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Summary of Civil Justice Reform Changes

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Summary

Details have recently been announced of the civil justice reforms to be implemented in Hong Kong in April 2009. The changes are very detailed and lengthy. This update summarises some of the changes of greater interest to clients and in-house counsel who deal with litigation and dispute resolution, in particular relating to the following changes in the conduct of litigation in the High Court:

- the new underlying objectives of litigation and the court's use of active case management;
- the way in which court cases are commenced;
- case management and interlocutory procedures;
- some new methods by which settlement of a case may be encouraged;
- the conduct of trials and appeals; and
- the costs of an action.

Background

Reform of Hong Kong's civil justice system has been discussed for many years. The Chief Justice set up a working party in 2000, under which proposals were formulated and consultations conducted. A final report was issued in 2004 and further consultations on proposed legislative amendments have since taken place. These culminated in the passage of amending legislation in 2008.

It is expected the reforms will be implemented from April 2009.

To quote Geoffrey Ma CJ, "The completion of the legislative process marks an important milestone in our civil justice system. With the reform, it is in a position to serve the public better in terms of accessibility, cost-effectiveness and efficiency".

The original proposal was for the reforms to be more radical, similar to the Woolf reforms adopted in England & Wales in 2000. As a result of the consultation process, the proposal was "watered" down, to constitute an amendment of the existing Rules of the High Court (and related District Court and some Lands Tribunal rules). The amendments take effect in two main ways:

- purely textual or black letter amendments - some of these are simple changes, some more substantive and some introduce wholly new provisions or concepts. However, in essence, they have resulted in textual amendments to the existing RHC
- the introduction of principles - a more dramatic change is the addition (by way of new RHC Orders 1A and 1B) of "underly-

ing objectives" and powers of active case management, intended to permeate the entire conduct of litigation.

Objectives and Principles

The new Order 1A introduces the underlying objectives and requires the courts to exercise their powers with regard to the same. It is worth paraphrasing these in full - they are aimed at:

- increasing cost-effectiveness;
- ensuring that a case is dealt with as expeditiously as is reasonably practicable;
- promoting a sense of reasonable proportion and procedural economy in the conduct of proceedings;
- ensuring fairness between the parties;
- facilitating settlement of disputes; and
- ensuring that the resources of the Court are distributed fairly.

Further, active case management powers are aimed at:

- identifying the issues in a dispute at an early stage;
- fixing timetables and controlling the progress of the case;
- giving directions to ensure that the trial of a case proceeds quickly and efficiently;
- encouraging co-operation and the use of alternative dispute resolution (ADR); and
- dealing with case management without the need for the parties to attend court (i.e., more paper based applications).

Since these rules and powers are mandated to be used in all aspects of the litigation process - it is likely they will be brought into play whenever the court or parties are doing anything in relation to the case - their introduction will bring a very important new dynamic to litigation. How these underlying objectives and the use of active case management actually play out in practice remains to be seen. JSM will keep clients informed of developments in this respect.

Originating Process and Pleadings

One cosmetic change is that applications before the Court of First Instance will be made only by way of a writ of summons or originating summons (unless an originating motion or petition is required by some other legislation). In fact, the District Court has been using only writs and originating summonses for some years now and no problems have been encountered. Greater flexibility has been introduced relating to which form to use - the choice is generally as to whichever form (writ or originating summons) the plaintiff considers appropriate (subject to a few cases where the use of one or the other is mandatory). This has relevance in that it may now be open for clients to use the quicker originating summons route to resolve more types of disputes.

One more substantial change is the introduction of "statements of truth". These will be required to be added to all pleadings (and amendments thereto) in an action. A statement of truth on a pleading will have to be signed either by a person in a "senior position" in the company which is a party to the action or by its lawyer and serves to verify the contents of the pleaded case are true. It should be noted the statement of truth can then found the basis of an application for contempt of court. Therefore, in future, parties will have to be more certain about what

they plead in an action. (Where an insurer has conduct of proceedings, it may sign a statement of truth, but will have to expressly indicate the fact of the insurer's interest.)

The period of time for service of a defence has been revised from 14 days to 28 days, a more realistic period obviating the need for many applications for an extension of time; but consequently slowing the time within which judgment in default of defence may be obtained.

Lastly, it is noteworthy that a party will no longer be allowed to merely plead a blanket and unspecific denial of a case. A denial in a defence will have to be positively supported by reasons and the recitation of any claimed alternative version of events. Anything else will merely be treated as a non-admission, to be proved by the plaintiff.

Case Management and Interlocutory Proceedings

The important reform of active case management is mentioned above.

