LegCo Subcommittee
on Rules of the High Court (Amendment) Rules 2017
("the Subcommittee")

Responses to Issues raised at the Meeting on 20 July 2017

Introduction

It was noted that the Judiciary proposed to amend Order 59, rule 7(1)(b) of the Rules of the High Court (Cap. 4A) ("RHC") by advancing the cut-off date of serving a supplementary notice to amend a notice of appeal or respondent's notice without the leave of the Court of Appeal to "the date on which a hearing date of the appeal is fixed in accordance with a direction referred to in rule 6A". In order to ascertain the efficacy of the proposed amendment, the Judiciary Administration was requested to provide a written response on the following :

(a) the background/justifications and policy intent for setting the cut-off date of serving a supplementary notice to amend a notice of appeal or respondent's notice without the leave of the Court of Appeal as "not less than three weeks before the date fixed for the hearing of the appeal" under the existing rule 7(1)(b);

(b) the average time duration between the date when a hearing date of an appeal is fixed and the actual hearing date of the appeal.

2. It was also noted that the Chinese rendition of "settle" was "擬備" in section 227 of the Companies Ordinance (Cap. 622) while the Chinese rendition of "settled" was "議定" in Order 102, rule 14 of the RHC. The Judiciary Administration was requested to give consideration to the above discrepancy and inform the Subcommittee its position.

Responses

Issue 1 : Civil Appeals to the Court of Appeal

3. The Judiciary has proposed to amend Order 59, rule 7(1)(b) of the RHC to advance the cut-off date for amending without leave the notice of appeal/respondent's notice for civil appeals to the Court of

Appeal ("CA") from not less than 3 weeks before the hearing date of the appeal to the date when the hearing is fixed. As requested by the Sub-committee, we set out below more clearly the background, justifications and policy intent of the proposed amendments.

Policy Objectives

4. The Civil Justice Reform introduced in April 2009 has gradually ushered in a sea change in litigation culture. Modern philosophy of civil litigation emphasises on (among other things) active case management, early identification of issues, procedural and costs efficiency and effectiveness, proportionality and practical justice.

5. Order 1A of the RHC therefore sets out clearly the objectives of the court procedures in the RHC and the role of the court in handling court cases. Stress is put on the court's case management powers.

6. More specifically, Order 1A, rule 1 of the RHC provides for the underlying objectives of the RHC. They 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 ensure fairness between the parties;
> (e) to facilitate the settlement of disputes; and
> (f) to ensure that the resources of the Court are distributed fairly."

7. Order 1A, rule 4 of the RHC further provides for the court's duty to manage cases as follows (with the more relevant ones bolded) :

> "(1) The Court shall further the underlying objectives of these rules by actively managing cases.
>
> (2) Active case management includes-
> (a) encouraging the parties to co-operate with each other in the conduct of the proceedings;
> **(b) identifying the issues at an early stage;**

(c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;
(d) deciding the order in which the issues are to be resolved;
(e) encouraging the parties to use an alternative dispute resolution procedure if the Court considers that appropriate, and facilitating the use of such a procedure;
(f) helping the parties to settle the whole or part of the case;
(g) fixing timetables or otherwise controlling the progress of the case;
(h) considering whether the likely benefits of taking a particular step justify the cost of taking it;
(i) dealing with as many aspects of the case as practicable on the same occasion;
(j) dealing with the case without the parties needing to attend at court;
(k) making use of technology; and
(l) giving directions to ensure that the trial of a case proceeds quickly and efficiently."

8. Against the above policy objectives, the CA has a positive duty to ensure that every appeal to the CA is properly presented by the litigants and dealt with by the CA as expeditiously as is reasonably practicable.

Overall Procedures before Hearing

9. In the light of these policy objectives, the Judiciary has recently reviewed the court procedures and practices for civil appeals to the CA. In March 2017, the Judiciary substantially revised and implemented a Practice Direction ("PD") governing civil appeals (namely PD 4.1) to strengthen the court's case management powers for such appeals. In particular, the hearing date of an appeal will not be fixed until all essential documents relating to an appeal are ready. These include the notice of appeal, any respondent's notice and the index of the appeal bundles. Moreover, both parties have to jointly submit a checklist confirming, among others, that there is no outstanding interlocutory application and the estimated time needed for the hearing.

10. If either party indicates an intention to amend the notice of appeal or the respondent's notice, the hearing date will not be fixed and the case will be referred to the Registrar of Civil Appeals for further direction.

11. In short, unless all proper preparation for the hearing of an appeal is done and the parties have so confirmed, no hearing date of the appeal will be fixed. In other words, by definition, the fixing of a hearing date signifies the parties' readiness for the hearing of the appeal. What remains to be done after the fixing of the hearing date is that the CA will direct the appellant to lodge and serve the appeal bundles between 35 to 42 days prior to the hearing of the appeal, depending on the complexity of the appeal; and PD 4.1 also requires the appellant and the respondent to lodge and serve their skeleton arguments and lists of authorities 28 days and 14 days respectively prior to the hearing of the appeal.

12. The time between an application to fix a hearing and the first available hearing date offered by the court is now normally under 3 months (averaging at about 86 days in 2016).

Policy Justifications

13. For the same policy objectives set out in Order 1A of RHC above, the Judiciary has also put forward amendments to Order 59, rule 7(1)(b) of RHC to advance the cut-off time for amending without leave the notice of appeal/respondent's notice from 3 weeks before the hearing date of the appeal to the date when the hearing is fixed.

