	13,000	272,500	**54,000**	(79)	14,500	181,500	**46,900**	39	500	107,700	**12,900**	(74)	500	75,300	**11,800**	35
$600,000 to < $1 M	46	14,000	319,300	**93,500**	(45)	12,000	180,000	**90,500**	20	500	119,400	**15,500**	(37)	500	55,300	**10,800**	15
$1 M to < $3 M	45	28,500	503,700	**129,000**	(43)	37,500	448,900	**125,000**	22	600	230,900	**25,000**	(36)	600	145,200	**29,000**	18
$3 M to < $5 M	12	59,500	1,847,500	**157,300**	(12)	82,500	1,692,300	**134,000**	6	600	558,200	**77,700**	(11)	600	522,700	**41,200**	6
$5 M or above	7	151,500	1,442,800	**507,900**	(7)	369,200	1,160,400	**383,500**	3	50,200	397,800	**127,500**	(7)	115,800	370,400	**127,500**	3
< $1 M	139	13,000	319,300	**60,900**	(128)	12,000	181,500	**52,800**	60	500	119,400	**13,300**	(115)	500	75,300	**12,200**	52
< $3 M	184	13,000	503,700	**71,000**	(171)	12,000	448,900	**73,800**	82	500	230,900	**15,000**	(151)	500	145,200	**14,700**	70
Sub-Total	203	13,000	1,847,500	**79,300**	(190)	12,000	1,692,300	**79,000**	91	500	558,200	**18,700**	(169)	500	522,700	**18,100**	79
No Quantified Amount Recovered	4	33,600	148,500	**91,100**	(2)	32,000	32,000	**32,000**	1	800	800	**800**	(1)	N/A	N/A	**N/A**	0

Amount Recovered	Total No. of Cases	Taxation Costs [12]							
		Claimed				Allowed			
		Lowest	Highest	Median	No. of Bills Submitted	Lowest	Highest	Median	No. of Bills Taxed [13]
< $120,000	8	8,500	37,400	**22,500**	8	7,000	21,800	**17,600**	3
$120,000 to < $600,000	85	6,500	99,700	**33,500**	85	6,100	72,500	**31,000**	41
$600,000 to < $1 M	46	11,500	122,100	**39,100**	46	14,900	89,000	**44,400**	19
$1 M to < $3 M	45	16,500	149,300	**46,800**	45	18,600	149,300	**46,500**	20
$3 M to < $5 M	12	45,800	230,700	**69,500**	12	34,400	227,700	**61,900**	6
$5 M or above	7	40,500	210,400	**109,100**	7	95,800	210,400	**99,200**	3
< $1 M	139	6,500	122,100	**34,400**	139	6,100	89,000	**33,400**	63
< $3 M	184	6,500	149,300	**37,500**	184	6,100	149,300	**35,400**	83
Sub-Total	203	6,500	230,700	**39,000**	203	6,100	227,700	**36,800**	92
No Quantified Amount Recovered	4	6,600	39,100	**16,600**	4	5,600	5,600	**5,600**	1

Notes:

(1) See Note 2 at Table 1.
(2) See Note 3 at Table 1.
(3) See Note 4 at Table 1.
(4) See Note 5 at Table 1.
(5) See Note 6 at Table 1.
(6) See Note 7 at Table 1.
(7) See Note 8 at Table 1.
(8) See Note 9 at Table 1.
(9) See Note 10 at Table 1.
(10) Not every case involved experts. The figures in brackets represent the number of bills in which experts' fees featured.
(11) Not every bill involved experts' fees. The number of taxed bills represents the number of bills in which experts' fees featured and were actually taxed.
(12) See Note 11 at Table 1.
(13) See Note 12 at Table 1.

Table 16 Personal Injury Actions – Costs Claimed and Costs Allowed (Categorised by Amount Recovered) [All Bills]

Amount Recovered	Total Costs						Profit Costs					
	Median Claimed	Median Allowed	% of Costs Taxed Off			No. of Bills Taxed (1)	Median Claimed	Median Allowed	% of Costs Taxed Off			No. of Bills Taxed (2)
			Lowest	Highest	Median				Lowest	Highest	Median	
< $120,000	127,100	90,800	**10%**	**34%**	**32%**	5	86,700	44,300	**13%**	**36%**	**32%**	3
$120,000 to < $600,000	284,900	236,400	**4%**	**77%**	**19%**	46	185,900	152,100	**3%**	**44%**	**21%**	41
$600,000 to < $1 M	379,700	285,000	**3%**	**76%**	**21%**	21	243,200	193,500	**4%**	**62%**	**24%**	19
$1 M to < $3 M	487,500	455,200	**0%**	**41%**	**17%**	22	268,300	272,400	**0%**	**39%**	**20%**	22
$3 M to < $5 M	879,000	630,800	**13%**	**47%**	**21%**	6	468,600	342,100	**15%**	**52%**	**25%**	6
$5 M or above	1,466,200	2,316,800	**13%**	**33%**	**15%**	4	693,400	669,200	**0%**	**40%**	**16%**	3
< $1 M	305,000	237,100	**3%**	**77%**	**20%**	72	201,500	156,500	**3%**	**62%**	**22%**	63
< $3 M	333,200	261,900	**0%**	**77%**	**20%**	94	219,600	179,600	**0%**	**62%**	**21%**	85
Sub-Total	357,500	280,600	**0%**	**77%**	**19%**	104	226,200	194,800	**0%**	**62%**	**21%**	94
No Quantified Amount Recovered	75,200	33,200	**0%**	**71%**	**29%**	3	47,300	162,200	**0%**	**30%**	**15%**	2

Amount Recovered	Counsel's Fees						Expert Fees					
	Median Claimed	Median Allowed	% of Costs Taxed Off			No. of Bills Taxed (3)	Median Claimed	Median Allowed	% of Costs Taxed Off			No. of Bills Taxed (4)
			Lowest	Highest	Median				Lowest	Highest	Median	
< $120,000	18,500	25,000	**38%**	**38%**	**38%**	1	20,100	35,400	**0%**	**0%**	**0%**	2
$120,000 to < $600,000	54,000	46,900	**0%**	**57%**	**17%**	39	12,900	11,800	**0%**	**61%**	**0%**	35
$600,000 to < $1 M	93,500	90,500	**0%**	**51%**	**26%**	20	15,500	10,800	**0%**	**31%**	**0%**	15
$1 M to < $3 M	129,000	125,000	**0%**	**49%**	**15%**	22	25,000	29,000	**0%**	**58%**	**0%**	18
$3 M to < $5 M	157,300	134,000	**2%**	**42%**	**10%**	6	77,700	41,200	**0%**	**20%**	**3%**	6
$5 M or above	507,900	383,500	**15%**	**57%**	**20%**	3	127,500	127,500	**0%**	**7%**	**7%**	3
< $1 M	60,900	52,800	**0%**	**57%**	**17%**	60	13,300	12,200	**0%**	**61%**	**0%**	52
< $3 M	71,000	73,800	**0%**	**57%**	**17%**	82	15,000	14,700	**0%**	**61%**	**0%**	70
Sub-Total	79,300	79,000	**0%**	**57%**	**17%**	91	18,700	18,100	**0%**	**61%**	**0%**	79
No Quantified Amount Recovered	91,100	32,000	**5%**	**5%**	**5%**	1	800	N/A	**N/A**	**N/A**	**N/A**	0

Amount Recovered	Taxation Costs					
	Median Claimed	Median Allowed	% of Costs Taxed Off			No. of Bills Taxed (5)
			Lowest	Highest	Median	
< $120,000	22,500	17,600	**2%**	**23%**	**18%**	3
$120,000 to < $600,000	33,500	31,000	**0%**	**43%**	**9%**	41
$600,000 to < $1 M	39,100	44,400	**0%**	**36%**	**10%**	19
$1 M to < $3 M	46,800	46,500	**0%**	**30%**	**10%**	20
$3 M to < $5 M	69,500	61,900	**1%**	**37%**	**15%**	6
$5 M or above	109,100	99,200	**0%**	**12%**	**0%**	3
< $1 M	34,400	33,400	**0%**	**43%**	**10%**	63
< $3 M	37,500	35,400	**0%**	**43%**	**10%**	83
Sub-Total	39,000	36,800	**0%**	**43%**	**10%**	92
No Quantified Amount Recovered	16,600	5,600	**14%**	**14%**	**14%**	1

Notes:

(1) See Note 6 at Table 1
(2) See Note 8 at Table 1
(3) See Note 10 at Table 1
(4) See Note 11 at Table 15
(5) See Note 12 at Table 1

Table 17 Personal Injury Actions - Amount Claimed and Costs Claimed and Costs Allowed [All Bills]

Quantified Amount Claimed	Total No. of Cases	Amount Claimed			Total Costs [1]								Profit Costs [4]							
					Claimed				Allowed				Claimed				Allowed			
		Lowest	Highest	Median	Lowest	Highest	Median	No. of Bills Submitted [2]	Lowest	Highest	Median	No. of Bills Taxed [3]	Lowest	Highest	Median	No. of Bills Submitted	Lowest	Highest	Median	No. of Bills Taxed [5]
< $120,000	6	8,000	84,000	**23,000**	146,800	631,600	**214,200**	6	123,300	229,200	**181,600**	4	81,200	316,700	**162,600**	6	67,600	142,100	**121,400**	4
$120,000 to < $600,000	28	135,200	585,400	**408,700**	93,000	782,500	**211,400**	28	43,600	705,700	**194,000**	15	63,200	467,400	**148,100**	28	43,000	409,700	**167,900**	12
$600,000 to < $1 M	24	601,100	984,400	**778,400**	114,500	1,208,600	**277,200**	24	33,200	648,400	**216,900**	11	62,500	613,600	**199,400**	24	77,900	425,500	**167,700**	8
$1 M to < $3 M	68	1,026,100	2,961,200	**1,863,000**	160,800	1,285,500	**357,300**	68	106,900	1,208,600	**345,100**	33	94,700	723,000	**228,900**	68	85,000	723,000	**198,000**	31
$3 M to < $5 M	15	3,310,100	4,995,500	**4,027,200**	261,000	865,600	**494,500**	15	210,500	697,000	**392,100**	10	145,900	573,500	**297,500**	15	159,500	381,300	**235,100**	10
$5 M or above	22	5,120,700	36,730,500	**6,399,500**	36,000	4,646,800	**608,800**	22	25,500	4,050,400	**695,500**	10	32,100	2,114,700	**334,600**	22	22,400	1,694,000	**387,400**	9
< $1 M	58	8,000	984,400	**552,200**	93,000	1,208,600	**244,700**	58	33,200	705,700	**198,700**	30	62,500	613,600	**162,800**	58	43,000	425,500	**156,600**	24
< $3 M	126	8,000	2,961,200	**1,086,600**	93,000	1,285,500	**316,300**	126	33,200	1,208,600	**250,700**	63	62,500	723,000	**210,000**	126	43,000	723,000	**168,400**	55
Sub-Total	163	8,000	36,730,500	**1,502,800**	36,000	4,646,800	**351,200**	163	25,500	4,050,400	**284,600**	83	32,100	2,114,700	**222,600**	163	22,400	1,694,000	**194,800**	74
No Quantified Amount Claimed	44	N/A	N/A	**N/A**	18,200	1,616,700	**389,100**	44	48,200	988,300	**276,100**	24	13,300	845,400	**231,400**	44	26,500	489,700	**179,200**	22

