A Guide to Civil Procedure in Hong Ko

Seventh Edition (Volume 1)

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Seventh Edition (Volume 2)

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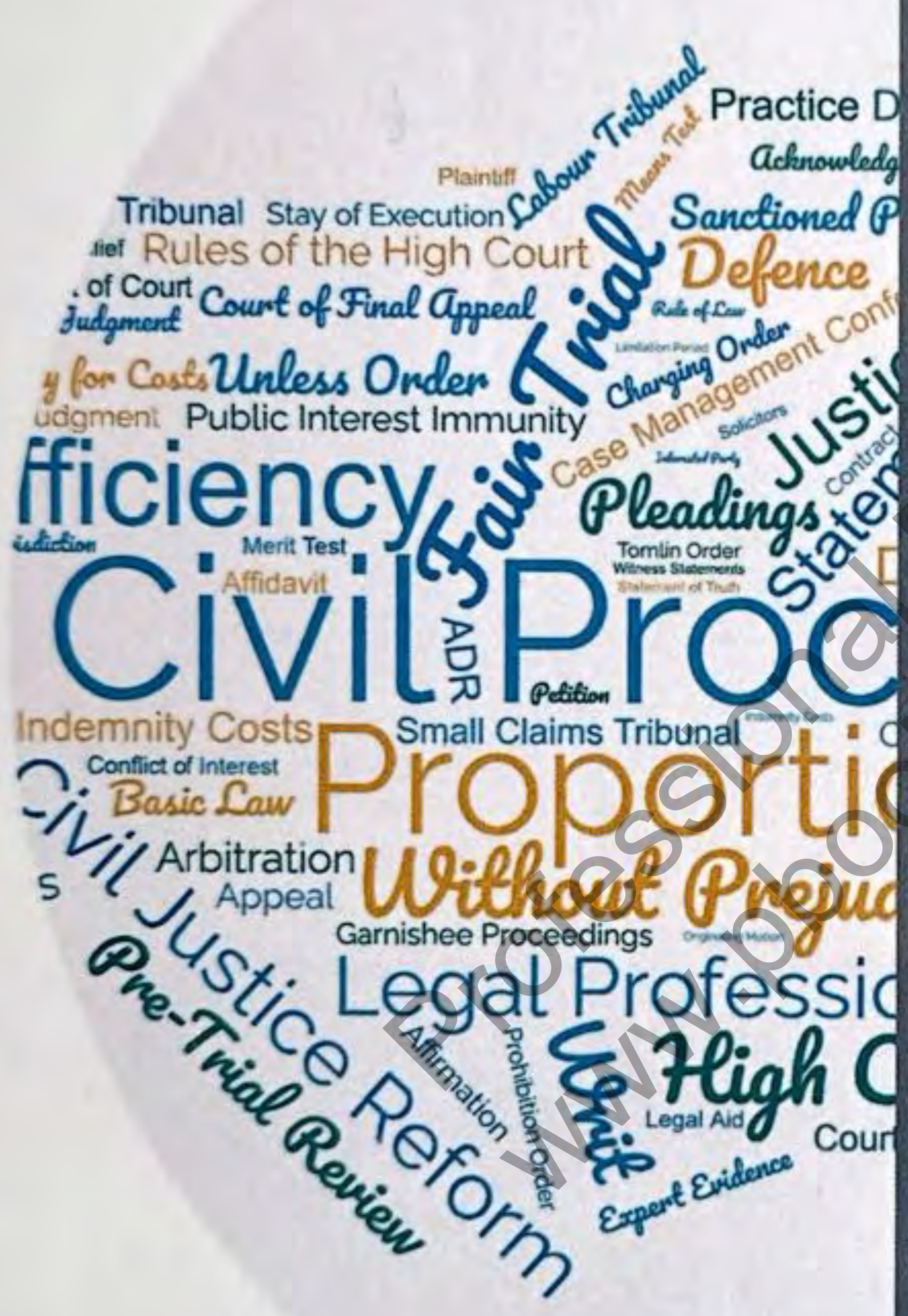

A Guide to Civil Procedure in Hong Kong

Seventh Edition (Volume 1)

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Chapter 1

Some Introductory Matters

1. Scope of this Book

[1-1] This book is intended for practitioners and students who are studying for their professional qualifications. It covers the rules of civil procedure as applied in the Court of Final Appeal,[1] the High Court[2] and the District Court,[3] but does not deal with the procedure applicable in Hong Kong's tribunals such as the Small Claims Tribunal,[4] the Labour Tribunal,[5] the Lands Tribunal[6] or the Competition Tribunal.[7]

