

Civil Justice Reform II

In the column last month our regular contributor Dr Arthur McInnis took our first look at Hong Kong's Civil Justice Reform Interim Report and Consultative Paper. Those reforms as noted and if enacted, would bring the most far-reaching changes to civil - including construction - litigation in more than 100 years. This month, in the second of the two-part series, we look at the key concepts underlying and the details in the specific proposals.

The Overriding Objective

The reforms are based upon the concept of adopting an explicit overriding objective of procedural justice and economy in civil justice. This would be supported by a whole new set of civil procedure rules. Plainly stated the overriding objective of the reforms would be to ensure that cases are dealt with justly.

Now justice is a fairly subjective concept and what is viewed as just by one side to a dispute may not be to the other. Thus the objective sets out precisely what it means by dealing with a case justly. In effect, that is to ensure the parties are dealt with on an equal footing, that expense is saved throughout, that the way in which the case is dealt with is always proportionate to the money involved, its importance, complexity and the parties' respective financial positions.

Fairness and expedition too are relevant as is the appropriate allocation of the court's resources to adjudicating on the matter. Thus the overriding is not meant simply to be aspirational but also operational as well. Should Hong Kong be so bold? My answer is yes. The idea is not that far off modern management precepts of mission, vision and values. After all why should the courts be left behind in this management revolution.

Case Management

Justice as outlined above will not work unless it is actively supported. This calls for culture change in the courtroom. Thus the reforms propose the adoption of a comprehensive case management approach to civil procedure. Why? Because it is recognised that for the overriding objective to be met judges have to become more involved in the conduct of litigation. Therefore an express duty is imposed upon the courts to further the overriding objective by actively managing cases. So too with justice views on how this might be achieved could vary. Therefore active case management would be defined to include things such as encouraging co-

operation and ADR, identifying issues earlier, dealing with matters more promptly, considering real costs and likely benefits of actions, using more technology and giving directions. These are but some of the main ways in which cases would be actively managed once again.

Should courts move away from their traditional passive role in this direction? Yes, they should. For far too long litigants and their counsel have controlled the agenda without sufficient regard to the other stakeholders in the judicial process and the need for a correction was long overdue. It always seemed incongruous to me that the one person best positioned and often most experienced to really deal with the dispute took such a low-key approach to the case. The judge after all will decide the dispute. Why should he appear to be so disinterested until it comes to writing his reasons. If he or she could not be trusted to be even-handed in this process throughout then why should anyone have even bothered. So take that expertise, take that independence and add value as we forward. These then would be the hallmarks of the reform what of the specific proposals.

Possible Reform Proposals

The report sets out a wide range of reforms across some 21 areas and thus their number and detail permits only the briefest comment on 20 of them here.

Pre-action protocols

The reforms would introduce new Codes of Practice called pre-action protocols on how disputes would be handled before proceedings are commenced. Thus the court would become involved at an earlier stage and could better influence behaviour through its cost jurisdiction. Construction and engineering cases would be given their own such code. On balance their use in the UK has been positive and they would add value here in Hong Kong.

Commencing proceedings and challenging jurisdiction

Both these areas would be rationalised under the reforms. There is no good reason not to reduce the number of modes of commencing proceedings or challenging jurisdiction. We have long passed the old formulaic ways of pleading historically and these reforms take this to its logical conclusion.

Default judgments and admissions

It is proposed the rules be made more flexible to permit the making of admissions and even the payment of orders by

instalments. Both are pragmatic suggestions and should serve to streamline cases and provide additional room for judgement debtors to better arrange their compliance.

Pleadings and statements of truth

Pleadings - in many cases - have never lived up to what they should be in practice. While supposedly they inform the court and other parties of the case alleged, far too often they are worded ritualistically and serve only to camouflage what is the real problem. Too often pleadings focus on the cause of the action not the facts. Trust me there are enough causes of action to go around. What interested parties need are details to be meaningful. These details, sometimes euphemistically referred to as particulars, are usually woefully inadequate. Therefore any proposals such as these which move the parties toward the real matter or facts at issue are welcome. On the other hand statements of truth seem to be superfluous if the lawyers are doing their job. If they are not then simply adding this requirement will be very unlikely to make any difference.

Summary disposal of cases or issues

A new test is proposed to be used in all cases involving summary dispositions. The test, a variation on an old theme, is that of no real prospect of success. This is a small point but once again does simplify matters. The true test of course will come in the court's application of it.

Offers to settle and payment into court

Greater incentives to make and consider both offers to settle and payments into court are strategic proposals that have worked well in the UK. Now disputants do have to look more carefully at the merits and demerits of their cases and adopt more cautious postures overall because no one likes penalties for failing to do so.

Interim remedies and security for costs

Over time the courts have developed a wide range of creative and effective common law remedies. The proposals seek to consolidate these remedies in a simpler more user-convenient format. One question raised by the report is whether Hong Kong courts should have like powers and be able to act extrajudicially. The answer given here is yes. Commerce and the court's customers are far too international in scope to leave the new proactive courts without the means to police this environment.