Quantified Amount Claimed	Total No. of Cases	Counsel's Fees [6]								Expert Fees							
		Claimed				Allowed				Claimed				Allowed			
		Lowest	Highest	Median	No. of Bills Submitted	Lowest	Highest	Median	No. of Bills Taxed [7]	Lowest	Highest	Median	No. of Bills Submitted [8]	Lowest	Highest	Median	No. of Bills Taxed [9]
< $120,000	6	18,000	93,500	**42,000**	6	25,000	58,500	**37,000**	4	6,400	119,400	**9,400**	4	6,400	10,600	**7,200**	3
$120,000 to < $600,000	28	14,000	174,700	**39,500**	23	12,000	157,200	**28,500**	11	500	74,200	**12,900**	26	500	72,200	**9,000**	13
$600,000 to < $1 M	24	13,000	272,500	**51,500**	23	15,000	148,800	**38,300**	7	500	205,000	**12,500**	20	500	35,900	**11,800**	6
$1 M to < $3 M	68	17,500	503,700	**79,600**	65	21,000	448,900	**90,000**	31	600	230,900	**16,400**	54	600	145,200	**18,100**	23
$3 M to < $5 M	15	36,000	266,300	**141,000**	15	32,000	266,300	**82,500**	9	600	146,000	**15,400**	13	600	127,000	**15,400**	7
$5 M or above	22	28,500	1,847,500	**154,300**	20	110,500	1,692,300	**158,000**	8	8,000	558,200	**49,600**	19	18,600	522,700	**58,800**	8
< $1 M	58	13,000	272,500	**41,000**	52	12,000	157,200	**33,500**	22	500	205,000	**12,300**	50	500	72,200	**9,700**	22
< $3 M	126	13,000	503,700	**63,000**	117	12,000	448,900	**58,500**	53	500	230,900	**14,200**	104	500	145,200	**13,300**	45
Sub-Total	163	13,000	1,847,500	**76,100**	152	12,000	1,692,300	**76,700**	70	500	558,200	**16,500**	136	500	522,700	**17,600**	60
No Quantified Amount Claimed	44	15,000	440,000	**89,300**	40	15,000	369,200	**79,300**	22	6,700	357,800	**25,300**	34	8,000	115,800	**19,600**	19

Quantified Amount Claimed	Total No. of Cases	Taxation Costs [10]							
		Claimed				Allowed			
		Lowest	Highest	Median	No. of Bills Submitted	Lowest	Highest	Median	No. of Bills Taxed [11]
< $120,000	6	16,800	40,700	**21,800**	6	16,800	28,000	**19,000**	3
$120,000 to < $600,000	28	18,500	74,600	**29,300**	28	11,700	67,200	**27,800**	12
$600,000 to < $1 M	24	12,200	108,000	**31,000**	24	23,100	89,500	**27,700**	8
$1 M to < $3 M	68	11,500	149,300	**41,200**	68	12,000	149,300	**43,700**	28
$3 M to < $5 M	15	20,800	137,300	**44,100**	15	20,800	112,800	**40,200**	9
$5 M or above	22	6,600	230,700	**63,300**	22	5,600	227,700	**62,900**	9
< $1 M	58	12,200	108,000	**29,300**	58	11,700	89,500	**26,800**	23
< $3 M	126	11,500	149,300	**35,800**	126	11,700	149,300	**35,300**	51
Sub-Total	163	6,600	230,700	**38,500**	163	5,600	227,700	**36,600**	69
No Quantified Amount Claimed	44	6,500	122,100	**43,600**	44	6,100	95,800	**36,600**	24

Notes:

(1) See Note 4 at Table 1.
(2) See Note 5 at Table 1.
(3) See Note 6 at Table 1.
(4) See Note 7 at Table 1.
(5) See Note 8 at Table 1.
(6) See Note 9 at Table 1.
(7) See Note 10 at Table 1.
(8) See Note 10 at Table 15.
(9) See Note 11 at Table 15.
(10) See Note 11 at Table 1.
(11) See Note 12 at Table 1.

Table 18 Personal Injury Actions - Costs Claimed and Costs Allowed (Categorised by Amount Claimed) [All Bills]

Quantified Amount Claimed	Total Costs						Profit Costs					
	Median Claimed	Median Allowed	% of Costs Taxed Off			No. of Bills Taxed (1)	Median Claimed	Median Allowed	% of Costs Taxed Off			No. of Bills Taxed (2)
			Lowest	Highest	Median				Lowest	Highest	Median	
< $120,000	214,200	181,600	**9%**	**20%**	**18%**	4	162,600	121,400	**11%**	**22%**	**18%**	4
$120,000 to < $600,000	211,400	194,000	**4%**	**65%**	**18%**	15	148,100	167,900	**5%**	**32%**	**17%**	12
$600,000 to < $1 M	277,200	216,900	**15%**	**71%**	**20%**	11	199,400	167,700	**3%**	**35%**	**20%**	8
$1 M to < $3 M	357,300	345,100	**0%**	**76%**	**20%**	33	228,900	198,000	**0%**	**54%**	**25%**	31
$3 M to < $5 M	494,500	392,100	**0%**	**47%**	**17%**	10	297,500	235,100	**0%**	**52%**	**18%**	10
$5 M or above	608,800	695,500	**9%**	**39%**	**15%**	10	334,600	387,400	**0%**	**49%**	**20%**	9
< $1 M	244,700	198,700	**4%**	**71%**	**18%**	30	162,800	156,600	**3%**	**35%**	**19%**	24
< $3 M	316,300	250,700	**0%**	**76%**	**20%**	63	210,000	168,400	**0%**	**54%**	**20%**	55
Sub-Total	351,200	284,600	**0%**	**76%**	**19%**	83	222,600	194,800	**0%**	**54%**	**20%**	74
No Quantified Amount Claimed	389,100	276,100	**2%**	**77%**	**23%**	24	231,400	179,200	**0%**	**62%**	**29%**	22

Quantified Amount Claimed	Counsel's Fees						Expert Fees					
	Median Claimed	Median Allowed	% of Costs Taxed Off			No. of Bills Taxed (3)	Median Claimed	Median Allowed	% of Costs Taxed Off			No. of Bills Taxed (4)
			Lowest	Highest	Median				Lowest	Highest	Median	
< $120,000	42,000	37,000	**7%**	**29%**	**19%**	4	9,400	7,200	**0%**	**12%**	**0%**	3
$120,000 to < $600,000	39,500	28,500	**0%**	**57%**	**17%**	11	12,900	9,000	**0%**	**40%**	**0%**	13
$600,000 to < $1 M	51,500	38,300	**0%**	**50%**	**14%**	7	12,500	11,800	**0%**	**0%**	**0%**	6
$1 M to < $3 M	79,600	90,000	**0%**	**37%**	**21%**	31	16,400	18,100	**0%**	**58%**	**0%**	23
$3 M to < $5 M	141,000	82,500	**0%**	**44%**	**16%**	9	15,400	15,400	**0%**	**22%**	**0%**	7
$5 M or above	154,300	158,000	**2%**	**57%**	**16%**	8	49,600	58,800	**0%**	**20%**	**2%**	8
< $1 M	41,000	33,500	**0%**	**57%**	**17%**	22	12,300	9,700	**0%**	**40%**	**0%**	22
< $3 M	63,000	58,500	**0%**	**57%**	**17%**	53	14,200	13,300	**0%**	**58%**	**0%**	45
Sub-Total	76,100	76,700	**0%**	**57%**	**17%**	70	16,500	17,600	**0%**	**58%**	**0%**	60
No Quantified Amount Claimed	89,300	79,300	**0%**	**51%**	**13%**	22	25,300	19,600	**0%**	**61%**	**0%**	19

Quantified Amount Claimed	Taxation Costs					
	Median Claimed	Median Allowed	% of Costs Taxed Off			No. of Bills Taxed (5)
			Lowest	Highest	Median	
< $120,000	21,800	19,000	**0%**	**12%**	**10%**	3
$120,000 to < $600,000	29,300	27,800	**0%**	**37%**	**13%**	12
$600,000 to < $1 M	31,000	27,700	**0%**	**17%**	**8%**	8
$1 M to < $3 M	41,200	43,700	**0%**	**36%**	**11%**	28
$3 M to < $5 M	44,100	40,200	**0%**	**37%**	**12%**	9
$5 M or above	63,300	62,900	**0%**	**35%**	**5%**	9
< $1 M	29,300	26,800	**0%**	**37%**	**12%**	23
< $3 M	35,800	35,300	**0%**	**37%**	**11%**	51
Sub-Total	38,500	36,600	**0%**	**37%**	**11%**	69
No Quantified Amount Claimed	43,600	36,600	**0%**	**43%**	**9%**	24

Notes:

(1) See Note 6 at Table 1.
(2) See Note 8 at Table 1.
(3) See Note 10 at Table 1.
(4) See Note 11 at Table 15.
(5) See Note 12 at Table 1.

