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Author(s)	Meggitt, G
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CIVIL JUSTICE REFORM IN HONG KONG – ITS PROGRESS AND ITS FUTURE



Gary Meggitt*

The Civil Justice Reform process in Hong Kong began in February 2000 and is expected to reach its culmination with new Rules of the High Court in April 2009. Nine long years therefore separate its beginning and end. This article attempts to answer the questions “Why did the process begin?”, “Where has it led?” and “What will it mean for the courts, litigants and the legal profession?”. In doing so, the article considers the English Civil Procedure Rules, which form the basis of many of the new Rules of the High Court in Hong Kong. In particular it looks at the changes that may result from the introduction of the proposed underlying objectives, sanctioned offers and the expanded scope of discovery.

Introduction

“The wheels of justice grind slowly, but...when they do...they grind exceedingly fine”.¹ Readers will hopefully excuse this article beginning with such an old chestnut – it is a very appropriate one when considering the progress of Civil Justice Reform in Hong Kong.

The grind began in February 2000 when the Chief Justice appointed a Working Party of distinguished Hong Kong lawyers and laymen² to review and recommend changes to the High Court’s rules and procedures.³ The Working Party published an Interim Report and Consultation Paper (“the Interim Report”) in 2001, followed by a Final Report in 2004.

In 2006, a Steering Committee – of equally distinguished members – published a further Consultation Paper and a set of draft amended Rules of the High Court (“RHC”). The next turn of the wheel was in April 2007, when the Civil Justice (Miscellaneous Amendments) Bill 2007 (“the Bill”)

* Barrister at Law and Solicitor Advocate (England & Wales), Teaching Consultant, Faculty of Law, and Fellow of the Asian Institute of International Financial Law University of Hong Kong.

¹ One version of the actual quote is “Though the mills of God grind slowly, yet they grind exceeding small; Though with patience He stands waiting, with exactness grinds He all” from “Retribution” (Sinngedichte) by Friedrich, Freiherr von Logau (1604–1655) but it has been used and abused over the centuries.

² The Working Party’s membership is listed at p 1, para 2 of the Interim Report and Consultative Paper (IR).

³ Whilst this article focuses on the High Court, as did the Working Party and subsequent work, it should be appreciated that the District Court’s rules (RDC) will also be reformed.

was introduced to the Legislative Council. In October 2007, the Steering Committee published another Consultation Paper and draft RHC to take into account the Legislative Council's work on the Bill. The Bill was enacted in February 2008⁴ and a new version of the draft RHC appeared the same month to reflect the responses to the earlier documents. The government hopes that the "new" court rules will be in place by 2 April 2009.⁵

Civil Justice Reform in Hong Kong may, therefore, take over nine years from start to finish. A slow grind indeed, especially when compared to reform in some of the other common law jurisdictions.⁶ Yet why did it begin? Where has it led? Most important of all, what will it mean for the courts, litigants and the legal profession? In looking at these questions, this article focuses on the practical aspects of reform, rather than the theoretical discussions that may – or may not – influence it.

Why? – The Interim Report

The Working Party's Task

The Civil Justice Reform Working Party was given the following terms of reference upon its appointment:

"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."⁷

From the outset, it was accepted that the civil justice system in Hong Kong needed reform. The Interim Report, published on 21 November 2001, quoted numerous judges, practitioners and academics bemoaning the state of common law systems in general and the Hong Kong system in particular. Mr Justice Litton, a former Permanent Judge of the Court of Final Appeal, commented, "Civil litigation is in a crisis. It has been so for some time".⁸

The Interim Report also pointed to numerous earlier reports on the problems of various common law jurisdictions.⁹ The Interim Report paid

⁴ As the Civil Justice (Miscellaneous Amendments) Ordinance 2008 ("the Ordinance").

⁵ Chief Justice's Speech at Ceremonial Opening of the Legal Year 2008, Department of Justice Press Release, 14 January 2008.

⁶ Lord Woolf was appointed by the Lord Chancellor to review the English civil justice system in March 1994. His Lordship's interim report appeared in June 1995, the final report was produced the following year and the English Civil Procedure Rules came into force in April 1999.

⁷ Interim Report, p 1, para 1.

⁸ Interim Report, p 15 para 37.1.

⁹ Interim Report, pp 5–14, s B. "Pressures felt by many civil justice systems".

particular attention to Lord Woolf's "Access to Justice" reports,¹⁰ which ultimately led to the introduction of the Civil Procedure Rules ("CPR") in England and Wales in 1999. This focus on the CPR, when compared to other reforms in other common law jurisdictions, has been maintained throughout the Civil Justice Reform process.

The Working Party's Analysis

The Interim Report identified a number of ailments shared by common law jurisdictions including Hong Kong. These include, in no particular order, expense; delay; uncertainty; and "overly adversarial" practices. Further, there is perceived a lack of equality between wealthy litigants and poorer ones. In addition, the procedural rules are "incomprehensible" to many members of the public. Finally, the courts are "fragmented" and no one has "clear overall responsibility" for their administration.¹¹ In addition to these problems, Hong Kong suffers additional "pressures" caused by expense, delay, complexity and unrepresented litigants.¹²

Expense

The Working Party examined all High Court bills of cost taxed between 1 July 1999 and 30 June 2000.¹³ They discovered that many successful plaintiffs in smaller cases paid their legal advisers more in costs than what they recovered from the defendants in damages.¹⁴ The costs in larger claims were almost, but not quite, as disproportionate. It is felt that this discourages people from pursuing their legitimate rights and also makes Hong Kong a less attractive place in which to do business.

Delay

The Working Party also examined the courts' records to determine the extent and cause of procedural delays.¹⁵ Litigants, their lawyers and the courts themselves were all found to be at fault. Overrunning trials leading to the postponement of subsequent hearings are just one of the many problems that need urgent attention.

Complexity

The Interim Report praised the CPR for "jettisoning" Latin in favour of "functional terms". For example "plaintiff" has been replaced with "claimant" (although this article shall use the term "plaintiff" throughout). More

¹⁰ Interim Report, p 6, paras 16–17 and subsequently throughout both the Interim and Final Reports.

¹¹ Interim Report, p 9, para 24.

¹² Interim Report, pp 15–16, s C. "Pressures felt by the Hong Kong system".

¹³ Interim Report, pp 17–36, s D. "Expense and the Hong Kong Civil Justice System" and Interim Report, Appendix A "Report on Survey of Litigation Costs".

¹⁴ Interim Report, pp 29–30, para 66.

¹⁵ Interim Report, pp 37–48, s E. "Delays and the Hong Kong Civil Justice System" and Appendix C.

importantly, it identified the CPR's "overriding objective" to "deal with cases justly" as crucial to cutting through unnecessary complexity and focusing on what was important to the parties.¹⁶

Litigants in person

The increasing number of unrepresented litigants¹⁷ creates delays because they do not know what to do or when or how to do it. Worse still, there are unrepresented litigants who abuse the system by bringing unjustified claims. An additional problem for Hong Kong is the pressure on the courts' bilingual resources caused by such litigants.

The Working Party's Proposals

If these are the symptoms of the civil justice's illness, what is the diagnosis? The Interim Report answered:

"The faults in the civil justice system are generally seen to be the product of distortions caused by its adversarial design."¹⁸

The Interim Report described this faulty "adversarial design" as emphasising oral advocacy, with the parties "running" their cases whilst the courts play a relatively passive role. This "design fault" is, in the Working Party's opinion, exacerbated by both the growth in litigation, a decline in lawyers' professional standards and a lack of judicial resources.¹⁹

In which case, why not change the design? Sadly, the Interim Report did not broach this question. It makes no comparison of the adversarial and inquisitorial approaches to civil litigation. It may have made for an interesting and productive discussion among the bench, the legal profession and the wider public had it done so. Instead, the Interim Report, as Lord Woolf's "Access to Justice" did, shied away from advocating anything as dramatic as replacing the adversarial system with an inquisitorial system along, say, the French lines.²⁰ This is the first, but not the last, grind to a halt in Civil Justice Reform.

Having said this, the Interim Report's suggested "treatment" of the illness was not timid and credit must be given for this. There were 80 separate Proposals on a wide variety of subjects. These are summarised in Figure 1. The range of the Proposals serves to remind those who have read the

¹⁶ Interim Report, pp 51–53, paras 134–137.

¹⁷ Interim Report, pp 42–70, s G "Unrepresented Litigants" and Appendix C, Tables 17–21.

¹⁸ Interim Report, p 10, para 26.

¹⁹ Interim Report, p 10, para 27.

²⁰ Interim Report, pp 11–14, paras 30–35.6.

Interim Report – and to demonstrate to those who have not – just how much change was anticipated.

Figure 1: Proposals in the Interim Report

- Adopt a CPR-style “overriding objective” and a “comprehensive case management approach”;
- Introduce pre-action protocols;
- Simplify the mode of starting proceedings;
- Streamline default judgments;
- Cut down on prolix pleadings;
- Introduce statements of truth in pleadings;
- Amend the test for summary judgment;
- Adopt CPR Part 36 on settlement offers and payments;
- Consolidate the rules on interim remedies such as *Marevas*;
- Introduce a docket system and increasing the number of specialist lists;
- Reform the rules on multi-party claims;
- Introduce CPR style “disclosure” in place of discovery and expand the scope of pre-action and non-party discovery;
- Reduce the time spent on interlocutory applications;
- Give the courts more control of lay and expert witnesses;
- Adopt a more court-centred approach to trials;
- Reform the rules on appeals, including a new requirement for leave to appeal;
- Simplify the taxation of costs; and
- Introduce an element of compulsory mediation or other types of ADR.

Implementing the Proposals

Just as important as “what” reforms to implement is “how” to implement them. The essential choice, as the Working Party saw it, was between adopting the CPR, subject to minor amendments (Proposal 74) and limited, specific amendments to the existing RHC (Proposal 75).²¹

There were believed to be several advantages to Proposal 74. The drafting work, three years of it, had already been done in England. The “plain English” of the CPR would reduce procedural complexity and could be translated into Chinese with greater ease than an amended RHC. There were several years of English court decisions, which had resolved

²¹ Interim Report, p 255–258, s M. “Implementing the Reforms”.

contentious and ambiguous points, to draw upon. Finally, a “Hong Kong CPR” would represent a fresh start and an opportunity to change the whole culture of dispute resolution in the territory.

