LC Paper No. CB(2)1356/01-02(01)

Speaking Note To LegCo On Civil Justice Reform

Overview

1. The Bar in response to the Judiciary's Civil Justice Reform Interim Report has set up a Committee to study the proposals set out in the Interim Report. The Committee has now finished a draft report which is presently before the Bar Council. The submission we make today is hence only a provisional submission.

2. There are two preliminary matters.

Procedural Fine-Tuning

3. First, we would like to point out that a large number of proposals in the Interim Report concern procedural fine-tuning of existing rules and will have imperceptible impact on the everyday litigant. By procedural fine-tuning, we mean these are strictly speaking not reforms or even changes but measures to ensure stricter adherence to or enforcement of the existing rules in order to speed up the pace of litigation.

4. The Bar is generally supportive of these proposals.

Guiding Principles

5. The second preliminary matter is perhaps more important. We consider that any

reform should not lose sight of the following guiding principles:-

Principle 1: Expediency must not be achieved at the expense of justice. There can be no compromise of a litigant's right to have a fair hearing. A Judiciary's paramount duty is to do justice to the parties, not to serve the public at its convenience.

Principle 2: The success of any reform will depend on the quality of our barristers, solicitors and judges. This is particularly true if more power is given to the judges. There must be a sustained commitment to upgrade the quality of our judges.

Principle 3: The Bar is not restricted by the Working Party's terms of reference. In considering how to improve our system, we constantly bear in mind the "big picture" and the need for a broad and over-all review.

Principle 4: There must be further consultation. Many of the Working Party's proposals are in vague or general terms leaving specifics to be worked out. There must be a continuous dialogue between the Judiciary and the legal profession to work out these specifics.

Major Areas Of Reform

6. The circumstances of this discussion do not permit us to deal with each and every proposal raised in the Interim Report. We will thus only touch on those areas of proposed reform which will impact most on the everyday litigant. These areas

are:-

(a) Pre-Action Protocols;

(b) Judicial Control;

(c) Restriction On Appeals;

(d) Costs Management;

(e) Alternative Dispute Resolution.

Pre-Action Protocol

7. The Interim Report proposes a shift of emphasis from post-action conduct to pre-action conduct. At present, a litigant will generally only incur modest costs in obtaining preliminary advice before a writ is issued. The bulk of legal costs will not be incurred until shortly before the trial. If the action settles before then, such costs may never be incurred.

8. If the proposed reform goes through, a litigant will incur substantially more costs in getting his own case in order first before a writ is issued. Because he will not be allowed to easily change his case or explore other remedies once a writ is issued, his lawyers will insist on a detailed consideration of the merits of his claim before a writ is issued. There will also be the need to verify his claim on oath which at present he does not have to do. There will thus be pressure to get his case "absolutely right" before a writ is issued.

9. Secondly, given that pre-action protocols will lead to front-end loading of costs, those who have limited financial resources may suffer a disadvantage. At present, poorer litigants may rely on the fact that costs are spread out over a long period of time leading up to the trial. This may not now be possible. The parties also may miss out on the chance of a cheap settlement early into the proceedings.

10. While we can see the merits of pre-action protocols which will:-

    (a) discourage unmeritorious claims;

    (b) shorten and simplify after-action steps,

    we think the system should be flexible with consequences of non-compliance carefully considered and laid out, especially if the litigant is unrepresented.

11. This is one area where the working out of specifics is very important and requires careful and extensive consultation.

Judicial Control

12. The Interim Report advocates substantial concentration of judicial management power. For example, there is a suggestion that we should adopt a variation of the US docket system whereby a judge will take charge of a case from beginning to end. There is a proposal that more power should be given to a judge to order

discovery, clarification of a party's case, order or even limit expert evidence. In other words, a more hands-on approach by judges.

13. While we see the merits of such a system, we are not convinced that our Judiciary is presently mature enough to cope with such a system. A look at our daily court list will show over 50% of our daily judges are deputy or junior inexperienced judges. Many are plucked from the lower courts with no specialized work experience on complicated or specialist cases.

14. A second concern is that judges not only are but should be seen to be neutral. By entering into the arena of dispute, a litigant may feel litigimately aggrieved if he gets stuck with a judge who is seen to be against him and constantly prevents him from presenting his case in the way he wants. There will be an erosion of confidence in our system which is both undesirable and unnecessary.

15. We propose that more specialist lists be established and more judges be trained to deal with specialist list cases. Since a specialist list judge should be more conditioned to take charge of a case within his field of expertise, it will be more acceptable to let him have greater control over the conduct of cases on his list.

Restriction On Appeals

16. The aim of these proposals is to give finality to proceedings and discourage unmeritorious appeals. However, again for the same reason as set out above, our Judiciary, with respect, has not reached such a confidence level that one can safely rely solely on a first level judgment.