The previous procedure was that usually a summons for directions would be heard at a hearing and an order would then be given: in future the parties' solicitors will have to complete a questionnaire and a case management summons may be issued upon which the parties will attend a case management conference. Alternatively, directions for the conduct of the case may be made by the court on paper, perhaps even of its own motion. The directions will likely include a timetable through to trial of the action, including "milestone" events which the parties alone cannot vary. The underlying objectives will then come into greater play and the courts will accordingly have wider powers regarding all types of interlocutory applications.

Another new provision relates to admission - a defendant may admit a claim where money is sought and at the same time propose payment terms which may subsequently be set out in a court order. It is considered that this will allow straight-forward debt collection matters to be resolved more economically.

As for discovery, which traditionally involves a substantial proportion of time and cost in any piece of litigation, reforms will allow for orders to be given to limit discovery in appropriate cases and ways; and the availability of pre-action and third party discovery has been extended to all cases (previously these were only available in personal injury actions).

Offers to Settle

One new, important change is to the system of offers to settle and payments into court. Previously a payment in might be made by a defendant to seek a certain degree of protection against costs. The new system allows for offers and payments in by defendants and plaintiffs. These are described as "sanctioned offers" and "sanctioned payments" which may be accepted by the offeree party. Plaintiffs are likely to use this procedure to offer to accept less than the amount claimed in the pleadings.

Where the plaintiff does not accept a sanctioned offer/payment, and obtains less at trial than the offer/payment, the court

will likely require the plaintiff to pay the defendant's costs after the time of the offer/payment, in the usual way. A novel feature is that the plaintiff may be ordered to pay the defendant's costs on an indemnity basis and pay interest on those costs, at up to judgment rate + 10% (currently more than 18%)!

Conversely, if the plaintiff has made a sanctioned offer which is not accepted by the defendant, and then does better at trial, he may be awarded interest on the judgment sum at the higher rate; and interest on his costs at the higher rate; and indemnity costs.

The statement of truth has been mentioned above. In future, all witness statements and expert reports will also have to carry such a statement, given by the maker of the document, subject also to the same potential penalty as for the verification of pleadings - see above.

As for experts' reports in particular, the court will be empowered to order a single joint expert; experts are stated to owe an overriding duty to the court and not to the client nor the party paying them; instructions to experts will have to include a new Code of Conduct; and the expert will have to recite various matters pertaining to the foregoing in the body of his report.

For the purpose of trials, there may be limitations on evidence to be adduced and time limits may be imposed on speeches, cross-examinations etc.

Appeals

Various changes have been made relating to procedural issues upon appeals. Of greatest interest is an increase in the types of appeal where the appellant must first obtain leave. This will mostly affect appeals to the Court of Appeal from interlocutory orders of judges. However certain types of orders are excepted and may be appealed as of right, including orders for summary judgment, judicial review, striking out or other judgements determinative of the acton.

Costs

Introduced and/or expanded are third party cost orders (allowing an order for payment of costs to be made against a third party, including procedural provisions for the joining of such persons); wasted costs orders against lawyers; and costs only proceedings.

Secondly, costs will no longer by default follow the event in interlocutory proceedings. Judges and Masters are thus given a wider discretion to award and apportion costs, taking into account the underlying objectives, partial successes and conduct of the parties (including the reasonableness of cases and issues, the manner in which the parties have acted and exaggerations). One further item of conduct may be considered: conduct before the action has commenced. It is noteworthy the reforms originally proposed to introduce pre-action protocols (PAPs), which have been introduced in England and were widely thought to both help with earlier settlement but also front-load costs. PAPs were removed from the legislation at a late stage in the Legislative Council because of reservations over the proposed imposition of automatic sanctions for non-compliance with PAPs. However, the reforms have retained the court's power to consider pre-action conduct when consider-

ing the issue of costs. To some extent the courts have always done this - that is why we commonly send letters before action; however, it remains to be seen whether the types of conduct considered relevant will expand.

Proceeding to recover legal costs only will be allowed where parties to a dispute have settled the dispute and it is agreed the successful party may have his costs assessed and paid. The court will now have jurisdiction to tax such costs.

As for procedural matters, Taxing Masters who assess a successful party's costs are given fairly similar case management powers to direct the conduct of the taxation. It is likely in future that taxations will customarily be done on paper, albeit there remains a right to have a hearing, similar to the current summary taxations for small bills.

Lastly, the cost of taxation proceedings themselves will likewise be subject to the underlying objectives, the conduct of the parties etc.

Other

Many other amendments are introduced as part of the reforms. For example:

- provision is made for interim relief (by way of injunction or receiver) in aid of foreign proceedings and foreign arbitrations;
- there are new rules relating to vexatious litigants; and
- various changes are made to the jurisdiction, practice and procedure of the Lands Tribunal and appeals therefrom.

This summary is necessarily brief. The full impact of the reforms will become clearer as the reforms are discussed and the Judiciary releases new, complementary practice directions over the coming 6 months. JSM will continue to review these and communicate with our clients how they will be affected.

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