[1-2] The rules regulating the procedure in the Court of First Instance and the District Court are substantially the same, although some significant differences do exist.[8] Where such differences exist, they are pointed out in the text.[9]

1 The Hong Kong Court of Final Appeal was established by the Hong Kong Court of Final Appeal Ordinance (Cap 484) which came into effect on 1 July 1997. The power of final adjudication was vested in the Court of Final Appeal replacing the former jurisdiction of the Privy Council in London: Hong Kong Court of Final Appeal Ordinance s 3.

2 The High Court comprises the Court of Appeal and Court of First Instance: High Court Ordinance (Cap 4) s 3(1).

3 The District Court was established in 1953 by the District Court Ordinance (Cap 336).

4 The Small Claims Tribunal was established in 1976 by the Small Claims Tribunal Ordinance (Cap 338). See Chapter 2 'Jurisdiction of the Courts and Tribunals and Transfer of Proceedings'.

5 The Labour Tribunal was established in 1973 by the Labour Tribunal Ordinance (Cap 25). See Chapter 2 'Jurisdiction of the Courts and Tribunals and Transfer of Proceedings'.

6 The Lands Tribunal was established in 1974 by the Lands Tribunal Ordinance (Cap 17). See Chapter 2 'Jurisdiction of the Courts and Tribunals and Transfer of Proceedings'.

7 The Competition Tribunal was established in 2013 by the Competition Ordinance (Cap 619). See Chapter 2 'Jurisdiction of the Courts and Tribunals and Transfer of Proceedings'.

8 For the jurisdiction of the District Court, see Chapter 2 'Jurisdiction of the Courts and Tribunals and Transfer of Proceedings'.

9 For the main differences, see below.

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2. The Nature of Civil Procedural Law

[1-3] Civil procedural law is a separate, distinct branch of the law which exercises a pervasive influence over all the other branches of the law, except for criminal law and procedure. It covers the entire body of civil law, including the practice and procedure of the courts, which regulates the machinery and governs the administration of civil justice. It extends over every legal or equitable claim, right, relief or remedy properly brought before any court, whether inferior or superior, at first instance or on appeal, which has power and jurisdiction to recognise, determine or adjudicate upon such claim or right and to award and enforce the appropriate relief or remedy.

[1-4] Civil procedural law forms an indispensable part of the machinery of justice and operates as an essential tool for enforcing legal rights and claims, for redressing or preventing legal wrongs, for asserting legal defences, and for such other ancillary purposes as the supervision and control of inferior courts, tribunals and other judicial decision-making bodies by way of judicial review.

[1-5] Civil procedure acts in a manner complementary to the substantive law. Whereas the substantive law creates rights and obligations, the procedural law provides the manner of enforcement of those rights and obligations. It is therefore of paramount importance to have a set of procedural law which facilitates the courts in ascertaining the truth, ensures that the parties are on an equal footing and their right to a fair trial be upheld, and resolves the civil disputes in a timely manner and at proportionate cost.[10]

3. Civil Procedure Distinguished from Criminal Procedure

[1-6] The expression 'civil' is used to distinguish the procedure from 'criminal' procedure. In Hong Kong, the systems of civil and criminal procedure are quite distinct, and criminal procedure is largely[11] governed by its own legislative rules. The criminal process has a distinct trial procedure and all trials in the Court of First Instance are conducted before a jury. By contrast, jury trials in civil proceedings are very rare.[12]

[1-7] The purpose of criminal proceedings is to assess guilt or innocence and to impose an appropriate penalty, whereas the purpose of civil proceedings is to adjudicate upon liability and assess appropriate compensation. There is, however, an inevitable, although slight, overlap between the civil and criminal processes

10 For a discussion of the multi-dimensional concept of justice, see Zuckerman, Zuckerman on Civil Procedure: Principles of Practice (4th edn, Sweet & Maxwell/Thomson Reuters, London, 2021) at pp 19–36.

11 But not entirely since some of the rules of the High Court and District Court apply to criminal proceedings as well as civil proceedings: see the Rules of the High Court (Cap 4A) ('RHC') O 1 r 2(3) and the Rules of the District Court (Cap 336H) ('RDC') O 1 r 2(3) and below.

