

**Re: Order 5, rule 6(2)-(6), R.H.C.
Right to Sue in Person - Body Corporate**

THE BAR'S POSITION PAPER

1. The Bar Council has recently received a complaint in respect of the right of corporations to bring or maintain legal proceedings without legal representation. Put shortly, the complaint is that the provisions in Order 5, rule 6(2) to (6) of the R.H.C. constitute an undue restriction to corporations (and its directors) in respect of their right of access to court. Following the complaint, a member of the Legislative Council has also approached the Bar Council asking for the Bar's view on the matter. This position paper outlines the Bar's views on the matter.

A. *The Statutory Regime*

2. The relevant parts in Order 5, rule 6 provide as follows:

- “(2) A body corporate may not begin or carry on any such proceedings in the Court otherwise than by a solicitor except ---
- (a) as expressly provided by or under any enactment; or
 - (b) where leave is given under paragraph (3) for it to be represented by one of its directors.
- (3) (a) An application by a body corporate for leave to be represented by one of its directors shall be made ex parte to a Registrar and supported by an affidavit, made by the director and filed with the application, stating and verifying the reasons why leave should be given for the body corporate to be represented by the director.
- (b) The relevant resolution of the board of the body corporate authorizing the director to appear on its behalf if leave is granted shall be exhibited to the affidavit.
- (4) No appeal shall lie from an order of the Registrar under paragraph (3) giving or refusing leave.
- (5) Leave given by a Registrar under paragraph (3) may be revoked by the Court at any time.
- (6) No appeal shall lie from an order of the Court revoking leave given by a Registrar.”

3. Apart from the requirement of leave, the provisions in Order 5, rule 6 also have the following effects:

- (1) Only a Registrar has the jurisdiction to grant leave. The trial judge or other judges do not have such a jurisdiction¹.
- (2) Only a director of the relevant company may be permitted to represent the company. Other persons related to the company (such as employees who are not directors, irrespective of how senior he/she may be in the management of the company) cannot be allowed to represent the company.
- (3) No appeal is allowed, whether in respect of the initial refusal of leave or the subsequent revocation of leave. This is in contrast with the position in England even before the implementation of the Woolf Reform².

B. Issues Raised

4. The issues thus raised include the following:

- (1) whether, as a matter of principle or policy, leave of court should be required before a body corporate can be represented by its directors to bring or conduct legal proceedings;
- (2) if answer to (1) is in the affirmative:
 - (a) whether persons other than directors (such as majority shareholder or employees) shall be allowed to represent companies in legal proceedings before the High Court;
 - (b) whether the denial of the right of appeal (as is presently the effect of Order 5, rule 6(4) and (6) in respect of the initial refusal of leave and the subsequent revocation of leave) is justified, or whether a right of appeal should be allowed under the Rules.

C. Whether Leave Should be Required

C.1 The Right of Access to Court

¹ See: *Kone Elevator (HK) Ltd. v Senfield Ltd.*, unrep., CACV 216/2002 (24 February 2003), at §§2-11, followed in *China Top Consultants Ltd. v Prosperity Construction & Decoration Ltd.*, unrep., HCA 6903/2000 (Chu J) (29 August 2003) (§14) and *Bank of China (Hong Kong) Ltd. v Expert Promise Ltd.*, unrep., HCMF 1136/2003 (Lam J) (17 September 2003) (§5).

² The decision in *Radford v Freeway Classics Ltd.* [1994] 1 BCLC 445 is an example of how the appellate court approach an appeal from an order refusing leave to a company to be represented by its director.