Table 19 Personal Injury Actions - Median Costs Claimed [All Bills]

Amount of Costs Claimed	Total No. of Cases	Median Total Costs	Profit Costs		Counsel Fees	
			Median	% vs. Total Costs (1)	Median	% vs. Total Costs (2)
< $100,000	7	76,400	52,100	68%	18,000	24%
$100,000 to < $250,000	49	191,300	120,900	63%	36,100	19%
$250,000 to < $500,000	91	351,200	221,900	63%	71,900	20%
$500,000 to < $750,000	33	595,400	343,600	58%	158,300	27%
$750,000 to < $1 M	11	865,600	502,000	58%	217,500	25%
$1 M to < $1.5 M	11	1,208,600	682,600	56%	237,500	20%
$1.5 M to < $3 M	2	1,689,400	757,300	45%	662,200	39%
$3 M or above	3	3,816,400	1,968,600	52%	1,442,800	38%
Overall	207	356,600	225,300	63%	79,300	22%

Amount of Costs Claimed	Total No. of Cases	Median Total Costs	Expert Fees		Taxation Costs	
			Median	% vs. Total Costs (3)	Median	% vs. Total Costs (4)
< $100,000	7	76,400	0	0%	8,500	11%
$100,000 to < $250,000	49	191,300	10,200	5%	25,300	13%
$250,000 to < $500,000	91	351,200	15,500	4%	39,000	11%
$500,000 to < $750,000	33	595,400	29,000	5%	60,100	10%
$750,000 to < $1 M	11	865,600	45,500	5%	84,700	10%
$1 M to < $1.5 M	11	1,208,600	126,900	10%	90,500	7%
$1.5 M to < $3 M	2	1,689,400	166,800	10%	99,600	6%
$3 M or above	3	3,816,400	397,800	10%	210,400	6%
Overall	207	356,600	18,700	5%	38,600	11%

Notes:

(1) Percentage represents median profit costs over median total costs.
(2) Percentage represents median counsel's fees over median total costs.
(3) Percentage represents median expert fees over median total costs.
(4) Percentage represents median taxation costs over median total costs.

Table 20 Personal Injury Actions - Median Total Costs Claimed and Median Total Costs Allowed [All Bills]

Amount of Costs Claimed	Total No. of Cases	Median Total Costs Claimed	Median Total Costs Allowed	% of Costs Taxed Off		
				Lowest	Highest	Median
< $100,000	7	76,400	49,000	15%	36%	29%
$100,000 to < $250,000	49	191,300	142,600	4%	71%	18%
$250,000 to < $500,000	91	351,200	271,300	0%	34%	19%
$500,000 to < $750,000	33	595,400	429,100	1%	77%	25%
$750,000 to < $1 M	11	865,600	626,900	9%	41%	28%
$1 M to < $1.5 M	11	1,208,600	1,044,000	0%	39%	21%
$1.5 M to < $3 M	2	1,689,400	1,531,200	13%	13%	13%
$3 M or above	3	3,816,400	3,202,700	13%	16%	14%
Overall	207	356,600	276,600	0%	77%	19%

Table 21 Personal Injury Actions - Mode of Disposal by Amount Recovered [All Bills]

Amount Recovered	Total No. of Cases	Consensual Means					
		Consent Order		Acceptance of Payment into Court		Settlement Without Court Order	
		No. of Cases	%	No. of Cases	%	No. of Cases	%
< $120,000	8	5	62%	3	38%	0	0%
$120,000 to < $600,000	85	59	69%	11	13%	5	6%
$600,000 to < $1 M	46	38	82%	3	7%	3	7%
$1 M to < $3 M	45	28	62%	4	9%	0	0%
$3 M to < $5 M	12	11	92%	0	0%	0	0%
$5 M or above	7	3	43%	1	14%	2	29%
< $1 M	139	102	73%	17	12%	8	6%
< $3 M	184	130	71%	21	11%	8	4%
Sub-Total	203	144	71%	22	11%	10	5%
No Quantified Amount Recovered	4	0	0%	0	0%	0	0%

Amount Recovered	Total No. of Cases	Non-Consensual Means									
		Default		Striking Out		Summary Judgment		Trial		Discontinuance	
		No. of Cases	%	No. of Cases	%	No. of Cases	%	No. of Cases	%	No. of Cases	%
< $120,000	8	0	0%	0	0%	0	0%	0	0%	0	0%
$120,000 to < $600,000	85	0	0%	0	0%	0	0%	10	12%	0	0%
$600,000 to < $1 M	46	0	0%	0	0%	0	0%	2	4%	0	0%
$1 M to < $3 M	45	0	0%	0	0%	0	0%	13	29%	0	0%
$3 M to < $5 M	12	0	0%	0	0%	0	0%	1	8%	0	0%
$5 M or above	7	0	0%	0	0%	0	0%	1	14%	0	0%
< $1 M	139	0	0%	0	0%	0	0%	12	9%	0	0%
< $3 M	184	0	0%	0	0%	0	0%	25	14%	0	0%
Sub-Total	203	0	0%	0	0%	0	0%	27	13%	0	0%
No Quantified Amount Recovered	4	0	0%	0	0%	0	0%	3	75%	1	25%

Table 22 Personal Injury Actions - Mode of Disposal: Consensual Means vs. Non-Consensual Means [All Bills]

Amount Recovered	Total No. of Cases	Consensual Means (1)		Non-Consensual Means (2)	
		No. of Cases	%	No. of Cases	%
< $120,000	8	8	100%	0	0%
$120,000 to < $600,000	85	75	88%	10	12%
$600,000 to < $1 M	46	44	96%	2	4%
$1 M to < $3 M	45	32	71%	13	29%
$3 M to < $5 M	12	11	92%	1	8%
$5 M or above	7	6	86%	1	14%
< $1 M	139	127	91%	12	9%
< $3 M	184	159	86%	25	14%
Sub-Total	203	176	87%	27	13%
No Quantified Amount Recovered	4	0	0%	4	100%

Notes:

(1) Consensual means include consent order, acceptance of payment into court and settlement without court order.
(2) Non-consensual means include default, striking out, summary judgment, substantive hearing (non writ), trial (writ) and others.

Table 23 Personal Injury Actions - Interlocutory Activity [(1)] by Number [Non-Provisional Bills Only]

Amount Recovered	Total No. of Cases	No. of Interlocutory Application [(2)]									
		None		1 to 3		4 to 6		7 to 9		10 or More	
		No. of Cases	%	No. of Cases	%	No. of Cases	%	No. of Cases	%	No. of Cases	%
< $120,000	7	3	43%	3	43%	1	14%	0	0%	0	0%
$120,000 to < $600,000	82	25	30%	47	57%	8	10%	1	1%	1	1%
$600,000 to < $1 M	46	11	24%	25	54%	8	17%	2	4%	0	0%
$1 M to < $3 M	45	16	36%	19	42%	8	18%	1	2%	1	2%
$3 M to < $5 M	12	1	8%	6	50%	4	33%	0	0%	1	8%
$5 M or above	7	0	0%	2	29%	2	29%	3	43%	0	0%
< $1 M	135	39	29%	75	56%	17	13%	3	2%	1	1%
< $3 M	180	55	31%	94	52%	25	14%	4	2%	2	1%
Sub-Total	199	56	28%	102	51%	31	16%	7	4%	3	2%
No Quantified Amount Recovered	3	0	0%	0	0%	2	67%	1	33%	0	0%

Amount Recovered	Total No. of Cases	No. of Interlocutory Appeals					
		None		1		2 or More	
		No. of Cases	%	No. of Cases	%	No. of Cases	%
< $120,000	7	7	100%	0	0%	0	0%
$120,000 to < $600,000	82	82	100%	0	0%	0	0%
$600,000 to < $1 M	46	44	96%	2	4%	0	0%
$1 M to < $3 M	45	45	100%	0	0%	0	0%
$3 M to < $5 M	12	10	83%	2	17%	0	0%
$5 M or above	7	7	100%	0	0%	0	0%
< $1 M	135	133	99%	2	1%	0	0%
< $3 M	180	178	99%	2	1%	0	0%
Sub-Total	199	195	98%	4	2%	0	0%
No Quantified Amount Recovered	3	3	100%	0	0%	0	0%

Notes:

(1) Does not include checklist reviews and pre-trial reviews. See also Note 1 at Table 9.
(2) See note 3 at Table 9.

Table 24 Personal Injury Actions - Interlocutory Activity [(1)] by Type [Non-Provisional Bills Only]

Amount Recovered	Total No. of Cases	Pleadings		Discovery		Interrogatory		Time		Unless Order	
		No. of Cases	%	No. of Cases	%	No. of Cases	%	No. of Cases	%	No. of Cases	%
< $120,000	7	3	43%	0	0%	0	0%	2	29%	1	14%
$120,000 to < $600,000	82	27	33%	18	22%	0	0%	23	28%	5	6%
$600,000 to < $1 M	46	16	35%	12	26%	1	2%	13	28%	3	7%
$1 M to < $3 M	45	14	31%	9	20%	0	0%	12	27%	2	4%
$3 M to < $5 M	12	5	42%	4	33%	0	0%	3	25%	1	8%
$5 M or above	7	5	71%	5	71%	0	0%	2	29%	1	14%
< $1 M	135	46	34%	30	22%	1	1%	38	28%	9	7%
< $3 M	180	60	33%	39	22%	1	1%	50	28%	11	6%
Sub-Total	199	70	35%	48	24%	1	1%	55	28%	13	7%
No Quantified Amount Recovered	3	1	33%	3	100%	0	0%	0	0%	1	33%

Amount Recovered	Total No. of Cases	Witness Statements		Expert Evidence		Injunction		Others [(2)]		Interlocutory Appeal [(3)]	
		No. of Cases	%	No. of Cases	%	No. of Cases	%	No. of Cases	%	No. of Cases	%
< $120,000	7	0	0%	0	0%	0	0%	2	29%	0	0%
$120,000 to < $600,000	82	3	4%	0	0%	0	0%	23	28%	0	0%
$600,000 to < $1 M	46	1	2%	2	4%	0	0%	17	37%	2	4%
$1 M to < $3 M	45	1	2%	0	0%	0	0%	18	40%	0	0%
$3 M to < $5 M	12	0	0%	2	17%	0	0%	6	50%	2	17%
$5 M or above	7	0	0%	1	14%	0	0%	6	86%	0	0%
< $1 M	135	4	3%	2	1%	0	0%	42	31%	2	1%
< $3 M	180	5	3%	2	1%	0	0%	60	33%	2	1%
Sub-Total	199	5	3%	5	3%	0	0%	72	36%	4	2%
No Quantified Amount Recovered	3	1	33%	0	0%	0	0%	3	100%	0	0%

Notes:

(1) See Note 1 at Table 23.
(2) Others: see annex to Table 24.
(3) Sees Note 3 at Table 10.