12 See the High Court Ordinance s 33A.

in, for example, the award in civil cases of exemplary damages,[13] the entitlement to plead criminal convictions as evidence in civil cases,[14] and the entitlement to invoke the rule against self-incrimination to withhold the disclosure and production of documents or the answering of interrogatories.[15] Conversely, the criminal courts may make restitution orders[16] and compensation orders[17] against convicted persons.

13 Exemplary damages may be awarded only in tort and in three classes of cases; the first is where there has been oppressive, arbitrary or unconstitutional action by government servants; the second is where the defendant's conduct has been calculated by him to make a profit for himself which might well exceed the compensation payable to the plaintiff; and the third is where statute so provides. See, for example, *Rookes v Barnard* [1964] AC 1129, [1964] 1 All ER 367 (HL); *Cassell & Co Ltd v Broome* [1972] AC 1027, [1972] 1 All ER 801 (HL); *Ng Man Sun v Law Wai & Ors* [1991] 1 HKC 311 (HC) (exemplary damages awarded in defamation action); *Yeung Wah James v Alfa Sea Ltd* [1993] 1 HKC 440, [1992-93] CPR 152 (HC) (exemplary damages for trespass by defendant landlord).

14 See the Evidence Ordinance (Cap 8) s 62. See also *Mak Yuk Kiu v Tin Shing Auto Radio CTR Ltd* [1981] HKLR 77, [1981] HKCU 13 (HC); *China Everbright-IHD Pacific Ltd v Ch'ng Poh* [1999] 1 HKC 278, [1999] 2 HKLRD 555 (CFI) (defendant was convicted of crime of conspiracy and was subsequently sued for breach of fiduciary duty; plaintiff sought to adduce evidence of the conviction and also to get admitted the statement of a co-conspirator given to the ICAC, transcripts of evidence at the criminal trial and the judge's summing-up; the court held that the effect of the Evidence Ordinance s 62(2)(a) was to shift the legal burden of proof from the plaintiff to the defendant; the statement, transcript and summing-up were all relevant and would be admitted in the civil trial); *J v Oyston* [1999] 1 WLR 694 (plaintiff sued defendant and relied upon defendant's criminal conviction; although the defendant admitted the conviction, he denied that he had committed the offence; plaintiff applied to strike out that part of the defence as being an abuse of the court's process; held that the application should be dismissed since, under the UK equivalent of s 62 of the Evidence Ordinance the conviction was prima facie but not conclusive evidence that the person convicted did commit the offence; the Ordinance permitted a convicted person to challenge his conviction in a civil action, although the burden was upon him to show that he had been convicted in error).

15 In criminal proceedings, witnesses other than the accused (see the Criminal Procedure Ordinance (Cap 221) s 54(1)(e)) enjoy privilege from self-incrimination: *Blunt v Park Lane Hotel Ltd* [1942] 2 KB 253, [1942] 2 All ER 187 (CA, Eng). The privilege extends also to civil proceedings in which an allegation is made that a witness has committed a criminal offence: *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380, [1981] 2 All ER 76 (HL); *Bishopsgate Investment Management Ltd (in provisional liquidation) v Maxwell* [1993] Ch 1, [1992] 2 All ER 856 (CA, Eng); *United Norwest Co-operatives Ltd v Johnstone* (1994) Times, 24 February (CA, Eng). In some cases, the privilege has been excluded by statute: see, for example, the High Court Ordinance s 44A.

16 The court is empowered to order that an offender restore to the owner property in the possession of the offender: see the Criminal Procedure Ordinance s 84; and the Theft Ordinance (Cap 210) s 30(1).

17 Victims of crimes who suffer personal injuries or sustain damage to their property may be awarded compensation by the courts: see the Magistrates Ordinance

4. The Adversarial System of Justice

4.1 Main differences between the pure adversarial system and the inquisitorial system of justice

[1-8] Hong Kong has adopted the common law adversarial system of procedure as distinct from the inquisitorial system used in civil law jurisdictions. The main differences between the pure adversarial system and the inquisitorial system of justice are as follows:

(a) Under an adversarial system, investigation is left to the discretion and initiative of the parties to the claim; under an inquisitorial system, the judge will take the initiative in directing inquiries to ascertain the truth.

(b) Under an adversarial system, the collection and production of evidence rests exclusively in the hands of the parties.

(c) Under an adversarial system, the speed with which the action proceeds is generally left to the discretion of the parties to the action;[18] under an inquisitorial system, the judge controls the speed of the progress of the action.