In comparison, amending the RHC would involve a great deal of re-drafting. This process would be complicated by the distinct styles of the CPR and RHC, ruling out a “cut and paste” exercise. In addition, there could be serious difficulties over the “boundaries” between any new rules, especially on case management, and the “older” parts of the RHC which would only be resolved by “costly satellite litigation”.²²

Without being too explicit, the Interim Report favoured Proposal 74 over Proposal 75. The grinding of the proverbial wheels thus resumed.

The Consultation

The consultation period for the Interim Report began following its publication on 21 November 2000 and ended on 30 April 2002.

The Working Party indicated that 5,000 printed copies and over 500 CD-ROMs of the Interim Report were distributed, together with 12,000 copies of the Executive Summary. The Working Party’s website received over 41,000 hits, with over 1,600 downloads of the entire Interim Report.²³ The consultation period also saw various briefings and seminars, including four local radio reports.

Almost 100 written submissions in response were received from organisations and individuals, including the Law Society, Bar Association and Consumer Council.²⁴

Where? – The Final Report to the Ordinance

The Working Party’s Final Report was published on 3 March 2004. The object of the Final Report, in the Working Party’s own words, was:

“to identify the areas where reform is considered necessary or desirable and to make recommendations to the Chief Justice accordingly.”²⁵

The Final Report contained 150 Recommendations, which focused on particular rule changes²⁶ rather than general aspirations.

²² Interim Report, p 256, para 699.1.

²³ Final Report, p 3, para 5 and Appendix 1.

²⁴ Final Report, Appendix 2.

²⁵ Final Report, p 3, para 7.

²⁶ Final Report, p 3, para 8.

From Proposals to Recommendations

Inevitably, not all of the 80 Proposals made it through to becoming Recommendations. In particular, the introduction of pre-action protocols (except for specialist lists) was dropped because of concerns that they would front-load costs. Nor was there much support for introducing the CPR's "no reasonable prospect of success" test for summary judgment in place of the existing test. Tighter court controls on lay and expert witnesses also fell by the wayside in light of the consultation.²⁷

There was, however, much more support for simplifying the commencement of proceedings and for statements of truth in pleadings. In addition, CPR Part 36 style settlement offers and payments received considerable backing. Also, while the consultation revealed no enthusiasm for dropping the *Peruvian Guano*²⁸ test for discovery,²⁹ there was support for expanding the scope of pre-action and non-party discovery beyond personal injury cases.

Implementation Revisited

The most telling consequence, however, of the consultation was the fate of Proposal 74. As already stated, the Interim Report gave the impression that the Working Party preferred adopting the CPR to amending the RHC. The Final Report spends a great deal of text dismissing that impression by taking the perceived benefits of adopting the CPR and proceeding to reject them.

Firstly, it is noted that the CPR's principal anticipated benefit of reduced costs had not been enjoyed in England and Wales. The Final Report highlighted various surveys demonstrating that costs had not decreased since 1999.³⁰

Also, it was alleged that the CPR had not reduced the complexity of the civil justice system in England and Wales. Whilst its "plain English" language was clearer, the CPR itself was becoming just as complex and cumbersome as the rules it had replaced. This process was fuelled, in part, by satellite procedural litigation. In addition, although this is not mentioned by the Final Report, there have – as of early 2008 – been 46 wide-ranging CPR updates issued by the UK court service.³¹

The Working Party also changed its mind about the amount of work that would be needed to introduce the CPR compared to amending the

²⁷ Ironically, the Legislative Council is now considering the introduction of a pre-action protocol. Unfortunately, as at the time of writing, there is no draft. Also, the proposed RHC contain tighter court controls on witnesses and experts.

²⁸ *Compagnie Financiere du Pacifique v Peruvian Guano Company* (1882) 11 QBD 55.

²⁹ Final Report, p 243, para 472.

³⁰ Final Report, p 9, para 16.

³¹ The 46th update, covering such diverse subjects as mesothelioma claims and the Companies (Cross-border mergers) Regulations 2007 came into force in stages in early 2008.

RHC. The Final Report implied that the Interim Report had, in particular, underestimated how much retraining of the judiciary, court staff and the profession would be called for. In addition, the “plain English” attractions of the CPR were downplayed, and the ease of translating it into Chinese, when there was already a “serviceable Chinese version” of the RHC, was also doubted.

The Final Report concluded its debunking exercise with a rhetorical question “One must therefore ask to what extent such additional cost would be justified” by adopting the CPR.³² Its answer can be found in its decision:

- “(a) to try, if possible, to avoid the pitfalls revealed by the CPR experience, for example, in respect of measures carrying front-loaded costs;
- (b) to try to form a realistic view of the benefits likely to be achievable under local conditions; and
- (c) to ask whether such benefits can be achieved with less effort than by introduction of an entirely new code.”³³

This required the adoption of Proposal 75. Among those reforms that could be introduced with “less effort” were CPR Part 36 style settlement offers and payments.

Given the opposition to Proposal 74 (including that of the Law Society, the Bar Association and many High Court judges and masters) that emerged during the consultation, the Working Party could be forgiven for retreating from its original, albeit tentative, support for adopting the CPR. Yet this sits uncomfortably with the Final Report’s robust defence of Alternative Dispute Resolution (ADR) in the face of a seemingly equal amount of opposition.

Once again, as with the sidestepping of the adversarial versus inquisitorial issue, one senses a slowing of the – already ponderous – wheels of reform. There is much to be said for Caesar Augustus’ policy of “Make haste slowly”³⁴ but not when the faults in the status quo are so manifest.

Whilst it is true that costs in England have not been arrested by the introduction of the CPR, that is no reason for dismissing it out of hand. The engines of costs are numerous and powerful. The introduction of new legal rights, such as those under the UK Human Rights Act 1998; a society of “consumers” rather than “recipients” of public and private services; and a legal profession that is forced – by market pressures – to behave more like a

³² Final Report, p 16, para 24.

³³ Final Report, p 16, para 26.

³⁴ Suetonius Div Aug 25.

“business” than a “calling” are just three of these engines. One indisputable success of the CPR has been to make such costs transparent – something that is desperately needed in Hong Kong.

The criticism that the CPR has grown in complexity since its introduction is similarly misguided. Are we to expect a legal system to remain unchanged in the face of changes elsewhere in commerce and society? Should it not be amended and added to when mistakes are discovered or improvements designed? Can the CPR or RHC remain pickled in aspic? To put it another way, the Final Report noted that one barristers’ chambers which opposed Proposal 74 spoke – with praise – of the way that the existing civil courts had “evolved over 150 years”. With respect, evolution does not involve the gentle metamorphosis of one creature into another over the course of years; it involves the often abrupt replacement of the former with the latter by the process of natural selection.³⁵

One could continue in this vein but, regrettably, the die is cast and any further comments on yet another – perhaps the most jarring – halt in the grind would serve little practical purpose. Instead, the article shall address the shortcomings of the incremental change embodied by Proposal 75 when dealing with some of the specific changes.

The Steering Committee and the Ordinance

On 19 March 2004, the Chief Justice announced his acceptance of the 150 Recommendations in the Final Report. At the same time, he established a Steering Committee, to be chaired by Chief Judge of the High Court the Hon. Mr Justice Ma, to focus on the amendments to primary and subsidiary legislation that would be required to implement the Recommendations. It eventually determined that 21 of them required amendments to primary legislation, and a further 84 would necessitate amending subsidiary legislation.

On 12 April 2006, the Steering Committee published its own Consultation Paper with, as annexes, a draft Bill; draft Rules of the High Court (Amendment) Rules 2007; and (iii) draft High Court Fees (Amendment) Rules 2007. The Steering Committee sought comments during a three-month consultation period which ended on 12 July 2006. Following this process, the Steering Committee was to “revise and refine” the draft legislation in advance of its introduction into the Legislative Council.

The actual Bill was introduced into the Legislative Council on 25 April 2007. It comprised 38 sections, divided into 12 parts. The Explanatory Memorandum stated that the purpose of the Bill was to amend certain

³⁵ Chapter 4 of the “Origin of the Species” (Charles Darwin).

Ordinances in order to implement some of Working Party's recommendations and several of the Steering Committee's recommendations. The Steering Committee produced a further draft RHC and a Consultation Paper in October 2007. The Bill was signed by the Chief Executive on 5 February 2008; with the Ordinance comprising 46 sections divided into 13 parts (albeit the overall structure and object of the Ordinance was as originally intended in the Bill). A further draft RHC was produced in February 2008 for renewed consultation. As indicated at the start of this article, the aim is to have the "new" RHC and RDC in place by the Spring of 2009 and it is reasonable to assume (at the time of writing – March 2008) that there may be further drafts of the principal documents before the process is complete.³⁶

A large number of recommendations that are not dealt with in the Ordinance are covered by the Steering Committee's draft amended RHC. Ironically, both the Ordinance and the draft RHC borrow heavily from the CPR, in spite of the Working Party's decision not to adopt the CPR wholesale. The grinding thus retains a distinctive "Woolfian" tone.

What? – The "New" RHC

So much for the history of the Civil Justice Reforms, what of their consequences?

It would be foolish to review all the changes that have survived the consultation process or to examine the minutiae of the "new" RHC and RDC in an article of this length. Instead, the focus shall be on the three most important changes – the introduction of the underlying objectives, the new CPR Part 36 style "sanctioned offers" and "sanctioned payments" and the changes to the rules on discovery.

Why are these the "most important" changes? Firstly, the underlying objectives represent a departure from the old mentality of civil litigation and form the rationale for the courts' enhanced case management powers. Secondly, CPR Part 36 is arguably the most successful aspect of the whole Woolf Reform project. Their impact on the conduct in England cannot be underestimated and it may well be that "sanctioned offers" will have an equally dramatic effect in Hong Kong. Thirdly, many practicing lawyers will freely tell you that discovery is the greatest generator of work and expense in the entire litigation process whilst, at the same time, much of that work serves little real purpose. Thus, any change to the discovery process

³⁶ All these documents can be found on the CJR website: <http://www.civiljustice.gov.hk/index.html>.

will have a significant impact on the way lawyers conduct themselves and, consequentially, their clients. These three points shall be expanded upon in due course.

The Underlying Objectives

The Recommendations

Recommendations 2 and 3 of the Final Report dealt with the introduction into the RHC of an equivalent to CPR Part 1's overriding objective.³⁷ The Final Report was at pains to stress that the RHC objectives would be "underlying" and not "overriding", so as to avoid any suggestion that the whole CPR was being introduced by stealth and to minimise any conflict between the new provisions and the rest of the RHC.