Annex to Table 24
Breakdown of the Interlocutory Activities Belonged to "Others" in the PI Cases

Categories	No. of Applications
I) Application concerning the title of the parties	
1. Application by the applicant to be added as the next friend of the plaintiff	1
2. Leave to amend the name of the plaintiff as the co-administratrixes of the estate of the deceased	2
3. Application by the applicant for leave to be substituted as the intended administratrix of the estate of the deceased	1
4. Leave to the applicant be appointed to represent the estate of the deceased and carry on the proceedings	5
5. Application by an applicant (the widow) for leave to be substituted as the defendant and carry on the proceedings	1
6. Consent summons to add the applicant as one of the defendants	1
7. Application for leave to join the third party as the 2nd defendant	1
II) Vacation or adjournment of hearings	
8. Application to adjourn an application to a date to be fixed and with some directions suggested	3
9. Consent summons to adjourn an application to a long hearing and vacate the hearing	2
10. Consent summons for directions and vacation of the hearing	5
11. Consent summons for an adjournment and vacation of the hearing	4
12. Consent summons for time to make payment into court and withdrawal of a summons	2
13. Leave to withdraw the summons and vacate hearing	10
14. Ex-parte application for leave to apply for a checklist review hearing out of time	3
15. Consent summons for an adjournment of the pre-trial review hearing and vacation of the hearing	4
16. Application to vacate a pre-trial review hearing	1
17. Consent summons for the action to be removed from the warned list	1
18. Application for leave to vacate the trial hearing and fix the hearing for the assessment	1
III) Various amendments	
19. Leave to amend the notice to insurer	1
20. Leave to amend the summons	2
21. Consent summons to amend the order	1
22. Leave to amend the hearsay notice	1
23. Leave to amend the final judgment	2
IV) Enter judgment	
24. Application to enter interlocutory judgment	9
25. Consent summons to enter interlocutory judgment on liabilities and ask for directions for assessment of damages	2
V) Others	
26. Application by the solicitors for leave to cease to act for the party	8
27. Application for leave to consolidate with another action	1

	Categories	No. of Applications
28.	Application to ask the court to debar certain persons to be called as witnesses	2
29.	Leave to discontinue the action against one of the defendants	4
30.	Application to dismiss the plaintiff's action for want of prosecution	6
31.	Leave to discontinue the third party proceedings	1
32.	Ex-parte application to issue a third party notice	4
33.	Consent summons for leave to withdraw the third party proceedings	1
34.	Application to ask the deponents of the affirmations to be cross-examined before a Master	2
35.	Application requesting the defendant to make an interim payment on account of damages	7
36.	Ex-parte application for leave to issue a concurrent writ of summons out of jurisdiction	1
37.	Leave to issue writ of subpoena	1
38.	Leave to not applying the provisions of Sec 27 of the Limitation Ordinance to the plaintiff's cause of action	1
39.	Application for payment out of money paid into court after time for acceptance has expired	1
40.	Application for leave to set aside a summons for time extension	1
41.	Application to set aside the writ of summons for defective service	1
42.	Application to set aside the default judgment	6
43.	Application to vary the order for security for costs	1
44.	Application to stay the proceedings unless the plaintiff submits himself to be examined by defendant's medical experts	3
45.	Application to stay the proceedings pending the determination of another action	1
46.	Ex-parte application for substituted service on the defendant	3
47.	Leave to transfer to the Personal Injuries list and further directions	7
48.	Consent summons to withdraw the acknowledgement of service filed	1
49.	Leave to withdraw the sum paid into court	1
50.	Leave to continue the proceedings notwithstanding a winding-up order has been made against the defendant	2
		Total: 133

Table 25 Personal Injury Actions with Amount Recovered - Median Costs and Stages [Non-Provisional Bills Only]

Stages	No. of Cases	Median Amount Recovered	Median Total Costs for the Stage	% of Costs for the Stage vs. Amount Recovered	Median Total Costs	% of Costs vs. Amount Recovered
Total No. of Cases	199	700,000	N/A	N/A	361,600	52%
					Median Cumulative Total Costs Incurred up to the Stage	**% of Cumulative Costs vs. Amount Recovered**
Concluded before 1st CLR	25	300,000	152,000	51%	152,000	51%
Continuing after 1st CLR	174	759,100	146,600	19%	146,600	19%
Concluded before Set Down	31	550,000	45,200	8%	233,300	42%
Continuing after Set Down	143	952,500	92,800	10%	214,400	23%
Concluded before 1st Date of Trial	83	800,000	73,200	9%	273,300	34%
Proceeding to Trial	60	1,051,200	172,500	16%	430,000	41%
Concluded after 1st Date of Trial but before Conclusion	33	1,000,000	164,100	16%	448,600	45%
Concluded after Trial	27	1,100,000	179,600	16%	404,200	37%

Table 26 Personal Injury Actions – Percentage of Cases Concluded at Various Stages [Non-Provisional Bills Only]

Stages	No. of Cases	Percentage	Cumulative Percentage
Total No. of Cases	202		
Concluded before 1st CLR	25	12%	12%
Concluded before Set Down	32	16%	28%
Concluded before 1st Date of Trial	83	41%	69%
Concluded after 1st Date of Trial but before Conclusion	33	16%	86%
Concluded after Trial	29	14%	100%

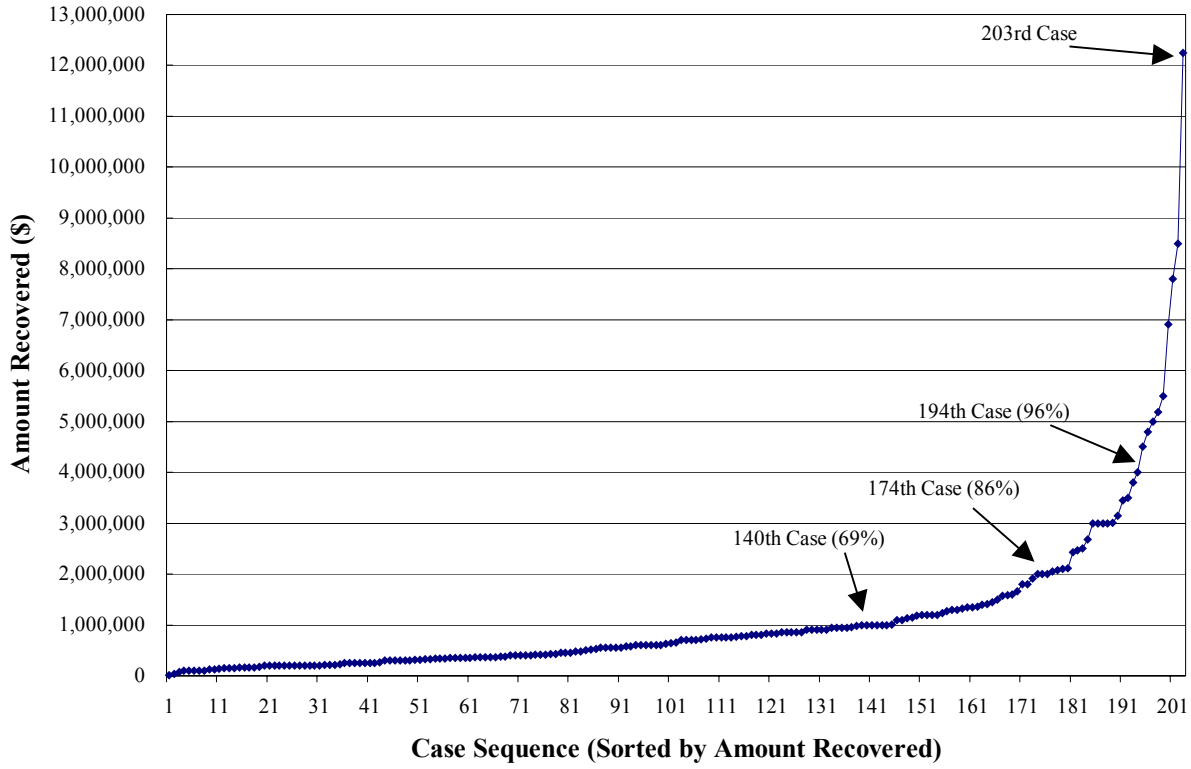
Table 27 Personal Injury Actions - Common Fund Costs [(1)] [All Bills]

Amount Recovered	Total No. of Cases	Median Amount Recovered	Median Total Common Fund Costs Claimed	% vs. Median Amount Recovered
< $120,000	7	100,000	13,400	13%
$120,000 to < $600,000	87	333,200	22,100	7%
$600,000 to < $1 M	45	786,000	29,700	4%
$1 M to < $3 M	44	1,357,200	25,200	2%
$3 M to < $5 M	11	3,150,000	34,000	1%
$5 M or above	7	6,907,900	37,200	1%
< $1 M	139	400,000	22,800	6%
< $3 M	183	560,000	23,900	4%
Sub-Total	201	625,000	24,700	4%
No Quantified Amount Recovered	3	N/A	153,900	N/A