(d) Under an adversarial system, the judge presides at the hearing and generally assumes the passive role of umpire in the presentation of the evidence.[19] Under an inquisitorial system, however, the judge takes a much more active role in the adjudication process.

(Cap 227) s 98; the Criminal Procedure Ordinance s 73; and the Theft Ordinance s 30(1)(c).

18 This is, of course, subject to the time constraints prescribed by legislation. The limitation provisions prescribe the time within which an action must be commenced, and the Rules of Court and court orders frequently impose a time limit within which a step in the action must be taken. Failure to comply with a time limit may, in certain circumstances, give rise to the plaintiff's claim or the defendant's defence being struck out: see Chapter 12 'Disposal of Actions Without Trial' (striking out) and Chapter 16 'Judgments and Orders'.

19 In *Yuill v Yuill* [1945] 1 All ER 183 (CA, Eng) at 185, Lord Greene MR described the judge's role as follows: 'It was said that the judge put many more questions to witnesses than all the counsel in the case put together and that he in effect took the case out of counsel's hands to the embarrassment of counsel and the prejudice of his case. The part which a judge ought to take while witnesses are giving their evidence must, of course, rest with his discretion. But with the utmost respect to the judge it was, I think, unfortunate that he took so large a part as he did … It is, of course, always proper for a judge—and it is his duty—to put questions with a view to elucidating an obscure answer or when he thinks that a witness has misunderstood a question put to him by counsel. If there are matters which the judge considers have not been sufficiently cleared up or questions which he himself thinks ought to have been put, he can, of course, take steps to see that the deficiency is made good. It is, I think, generally more convenient to do this when counsel has finished his questions or is passing to a new subject … the whole strength of cross-examination may be destroyed if the judge, in his desire to get to what seems to him to be the crucial point, himself intervenes and prematurely puts the question himself.' Commenting

4.2 Incremental changes to the adversarial system made prior to the Civil Justice Reform 2009 and the changing role of the judge

[1-9] The pure mode of adversarial proceedings and the conventional non-interventionist role of the judge in adversarial proceedings led to delays in the adjudication process and dissatisfaction on the part of litigants, lawyers and judges,[20] and, as a result, significant changes have been taking place in England[21] and Hong Kong. One noteworthy feature which can be seen in several common law jurisdictions is increasing judicial activism. This has been the product of many factors, including changes in community expectations, the need to maintain the quality of justice in the face of growth in litigation and the decline in resources from government, the need to assist unrepresented parties, the avoidance of possible injustice caused by incompetent lawyers and the management of cases in a manner aimed at reducing cost and delay. As a result of judicial recognition that

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further on the judge's role, Lord Denning MR said in *Jones v National Coal Board* [1957] 2 QB 55 at 64, [1957] 2 All ER 155 (CA, Eng) at 159: 'The judge's part … is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any points that have been overlooked or left obscure; to see that advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the robe of an advocate; and the change does not become him well. Lord Chancellor Bacon spoke right when he said that: "Patience and gravity of hearing is an essential part of justice and an over-speaking judge is no well-tuned cymbal".' As we will see below, following the Civil Justice Reform 2009, judges and masters play a more active role in controlling the speed of litigation. Judges and masters also have been empowered to make orders on their own initiative (*suo proprio motu*).

20 For a discussion of the perceived defects in the adversarial system, see Wilkinson and Burton, *Reform of the Civil Process in Hong Kong* (LexisNexis Butterworths, Singapore, 2000) at pp 8–35; see also Mr Justice DA Ipp 'Reforms of the Adversarial Process in Civil Litigation' (1995) 69 ALJ 705.

21 Substantial changes to the civil process in England were brought about as a result of Lord Woolf's Report, *Access to Justice* (Final Report, July 1996). The main aims of Lord Woolf's reforms were: (1) to speed up civil justice; (2) to render civil procedure more accessible to ordinary people and to small businesses; (3) to eliminate the arcane language of the law; (4) to encourage early settlement; (5) to render litigation simpler and cheaper by avoiding excessive and disproportionate resort to procedural devices such as over-detailed pleadings, unreasonably expensive discovery and interrogatories, over-lengthy witness statements, extravagant use of experts and unnecessary orality at trial. See further David Leonard, 'Reforms in England: the Woolf Report and Consequences', Chapter 2 in Wilkinson & Burton, *Reform of the Civil Process in Hong Kong* (LexisNexis Butterworths, Singapore, 2000). New and significantly different civil procedure rules were enacted in 1998 to give effect to these changes.