The importance of these Recommendations should not be underestimated despite the Working Party's attempts to minimise their significance. Whilst they are not intended to form the basis of a new procedural methodology – unlike CPR Part 1 – they may still function as, in Lord Woolf's words, "a compass to guide courts and litigants and legal advisers as to their general course".³⁸ In that respect, they represent a marked change from previous practice. No less importantly, the underlying objectives aim, in the Working Party's own words, to "make more systematic the approach to case management presently accepted as a matter of common law".³⁹ The Interim and Final Reports both emphasised the need for improved case management and this need was supported in the consultation exercise.

Of all the Recommendations made, these are the most significant. The Working Party may have hedged-in the Recommendations with a rebuttal of a new procedural code and a criticism of CPR Part 1's principle of "proportionality" but, in my view, this may have little impact when the courts start to implement the underlying objectives. As we shall now see, the effect of the overriding objective in England was not what was originally expected when it was introduced.

The New Rules

The Steering Committee's draft amended RHC contained new RHC Order 1A rules 1 and 2 in respect of Recommendations 2 and 3. These are set out in Figure 2. For the sake of space, "draft" or "amended" shall be dispensed with when referring to the Steering Committee's proposed RHC from now on, apart from when distinguishing between the new and old RHC.

³⁷ See the CPR website: http://www.justice.gov.uk/civil/procrules_fin/index.htm.

³⁸ Lord Woolf's "Access to Justice" Final Report (AJFR), Ch 20, para 12.

³⁹ Final Report, p 55, para 109.

Figure 2: RHC Order 1A

1. Underlying objectives (O. 1A, r. 1)

The underlying objectives of these rules are –

- (a) to increase the cost-effectiveness of any practice and procedure to be followed in relation to proceedings before the Court;
- (b) to ensure that a case is dealt with as expeditiously as is reasonably practicable;
- (c) to promote a sense of reasonable proportion and procedural economy in the conduct of proceedings;
- (d) to promote greater equality between the parties;
- (e) to facilitate the settlement of disputes; and
- (f) to ensure that the resources of the Court are distributed fairly.

2. Application by the Court of underlying objectives (O. 1A, r. 2)

- (1) The Court shall seek to give effect to the underlying objectives of these rules when it –
 - (a) exercises any of its powers (whether under its inherent jurisdiction or given to it by these rules or otherwise); or
 - (b) interprets any of these rules or a practice direction.
- (2) In giving effect to the underlying objectives of these rules, the Court shall always recognize that the primary aim in exercising the powers of the Court is to secure the just resolution of disputes in accordance with the substantive rights of the parties.

Order 1A rule 1 matches Recommendation 3 almost word-for-word. Order 1A rules 2, 3 and 4 are almost exactly the same as CPR Part 1.2, 1.3 and 1.4 respectively (rules 3 and 4 are not repeated here – they oblige parties to comply with underlying objectives and courts to actively manage cases). A new Order 1B (again, which is not repeated here) introduces specific case management powers to augment Order 1A and draws heavily on CPR Part 3.1.

It would be insightful to remind ourselves of CPR Part 1.1 at this point, so it is reproduced in Figure 3.

Figure 3: CPR Part 1.1

- 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.”

The similarities between the “radical” CPR Part 1.1 and the “incremental” Order 1A rule 1 are quite striking. They are set out in Figure 4.

Figure 4: Comparison of RHC Order 1A rule 1 and CPR Part 1.1

Provision	Draft RHC Order 1A rule 1	CPR 1.1
New procedural code		1.1(1)
Deal with cases justly		1.1(1)
Cost saving	1A r.1(a)	1.1 (2)(b)
Expedition	1A r.1(b)	1.1 (2)(d)
Proportionality	1A r.1(c)	1.1(2)(c)
Equality between parties	1A r.1(d)	1.1(2)(a)
Facilitate settlement	1A r.1(e)	
Distribution of court resources	1A r.1(f)	1.1(2)(e)

This article shall now address both the similarities and the differences in order to demonstrate that, when it comes to implementing and applying overriding and underlying objectives, there may be little to choose between the two.

New Procedural Code

There is no mention of a “new procedural code” in Order 1A. This comes as little surprise given what we have already seen of the Working Party’s approach and the consultees’ desires. It is, however, worth noting that the term has not snuck in under the proverbial radar by, say, its inclusion in a

specific amendment to the RHC. After all, the term did not appear in the CPR until its penultimate draft in July 1998. At the time its meaning was a matter of much debate, especially as many members of the profession saw the CPR as merely a plain English version of the old rules it was designed to supplant.⁴⁰

The meaning, however, became clear in *Biguzzi v Rank Leisure Plc*,⁴¹ in which the Court of Appeal held that the pre-CPR rules and authorities would generally no longer be applied on questions of procedure, which is hardly surprising given that Lord Woolf himself sat as part of the Court of Appeal. Indeed, His Lordship stated quite categorically:

“The whole purpose of making the CPR a self-contained code was to send the message which now generally applies. Earlier authorities are no longer generally of any relevance once the CPR applies.”

Whilst the English courts have, since *Biguzzi*, looked at pre-CPR authorities on several occasions, the general position was demonstrated in *Carnegie v Giessen*,⁴² where the Court of Appeal only applied pre-CPR provisions in the complete absence of any relevant provision in the CPR itself (something which Carnwath LJ lamented in his judgment). Over the passage of time, with more post-CPR case law and the 46 CPR updates, this recourse has been less common.

The intent of the authors of both the CPR and amended RHC is clear – the CPR is “new”, the amended RHC will not be. “Round One” to the RHC “camp” then but no guidance on how the remaining underlying objectives would be applied in a *Biguzzi*-type case in Hong Kong. Much confusion and wasteful satellite litigation may be the price of this victory.

Deal with cases justly

The injunction in CPR Part 1.1 that courts should “deal with cases justly” is not found in Order 1A rule 1 but is reflected in the requirement in Order 1A rule 2(2) that the courts are “to secure the just resolution of disputes in accordance with the substantive rights of the parties”. There are few who would dispute that achieving justice is the *sine qua non* of the civil (and criminal) courts.

There are, of course, many disputes over what “justice” actually means. The theories of Rawls, Nozick and others will not be discussed here, nor will any time be spent discussing the equally wide-ranging, albeit more

⁴⁰ There is a discussion of this point at n 1.3.9 on p 22 of *English Civil Procedure* (Sweet & Maxwell, 2006 edn).

⁴¹ [1999] 1 WLR 1926.

⁴² [2005] 1 WLR 2510.

prosaic, differences in opinion among English judges on the subject.⁴³ This article will be confined to noting that members of the judiciary have disagreed over what is “just” and the balance between “justice” and “law” since time immemorial. Lord Denning MR may have been something of a maverick but he was not alone in his views regarding the relationship between justice, equity and law and his spirit lives on in many decisions relating to CPR Part 1.1.

What should we expect of the Hong Kong courts? The Final Report was critical of the fact that the overriding objective had led to “absurd results” in such cases as *Law v St Margarets Insurances Ltd*,⁴⁴ albeit that may be a fault of inexperienced judges rather than CPR Part 1.1 itself.⁴⁵ Nevertheless, it is true that the very broad nature of the overriding objective and of “justice” itself created the opportunity for contradictory decisions, especially in the early days of the CPR. It was to avoid history repeating itself, that the Final Report recommended the adoption of “underlying” rather than “overriding objectives”. Whether this will be sufficient to stem a tide of peculiar applications and judgments remains to be seen. Perhaps the only sure guarantee is thorough training of the judiciary and legal profession, but such training must avoid becoming indoctrination.

Costs and delay

The current edition of the CPR White Book describes cost and delay as “the twin scourges of civil justice”.⁴⁶ The CPR has, however, largely failed to cut costs or quicken the pace of litigation. Whilst the courts have often applied their case management powers in CPR Parts 1.4 and 3.1 to impose sanctions on miscreant parties, the approach has been haphazard.⁴⁷ Many courts have been reluctant to promote these aspects of the overriding objective for fear of falling foul of the others.

On other occasions, an excess of enthusiasm for thrift and speed on the part of the lower courts has been chastised by the Court of Appeal.⁴⁸ In this context, it should be borne in mind that CPR Part 3.9 enables parties to seek relief from sanctions and it is a power that the courts are often called upon to exercise in the name of CPR Part 1.1. Clearly, the simple intro-

⁴³ A good introduction to theories of justice can be found in Ch 7 of Lloyd's *Introduction to Jurisprudence* (Sweet & Maxwell, 7th edn).

⁴⁴ [2001] EWCA Civ 30.

⁴⁵ Final Report, p 49, para 97.

⁴⁶ *English Civil Procedure*, p 12, n 1.3.4.

⁴⁷ The English courts' approach is on a case-by-case basis which, understandably, can create the impression of inconsistency.

⁴⁸ *Barry Parker v Laurence Snyder and Ors* LTL 1/4/2003. The claim was struck out and a draft amended Particulars of Claim was rejected by the lower court. The Court of Appeal accepted that the claim was not “crisply pleaded” but it disclosed a viable cause of action and was therefore reinstated.

duction of a rule to cut costs or speed up litigation is not enough; it takes a change in attitude on the part of the litigants, the legal advisers and the judiciary. Whether the Hong Kong courts have any greater success than their English counterparts will not depend on the replication of CPR Parts 1.4 and 3.1 in Order 1A but on the attitudes towards litigation inculcated in themselves and in others by the judges.

Proportionality

The Final Report was critical of the nature of “proportionality” within the CPR. Whilst it was accepted that “proportionality” should be included in the proposed underlying objectives, it should not have “the specificity of CPR Part 1.1(2)(c)”. The Final Report preferred an approach that would “be a reminder that commonsense notions of reasonableness and a sense of proportion should inform the exercise of a judicial discretion”.

Oddly, the Working Party and the Steering Committee seem not to have grasped the most significant practical expression of “proportionality” in the CPR. The Interim and Final Reports make only a fleeting reference to it. The draft RHC is silent on it. This is “Track Allocation”.

Under CPR Part 26 every claim is allocated by the court to one of three procedural tracks – the small claims track; fast track; or multi-track. Allocation usually takes place after the defence has been served and the court has received completed allocation questionnaires from the parties (although the court need not wait for these if they are late). These allocation questionnaires contain information on the value of the claim, the number of witnesses and so on to help the judge decide upon the appropriate track. Allocation can be dealt with at a hearing or on paper.