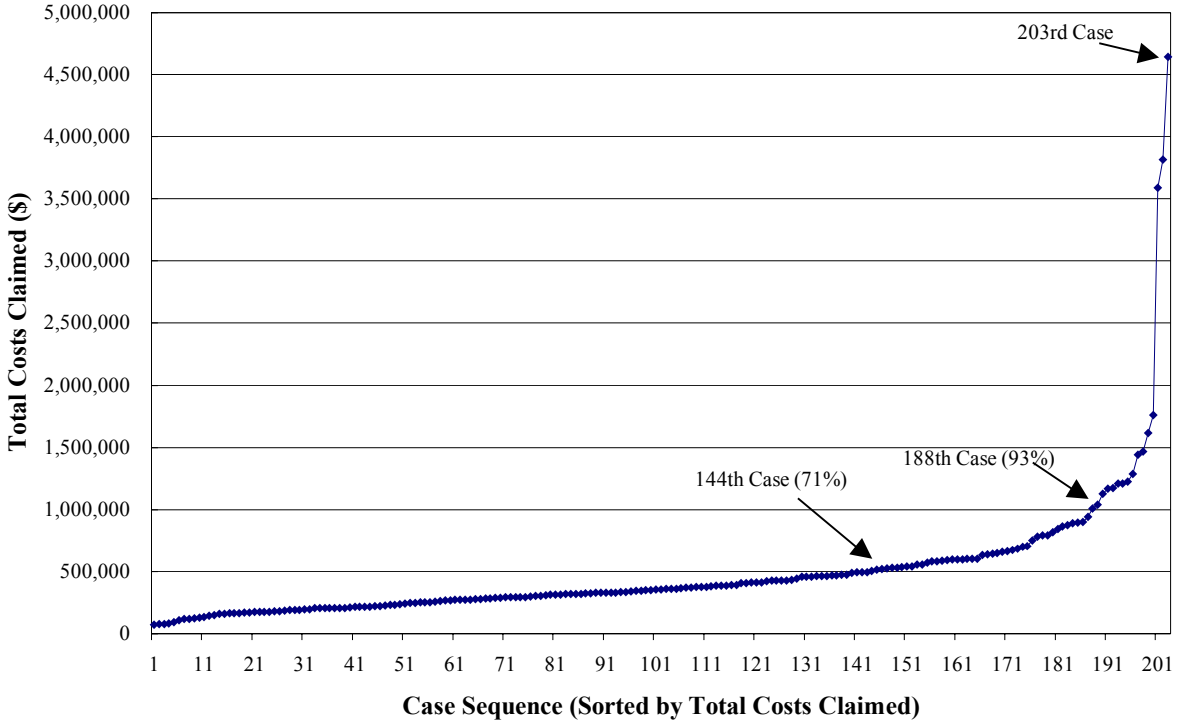
Note:

(1) Common fund costs represents the costs borne by a legally aided person beyond the costs recovered from the other party.

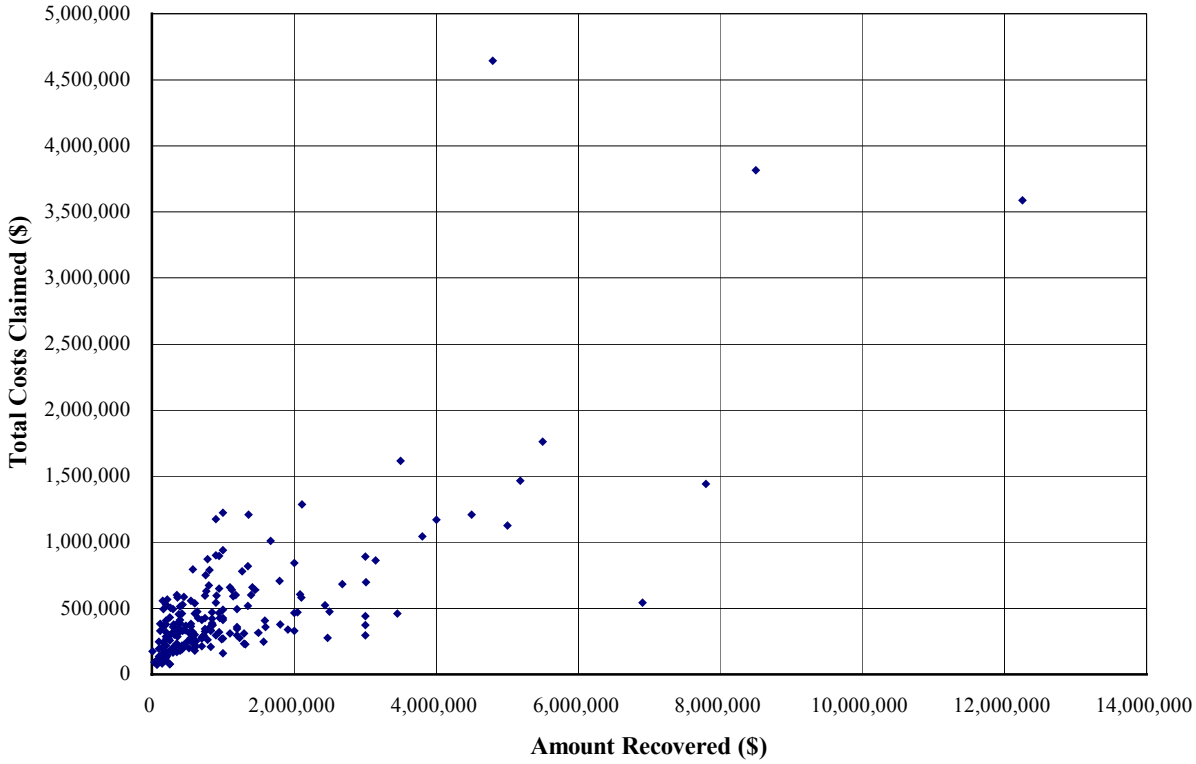
Graph 6: Personal Injury Actions - Amount Recovered Profile



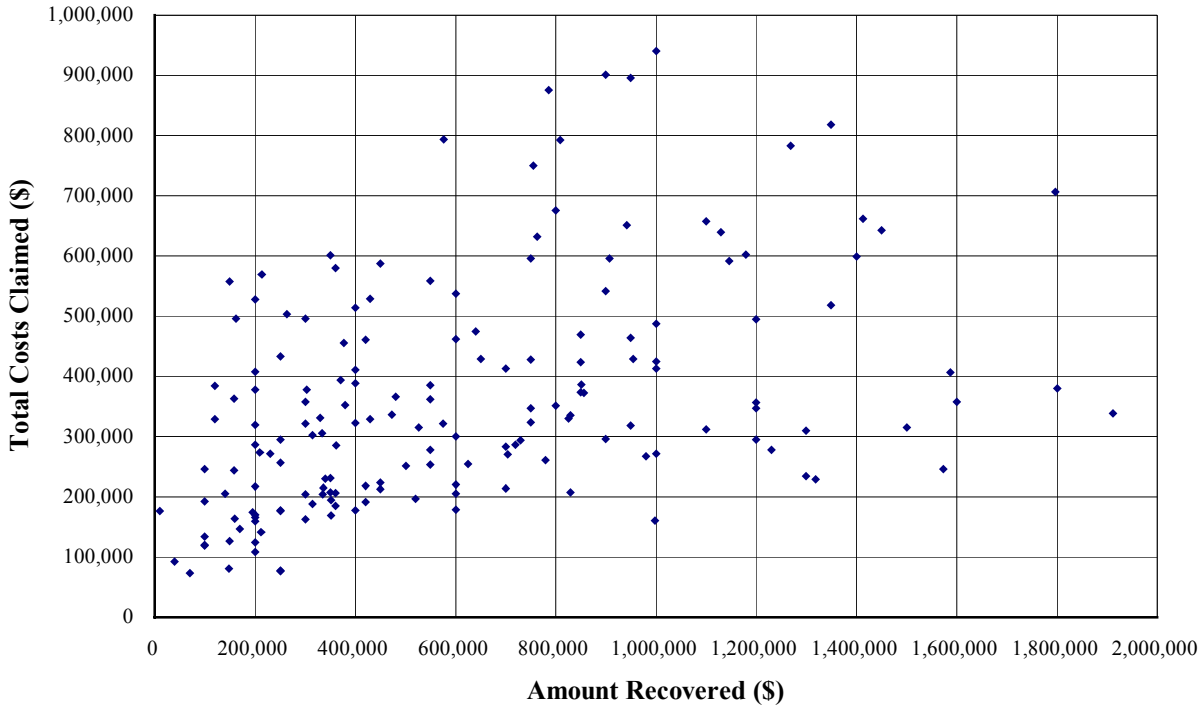
Graph 7: Personal Injury Actions - Total Costs Claimed Profile



Graph 8: Personal Injury Cases - Amount Recovered versus Total Costs Claimed (203 cases)



Graph 9: Personal Injury Actions - Amount Recovered (under $2M) versus Total Costs Claimed (under $1M) (169 ccases)



Part C - Uncontested Insolvency Matters

Table 28 Uncontested Insolvency Matters - Costs Claimed by Case Type

Case Type	Total No. of Cases	Total Costs Claimed				Profit Costs Claimed				
		Lowest	Highest	Median	No. of Bills Taxed	Lowest	Highest	Median	% vs. Total Costs Claimed (1)	No. of Bills Taxed
Bankruptcy	132	6,000	76,700	**46,000**	132	6,000	66,600	**29,500**	**64%**	132
Winding-up	400	16,400	99,700	**43,200**	400	11,500	75,100	**21,200**	**49%**	399
Total	532	6,000	99,700	**43,400**	532	6,000	75,100	**22,400**	**52%**	531

Case Type	Total No. of Cases	Taxation Costs Claimed				
		Lowest	Highest	Median	% vs. Total Costs Claimed (2)	No. of Bills Taxed
Bankruptcy	132	1,500	19,300	**5,400**	**12%**	132
Winding-up	400	3,100	18,400	**4,900**	**11%**	399
Total	532	1,500	19,300	**4,900**	**11%**	531

Notes:

(1) Percentage represents median profit costs over median total costs.
(2) Percentage represents median taxation costs over median total costs.

Table 29 Uncontested Insolvency Matters - Costs Allowed by Case Type

Case Type	Total No. of Cases	Total Costs Allowed				Profit Costs Allowed				
		Lowest	Highest	Median	No. of Bills Taxed	Lowest	Highest	Median	% vs. Total Costs Allowed (1)	No. of Bills Taxed
Bankruptcy	132	5,200	69,800	**38,800**	132	5,200	51,000	**22,400**	**58%**	132
Winding-up	400	13,200	90,400	**38,600**	400	9,900	50,300	**17,000**	**44%**	399
Total	532	5,200	90,400	**38,700**	532	5,200	51,000	**17,600**	**45%**	531

Case Type	Total No. of Cases	Taxation Costs Allowed				
		Lowest	Highest	Median	% vs. Total Costs Allowed (2)	No. of Bills Taxed
Bankruptcy	132	800	9,300	**4,100**	**11%**	132
Winding-up	400	2,500	8,900	**3,300**	**9%**	399
Total	532	800	9,300	**3,400**	**9%**	531

Notes:

(1) Percentage represents median profit costs over median total costs.
(2) Percentage represents median taxation costs over median total costs.