5. It cannot be gainsaid that the right of access to court is a fundamental right. The relevant provisions in the Basic Law and the Bill of Rights aside, the common law right of access to court has often been described as a constitutional right³.
6. Putting aside necessary safeguards (such as security for costs where the plaintiff is a body corporate), there should not be any material difference between a corporation and a natural person insofar as the right of access to court is concerned. Indeed, the right of access to court enshrined under Article 6 of the European Convention on Human Right (“ECHR”) has been relied on by corporations⁴.
7. It is accepted that the right of access to court is not absolute⁵. It is also accepted that provisions similar to those contained in Order 5, rule 6 can be found in the civil procedure rules in other common law jurisdictions⁶ and had been held to be constitutional⁷. However, it is pertinent to note that those jurisdictions mainly follow the civil procedure rules of England enforced before the Woolf Reform. More importantly, each jurisdiction has its own legal history and unique circumstances. The mere fact that a similar set of rules is appropriate in another jurisdiction does not mean that the same regime is necessarily appropriate in the context of Hong Kong⁸.
8. Ultimately, as the court held in *Ashingdane v United Kingdom*⁹ in the context of Article 6 of the ECHR:

“the limitations applied must not restrict or reduce the access left to the individuals in such a way or to such an extent that the very essence of the right is impaired [and] a limitation will not be compatible with Article 6(1) if it does

³ See: Richard Clayton & Hugh Tomlinson, *Fair Trial Rights* (Reprint from *The Law of Human Rights*, 2nd edn.) (OUP), §11.44.

⁴ See: Ailbhe O’Neill, *The Constitutional Rights of Companies* (Thomson Round Hall) (2007), §§11-21 to 11-24.

⁵ See: Richard Clayton & Hugh Tomlinson, *ibid.*, §11.374.

⁶ Examples include Singapore, New Zealand, Australia, South Africa and Canada. See also: *Bay Marine Pty Ltd. v Clayton Country Properties* [1986] 8 NSWLR 104, *Worldwide Enterprises Pty Ltd. v Don Silberman* [2010] VSCA 17, *Simto Resources Ltd. v Normandy Capital Ltd.* 10 ACSR 776, *Termi-Mesh Australia Pty Ltd. v Josu Manufacturing Pty Ltd.* [1999] FCA 1241, *Super Choice Now Pty Ltd. v Brisconnections Management Co. Ltd.* (2009) 259 ALR 451 and *Aylward’s Ltd. v Town Council for the Town of St. Lawrence*, unrep. No. 33 of 1983 (16 November 1987).

⁷ See, e.g., *Lees Import & Export (PVT) Ltd. v Zimbabwe Banking Corporation Ltd.* (Lexis Transcript) 1999 (4) SA 1119 and *National Detectives & Professional Practitioners CC v Standard Bank of Namibia Ltd.* (24/10/2008), Supreme Court of Namibia.

⁸ Amongst others, considerations concerning unrepresented litigants and the legal aid system vary from jurisdiction to jurisdiction.

⁹ (1985) 7 EHRR 528, §57.

not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved ...”

9. Accordingly, the key questions that call for consideration is whether there are any good reasons for restricting corporations’ right of access to court in the way as Order 5, rule 6 seeks to do, and if yes, whether such limitation satisfies the proportionality test.

C.2 Justification for the Present Regime: A Brief Analysis

10. In reply to a query raised by the Legislative Council Panel on Administration of Justice and Legislative Services, the Judiciary Administration explained the policy considerations for requiring corporations to obtain leave to be represented by one of its directors as follows:

“6. The Judiciary considers that requiring corporations to obtain leave to be represented by one of its directors in High Court proceedings is justified. A limited company may not be able to compensate those who litigate with them as assets of a limited company’s shareholders and directors are not at risk as to the consequences of litigation. To permit a limited company to pursue proceedings without legal representation, at no financial risk to its shareholders and directors, is inherently unfair to the other parties to the litigation. This would put the other parties to the litigation at a considerable disadvantage because it is most unlikely that anybody will be able to recover costs against a company that cannot afford legal representation. ... It is also highly undesirable for limited companies to act without legal advisers. ...”¹⁰

11. The Bar does not find the above-quoted justification put forward by the Judiciary Administration convincing. Our reasons can be summarised as follows.
12. First, insofar as a company is the plaintiff in a legal action, section 357 of the Companies Ordinance addresses the concern. Where appropriate, the court has power under section 357 of the Companies Ordinance to order security for costs in favour of a defendant before the plaintiff company will be allowed to proceed with its action any further.
13. Second, in cases where a company is the defendant in a legal proceeding, the mere fact that it is impecunious plainly should not be a reason for

¹⁰ See: LC Paper No. CB(2)2543/08-09(01) (September 2009)

depriving it of the chance to defend itself; otherwise an impecunious defendant would lose a lawsuit not on the ground of merits but by reason of its poor financial circumstances.