17. Furthermore, a right of appeal is a fundamental right of a litigant in a developed and fair legal system. We propose that there should at least be a one-tier unrestricted appeal with appeals thereafter restricted by leave.

18. We also propose that there should be "leap-frog" appeals to enable cases which will bound to go to higher courts to skip some intermediate hearings and thus save on costs and judicial time.

Costs Management

19. The Working Party proposes a system of costs management which will force lawyers to disclose their rates, set up benchmark costs, force parties to disclose the costs they have incurred and punish unreasonable behaviour by imposing immediate costs orders.

20. Disclosure of Rates

We consider further transparency in the legal profession a necessary step towards an open and fair legal system. However, we do not believe statute-enforced disclosure has any place in a free market such as Hong Kong. No other profession is subject to such control.

21. In fact, market forces dictate the behaviour of professionals including a barrister. A lack of frankness on a barrister's part as to his rates will in practice swiftly lead to a drying up of work.

22. Benchmark Costs

The setting up of benchmark costs will not only be difficult to achieve but we believe will have very little to offer by way of limiting costs.

23. First, it is a generally held assumption that price equals excellence. In many cases, this assumption is true. Why should litigant A not be allowed to have the luxury of the best lawyer available if he can afford it, provided the losing party does not have to pay for the extra cost? The present system has already an in-built taxation process where unusually high fees are taxed off. We do not see why a benchmark system is needed on top of this.

24. Secondly, such a system may have an adverse market effect. If a benchmark is set too low, it will be unfair to litigants who would not recover their reasonable costs. If a benchmark is set too high, less experienced lawyers would be tempted to charge the benchmark on the footing that charging below the benchmark will be an admission of inexperience or incompetence when compared with one's peers. This will in effect increase rather than reduce taxed legal costs

25. Thirdly, benchmark costs will in fact favour rich litigants since they can afford to absorb the difference between fees charged and the benchmark. But the less resourceful litigants may feel compelled not to go to a more qualified lawyer because they cannot afford to run the risk of not recovering the difference in fees in taxation, even if they win.

26. Finally, with other reforms promoting simplified procedure, a tighter judicial control, a change of litigating mentality and discouragement of unnecessary interlocutory applications will give rise to fewer opportunities for unscrupulous lawyers to exploit costs. We are thus unconvinced that benchmark costs are the right answer.

27. Disclosure of Costs

We have serious reservations about this proposal. This is because disclosure of

costs incurred by a litigating party to his opponent will reveal privileged and confidential information relating to the strength or weakness of his case.

28. Take for example a case where a plaintiff knows he suffers from a fatal point which is not obvious to his opponent. He goes off to seek advice from a silk or an expert on the point. Disclosed costs will reveal that he has incurred additional costs or undertaken abnormal activity so as to alert his opponent.

29. If the disclosure is simply a global figure without a proper breakdown, we question the benefit to be derived from such knowledge. Indeed, such a system is open to abuse in that a party can inflate his costs and try to scare off his opponent.

30. Immediate Costs Orders

The Bar has been advocating this for some 4 or 5 years and we are pleased to see that this proposal is now being taken on board.

31. Such a system involves a Court ordering the losing party to immediately pay the winning party at the end of every interlocutory dispute. At present, a party does not have to pay until the end of the case thus encouraging him to pick a fight at every step of the litigating process without sanction.

32. Immediate costs orders will discourage unnecessary interlocutory applications and hopefully change the common mentality of litigants that interlocutory applications are necessary and not costly.

Alternative Dispute Resolution

33. The Working Party proposes compulsory mediation before litigation. At present, such a system only exists in the family court.

34. We oppose such a proposal. We believe mediation should be encouraged but not enforced.

35. First, civil justice reform should not mean denying litigants recourse to the Court which is a fundamental right. The Court should serve litigants by giving such a right proper legal content and not by abdicating its duty to resolve disputes.

36. Secondly, if a party has a legal right, why should he be compelled to compromise his legal right and accept something less?

37. Thirdly, such a system will be open to abuse with undeserving defendants using mediation as a means of delay or as an escape route from the full rigour of their liability.

Conclusion

38. To conclude, while we generally welcome the proposed reforms, we wish to caution against inflexible and over-compensating changes. There must be continued consultation and continuous upgrading of the quality of the judicial and legal service to be provided to the public. The continuous upgrading of judicial service may require a significant commitment of public funds. But such commitment is vital to the preservation of the Rule of Law in Hong Kong.

39. Indeed, we firmly believe a sustained and gradual reform is inevitably more fruitful than an abrupt and complete over-haul.

Thank you.

Dated this 14th day of March 2002.

Ronny K.W. Tong, S.C.