The key factor in track allocation is the monetary value of the claim, although a claim may be allocated to a track which is not the usual one for its value if the court decides that it can be dealt with more justly in another track. The small claims track is for consumer disputes, minor accidents and the like with a value not exceeding £5,000 (HK\$76,500 in February 2008). The procedures are informal and the parties do not automatically receive their legal costs (hence litigants in person are very common). The fast track is generally for claims between £5,000 and £15,000 (HK\$229,500), with a set procedural timetable which discourages interlocutory applications and aims to bring the parties to a one-day trial within a year of proceedings having commenced. The multi-track is for claims above £15,000 or where the issues will need more than a one-day trial to be resolved. There is much greater scope for the parties to control the timetable to trial in multi-track cases albeit the court still has the final word.

The procedural tracks were seen as the CPR’s “reinvention” of the separate rules for the small claims tribunals, County Courts and High Court. In many respects, the Hong Kong system already caters adequately enough

for the differing value and complexity of cases in its existing rules. The difference between the two systems is that in England there is one procedure for issuing and pleading most claims, with allocation taking place at a later stage and at the direction of the court. This simplifies both the issuing of proceedings and the pleadings stages and avoids unnecessary jurisdictional disputes. It is a shame that, whilst the proposed RHC simplify the issuing of proceedings and enhance the courts' case management, adopting such a stratified approach in Hong Kong seems to have been overlooked. The potential administrative costs savings may have made it very worthwhile.

Equality

Under CPR Part 1.1 (2) (a) the overriding objective entails “ensuring that the parties are on an equal footing”. This reflects the right to “equality of arms” under Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”), to which the UK is a signatory and which was given further effect by the Human Rights Act 1998. By this right, each party must be afforded a reasonable opportunity to present his, her or its case in conditions which are not overly advantageous to the other party or parties.⁴⁹

One of the greatest such inequalities is the ability to pay for a good – or any – lawyer. The inadequacies of Legal Aid (now known as Community Legal Service) in England will be known to many readers. The financial limits (eligibility depends on a maximum monthly disposable income not exceeding £672, albeit parties will be expected to contribute towards costs if they have over £289 per month⁵⁰) combined with the fact that various categories of work including personal injury and libel claims are excluded explains the growth in litigants in person. The European Court of Human Rights was markedly critical of these developments in the infamous “McLibel” case⁵¹ when it stated that:

“the denial of legal aid to the applicants [Steel and Morris, who conducted a 313 day libel trial against McDonald's largely on their own] had deprived them of the opportunity to present their case effectively before the court and contributed to an unacceptable inequality of arms with McDonald's”

⁴⁹ *De Haes v Belgium* (1998) 25 EHRR 1.

⁵⁰ Figures correct at time of writing but subject to review – see the LSC website <http://www.legalservices.gov.uk/lsonline.asp>.

⁵¹ *Steel v United Kingdom* [2005] EMLR 15.

CPR Part 1.1(2)(a) does not address this point directly nor, for that matter, is there any other provision in the CPR to “give” representation to litigants in person or “subtract” an over-abundance of lawyers from their opponents.

Instead, the CPR seeks to prevent wealthier parties from “playing the system” at the expense of their weaker opponents. The increased case management powers and the three procedural tracks are both part of this process. A wealthy party will not recover his legal costs in the Small Claims Track and will only obtain fixed costs at a Fast Track trial. In addition, the Small Claims Track is very informal, hence litigants in person cannot be “blinded by science” or bullied by teams of opposition lawyers and the Fast Track has set procedural timetable, preventing multiple interlocutory applications. In addition, in *Maltez v Lewis*,⁵² the applicant sought to prevent the respondent from instructing senior counsel given that he “only” had junior counsel. The court refused to make the order sought but held that it could “level the playing field” by, for example, allowing a poorer party (or rather its smaller firm of solicitors) more time to prepare court bundles or ordering the wealthier party (or its larger firm of solicitors) to carry out the task instead.

The rule in the RHC is subtly different to that in CPR Part 1, as it says at Order 1A rule 1(d) that the aim is “to promote greater equality between the parties”. As stated above, the language of the provision is that of Recommendation 3 of the Final Report. Unfortunately, the Final Report is silent on what it means by “greater equality” which, as few would deny, is a term pregnant with meaning. A conservative assumption would be that it means the same as CPR Part 1 and that the different language is of no practical concern. This is not as straightforward as it seems, however, given that the CPR draws upon jurisprudence developed under the ECHR. Is the suggestion that such European case law is now to be applied, albeit indirectly, in Hong Kong?

Yet, even if the intended meaning is the same, why say “greater equality” rather than “equal footing” when the former is such a loaded term? The danger (or maybe the intention) is that the term “greater equality” could be employed to argue any number of restrictions upon or enhancements of parties’ freedom of action. Even under the relatively restrained “equal footing” the English courts were able, in cases such as *Maltez*, to shift administrative burdens to wealthier parties. What is to stop a judge espousing “greater equality” when exercising his discretion in the interpretation of evidence or even substantive law to shift other burdens onto who he sees as a less

⁵² (1999) *The Times*, 4 May 1999.

deserving party? Lord Denning was able to effect much change (or mischief) with far fewer tools at his disposal.

Facilitating settlement

The provision in Order 1A rule 1(e) that courts should “facilitate the settlement of disputes” is found in CPR Part 1.4(f) among the elements of active case management. “Facilitating settlement” is commonly understood to include encouraging the parties to try ADR, usually mediation. ADR is actively promoted elsewhere in the CPR, in the pre-action protocols and in the individual court guides such as that of the Commercial Court, which states that legal representatives “should” – not “ought” or “may” – consider with their clients and the other parties, the possibility of attempting to resolve their dispute by ADR.⁵³

Whether or not the parties consider ADR is also relevant to costs in England. CPR Part 44.5(3)(a)(ii) states “The court must also have regard to...the efforts made, if any, before and during the proceedings in order to try to resolve the dispute” when exercising its discretion as to costs. Several courts have also operated pilot compulsory mediation schemes since 1999, despite mixed records as to their success.⁵⁴

All this is evidence of the enthusiasm of the English courts for ADR in general and mediation in particular. Indeed CPR Part 44.5(3)(a)(ii) is both the proverbial “stick and carrot” in respect of ADR and this has been demonstrated in the post-CPR case law. Many parties that have refused to consider ADR, or only paid lip service to doing so, have been penalised on costs by the courts. As early as *Dyson v Leeds City Council*,⁵⁵ Ward LJ stated that:

“the court has powers to take a strong view about the rejection of the encouraging noises we [the courts] are making [about ADR], if necessary by imposing eventual orders for indemnity costs or indeed ordering that a higher rate of interest be paid on any damages”

This willingness to take such a “strong view” was demonstrated by the Court of Appeal in *Dunnett v Railtrack plc*.⁵⁶ The Court of Appeal reiterated both that it was a lawyer’s duty to further the overriding objective under

⁵³ *Admiralty and Commercial Court Guide* (HM Court Service, 7th edn, 2006) s G, para G1.4.

⁵⁴ The UK Ministry of Justice commissioned Professor Dame Hazel Genn to conduct research on the Automatic Referral to Mediation (ARM) pilot scheme at the Central London County Court in 2004–2005. The findings of this research are contained in “Twisting Arms: Court referred and court linked mediation under judicial pressure” (see Ministry of Justice website at <http://www.justice.gov.uk/publications/research210507.htm>).

⁵⁵ [2000] CP Rep 42

⁵⁶ [2002] 2 All ER 850.

CPR Part 1.1 and that if parties turned down ADR they could suffer costs consequences. Here the defendant, Railtrack, had been confident of success and had therefore refused to consent to mediation. Thus, despite winning at trial and on appeal, and having made a CPR Part 36 Payment which the plaintiff rejected, Railtrack did not receive an order for costs in its favour.

Yet it would be wrong to assume that the courts take a purely “all or nothing” view of ADR. For example, in *Hurst v Leeming*⁵⁷ it was held that a barrister was justified in refusing mediation in a professional negligence action where the character and attitude of the plaintiff meant that “mediation had no real prospect of getting anywhere”. On the other hand, the enforceability of dispute resolution clauses in commercial contracts – by which parties may be obliged to try ADR before suing – was upheld in *Cable & Wireless plc v IBM United Kingdom Limited*⁵⁸ where Colman J made the telling comment:

“For the courts now to decline to enforce contractual references to ADR on the grounds of intrinsic uncertainty would be to fly in the face of public policy as expressed in the CPR and as reflected in the judgment of the Court of Appeal in *Dunnett v Railtrack*”.

In the leading case of *Halsey v Milton Keynes General NHS Trust*⁵⁹ the Court of Appeal reviewed the preceding case law and held that if the unsuccessful party (the prospective costs payer) could show that the successful party (the payee) had acted unreasonably in refusing to agree to ADR, the former would not have to pay the latter its costs. In deciding whether a party had acted unreasonably the court was to remember the “advantages” of mediation over litigation⁶⁰ (although recognising that mediation and other forms of ADR were not a “panacea”). When reaching its decision the court was also to consider the nature of the dispute; the merits of the case; the extent to which other settlement methods had been attempted; if the ADR had a reasonable prospect of success; and whether a successful party had refused to agree to ADR despite the court’s “encouragement”.

⁵⁷ (2003) 1 Lloyd’s Rep 379,

[2002] 2 All ER 1041.

⁵⁹ [2004] 1 WLR 3002.

⁶⁰ In Dyson LJ’s words, at para 15 of his judgment, “It is usually less expensive than litigation which goes all the way to judgment, although it should not be overlooked that most cases are settled by negotiation in the ordinary way. Mediation provides litigants with a wider range of solutions than those that are available in litigation: for example, an apology; an explanation; the continuation of an existing professional or business relationship perhaps on new terms; and an agreement by one party to do something without any existing legal obligation to do so.”

Subsequently, in *Reed Executive PLC and Others v Reed Business Information Ltd and Others*,⁶¹ the Court of Appeal upheld a party's refusal to mediate and held that a court cannot order disclosure of completely "without prejudice" communications, whereas "without prejudice save as to costs" (ie Calderbank Letter) communications could be disclosed to determine whether the refusal to mediate was reasonable or not. By contrast, the *Halsey* principles were applied in *Burchell v Bullard*⁶² to hold that a refusal to mediate had been unreasonable and in *Mona Al-Khatib v Abdullah Masry & Others*,⁶³ the Court of Appeal held, albeit obiter, that there is "no case, however conflicted" that cannot be mediated.

Thus, in England, the general view remains that parties need to give – and show that they have given – serious consideration to mediation or another form of ADR if they are to avoid being penalised by the courts.