14. Third, following the implementation of Civil Justice Reform, the court now has power to order costs against a non-party under section 52A(2) of the High Court Ordinance. Hence, where appropriate, the court may award costs against the directors or shareholders of the company in question.
15. Fourth, the above-quoted explanation by the Judiciary Administration did not appear to have considered the question of proportionality. In this regard, it is pertinent to note that restriction on the ability of the managing director and sole shareholder of a company to challenge its liquidation has been held to be disproportionate¹¹. By parity of reason, there is a strong argument that the restrictions contained in Order 5, rule 6 are also disproportionate.
16. Fifth, the state of affairs as created by Order 5, rule 6(2) is even more difficult to comprehend or justify when one compares the position in the High Court with the position in the District Court¹². Order 5A, rule 2(2) of the Rules of the District Court permits a company to begin or carry on proceedings by one of its directors. No leave of the court is required when a company chooses to have one of its director to represent it in proceedings before the District Court. One asks the question: why should there be such a difference? The Bar finds it difficult to find a satisfactory explanation. Since the legal costs of High Court proceedings is generally more substantial than those in the District Court, one would have thought that it is more important to allow companies to be represented by one of its directors.
17. Sixth, it is also instructive to consider the position in England after the implementation of the Woolf Reform. Part 39.6 of the Civil Procedure Rules provides as follows:

“A company or other corporation may be represented at trial by an employee if –

- (a) the employee has been authorised by the company or corporation to appear at trial on its behalf; and
- (b) the court gives permission.”

¹¹ See: Richard Clayton & Hugh Tomlinson, *ibid.*, §11.389.

¹² The Bar believes the reason for this difference is purely historical, based on some very ancient common law rule which is clearly outdated. See: *Da Luz v Kwong Ming Quarry Ltd.* [1958] HKDCLR 215.

18. Although the court's permission is still required, it has been stated that the court "should normally exercise its discretion" by granting permission. Besides, the CPR deliberately introduced a greater measure of flexibility into the ability of companies to choose their representative. They no longer have to be represented by one of its directors, but may be represented by an authorised employee (whether or not he/she is also a director)¹³.

C.3 Views and Proposals

19. *Option 1:* In light of the above discussion, the Bar takes the view that there is much to be said for the total abolition of the requirement for leave before companies may be allowed to be represented by one of its directors in proceedings before the High Court, so that the position in the High Court would be aligned with that in the District Court.
20. *Option 2:* Alternatively, the relevant parts in Order 5, rule 6 should be amended along the line of Part 39.6 of CPR on the understanding that the court should normally exercise its discretion in favour of granting leave. Besides, the approach should not be confined to representation at trial but should be extended to all steps at all stages of proceedings before the High Court.
21. The Bar appreciates that either of these two options would have an impact on the present civil justice system and deserve serious consideration. However, the Bar invites the Judiciary to commence a thorough review of the present situation as soon as possible so that appropriate reform may be introduced without unnecessary delay.

D. Whether Right of Appeal Should be Allowed

22. If the Judiciary agrees to abolish the requirement of leave, the question of appeal against the granting or refusal of leave does not arise.
23. However, if the leave requirement is maintained (whether in respect of the initial refusal of leave or the subsequent revocation of leave), the Bar suggests that serious consideration be given to the provision of a right of appeal.

¹³ See: *Civil Procedure 2011*, Vol. 1, §39.6.1.

24. The Bar fully appreciates that there may be delay caused if a right of appeal is allowed. However, in view of *Mok Charles Peter v Tam Wai Ho*, unrep., FACV 8/2010 (13 December 2010) (albeit dealing with a different scenario), the Bar has serious concern as to whether the absence of a right of appeal in this context can satisfy the proportionality test. In particular, a refusal of leave may effectively prevent the company from participating in the legal proceedings. This means the company may either be deprived of its right to pursue its claim or to defend a claim against it. Furthermore, as noted above, appeal against refusal of leave was allowed in England even before the Woolf Reform.

Hong Kong Bar Association
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