the state must make the optimum use of its resources, it is now clear that litigants cannot expect to have as much court time available to them as they might wish.[22]

[1-10] Prior to Civil Justice Reform in 2009 (which is discussed below), several important developments had already taken place in Hong Kong, incrementally improving the civil litigation process. These have included:

(a) judges attempting to reduce prolix advocacy;[23]
(b) the widespread introduction of skeleton arguments, lists of authorities, *dramatis personae* and chronologies of events;
(c) the requirement of the exchange of witness statements[24] together with a common order that witness statements shall stand in place of evidence-in-chief;[25]
(d) the introduction of special lists and a more prominent role for case management within those lists;[26]
(e) special provisions for case management in long trials;[27] and
(f) the gradual recognition of the court's power to fix a timetable for the trial.

[1-11] The judiciary's response, both in England and in Hong Kong, by assuming a more active role in case management has since been widely recognised. When making case management decisions, the court is primarily concerned with the saving of time and cost, and with the avoidance of unnecessary delay, undue complexity and overloading of issues. Further, to avoid a proliferation of appeals from decisions affecting case management, the Court of Appeal has made it clear that it will be reluctant to interfere with procedural decisions made by a judge in the management of the case before him and will only do so in exceptional circumstances.[28]

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22 The High Court of Australia observed in *Sali v SPC Ltd* (1993) 116 ALR 625 (HC, Aust) at 629: 'What might be perceived as an injustice to a party when considered only in the context of an action between parties may not be so when considered in a context which includes the claims of other litigants and the public interest in achieving the most efficient use of court resources'.

23 See, for example, *Banque Financière de la Cite SA v Westgate Insurance Co Ltd* [1991] 2 AC 249 at 280–281, [1990] 2 All ER 947 (HL) at 959, per Lord Templeman.

24 Ie under RHC and RDC O 38 r 2A(2). In *Cheung Kai Wing v Mok Sheung Shum (t/a Mok Sum Kee)* [1993] 2 HKC 113 (CA) at 126, Kaplan J said: 'It is no exaggeration to say that O 38 r 2A has revolutionised the way in which civil litigation is conducted in England and in Hong Kong'. See Chapter 14 'Certain Aspects of Evidence'.

25 RHC and RDC O 38 r 2A(7).

26 See Chapter 17 'Personal Injury Actions and Other Particular Proceedings'.

27 See Practice Direction No 5.7 'Long Cases'. See also Chapter 10 'Case Management and Interlocutory Proceedings'.

28 See *Cheung Yee Mong Edmond v So Kwok Yan Bernard (t/a Gloria English School)* [1996] 2 HKLR 48, [1996] HKCU 441 (CA); *Lee Tak Yee v Chen Park Kuen* [2001] 1 HKLRD 401, [2001] HKCU 149 (CA) (the court would only interfere with judge's case management if judge had gone clearly wrong and made orders which clearly involved either an injustice or inability of court to carry out its task); *Wong Kar Gee Mimi v Severn Villa Ltd* [2012] 1 HKLRD 887, [2012] HKCU 114 (CA) at para 31: 'Case management decisions are only subject to appeal in rare cases. The appellant

[1-12] It became clear, however, that more radical reform was required. In the words of Marlene Ng J, in *Wong Cheuk v Falcon Insurance Co (Hong Kong) Ltd*:[29]

> 2. I should start by saying that this case exposes with startling clarity the ills of deeply entrenched legal culture that underpins the adversarial system and of litigants/lawyers clinging to the familiar and resisting change. If there has been any doubter in respect of the Civil Justice Reform, this case vindicates such reform by underscoring an urgent need for major change in how we resolve disputes and for transformation in our way of thinking.
>
> 3. In modern litigation, justice may not necessarily be best served by adhering to the traditional belief that the best way to resolve a dispute is to let litigants (or their lawyers) control the process in a contest between opposing adversaries that ultimately results in trial and judgment. Full-blown adversarialism may result in zealous lawyers going to great lengths to adopt defensive or even perverse practices, such as delay tactics and other tactical moves, in the belief or hope that such practices will advance the case of their clients, but which in fact obscure the evidence, cause delay, waste costs and ultimately adversely affect the administration of justice. As will be amply illustrated by this case, litigants/lawyers may become so preoccupied or seduced by the process that the process itself becomes an obstacle to justice.