What of the Hong Kong approach? ADR in general and mediation in particular have not traditionally featured very highly in legal advisers' vocabulary, with the exception of those involved in construction and family disputes. One of the few reported decisions in the Hong Kong courts on mediation, *Hyundai Engineering & Construction Co Ltd v Vigour Ltd*,⁶⁴ saw the Hong Kong Court of Appeal negatively distinguish *Cable & Wireless* and hold that a dispute resolution clause which stated "failing an ultimate agreement [after negotiations] then both parties shall agree and submit to Third Party Mediation procedure" was in fact unenforceable. An appeal of this decision was rejected by the Court of Final Appeal.⁶⁵ Thus the Hong Kong approach to date has been very different to that in England and other common law jurisdictions. This is, however, changing rapidly.

The prominence of "facilitating settlement" in Order 1A rule 1 gave an early clue as to the thinking of the authorities. The Working Party's views were equally revealing. The Interim Report put forward six options on the courts and ADR – ranging from them having the power to order the parties to engage in ADR; to making adverse costs orders against parties who refused ADR without good reason (as in England); to simply "encouraging and facilitating purely voluntary ADR".⁶⁶

The Final Report dealt with the concerns raised by consultees about these Proposals in what can only be described as a robust fashion before recommending that the courts should to provide parties with better information and support "with a view to encouraging purely voluntary

⁶¹ [2004] 4 All ER 942.

⁶² [2005] EWCA Civ 358.

⁶³ [2005] 1 FLR 381.

⁶⁴ [2005] 3 HKLRD 723.

⁶⁵ *Hyundai Engineering & Construction Co Ltd v Vigour Ltd* [2006] HKEC 306.

⁶⁶ Interim Report, pp 232–250, s K21.

mediation”; that the Legal Aid Department should have power to limit its initial funding to the funding of mediation when appropriate; and that the courts should be able to make adverse costs orders in cases where mediation has been unreasonably refused.

Whilst these recommendations do not appear within the draft RHC, much to the disappointment of many interested parties,⁶⁷ the presence of the draft Order 1A rule 1(e) is, in this author’s view, a sufficient building block for the Hong Kong courts to develop an English approach to ADR. The authorities are, however, going to go much further.

In a speech in March 2006,⁶⁸ the Secretary for Justice noted that mediation was not as popular in Hong Kong as elsewhere and ascribed this to the attitudes of parties and lawyers. He concluded with the words “Mediation is very much on my agenda”. If that was not enough, in his Policy Address in October 2007, the Chief Executive stated:

“To alleviate conflicts and foster harmony, we will promote the development of mediation services. On many occasions, interpersonal conflicts need not go to court. Mediation can reduce social costs and help the parties concerned to rebuild their relationship. This is a new trend in advanced regions around the world. The cross-sector working group headed by the Secretary for Justice will map out plans to employ mediation more extensively and effectively in handling higher-end commercial disputes and relatively small-scale local disputes.”

The Secretary for Justice’s group has subsequently started work on these plans. Moreover, at a Conference in November 2007 both the Justice Secretary and Chief Justice praised mediation as a means of resolving disputes. The Chief Justice went so far as to say that ADR should be a compulsory part of law students’ education.⁶⁹

Further, in each of their speeches at the Ceremonial Opening of the 2008 Legal Year, both the Secretary for Justice and the Chief Justice reiterated the importance and value of mediation and stressed the work that was going on to promote its use.⁷⁰ Hence, it seems that the official Hong Kong approach to mediation is now as enthusiastic as that in England. Consequently, of all the concepts embodied by the “overriding” or “underlying

⁶⁷ ADR Chambers (HK) Limited expressed its disappointment that none of the ADR related recommendations in the Final Report were mentioned in the Steering Committee’s Consultation Paper on the Draft Bill, in a letter to the Legislative Council Secretariat of 5 June 2007.

⁶⁸ See <http://www.doj.gov.hk/eng/archive/index2006.htm#ssj>.

⁶⁹ *South China Morning Post*, 1 Dec 2007.

⁷⁰ See <http://www.doj.gov.hk/eng/public/>.

objectives”, the courts’ promotion of settlement may prove to be the most far-reaching.

Sanctioned Offers and Payments

The Working Party and Steering Committee

The Interim Report dealt with the workings of CPR Part 36 at some length and proposed the adoption of similar provisions in Hong Kong.⁷¹ In the Final Report, it was noted that “The response elicited in the consultation on this Proposal was enthusiastic”.⁷² Indeed, it may be possible to say that this was the most popular of the Proposals in the Interim Report. As a consequence, Recommendation 38 of the Final Report was for the adoption of “sanctioned offers and payments along the lines of CPR Part 36” subject to modifications, such as their only being available after the commencement of proceedings.

The draft RHC contains a new Order 22, which replicates much of CPR Part 36 (as it once looked). It is supplemented by a new Order 22A which deals with miscellaneous matters relating to money remaining in court and payments out. It seems likely that the new regime of sanctioned offers and payments will come into force largely unscathed in 2009. Should it?

CPR Part 36 – before April 2007

The purpose of CPR Part 36 is simple – it is to persuade parties to settle their disputes.⁷³ This reflects UK public policy that settlements are better than trials. Settlements bring “closure” (commercial or emotional), save money and save court time. A party who receives a reasonable CPR Part 36 offer or payment should (all other things being equal) accept it. If it is declined, and the offeree wins at trial, the offeror will still obtain its costs from the date the offer expired if the offeree fails to “beat”⁷⁴ the offer or payment at trial. The offeree therefore pays the price of prolonging the claim unnecessarily.

It is important to appreciate that CPR Part 36 originally provided for both payments and offers by defendants. The former are no longer required under the CPR but the proposed RHC regime maintains them. Payments involved paying the sum being offered into court and sending the offeree a formal notice of that payment. Defendants were required by CPR Part 36.3 to make a payment into court in conjunction with a CPR Part 36 offer in money claims (provided proceedings were issued) otherwise the offer would

⁷¹ Interim Report, paras 317–323, pp 122–127 and Proposal 15.

⁷² Final Report, paras 291–324, pp 144–160, s 11.

⁷³ This can be gleaned from reading the notes to CPR Part 36 and from numerous commentaries over the years since the provisions’ introduction.

⁷⁴ This term will be explained shortly.

not generally “count” as a CPR Part 36 offer (unless the court ordered otherwise). Defendants could, however, make a CPR Part 36 offer without an accompanying payment in both non-money claims and before proceedings had been issued in money claims. An offeree would be given 21 days in which to accept an offer or payment.

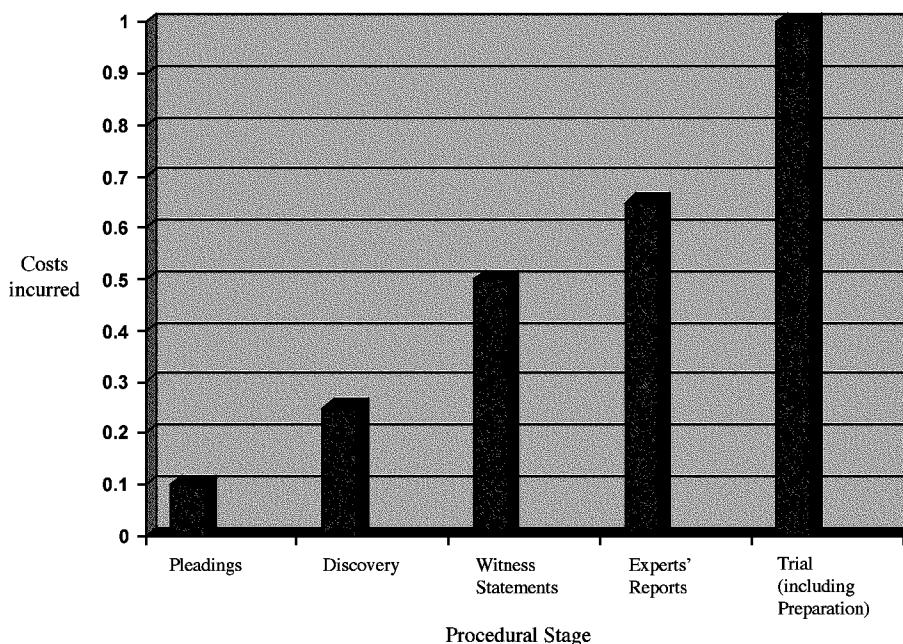
An innovation of CPR Part 36 was the introduction of plaintiffs’ CPR Part 36 offers. These are made by a “without prejudice save as to costs” letter which is open for acceptance for 21 days. If a defendant rejects a plaintiff’s offer and the plaintiff subsequently “beats” its own offer at trial, the defendant not only pays the damages and costs but could be made to pay interest on the damages at up to 10 per cent above base rate; indemnity basis costs; and interest on those costs at up to 10 per cent above base rate (the interest runs from the expiry of the plaintiff’s offer).⁷⁵

A cursory knowledge of civil litigation is enough to appreciate how and why CPR Part 36 offers and payments are so effective. A “greedy” litigant who turns down a sensible offer or payment proposal risks bearing all the costs of the proceedings after the point at which he or she could have settled. As can be seen from the diagram in Figure 5, the costs of litigation increase over the duration of the claim but they may not do so in a straight line.⁷⁶ Certain stages of litigation, preparing witnesses statements for example, involve a great deal of work on the part of the legal advisers and some disbursements, such as experts’ reports, can be especially expensive. The approach to trial and trial itself is often the most cost intensive part of the process. Thus, not only is it prudent to make a Part 36 offer or payment as early as possible – to increase the cost pressure on the other side – it is often wise to make the offer just before a particularly costly stage of the claim in order to focus the other side’s mind on the benefits of settlement.

⁷⁵ Readers will appreciate the similarity with *Calderbank* Letters.

⁷⁶ This diagram is not particularly scientific and the gradations of costs can differ greatly between cases but it demonstrates the progression of costs of the course of a claim and – especially – the escalation at trial.

Figure 5: Civil Litigation Costs



CPR Part 36 – current version

On 6 April 2007, CPR Part 36 was radically altered. CPR Part 36 payments were abolished, as were many of the provisions flowing from the distinction between payments and offers. Under a rewritten CPR 37 payments into court are now limited to payments made under court orders, payments in support of a defence of tender before claim, and payments under various enactments.