Case management - timetabling and milestones

Construction litigators are well familiar with timetabling and milestones. Would these tools be out of place in the courts?

Far from it. What is more surprising is that more use has not been made of them long before now. Time and cost are inherently related and well understood in the programming context. Let us draw upon that knowledge in this way.

A docket system

A docket system is put forward as a possible alternative to the case management and timetabling discussed above. The report notes that it has been used with some success in other jurisdictions. While my knowledge of docket systems is limited it would seem their rejection for administrative and other reasons in the UK has to be given weight. It seems as well that the relatively small number of cases which might be heard in various dockets is a limiting factor in considering the adoption of the approach.

Specialist lists

Recognition is given of the contribution that specialist lists make to judicial efficiency. Once again the construction industry benefits from this as well with the specialist Construction and Arbitration List. In my view the advantages of these lists outweigh any disadvantages that might come from further rationalisations. In fact I would like to lend my support to considering the advantages of establishing a specialist construction court as exists in the United States, Australia and the UK. I will return to this at another time.

Multi-party litigation

The proposals are timid in terms of multi-party litigation. Recognition is given to the fact that the Hong Kong system does not cater to so-called class actions. This is true. The current arrangements for representative actions too are no substitute. In the UK a sort of half-way house entailing group litigation orders was adopted. However, this is not going as far as many consumer groups would advocate. It would seem that recognition should be given to the fact that there are instances where a class may be defined and it would be in their interest, and arguably society's, that their dispute be dealt with at once. Ample precedent exists for this and in my view we should draw upon rather than resile from it.

Discovery

The practice of discovery of documents is inherently part of the litigation process. The proposals would seek to limit it. This seems to me to be going in the wrong direction. Let me put it this way: While I can accept that too many documents in court can lead to additional expense, the objective of limiting that number may still be met in another way. Thus, rather than allow the parties themselves to limit their own release of

documents, require the parties opposite themselves to do it. Perhaps I am just a bit cynical but I would rather be the judge of whether my opponent's documents were relevant or not than leaving that decision to him. So same objective here, different orientation.

Interlocutory applications

The focus of the proposals is upon making parties pay for unnecessary interlocutory applications. I would agree that this is fine. However, it may be equally as effective if the interlocutory applications are simply opened up more. The Hong Kong system hides so much in its mode of interlocutories. It is far too cosy. Lets get these applications out in the open, covered more in the press and reported more in the law reports. Lets make the lawyers and their clients more accountable before each other and the public. This is how to achieve the objective sought.

Witness statements

Witness statements are truly one of the worst features of Hong Kong litigation. In fact, until I came here many years ago, I would not have believed that so formal and so artificial a system would be found here. Every criticism that has been made of witness statements is true save likely one thing - that is that it probably understates their utility. Witness statements are concoctions of the lawyers. What we need is not oral supplementation but oral evidence, under oath and tested by cross-examination. Let's really hear what the witnesses have to say unvarnished. To do this effectively we need a full-fledged system of depositions or examinations for discovery as used in North America. Only such a move will truly overcome the artifice of the present practices and I cannot make that point strongly enough.

Experts

In construction litigation at least we rely heavily upon experts. Have they become hired guns? The answer is yes. What should we do about it? One thing we could do is admit the fact that that they are on someone's payroll and will be influenced by it. In short, let's not pretend the experts are independent. Thus, if you want independent experts then let the court appoint them and the court pay for them. Naturally that payment would be recouped from the unsuccessful parties. On the other hand if it is just experts that you want then leave the system alone.

Trials and case management

The proposals here would allow the judge to impose time limits where need be. This seems to follow both logically and naturally from the other reforms proposed and is supported.

Appeals

Here it is suggested that the courts be given a larger role in what comes before them. I am worried about these suggestions. My reason, in part, is that if you have already given the court power to manage the cases and you have imposed potential cost penalties at every stage as well for poor case management practices, then isn't that enough to achieve the overriding objective? I would think so. In addition, I worry that some good appeals simply will not get leave for the wrong reasons - e.g. too big, too political, too embarrassing, too difficult, too close to this or that, whatever. Some would say this is exactly what takes place at present in the context of judicial review. Sadly I might have to agree. In my view the courts are there to be used - at your peril of course - but used nevertheless. We should not encroach on this.

Costs

Reforms are suggested across the spectrum of costs. They are long overdue and I support them.

Alternative Dispute Resolution

ADR is a force increasingly to be reckoned with in construction. Thus the proposals seeking to further develop it in the judicial context is not of place. The proposals sit comfortably with the overriding objective and case management as a whole. A mandatory role for ADR is welcomed.

Judicial review

Subject to what has been said about leave requirements in appeals some rationalisation of the judicial review process consistent with overcoming historical anomalies in nomenclature is supported here too.

Summing Up

Civil justice in Hong Kong is in need of reform. The shortcomings I have outlined in Parts I and II of this article are generally conceded. Thus the question really has become not of whether to reform but how far to go. I believe it can be seen from this Part that I support the reforms and more. I noted earlier that complacency has prevailed far too long in this regard and now it really is time for action. Let's adopt the proposals and then some.

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