Part D – Appeals to the Court of Appeal

Table 30 Appeals to the Court of Appeal - Costs Claimed by Case Type

Case Type	Total No. of Cases	Total Costs Claimed				Profit Costs Claimed				
		Lowest	Highest	Median	No. of Bills Submitted	Lowest	Highest	Median	% vs. Total Costs Claimed (1)	No. of Bills Submitted
Interlocutory Appeal	13	127,600	801,500	**189,500**	13	46,100	352,200	**74,100**	**39%**	13
Final Appeal	25	112,600	1,554,400	**343,200**	25	33,700	536,700	**88,000**	**26%**	25
Total	38	112,600	1,554,400	**238,400**	38	33,700	536,700	**85,300**	**36%**	38

Case Type	Total No. of Cases	Counsel's Fees Claimed					Taxation Costs Claimed				
		Lowest	Highest	Median	% vs. Total Costs Submitted (2)	No. of Bills Taxed	Lowest	Highest	Median	% vs. Total Costs Claimed (3)	No. of Bills Submitted
Interlocutory Appeal	13	43,500	638,000	**95,800**	**51%**	13	7,000	42,500	**18,100**	**10%**	13
Final Appeal	25	24,000	968,000	**175,500**	**51%**	24	6,500	43,200	**17,800**	**5%**	25
Total	38	24,000	968,000	**116,700**	**49%**	37	6,500	43,200	**17,900**	**8%**	38

Notes:

(1) Percentage represents median profit costs over median total costs.
(2) Percentage represents median counsel's fees over median total costs.
(3) Percentage represents median taxation costs over median total costs.

Table 31: Appeals to the Court of Appeal - Costs Allowed by Case Type

Case Type	Total No. of Cases	Total Costs Allowed				Profit Costs Allowed				
		Lowest	Highest	Median	No. of Bills Taxed	Lowest	Highest	Median	% vs. Total Costs Allowed (1)	No. of Bills Taxed
Interlocutory Appeal	13	96,800	630,700	**174,400**	12	46,100	193,900	**69,800**	**40%**	12
Final Appeal	25	36,200	1,499,700	**207,900**	24	26,200	485,000	**70,200**	**34%**	24
Total	38	36,200	1,499,700	**195,300**	36	26,200	485,000	**70,200**	**36%**	36

Case Type	Total No. of Cases	Counsel's Fees Allowed					Taxation Costs Allowed				
		Lowest	Highest	Median	% vs. Total Costs Allowed (2)	No. of Bills Taxed	Lowest	Highest	Median	% vs. Total Costs Allowed (3)	No. of Bills Taxed
Interlocutory Appeal	13	35,000	524,500	**75,000**	**43%**	13	7,000	42,500	**16,600**	**10%**	12
Final Appeal	25	20,000	965,000	**90,000**	**43%**	21	9,500	41,900	**17,800**	**9%**	19
Total	38	20,000	965,000	**82,500**	**42%**	34	7,000	42,500	**17,200**	**9%**	31

Notes:

(1) Percentage represents median profit costs over median total costs.
(2) Percentage represents median counsel's fees over median total costs.
(3) Percentage represents median taxation costs over median total costs

Table 32: Appeals to the Court of Appeal - Median Costs Claimed

Amount of Costs Claimed	Total No. of Cases	Total Costs Claimed				Profit Costs Claimed				
		Lowest	Highest	Median	No. of Bills Taxed	Lowest	Highest	Median	% vs. Total Costs Claimed (1)	No. of Bills Taxed
$100,000 to < $250,000	20	112,600	246,900	**149,800**	20	33,700	179,200	**72,100**	**48%**	20
$250,000 to < $500,000	9	259,900	482,300	**377,500**	9	59,000	300,900	**88,000**	**23%**	9
$500,000 to < $750,000	6	505,900	637,500	**561,100**	6	80,700	352,200	**210,300**	**37%**	6
$750,000 to < $1 M	2	761,100	801,500	**781,300**	2	142,200	164,500	**153,400**	**20%**	2
$1 M or above	1	1,554,400	1,554,400	**1,554,400**	1	536,700	536,700	**536,700**	**35%**	1
Overall	38	112,600	1,554,400	**238,400**	38	33,700	536,700	**85,300**	**36%**	38

Amount of Costs Claimed	Total No. of Cases	Counsel's Fees Claimed					Taxation Costs Claimed				
		Lowest	Highest	Median	% vs. Total Costs Claimed (2)	No. of Bills Taxed	Lowest	Highest	Median	% vs. Total Costs Claimed (3)	No. of Bills Taxed
$100,000 to < $250,000	20	24,000	120,000	**80,000**	**53%**	19	6,500	33,900	**17,600**	**12%**	20
$250,000 to < $500,000	9	116,700	408,000	**210,000**	**56%**	9	9,500	22,000	**17,600**	**5%**	9
$500,000 to < $750,000	6	177,500	455,000	**319,000**	**57%**	6	13,100	42,500	**21,900**	**4%**	6
$750,000 to < $1 M	2	563,000	638,000	**600,500**	**77%**	2	21,700	38,100	**29,900**	**4%**	2
$1 M or above	1	968,000	968,000	**968,000**	**62%**	1	43,200	43,200	**43,200**	**3%**	1
Overall	38	24,000	968,000	**116,700**	**49%**	37	6,500	43,200	**17,900**	**8%**	38

Notes:

(1) Percentage represents median profit costs over median total costs.
(2) Percentage represents median counsel's fees over median total costs.
(3) Percentage represents median taxation costs over median total costs.

Appendix C

Table of Contents

Table 1 Overall Caseload of the Court of First Instance [1998 - 2000]

Case Type	Case Filing Year		
	1998	**1999**	**2000**
High Court Actions (HCA)	**22482**	**19733**	**10704**
Miscellaneous Proceedings (HCMP)	**7087**	**7998**	**6689**
Special List			
Admiralty Actions (HCAJ)	432	338	312
Bankruptcy Proceedings (HCB)	1637	3879	5487
Commercial Actions (HCCL)	308	235	110
Companies Winding-up Proceedings (HCCW)	942	1161	1242
Constitutional and Administrative Law Proceedings (HCAL)	112	162	2767
Construction and Arbitration Proceedings (HCCT)	137	128	140
Personal Injury Actions (HCPI)	1340	1460	1535
Probate Actions (HCAP)	7	11	22
Special List Sub-total	**4915**	**7374**	**11615**
Other Cases			
Adoption Application (HCAD)	2	0	1
Application for Interim Order (Bankruptcy) (HCBI)	15	6	2
Application to Set Aside a Statutory Demand (HCSD)	17	43	47
Bill of Sale Registration (HCBS)	9	18	17
Book Debt Registration (HCBD)	13	15	50
Matrimonial Causes (HCMC)	3	5	3
Stop Notice (HCSN)	13	20	26
Other Cases Sub-total	**72**	**107**	**146**
Overall Caseload	**34556**	**35212**	**29154**

Table 2 HCA with Breakdown by Subject-matter [1998 - 2000]

Case Nature	Case Filing Year		
	1998	**1999**	**2000**
Arrears of Rent, Rates, etc	334	357	69
Breach of Agreement	77	102	56
Breach of Contract	102	87	63
Commission/Agency Fees	48	5	2
Damages	485	606	435
Declaration	723	500	303
Deposit	20	21	0
Dishonoured Cheque/Bill of Exchange	696	263	5
Goods Sold and Delivered	1218	347	17
Hire Purchase Agreement	771	124	4
Infringement of Copyright, Patents & Designs	122	77	1
Injunction	449	540	487
Interest	2	8	3
Landlords and Tenants (Possession)	3703	3319	2633
Libel and Slander	21	15	4
Money Due/Owing	727	204	65
Order	273	177	103
Other	986	269	113
Personal Injury	8	0	1
Specific Performance	94	56	41
Sum	10997	12577	6253
Wages	35	54	35
Work Done and Material Supplied	118	25	6
No Case Nature Recorded	473	0	5
Total	**22482**	**19733**	**10704**

Table 3 HCMP with Breakdown by Subject-matter [1998 - 2000]

Case Nature	Case Filing Year		
	1998	**1999**	**2000**
Admission of Barristers	74	128	136
Admission of Solicitors	439	430	354
Application for Leave to Appeal	0	0	241
Application for Bail	403	295	329
Declaration	181	77	61
Exemption under Cap. 288, Corrupt and Illegal Practices	0	0	1
Extension of Time	616	250	147
Judicial Review	2	1	2
Landlords and Tenants (Possession)	677	184	170
Mortgage	3686	5855	4507
Order	290	390	509
Other	540	353	173
Petition	11	5	13
Wards of Court	17	25	33
Not Defined	151	5	13
Total	**7087**	**7998**	**6689**

Table 4 High Court Caseload, Judicial Establishment and Legal Profession [1991 - 2000]

	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000
No. of Judges										
Court of Appeal	10	10	10	10	10	10	10	10	10	10
Court of First Instance	20	22	22	22	25	25	25	25	25	25
Masters	8	8	8	7	6	6	6	7	10	10
High Court Caseload										
Court of Appeal										
Civil Appeals	206	211	218	225	258	254	260	336	338	1078
Miscellaneous Appeals	-	-	-	11	16	4	5	14	37	47
Total to Court of Appeal	**206 (100)**	**211 (102)**	**218 (106)**	**236 (115)**	**274 (133)**	**258 (125)**	**265 (129)**	**350 (170)**	**375 (182)**	**1125 (546)**
Court of First Instance										
High Court Actions	10020	9305	11863	13208	13598	14872	14373	22482	19733	10704
Miscellaneous Proceedings	3997	4206	4438	3659	3968	4534	4543	7087	7998	6689
Admiralty Actions	421	335	365	480	463	427	438	432	338	312
Bankruptcy Proceedings	859	887	915	1080	1448	1698	1865	1637	3879	5487
Commercial Actions	205	152	213	250	257	375	255	308	235	110
Companies Winding-up Proceedings	422	423	539	582	631	742	662	942	1161	1242
Constitutional & Administrative Law Proceedings	-	-	-	-	-	-	115	112	162	2767
Construction and Arbitration Proceedings	20	13	24	48	57	87	134	137	128	140
Personal Injury Actions	-	-	-	182	1271	1387	1317	1340	1460	1535
Probate Actions	7	6	11	6	8	19	14	7	11	22
Others	76	76	57	102	59	41	50	72	107	146
Total to Court of First Instance	**16027 (100)**	**15403 (96)**	**18425 (115)**	**19597 (122)**	**21760 (136)**	**24182 (151)**	**23766 (149)**	**34556 (216)**	**35212 (220)**	**29154 (182)**
No. of Practitioners										
Barristers	454 (100)	485 (107)	570 (126)	559 (123)	613 (135)	624 (137)	660 (145)	683 (150)	728 (160)	752 (166)
Solicitors	2479 (100)	2720 (110)	2981 (120)	3307 (133)	3597 (145)	3896 (157)	4310 (174)	4619 (186)	4721 (190)	4890 (197)

Note

(1) Others cases refer to adoptions, bill of sale registrations, matrimonial causes, stop notices, application for Interim Order and application to set aside a Statutory Demand.