The changes to CPR Part 36 had been prompted by a consultation paper “Part 36 of the Civil Procedure Rules: Offers to settle and payments into court”⁷⁷ published on 12 January 2006 by the UK Department of Constitutional Affairs (DCA).⁷⁸ This consultation had, in turn, arisen from a number of judgments on the freedom of certain categories of defendant from making CPR Part 36 payments. In *Crouch v King’s Healthcare NHS Trust*⁷⁹ and *The Trustees of Stokes Pension Fund v Western Power Distribution (South West) plc*,⁸⁰ the Court of Appeal held that certain categories of defendant – namely, Government departments and insurers – need only make Part 36 offers without supporting CPR Part 36 payments as they were, to

⁷⁷ This can be found at the DCA’s website <http://www.dca.gov.uk/consult/civilproc36/cp0206.htm>.

⁷⁸ The functions of the DCA were transferred to a new Ministry of Justice on 9 May 2007.

⁷⁹ [2005] 1 All ER 207.

⁸⁰ [2005] 1 WLR 3595.

put it bluntly, “good for the money”. The Court of Appeal had used the “if the court so orders” exception within CPR Part 36.1(2) to justify these decisions.

The DCA wished to clarify the rules in the light of these decisions. Of the 61 responses received during the consultation, almost all of them supported a change whereby defendants need no longer pay any money into court in support of a CPR Part 36 offer. Consequently, the rules were changed, much to the satisfaction of those who regarded them as an unfair imposition on defendants. Unfortunately, other problems with the CPR Part 36 regime remain and these problems will also arrive in Hong Kong with the introduction of sanctioned offers and payments, unless steps are taken to avoid them.

Sanctioned offers and payments

The provisions of the new Order 22 are very close to those of the pre-April 2007 CPR Part 36. For example, Order 22 rule 3(1) is quite explicit that “An offer by a defendant to settle the whole or part of a claim or an issue arising from the claim does not have the consequences set out in this Order unless it is made by way of a sanctioned offer or sanctioned payment or both”. Order 22 rule 3(2) adds “Where an offer by a defendant involves a payment of money to the Plaintiff, the offer must be made by way of a sanctioned payment”. This point will be revisited shortly.

By Order 22 rule 9 a sanctioned offer or payment is made when it is “served” on the offeree. Under the old CPR Part 36 and an earlier version of the draft RHC, offers (and payments) were made when “received”. Under the revised CPR Part 36, offers are also made when “served”, which brings them into line with the CPR provisions on deemed service. Sadly, this desire for uniformity overlooks the fact that the English rules on deemed service have themselves been criticised for their inflexibility.⁸¹ Fortunately, the RHC avoids this potential trap.⁸² As with the old (and new) CPR Part 36, there is also provision for parties to seek the clarification of sanctioned offers and payments.

⁸¹ It was held by the Court of Appeal in *Anderton v Clwyd CC* [2002] 1 WLR 3174 that the deemed day of service of a claim form under CPR Part 6.7 cannot be rebutted by evidence of the actual receipt of the claim form by the defendant. As the deemed date of service of a letter sent by first-class post is the second day after it was posted, a letter posted at, say, 5pm on a Friday in the UK would be deemed served on the following Sunday despite the fact that the postal service does not make deliveries on Sundays. Evidence of its receipt on the Monday (which would demonstrate rare speed on the part of the UK post!) would be discounted. Further, it would be deemed served before a fax of the same letter if that fax was transmitted at 4.10pm on the same Friday. The fax would be deemed served on the following Monday, irrespective of a fax transmission report showing a successful transmission at 4.10pm.

⁸² Practice Direction 19.2 also provides for deemed service by post but permits the rebuttal of deemed service by evidence of actual service.

Unlike CPR Part 36, the new Order 22 provides that sanctioned offers and payments will be “open” for 28 days. The CPR sets down a 21 day period. The Final Report does not advocate the need for a longer time period but, on reflection, it is probably no bad thing to give parties a little extra time to consider the value of settling. In any event, there is nothing to prevent acceptance after this period provided the parties agree costs or the court grants leave (it seems likely that the Hong Kong courts would grant leave except in difficult cases, as they generally do in England). There is also nothing to stop parties agreeing settlement terms outside the scope of Order 22 provided they are willing to forego the strict costs protections.

It is also the case that any offers or payments to or by minors will need the court’s approval under Order 22 rule 15 and Order 80 rule 10, which mirrors the old CPR Part 36.18 (now deleted) and CPR Part 21.10. Whilst it is eminently sensible that the court should protect the interests of minors, it is worth noting the case of *Drinkall v Whitwood*,⁸³ in which a motorist argued that a settlement with a child, who had been badly injured in an accident with his car, was not binding in the absence of court approval under CPR Part 21.10. The Court of Appeal was obliged “regrettably” (in its own words) to agree with the motorist and therefore hold that he could renege on the settlement as it had not yet been approved by the court. In such circumstances, parties may be tempted to opt for tightly worded deed of settlement or solicitors’ undertakings rather than trust to Order 22.

The principal problems with the operation of CPR Part 36 in England, which could be repeated within sanctioned offers and payments, have been due to a perceived anti-defendant bias. The first aspect of this is (or was) the need for defendants in money claims to support their CPR Part 36 offers with CPR Part 36 payments. The rationale for this rule – which was not part of Lord Woolf’s original “Access to Justice” report – was that plaintiffs needed a guarantee that such offers were genuine. A secondary, and largely unspoken, rationale was that all defendants were assumed not to be making genuine offers.

Not only did this undermine the very spirit of CPR Part 36, to encourage mutually beneficial settlements between parties, in that it harks back to an adversarial approach to litigation, it was not actually borne out by the evidence. According to the DCA, approximately 70 to 80 per cent of CPR Part 36 Payments in England and Wales are made by public sector and insured defendants, who can generally be considered “good for the money”. It was the recognition that certain defendants were certainly “sound” that was behind the decisions in *Crouch* and *Western Power*. Consequently, as already

⁸³ [2004] 4 All ER 378.

noted, the post-April 2007 CPR Part 36 does not require any defendants to pay money into court in support of a Part 36 offer. Plaintiffs are safeguarded from possible prejudice by CPR Part 36.4(2) by which an offer to pay all or part of a claim at a date later than 14 days following acceptance is not treated as a Part 36 offer unless the offeree accepts such postponed payment. It is submitted that the new Order 22 rule 3 should be recast before it comes into force to reflect this reform of CPR Part 36.

Another bias in the CPR, which has been partially avoided in the RHC, is the different interest and costs treatment of plaintiffs' and defendants' offers. In England, if a defendant makes an offer (or payment) which is rejected by the plaintiff, and the plaintiff "fails to do better" than this offer or payment the court "shall order the plaintiff to pay any costs" incurred by the defendant after the last date on which the payment or offer could have been accepted (without leave) unless it considers it "unjust to do so". This seems fair enough until one considers the defendant's position vis a plaintiff's offer. Where a plaintiff does better than his or her own CPR Part 36 offer the Court may order "extra" interest on the damages awarded to the plaintiff at a rate not exceeding 10 per cent above base rate for the period since the last date on which the defendant could have accepted the offer. The smell of punitive damages lingers about this provision. In addition, the plaintiff may be awarded costs on the indemnity basis and "extra" interest on those costs at a rate not exceeding 10 per cent above base rate.

Under the CPR, the award of indemnity costs where a successful plaintiff beats his or her own Part 36 offer is not "fault based".⁸⁴ Further, indemnity costs are often awarded irrespective of the size of the plaintiff's offer in relation to the eventual judgment (or the number of liable defendants) provided the former is exceeded by the latter.⁸⁵ By contrast, a defendant making a successful CPR Part 36 offer will usually be awarded costs on the standard basis. They will only receive costs on the indemnity basis if the court wishes to "condemn" the plaintiff's conduct. In *HLB Kidsons v Lloyds Underwriters*,⁸⁶ the court held that the plaintiff would not have to pay indemnity costs as there needed to be some conduct or circumstance taking the case "out of the norm". Although the plaintiff's rejection of the

⁸⁴ *McPhilemy v Times Newspapers Ltd (Costs)* [2001] 4 All ER 861. The trial judge had declined to order indemnity costs because of the "stigma" attached to them. The Court of Appeal overturned his decision.

⁸⁵ *Humphreys v Nedcom UK Ltd (Costs)* [2004] EWHC 2558. The plaintiff had made a CPR Part 36 offer to the first defendant, which had been rejected. The first defendant argued that, as it was liable for only two thirds of the judgment, the plaintiff had not "beaten" its own CPR Part 36 offer. The court held that the first defendant was liable to the plaintiff for the whole of the judgment sum – irrespective of the apportionment.

⁸⁶ [2007] EWHC 2699.

defendant's CPR Part 36 offer had been "wrong", it was not "out of the norm".

Fortunately Order 22 rules 19 and 20 maintain that both plaintiffs and defendants may be entitled to their "costs on the indemnity basis from the latest date on which the [other side] could have accepted the payment or offer without requiring the leave of the Court" and "interest on those costs at a rate not exceeding 10 per cent above judgment rate" if their opponent fails to accept a reasonable offer or payment. Thus a significant bias in CPR Part 36 is avoided. Sadly, Order 22 rule 20(2) adopts the provisions in CPR Part 36 on enhanced interest on the damages awarded to a plaintiff where he or she "beats" his or her own offer. It is hoped that the version of the RHC that is ultimately adopted will be amended so as to prevent this form of punitive damages from being imported into Hong Kong.

Finally, on the question of "beating" the other side's offer, it should be noted that Order 22 rules 19 and 20 both quite clearly state that a plaintiff needs to "do better" than his own or a defendant's sanctioned offer (or payment) in order to obtain a beneficial costs order. This position is based on the pre-April 2007 CPR Part 36. Unfortunately, for English defendants, CPR Part 36.14 on the costs consequences following judgment now reads as follows:

- "36.14 (1) This rule applies where upon judgment being entered –
- (a) a claimant fails to obtain a judgment more advantageous than a defendant's Part 36 offer; or
 - (b) judgment against the defendant is *at least as advantageous* to the claimant as the proposals contained in a claimant's Part 36 offer." (emphasis added)

The change is subtle but clear. Plaintiffs in England no longer have to beat their own offers, merely match them, to obtain indemnity costs and extra interest on their damages and costs. It is a little change, but it is a significant one nonetheless and does not seem to be motivated by a desire to do justice. Whilst this author would encourage the Hong Kong authorities to adopt some parts of the new CPR Part 36 in place of the current proposals in Order 22, it is sincerely hoped that they would avoid this unfair provision.