14. The existing Order 59, rule 7(1)(b) which allows a party to amend the notice of appeal or respondent's notice which serves to set out the grounds of appeal or grounds of opposition to the appeal so close to the hearing date without any control of the court is a relic of the past. It was enacted a long time ago when litigation was allowed to be conducted in a more relaxed pace with the court adopting essentially a passive role. Viewed in the light of modern litigation with its underlying objectives explained above, the provision is plainly an oddity which is prone to give rise to unacceptable delays, wasting of costs and efforts, and even abuses.

Disruption of preparation and wasting of costs

15. Under the revised PD4.1, by the time when it is up to 3 weeks before the hearing, both parties will have long submitted all their related documents to the CA and confirmed that there is no more

outstanding interlocutory application. The skeleton arguments and lists of authorities will have already been submitted to the court as well.

16. At this late stage, both parties should be very advanced in their preparatory work for the hearing itself. If any party has any substantive last-minute changes to the grounds of appeal or grounds of opposition to the appeal, it will very likely lead to wasted costs and efforts of the other party. The other party may also need to incur additional costs to prepare fresh/refined counter-arguments. The appeal bundles may have to be re-assembled, and further or revised skeleton arguments may have to be lodged and served within a small window before the hearing of the appeal.

17. The understandable reluctance of the innocent party to avoid an adjournment of the hearing resulting from the last-minute amendments may put that party in a most disadvantaged position in terms of proper preparation for the hearing.

Wastage of Judicial Resources

18. Besides, last-minute substantive changes without controls may also lead to disruption or wastage of preparatory efforts of the court.

19. The judges may have already spent time to read the documents submitted to the court. They may be forced to read substantial additional materials at the last minute, thereby disrupting their normal schedules of work. Given the sudden changes, the time estimated for the hearing may also need to be adjusted, thereby disturbing the court's diary and the Judges' schedules. The court hearing may need to be prolonged, or even adjourned to ensure proper preparation and/or fairness to the other party. In case of adjournment, the vacated court hearing slot will be wasted and there will be a delay to the adjudication of the matter. The same division of Judges may not be available to hear the case at the adjourned hearing, and the preparatory work already done by the unavailable judge(s) will be wasted.

Unfairness

20. Last-minute changes may also cause unfairness to the other party, adversely affecting the administration of justice.

21. For civil cases, in general, both sides are required to disclose their arguments to the other side and to the court well in advance to

facilitate possible settlement and when that cannot be achieved, a fair adjudication of the real issues. But, as it is, as a party is free to amend the notice of appeal/respondent's notice as he likes very close to the hearing date, the party can adopt an ambush strategy by concealing some of the key arguments till this late stage so as to catch his opponent by surprise and secure undue forensic advantages.

Not in line with Policy Objectives

22. Taken the above together, the Judiciary takes a strong view that the current arrangement in Order 59, rule 7(1)(b) of allowing parties to freely make changes to the notice of appeal or respondent's notice so close to the actual hearing is not acceptable and is not in line with the policy objectives of Order 1A of the RHC.

Views of Professional Bodies

23. Our proposed amendments have been agreed by the legal professional bodies who are directly affected by the proposed changes, without questions.

24. Indeed, the Law Society of Hong Kong indicated in their letter to the Judiciary dated 22 February 2017 their unreserved agreement to the proposed changes in these terms :

> *"We agree to the proposal to push back the time for amending a notice of appeal and respondent's notice without leave of the Court of Appeal to the date when a hearing is fixed. We agree that amendments to original notice of appeal and respondent's notice three weeks before the hearing of the appeal date is too late and unsatisfactory. Indeed, this would be at odds with the new PD 4.1 which requires the appellant's skeleton argument to be lodged no later than 28 days before the hearing of the appeal."*

25. Similarly, the Hong Kong Bar Association indicated no comments on the above proposed legislative amendments in their letter to the Judiciary dated 13 February 2017.

Justified amendments will still be allowed

26. It should be emphasised that the proposed amendments do not shut out justified amendments. They only give the court control over

what late amendments should be allowed and on what terms they should be allowed, in order to further the underlying objectives described above. The quality of justice is by no means compromised.

Costs Implications

27. Some members of the Subcommittee were concerned with the legal costs that may be incurred if leave is required for amendments after the hearing date is fixed as the period requiring such leave will in most cases be longer than the current period of three weeks.

28. As required in the revised PD 4.1, the key issues for determination in the appeal, as defined by the grounds of appeal in the notice of appeal and grounds of opposition in the respondent's notice, have to be crystallized before the fixing of the hearing date. The parties are specifically required to confirm in writing that there is no outstanding interlocutory application before the hearing date is fixed. Furthermore, if either party indicates an intention to amend the notice of appeal or respondent's notice, no hearing date will be fixed until the matter is sorted out. Therefore, the chance for the parties to subsequently introduce any substantial changes to the notice of appeal/the respondent's notice is small. This is particularly so as the time between an application to fix a hearing and the first available hearing date offered by the court is now normally under 3 months.

29. Moreover, an unopposed application for leave to make a late amendment may be disposed of by consent between the parties (followed by a court order). The court may also deal with an opposed application for leave to amend on paper without an oral hearing.

30. It is therefore considered that the overall advantages to be gained by the proposed amendments to the rule, including the saving of legal costs that may otherwise be wasted, far outweigh the additional costs that may be involved in the proposed leave requirement in individual cases.

Issue 2 : Chinese equivalent of "settled"

31. On the Chinese equivalent of "settled" in Order 102, rule 14 of the RHC, the Judiciary has consulted the Financial Services and the Treasury Bureau and the Department of Justice. They have advised that the Chinese equivalent of "議定" in Order 102, rule 14 of the RHC is appropriate considering the context of section 227 of Cap. 622. As such,

for alignment, the Government will amend the Chinese equivalent of "settle" in the relevant provisions of Cap. 622, including section 227, when they next amend Cap. 622.

Judiciary Administration
August 2017