Table 5 Comparison of Civil Actions, Miscellaneous Proceedings and Personal Injury Actions Started in the District Court Before and After Increase in Jurisdiction to $600,000

Case Type	Month	Cases Started	Month	Cases Started	Percentage Change
Civil Actions		441		728	+65.1%
Miscellaneous Proceedings	September 1999	228	September 2000	427	+87.3%
Personal Injury Actions		0		16	-
Civil Actions		399		838	+110%
Miscellaneous Proceedings	October 1999	192	October 2000	360	+87.5%
Personal Injury Actions		0		17	-
Civil Actions		202		1002	+396%
Miscellaneous Proceedings	November 1999	194	November 2000	356	+83.6%
Personal Injury Actions		0		40	-
Civil Actions		259		761	+193.8%
Miscellaneous Proceedings	December 1999	204	December 2000	249	+22%
Personal Injury Actions		0		31	-
Civil Actions		166		744	+348.2%
Miscellaneous Proceedings	January 2000	305	January 2001	280	-8.2%
Personal Injury Actions		0		34	-
Civil Actions		141		747	+430%
Miscellaneous Proceedings	February 2000	178	February 2001	373	+110%
Personal Injury Actions		0		62	-
TOTAL					
Civil Actions	**September 1999 to February 2000**	**1608**	**September 2000 to February 2001**	**4820**	**+199.8%**
Miscellaneous Proceedings		**1301**		**2045**	**+57.2%**
Personal Injury Actions		**0**		**200**	**-**

Table 6 Disposal of HCA, HCCL, and HCCT Cases by Default Judgment [1998 - 2000]

	Case Type	High Court Actions			Commercial Actions			Construction and Arbitration Proceedings		
	Cases Filed in	**1998**	**1999**	**2000**	**1998**	**1999**	**2000**	**1998**	**1999**	**2000**
	Caseload (a)	22482	19733	10704	308	235	110	137	128	140
Default Judgment Entered	in 1998	11156	-	-	42	-	-	18	-	-
	in 1999	2670	10501	-	18	27	-	6	19	-
	in 2000	164	2161	5249	2	18	4	0	10	31
	Accumulated Total (b)	13990	12662	5249	62	45	4	24	29	31
	Percentage of Caseload (b/a)	62.3%	64.2%	49%	20.1%	19.2%	3.6%	17.5%	22.7%	22.1%

Note

(1) The data are presented at case level, i.e. one case may have more than one default judgment. For cases involving more than one defendant, only those with default judgment entered against each and every defendant are counted.

Table 7 Disposal of HCA, HCAJ, HCCL and HCPI by Summary Judgment [Total Summary Judgment Obtained by End of 2000]

Case Filing Year	Total Summary Judgment obtained by end of 2000					No. of Applications for Summary Judgment	Success Rate
	High Court Actions	Admiralty Actions	Commercial Actions	Personal Injury Actions	Total		
1998	769	2	4	2	**777**	1802	**43%**
1999	755	17	0	0	**772**	2738	**28%**
2000	243	8	0	1	**252**	1662	**15%**

Notes

(1) The data in respect of summary judgment are presented at case level, i.e. one case may have more than one judgment. For cases involving more than one defendant, only those with summary judgment entered against each and every defendant are counted.

(2) The data in respect of number of applications for summary judgment are presented at application level, i.e. one case may have more than one application.

Table 8 Disposal of HCA, HCAJ, HCCL and HCPI by Summary Judgment [1998 - 2000]

	Case Type	High Court Actions			Admiralty Actions			Commercial Actions			Personal Injury Actions		
	Cases Filed in	**1998**	**1999**	**2000**	**1998**	**1999**	**2000**	**1998**	**1999**	**2000**	**1998**	**1999**	**2000**
	Caseload (a)	22482	19733	10704	432	338	312	308	235	110	1340	1460	1535
Summary Judgment Entered	in 1998	381	-	-	0	-	-	1	-	-	1	-	-
	in 1999	363	506	-	1	12	-	3	0	-	1	0	-
	in 2000	25	249	243	1	5	8	0	0	0	0	0	1
	Accumulated Total (c)	769	755	243	2	17	8	4	0	0	2	0	1
	Percentage of Caseload Filed (c/a)	3.4%	3.8%	2.3%	0.5%	5%	2.6%	1%	0%	0%	0.1%	0%	0.1%

Table 9 Inactive HCA and HCPI as at 31 December 2000

Case Type/Year Filed	1998			1999		
	Caseload	**Inactive Cases**	**%**	**Caseload**	**Inactive Cases**	**%**
High Court Actions	22482	5979	27%	19733	3702	19%
Personal Injury Actions	1340	551	41%	1460	137	9%

Note

(1) Inactive cases refer to cases not known to have been concluded, but in respect of which no court event (hearing or filing of a document) has occurred for one year or more.

Table 10 Disposal of Cases Commenced in 1998, Listed for Trial

Cases Filed in 1998	No. of Cases		
	No.	**Listed for Trial on or before 31/12/2000**	**% of Cases Listed for Trial**
	(a)	**(b)**	**(b/a)**
High Court Actions (HCA)	22482	372	1.7%
Miscellaneous Proceedings (HCMP)	7087	126	1.8%
Admiralty Actions (HCA)	432	0	0%
Bankruptcy Proceedings (HCB)	1637	38	2.3%
Commercial Actions (HCCL)	308	13	4.2%
Companies Winding-up Proceedings (HCCW)	942	87	9.2%
Constitutional and Administrative Law Proceedings (HCAL)	112	47	42%
Construction and Arbitration Proceedings (HCCT)	137	4	2.9%
Personal Injury Actions (PI) (HCPI)	1340	355	26.5%
Probate Actions (HCAP)	7	1	25%
Matrimonial Causes (MC)	3	0	0%
Total	**34487**	**1043**	**3%**

Table 11 Disposal of HCA and HCPI as at 31 December 2000

Case Type	High Court Actions			Personal Injury Actions		
Cases Filed in	**1998**	**1999**	**2000**	**1998**	**1999**	**2000**
Total Actions Started	22482	19733	10704	1340	1460	1535
Total Actions Disposed of by 31.12.2000	17507	15780	6484	489	472	131

Mode of Disposal	1998		1999		2000		1998		1999		2000	
	No.	% of Total Actions Disposed of	No.	% of Total Actions Disposed of	No.	% of Total Actions Disposed of	No.	% of Total Actions Disposed of	No.	% of Total Actions Disposed of	No.	% of Total Actions Disposed of
Default Judgment	13990	79.9%	12662	80.2%	5249	81%	46	9.4%	48	10.2%	20	15.3%
Summary Judgment	769	4.4%	755	4.8%	243	3.7%	2	0.4%	0	0%	1	0.8%
Judgment by Consent	125	0.7%	67	0.4%	22	0.3%	114	23.3%	109	23.1%	19	14.5%
Delivery of Judgment after Trial	123	0.7%	96	0.6%	72	1.1%	61	12.5%	54	11.4%	1	0.8%
Acceptance of Payment into Court	45	0.3%	42	0.3%	22	0.3%	167	34.2%	140	29.7%	40	30.5%
Discontinuance or Withdrawal of Actions with or without Court Order	1521	8.7%	1339	8.5%	598	9.2%	64	13.1%	75	15.9%	35	26.7%
Dismissal of Actions on Striking Out of Pleadings	14	0.1%	13	0.1%	1	0%	2	0.4%	9	1.9%	3	2.3%
Unless Order	920	5.2%	806	5.1%	277	4.3%	33	6.7%	37	7.8%	12	9.2%
Total	**17507**	**100%**	**15780**	**100%**	**6484**	**100%**	**489**	**100%**	**472**	**100%**	**131**	**100%**

Table 12 Waiting-times for Appeals to the Court of Appeal (CA) and for Court of First Instance (CFI) Trials [October 2000 - March 2001]

Court	Month	Court Waiting-time (Days)	Case Waiting-time (Days)
October 2000	CA	82	88
	CFI (Fixture)	187	201
	CFI (Running List)	121	121
November 2000	CA	108	11
	CFI (Fixture)	173	189
	CFI (Running List)	112	112
December 2000	CA	120	135
	CFI (Fixture)	179	188
	CFI (Running List)	129	129
January 2001	CA	117	130
	CFI (Fixture)	189	204
	CFI (Running List)	132	132
February 2001	CA	140	144
	CFI (Fixture)	205	223
	CFI (Running List)	172	172
March 2001	CA	151	154
	CFI (Fixture)	209	211
	CFI (Running List)	143	143

Notes

(1) “Court Waiting-time” refers to the period from the date of listing to the first free date offered by the court.

(2) “Case Waiting-time” refers to the period from the date of listing to the first day of the actual hearing.