Discovery

The CPR

Discovery has been labelled as an engine of costs in civil litigation.⁸⁷ There are few practitioners who will, when challenged, be able to deny that in most cases (even the most complicated ones) the court's decision is made on little more than a handful of the often voluminous quantity of documents in the trial bundles. Lord Woolf himself criticised the process of pre-CPR discovery and the *Peruvian Guano* test in his "Access to Justice" Interim Report.⁸⁸

The proposed solution to this problem was the introduction of standard disclosure, which is set out in Figure 6.⁸⁹

Figure 6: CPR Part 31.6

- Standard disclosure requires a party to disclose only –
- (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.

The duty is also limited, by CPR Part 31.8 only to those documents which are or have been in a party's "control" (those which are or were in its physical possession; it has or had a right to possess; or it has or had a right to copy and/or inspect). Further, a party need only carry out a "reasonable search" for those documents within CPR Part 31.6 when giving standard disclosure.

Conversely, the CPR also introduced measures – at Lord Woolf's prompting – extending the scope of discovery. These were pre-action and

⁸⁷ Not least by Lord Woolf and the Civil Justice Reform Working Party.

⁸⁸ Lord Woolf MR wrote at Ch 21, para 17 in his "Access to Justice" Interim Report – "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."

⁸⁹ "Disclosure" is the term now used in England, but throughout this article, "discovery" shall be used for the overall process to avoid confusion.

non-party discovery in all cases, which had previously only been available in personal injury and fatal accident cases (the current position in Hong Kong). The operative terms of the relevant provisions are at Figure 7.

Figure 7: CPR Part 31.16 – pre-action discovery

- (3) The court may make an order under this rule only where –
- (a) the respondent is likely to be a party to subsequent proceedings;
 - (b) the applicant is also likely to be a party to those proceedings;
 - (c) if proceedings had started, the respondent’s duty by way of standard disclosure, set out in rule 31.6, would extend to the documents or classes of documents of which the applicant seeks disclosure; and
 - (d) disclosure before proceedings have started 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.

CPR Part 31.17 – non-party discovery

- (3) The court may make an order under this rule only 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.

Under both provisions, the applicant must support the application with evidence (going to the reasons for the discovery sought) and the order must specify the documents or the classes of documents which are to be disclosed. Thus, CPR Parts 31.16 and 31.17 cannot be used for “fishing expeditions”. Finally, CPR Part 31.12 maintains specific discovery (which is further explained by Practice Direction 31 paragraph 5) and CPR Part 31.18 explicitly sets out that CPR Parts 31.16 and 31.17 “do not limit any other power which the court may have to order” discovery before proceedings or against non-parties. Hence *Bankers’ Trust* and *Norwich Pharmacal*⁹⁰ orders

⁹⁰ *Bankers Trust Co v Shapira* [1980] 3 All ER 353; *Norwich Pharmacal Co v Commissioners of Customs and Excise* [1974] AC 133.

are preserved, albeit the scope of the latter has changed since 1999, as will be shown shortly.

The Working Party and Steering Committee

In its Interim Report, the Working Party proposed retaining the automatic obligation to give discovery but to limit its scope to that in CPR Part 31.6. It was also suggested that parties should be free to agree the scope of the discovery they intended to give, failing which the default position would be that in CPR Part 31.6. In its Final Report, the Working Party stated that “The weight of opinion among respondents to the consultation was significantly against adopting either of these Proposals and in favour of retaining the *Peruvian Guano* principles”.⁹¹ The rationale behind keeping the *Peruvian Guano* test was that, in Hong Kong, the problem was not excessive discovery but too little discovery. It was also suggested by some consultees that a narrower test would increase costs as more senior (and therefore more expensive) lawyers would need to be involved in the discovery process. It was also suggested that the reform of discovery in the CPR Part 31 had not produced any notable cost savings.

These responses demonstrate that the importance of the discovery process and its practical implementation are not taken seriously enough by some members of the Hong Kong legal profession. Perhaps those consultees who opposed its reform should ask themselves whether the inadequacy of discovery is because of the fact that it is a job that is doled out to inexperienced staff? As has already been noted, when cases come to trial, the court often ignores all but a handful of the documents that are placed in the trial bundles. The cost of collating, analysing and accommodating the rest into witness statements and experts’ reports is arguably thrown away. Would it not make sense to avoid this pointless and expensive exercise by focusing at the outset on the documents that actually go to the heart of the dispute? The failure of CPR Part 31 – if it is accepted to have failed – in England is not a failure of the rule itself but of the courts in failing to manage litigation and of the parties and their lawyers’ desire to discover and seek the discovery of every possible scrap of paper. There are very rarely any Perry Mason style “smoking gun” documents and people should stop looking for them.

Sadly, the Working Party was persuaded to drop its proposals and the Final Report contained, as Recommendation 80, a call for the maintenance of the *Peruvian Guano* test and, at Recommendation 73, a call for a practice direction “designed with a view to encouraging the parties to achieve economies in the discovery process by agreement; and to encouraging the courts, in appropriate cases, to give directions with the same aim”. This more

⁹¹ Final Report, para 472, p 243.

modest proposal on controlling discovery has found its way into the RHC, as will be shown shortly.

In a more enlightened frame of mind, the Final Report noted the consultees' broad agreement with the extension of pre-action and non-party discovery along the lines of CPR Parts 31.16 and 31.17. The Ordinance contains provisions to implement these recommendations with regard to the High Court and District Court. The Recommendations are also incorporated into the draft RHC, which shall now be covered.

Case Management of Discovery

In its Final Report, the Working Party recommended the adoption of case management timetabling and milestones. The first stage of this process would be at the summons for directions stage. The parties would be required to complete questionnaires "giving specified information and estimates concerning the case" to facilitate future case management and also to propose directions and a timetable to then be ordered by the court. A further recommendation was that the court, if it thought it "desirable", could fix a date for a case management conference (CMC) and the other milestones up to and beyond that date. These recommendations have been inserted into Order 25, the name of which has also been amended to "Case Management Summons and Conference".

CMCs are provided for by the CPR, indeed they are a major part of the "new procedural framework", and the new provisions in the RHC reflect the English rules. It is important to appreciate that CMCs are designed to be more than a rejuvenated Summons for Directions. The court is required to consider all the relevant matters in the case. This duty is also contained in Order 25 rule 2 but the wording doesn't explain the difference that CMCs and case management are supposed to make in respect of discovery. Having said this, Order 24 rules 8 and 15A have been amended and introduced respectively to enhance the courts' control over discovery. Order 24 rule 15A is especially useful in that it enables the court to limit discovery; specify a particular manner in which discovery should be made; and direct when inspection of discovered documents should take place.

In respect of the "manners" of discovery, it may be useful to look at the Commercial Court Guide.⁹² Part of Section E of the Guide is reproduced at Figure 8.

⁹² For the full text of the Court Guide, see the HM Court Service website at <http://www.hmcourts-service.gov.uk/publications/guidance/admiralcomm/index.htm>.

Figure 8: Admiralty and Commercial Court Guide, Section E**E2 Procedure**

E2.1 At the case management conference the court will normally wish to consider one or more of the following:

- (i) ordering standard disclosure: rule 31.5(1);
- (ii) dispensing with or limiting standard disclosure: rule 31.5(2);
- (iii) ordering sample disclosure;
- (iv) ordering disclosure in stages;
- (v) ordering disclosure otherwise than by service of a list of documents, for example, by service of copy documents; and
- (vi) ordering specific disclosure: rule 31.12.

Albeit that the English authorities are thin on the application of the above Commercial Court practice it is suggested that the terms are self-explanatory and that the Hong Kong courts should exercise a degree of imagination and, provided the underlying objectives are satisfied, dispense with the routine paper trail and order limited disclosure – perhaps on liability only or on a particular issue – on occasions.

Pre-action discovery

The Ordinance addresses the extension of pre-action discovery by removing the words “in respect of personal injuries to a person or in respect of a person’s death” from section 41 of the High Court Ordinance so that the relevant passage reads as set out in Figure 9.⁹³

Figure 9: Section 41(1)

(1) On the application, in accordance with rules of court, of a person who appears to the Court of First Instance to be likely to be a party to subsequent proceedings in that Court in which a claim is likely to be made, the Court of First Instance shall, in such circumstances as may be specified in the rules, have power to order a person who appears to the Court of First Instance to be likely to be a party to the proceedings and to be likely to have or to have had in his possession, custody or power any documents which are directly relevant to an issue arising or likely to arise out of that claim [discovery and inspection of any documents specified in the order]”

⁹³ Section 41 is also now divided into two subsections.

RHC Order 24 rule 7A is amended to reflect these changes also.

Yet, although the change is inspired by CPR Part 31.16, there are some differences between the two provisions. Firstly, within section 41, not only must the applicant and respondent to the pre-action discovery application be “likely” parties to a subsequent claim, that claim itself must also be “likely”. The word “likely”, as far as English proceedings are concerned, means “may well” rather than “more probable than not”⁹⁴ and it is one which the Hong Kong courts are familiar with. Having said this, the requirement that the claim itself is “likely” is not found in the CPR, nor is it found in the proposed rule for pre-action discovery in the District Court⁹⁵ and it has been removed from the latest draft RHC pre-action discovery rules. This inconsistency needs to be addressed.

Sharp eyed readers would have spotted a new term in section 41. What does “directly relevant” mean? This is defined in a “new” section 41(2) as can be seen in Figure 10.

Figure 10: Section 41(2)

- (2) For the purposes of subsection (1), a document is only to be regarded as directly relevant to an issue arising or likely to arise out of a claim in the anticipated proceedings if –
- (a) the document would be likely to be relied on in evidence by any party in the proceedings; or
 - (b) the document supports or adversely affects any party’s case.

Again, RHC Order 24 rule 7A reflects this provision. This is a little wider than the “standard disclosure” of CPR Part 31.6, given the presence of the words “likely to arise” and “likely to be relied on”. It is worth noting that pre-action disclosure in the CPR is limited to standard disclosure, the aim being to prevent “fishing expeditions”. Whether it does so of course is down to the willingness of the courts to apply the rule. In England, all applications are decided on their own merits and, to reinforce this fact, the Court of Appeal expressly ruled out laying down guidelines on such applications in *Bermuda International Securities Ltd v KPMG*.⁹⁶

The English courts have therefore tended to take a fairly cautious case-by-case approach to pre-action discovery. For example, in *BSW Ltd v Balltec*

⁹⁴ *Black v Sumitomo Corporation* [2003] 3 All ER 643.

⁹⁵ This is one occasion when the District Court’s rules have not been ignored.

⁹⁶ [2001] CPLR 252.

*Ltd.*⁹⁷ the applicant sought pre-action discovery the respondent's design drawings in relation to equipment for the off-shore oil industry. One of the applicant's former directors had been involved in the design and manufacture of the equipment concerned and he joined the respondent shortly after he left the applicant. Within two months of him doing so, the respondent started to manufacture equipment that was similar to and in direct competition with the applicant's. Naturally, the applicant suspected that its copyrights had been infringed. The court would not, however, simply follow a "two and two makes four" approach. It held that the applicant's allegations against the respondent were not based on any direct documentary or expert evidence. The intended claim was a "speculative" claim and the applicant would not be permitted access to the respondent's trade secrets (ie its designs) without a "clear and convincing evidential basis" for its belief that its copyright had been infringed.

By contrast, in *Baron WR Jay and Ors v Wilder Coe (A firm)*,⁹⁸ the applicant solicitors firm's bookkeeper had committed fraud against them, which had not been spotted by the firm's auditors. The respondent auditors had refused to voluntarily discover the relevant audit documents. In this case, the court held that a CPR Part 31.16 application was justified as the applicants had suffered and needed the respondent's papers to identify "mechanism" of their "misfortune". One would hope and expect that, despite the slight variation in the language of section 41(2) and CPR Part 31.16, the Hong Kong courts would take an equally pragmatic approach.

Non-party discovery

The Ordinance addresses non-party discovery by simply amending section 42(1) of the High Court Ordinance by removing the words "in respect of personal injuries to a person or in respect of a person's death". The changes to RHC Order 24 rule 7A also apply to non-party discovery. As with pre-action discovery, the English courts have adopted a case-by-case approach to non-party discovery. For example, in *A v X & B (Non-party)*,⁹⁹ the plaintiff suffered from psychological problems after accident for which the defendant had been found liable. The defendant, when it came to contest quantum, sought CPR Part 31.17 disclosure of the plaintiff's brother's (a non-party) medical records in order to demonstrate that the plaintiff's psychological problems were not all due to the accident. The court declined to make such an order.

One of the more interesting consequences of CPR Part 31.17 has been the affect on the alternative means of discovery all the same. As already

⁹⁷ [2006] EWHC 822.

⁹⁸ [2003] EWHC 1786.

⁹⁹ [2004] EWHC 447.

mentioned, CPR Part 31.18 states that CPR Parts 31.16 and 31.17 do not limit any other power which the courts may have to order pre-action and non-party discovery. Hence, the *Norwich Pharmacal* and *Khanna v Lovell White Durrant* “fake subpoena” procedures remain, as do the discovery of documents under Freezing Injunctions (*Mareva* Injunctions), Search Orders (*Anton Piller* Orders) and orders for the inspection of property.¹⁰⁰

Readers will be familiar with the principle in *Norwich Pharmacal Co v Commissioners of Customs & Excise*¹⁰¹ that anyone who, however innocently, becomes “mixed up in the tortious acts of others so as to facilitate their wrongdoing” is under a duty to assist the person who had been wronged by giving full information and disclosing the identity of the wrongdoer(s). The court can, accordingly, order that person to disclose the wrongdoer’s identity so that they may be sued. There is, of course, the important distinction between a mere witness and a facilitator for the purposes of a *Norwich Pharmacal* order. The former cannot be compelled to make any such disclosure.

In *Carlton Film Distributors v VDC Ltd*¹⁰² the court granted an application for an order that a third party disclose certain information where the potential plaintiff knew the potential defendant but required more information to plead an allegation of breach of contract. The information sought went “straight to the heart” of the potential claim and making a *Norwich Pharmacal* order “was the fastest, clearest and shortest way of getting there”. Similarly in *AOOT Kalmneft v Denton Wilde Sapte*¹⁰³ it was held that a solicitors’ files on its client’s affairs should be disclosed as *Norwich Pharmacal* covered an alleged wrongdoer’s identity and any information showing that he, she or it (the client in this case) had carried out the wrongdoing. It will be interesting to see if the Hong Kong courts also widen the scope of *Norwich Pharmacal* after April 2009.

Electronic Discovery

Perhaps the most telling absence in the Interim Report, Final Report, Bill, Ordinance and RHC is the failure to address the subject of electronic discovery or the discovery of electronic documents.

The definition of a “document” in both England and Wales and Hong Kong has long been accepted as being broader than mere sheets of paper, yet CPR Part 31.4 specifically states that a document is “anything in which information of any description is recorded” thus a “document” includes audio and video cassettes, DVDs, CDs and electronic documents such as emails, messages on mobile telephones, word-processed documents and

¹⁰⁰ These are all now covered by CPR Part 25 and its accompanying Practice Directions.

¹⁰¹ [1974] AC 133.

¹⁰² (2003) EWHC 616.

¹⁰³ [2002] 1 Lloyd’s Rep 417.

databases. There is no such provision in the RHC, instead faith is placed in the case law which CPR Part 31.4 codifies. Moreover, Practice Direction 31 paragraph 2A.1 of the CPR provides that the definition covers documents “that are stored on servers and back-up systems and electronic documents that have been ‘deleted’”. It also extends to additional information stored and associated with electronic documents known as metadata. Again, the RHC is silent.

As to how to deal with the discovery of electronic documents, Practice Direction 31 paragraph 2A.2 states that “The parties should, prior to the first CMC, discuss any issues that may arise regarding searches for and the preservation of electronic documents”. This discussion should be wide-ranging and cover, among other things, the “categories of electronic documents within their control, the computer systems, electronic devices and media on which any relevant documents may be held”. Paragraph 2A.3 adds that this cooperation is to extend to the “format in which electronic copy documents are to be provided on inspection”. Any “difficulty or disagreement” should be referred to a judge for directions at, if possible, the CMC.

Practice Direction 31 paragraph 2A.4 covers the fact that the existence of electronic documents will affect the extent of the reasonable search required by CPR Part 31.7. A number of factors may be relevant when deciding the reasonableness of a search for electronic documents including the number involved; the ease and expense of their retrieval; and the significance of any document which is likely to be found. Finally Practice Direction 31 paragraph 2A.5 recognises that it may be reasonable to search some or all of the parties’ electronic storage systems depending on the circumstances. The courts are therefore given the discretion to determine what may be appropriate.

The English courts have once again taken a pragmatic approach. In *Hands v Morrison Construction Services Ltd*,¹⁰⁴ the applicant sought the pre-action discovery of certain documents relating to the design and construction of an oval circuit suitable for staging car races. The respondent argued that this request covered electronic documents which were the equivalent to 850,000 lever arch files and 550 physical files of documents. The court ordered the discovery of the hard copy documents in the respondent’s solicitor’s possession only. By contrast, in *Chantrey Vellacott v The Convergence Group Plc*¹⁰⁵ the court ordered the specific discovery of six years’ worth of e-mails between several individuals in relation to a failed multi-million dollar telecoms project.

¹⁰⁴ [2006] EWHC 2018.

¹⁰⁵ [2006] EWHC 490.

It strongly recommended that the literature on electronic disclosure and those practitioners familiar with its complexities be consulted in advance of the finalisation of the RHC. The fruits of such consultation should then be included in the RHC. Not to do so would be to lay traps for the future.¹⁰⁶

The Fate of Civil Justice Reform

The Civil Justice Reforms are still over a year from being implemented and the final forms of the “new” RHC and RDC are not yet settled. It is to be hoped that the drafting errors in the CPR, some of which have been addressed in this article, will be noted and amendments made to the draft RHC in light of the same. The success or failure of the process will not, however, rest merely on the contents of the Ordinance and RHC.

The success of the CPR has not been due to what is contained in the several thousand pages of the White Book but due to the attitudes of the courts, practitioners and parties. The introduction of the CPR coincided with a notable shift away from the adversarial attitude of the past. How deep this shift has been and whether it was a consequence or the cause of the CPR remain subjects of debate, but there has been a shift nonetheless. The most prominent sign of this shift has been the growth in mediation. Again, some observers claim that mediation has grown as a consequence of the cuts in civil Legal Aid and the rising cost of lawyers.¹⁰⁷ Nevertheless, Churchill’s old adage that “Jaw, jaw” is better than “War, war” appears to have been taken to heart.

A similar shift will be needed if the limited changes embodied by the Ordinance and new RHC are to succeed. Thus far, there appears to be little sign of such a shift. The responses to the Working Party’s reports reveal a strong resistance to any form of meaningful reform, despite the almost universal recognition that the current system is not providing litigants with what they need. Calls for “evolutionary” change are siren calls.

A change will be required from the courts and the authorities too. The CPR were far less successful than they could have been because of a reluctance of the UK government to invest in training and resources. Lord Woolf himself called for up-to-date IT systems for the courts in his “Access to Justice” reports over 10 years ago, yet there are still courts today that

¹⁰⁶ The UK Commercial Litigator’s Forum was an early advocate for rules to deal with electronic disclosure. Its discussion paper can be found on its website: <http://www.commerciallitigatorsforum.com>.

¹⁰⁷ Lightman J’s speech at the SJ Berwin Mediation Summer Drinks Reception of 28 June 2007 is especially critical of the UK government’s treatment of civil legal aid. A copy of the speech is available on the ADR Group’s website: <http://www.adrgroup.co.uk>.

lack adequate stationery, let alone have integrated e-mail communications with each other or the outside world. Both the judiciary and practitioners will need retraining in the new rules. Again, in England, some courts and firms were found lacking, which explains some of the confusion of the early decisions on the CPR. Similar mistakes can and must be avoided in Hong Kong.

Finally, the implementation of the Ordinance and RHC should not be seen to be the end of the reform process. Whilst it is irksome that the UK authorities have issued 46 updates to the CPR, it reflects a recognition that the court system should be subject to constant review and – if need be – reform. The Civil Justice Council¹⁰⁸ was established under the Civil Procedure Act 1997 “with responsibility for overseeing and coordinating the modernisation of the civil justice system”. Its role is therefore distinct from that of the Law Commission. Its membership is comprised from the judiciary, legal profession, civil servants concerned with the administration of the courts, consumer affairs experts, lay advisors and representatives of certain business sectors eg insurers. It has conducted a great deal of work since its creation, not least in the field of ADR, and many of its reports and recommendations have been implemented.

The Civil Justice Council has proved to be an effective “watchdog” for reform. It is to be hoped that the Department of Justice will give a home to a similar pet.

¹⁰⁸ The CJC website: <http://www.civiljusticecouncil.gov.uk>.