Table 13 Waiting-times for Applications Before the Master [October 2000 - March 2001]

Hearing Type	Average Waiting-time (Days)					
	Oct 2000	Nov 2000	Dec 2000	Jan 2001	Feb 2001	Mar 2001
Substantive Hearings						
1 Day	64	69	73	66	65	55
½ Day	63	60	60	56	60	53
30 Mins	14	14	17	8	14	13
Taxation	68	63	66	54	62	70
General Chambers Hearings						
Taxation Call-over	50	67	63	53	48	42
3 Minute List	7	8	9	7	7	7
O 14 List	17	21	24	17	17	17
Winding-up List	84	86	87	86	73	65
Bankruptcy List (Creditor)	80	90	97	105	94	89
Bankruptcy List (Self Petition)	97	99	88	67	81	93
Personal Injury Checklist Review	7 Months	7 Months	7 Months	7 Months	7 Months	4.5 Months
Legal Aid Appeals (Merits)	46	47	50	38	27	30
Legal Aid Appeals (Means)	33	29	35	40	26	21

Table 14 Waiting-times for Applications Before the Judge [October 2000 - March 2001]

Hearing Type	Average Waiting-times (Days)					
	Oct 2000	Nov 2000	Dec 2000	Jan 2001	Feb 2001	Mar 2001
Interlocutory Applications						
More than 1 Hour	9	9	21	43	33	41
Less than 30 Mins	7	6	10	22	7	6
Master's Appeals						
1 Day or More	49	44	75	96	76	80
More than 1 Hour	9	13	30	65	42	41
Less than 30 Mins	7	7	15	23	12	14

Table 15 Civil Trials Conducted in 2000

Case Type	No. of Trial Cases	Settled		No. of Cases Proceeded on Full Trial	Total Days Taken on Full Trial	Median (Included Cases Settled)	Median (on Full Trials)
		On 1st Day	During Trial				
High Court Actions	312	49	21	242	847	2	3
Personal Injury Actions	159	79	9	71	200	1	3
Miscellaneous Proceedings	33	5	0	28	102	1	2
Commercial List Actions	16	0	0	16	61	4	4
Administrative Law List Action	94	4	2	88	142	2	2
Admiralty Actions	2	0	0	2	14	1	1
Construction List Actions	5	1	0	4	42	7	7
Probate Actions	4	0	0	4	25	2	2
Company Winding-up Actions	16	2	2	12	69	1	2
Bankruptcy Actions	7	0	0	7	13	2	2
Total :	**648**	**140**	**34**	**474**	**1515**		

Table 16 Trial Estimates in Relation to Time Actually Taken [1998 - 2000]

	Cases Filed in	No. of Trial Cases	Trial Over-running		Concluding Earlier	
			No. of Cases	%	No. of Cases	%
High Court Actions	1998	218	34	15.6%	57	26.1%
	1999	51	4	7.8%	9	17.6%
	2000	8	0	0%	3	37.5%
Personal Injury Actions	1998	64	12	18.8%	46	71.9%
	1999	75	10	13.3%	45	60%
	2000	6	1	16.7%	4	66.7%

Table 17 Unrepresented Litigants at First Interlocutory Hearing Stage [1998 - 2000]

Cases Started	1998			1999			2000		
Case Type	No. of Cases With Interlocutory Hearings	No. of Cases Involving Unrepresented Litigants	%	No. of Cases With Interlocutory Hearings	No. of Cases Involving Unrepresented Litigants	%	No. of Cases With Interlocutory Hearings	No. of Cases Involving Unrepresented Litigants	%
	(a)	(b)	(b/a)	(c)	(d)	(d/c)	(e)	(f)	(f/e)
High Court Actions	10865	4758	44%	9697	6165	64%	4144	2238	54%
Admiralty Actions	59	12	20%	42	19	45%	30	18	60%
Commercial Actions	129	26	20%	84	10	12%	38	7	18%
Constitutional and Administration Law Proceedings	56	36	64%	107	51	48%	1138	1058	93%
Construction and Arbitration Proceedings	87	8	9%	91	6	7%	63	12	19%
Personal Injury Actions	1043	50	5%	1244	120	10%	677	62	9%
Probate Actions	3	1	33%	3	1	33%	3	0	0%

Notes

(1) Cases with hearing date on or before 31.12.2000 are covered.

(2) Any one of the parties in a case not legally represented will be counted as an unrepresented case.

Table 18 Unrepresented Litigants at Summary Judgment Stage [1998 - 2000]

Cases started	1998			1999			2000		
Case Type	Summary Judgment Hearings	Hearings Involving Unrepresented Litigants	%	Summary Judgment Hearings	Hearings Involving Unrepresented Litigants	%	Summary Judgment Hearings	Hearings Involving Unrepresented Litigants	%
	(a)	(b)	(b/a)	(c)	(d)	(d/c)	(e)	(f)	(f/e)
High Court Actions	781	233	30%	768	293	38%	273	106	**39%**
Admiralty Actions	0	0	0%	0	0	0%	0	0	**0%**
Commercial Actions	4	0	0%	0	0	0%	0	0	**0%**
Constitutional and Administration Law Proceedings	0	0	0%	0	0	0%	0	0	**0%**
Construction and Arbitration Proceedings	3	0	0%	4	0	0%	0	0	**0%**
Personal Injury Actions	2	0	0%	0	0	0%	2	0	**0%**
Probate Actions	0	0	0%	0	0	0%	0	0	**0%**

Notes

(1) Cases with hearing date on or before 31.12.2000 are covered.

(2) Any one of the parties in a case not legally represented will be counted as an unrepresented case.

(3) The data are presented at hearing level, i.e. one case may have more than one hearing.

Table 19 Unrepresented Litigants at Summons for Directions Stage [1998 - 2000]

Cases started	1998			1999			2000		
Case Type	Total No. of Summons for Directions Hearings	No. of Hearings Involving Unrepresented Litigants	%	Total No. of Summons for Directions Hearings	No. of Hearings Involving Unrepresented Litigants	%	Total No. of Summons for Directions Hearings	No. of Hearings Involving Unrepresented Litigants	%
	(a)	(b)	(b/a)	(c)	(d)	(d/c)	(e)	(f)	(f/e)
High Court Actions	873	218	25.0%	455	135	29.7%	76	23	30.3%
Admiralty Actions	17	6	35.3%	6	2	33.3%	19	15	79.0%
Commercial Actions	60	13	21.7%	30	3	10%	6	0	0%
Constitutional and Administration Law Proceedings	6	2	33.3%	15	5	33.3%	996	980	98.4%
Construction and Arbitration Proceedings	17	0	0%	43	6	14.0%	11	0	0%
Personal Injury Actions	1192	63	5.3%	1716	162	9.4%	652	71	10.9%
Probate Actions	2	1	50%	5	1	20%	2	0	0%

Notes

(1) Cases with hearing date on or before 31.12.2000 are covered.

(2) Any one of the parties in a case not legally represented will be counted as an unrepresented case.

(3) The data are presented at hearing level, i.e. one case may have more than one hearing.

Table 20 Unrepresented Litigants at Commencement of Trial [1998 - 2000]

Cases started	1998			1999			2000		
Case Type	No. of Trial Hearings	No. of Cases Involved Unrepresented Litigants at Commencement of Trial	%	No. of Trial Hearings	No. of Cases Involved Unrepresented Litigants at Commencement of Trial	%	No. of Trial Hearings	No. of Cases Involved Unrepresented Litigants at Commencement of Trial	%
	(a)	(b)	(b/a)	(c)	(d)	(d/c)	(e)	(f)	(f/e)
High Court Actions	266	105	39%	92	50	54%	31	13	42%
Admiralty Actions	5	4	80%	6	2	33%	11	10	91%
Commercial Actions	12	3	25%	4	3	75%	0	0	0%
Constitutional and Administration Law Proceedings	37	7	19%	53	12	0%	141	93	66%
Construction and Arbitration Proceedings	6	0	0%	3	0	0%	4	0	0%
Personal Injury Actions	127	19	15%	111	19	17%	6	1	17%
Probate Actions	0	0	0%	0	0	0%	0	0	0%

Notes

(1) Cases with hearing date on or before 31.12.2000 are covered.

(2) Any one of the parties in a case not legally represented will be counted as an unrepresented case.

Table 21 High Court Actions Unrepresented Litigants at Various Stages [1998 - 2000]

Cases started	1998			1999			2000		
	Hearings	Hearings With Unrepresented Litigants	%	Hearings	HearingsWwith Unrepresented Litigants	%	Hearings	Hearings With Unrepresented Litigants	%
First Interlocutory	10865	4758	44%	9697	6165	64%	4144	2238	54%
Summary Judgment	781	233	30%	768	293	38%	273	106	39%
Summons for Directions	873	218	25%	455	135	30%	76	23	30%
Start of Trial	266	105	39%	92	50	54%	31	13	42%

Table 22 Hearings Before the Master in Chambers Held During the Year 2000

	Total No. of Applications	Cases where All were in Person		Cases Where at least One Party was in Person		Cases Where All were Represented	
		No.	%	No.	%	No.	%
Chambers Applications	1326	9	< 1%	348	26%	969	73%

Table 23 Hearings Before the Master Sitting in Court Held During the Year 2000

	Total No. of Applications	Cases Where All were in Person		Cases Where at least One Party was in Person		Cases Where All were Represented	
		No.	%	No.	%	No.	%
Assessment of Damages	163	0	0%	69	42%	94	58%
Examination of Debtors	133	1	<1%	106	80%	26	20%
Others	18	2	11%	7	39%	9	50%
Total	314	3	1%	182	58%	129	41%

Table 24 Hearings Before the Judge (Both in Court and in Chambers) on Masters' Appeals Held During the year 2000

	Total No. of Applications	Cases Where All were in Person		Cases Where at least One Party was in Person		Cases Where All were Represented	
		No.	%	No.	%	No.	%
Hearings in Chambers and in Court	131	6	4%	57	44%	68	52%

Table 25 Total for Hearings Before Master and Judge on Appeal Held During the Year 2000

	Total No. of Applications	Cases Where All were in Person		Cases Where at least One Party was in Person		Cases Where All were Represented	
		No.	%	No.	%	No.	%
Hearings in Chambers and in Court	1781	18	1%	587	33%	1176	66%

Table 26 Percentage of Parties Appearing in Person Counting "Per Party Per Hearing"

Hearing	Instances in Person	Percentage of Whole
Before Master in Chambers and Court	743	19%
Before Judge on Masters' Appeals	214	23%

Table 27 Hearings in Chinese [1998 - 2000]

Court	Case Type	1998			1999			2000		
		Total No. of Trials	No. of Trials Conducted in Chinese	%	Total No. of Trials	No. of Trials Conducted in Chinese	%	Total No. of Trials	No. of Trials Conducted in Chinese	%
Court of Appeal	Criminal Appeal	1160	113	9.7%	888	112	12.6%	633	132	20.9%
	Civil Appeal	486	34	7.0%	539	70	13.0%	358	79	22.0%
Court of First Instance	Criminal Case	579	78	13.5%	525	61	11.6%	434	64	14.7%
	Civil Case	500	20	4.0%	414	22	5.3%	932	88	9.4%
	Appeal from Lower Court	801	284	35.5%	1064	420	39.5%	1003	406	40.5%