5. The Civil Justice Reform 2009

[1-13] In response to the perceived need for a significant overhaul of the civil litigation system in Hong Kong, in 2000, the Chief Justice set up a Working Party on Reform of the Civil Rules and Procedures of the High Court. The purpose of the Working Party was to consider and make recommendations as to what changes should be made to the civil justice system in Hong Kong with a view to ensuring and improving access to justice at reasonable cost and speed. The Working Party published its final report in March 2004 and its recommendations were accepted by the Chief Justice. New Rules have been enacted (with some underpinning by necessary changes to the High Court and District Court Ordinances) to give

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faces a "very high hurdle" and must show that the judge "has gone clearly wrong and made orders which will clearly involve an injustice or an inability for the trial court to carry out its task"', citing *Lee Tak Yee v Chen Park Kuen* [2001] 1 HKLRD 401 at 403, [2001] HKCU 149 (CA), or the judge 'erred in principle or the order was irrational having regard to the issues that had to be resolved': *Kam Miu Wah v Aeroflot Russian International Airlines* [2006] HKCU 1489 (unreported, CACV 142/2006, 6 September 2006) (CA) at para 11; see also *Chan Wing Cheung v Ho Shu Yee* [2005] HKCU 37 (unreported, CACV 393/2004, 10 January 2005) (CA) at para 8. It need hardly be emphasised that generally, an appellate court will not interfere with a judge's exercise of discretion unless the judge has misunderstood the law or the evidence or the exercise of his discretion was plainly wrong such that it was outside the generous ambit within which a reasonable disagreement is possible: *Cheung Kam Wah v Cheung Hon Wah* [2005] 1 HKC 136 (CA) at 142; *First Laser Ltd v Fujian Enterprises (Holdings) Co Ltd* [2016] 4 HKLRD 360, [2016] HKCU 1791 (CA).

29 *Wong Cheuk v Falcon Insurance Co (Hong Kong) Ltd* [2009] HKCU 726 (unreported, DCEC 688/2008, 20 May 2009) (DC).

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effect to those recommendations. At the same time, significant amendments (of an almost identical nature) have been made to the District Court Rules. These amendments came into effect as from 2 April 2009.

5.1 Selective amendment rather than enactment of entire set of new rules

[1-14] In reaching its recommendations, the Working Party paid close attention to the English Civil Procedure Rules enacted in 1998 to implement the 'Woolf Reforms', analysing their perceived achievements and deficiencies. The new English Rules formed an entirely new code, but the Hong Kong Working Party concluded that, in the light of local circumstances, it would be preferable to adopt a series of selective reforms by amendment to our existing Rules rather than by introducing an entirely new code. This would provide for future flexibility and cause less disruption. In deciding what changes to recommend, the Working Party was guided by the objectives of improving the cost-effectiveness of the civil justice system, reducing the complexity and reducing the delays encountered in litigation. Any changes were, however, subject to the fundamental requirements of procedural and substantive justice.

5.2 The most significant changes to the Rules

[1-15] The most significant changes to the Rules include:

(a) introducing underlying objectives;
(b) introducing 'cost-only proceedings' to enable parties, who had reached a settlement on the substantive issues as well as the liability for costs but could not agree on the amount of costs, to have the relevant costs taxed;
(c) reducing the modes of commencement of actions to two: writs and originating summonses save where provided otherwise by statute;
(d) introducing a scheme for making admissions in claims for the payment of money;
(e) requiring defendants to plead substantive defences rather than plead mere denials;
(f) requiring that pleadings, witness statements and experts' reports be verified on oath;
(g) introducing sanctioned offers and sanctioned payments both in respect of liability, quantum and costs;
(h) rendering more effective the system of case management by introducing court determined timetables for the hearing of civil cases, including the submission of questionnaires and the holding of case management conferences and pre-trial reviews and the setting of milestone and non-milestone dates; further, case management summonses have replaced summonses for directions;
(i) strengthening the role of self-executing sanctions and providing for applications for relief against such sanctions;

(j) empowering the court to make orders of its own motion;
(k) extending the scope of pre-action and pre-trial discovery from personal injuries cases to all cases;
(l) reducing the number of interlocutory applications and providing for resolution of many such applications by way of 'paper' hearings;
(m) extending the court's wasted costs jurisdiction to barristers;
(n) requiring leave for many interlocutory appeals from the decision of a judge of the Court of First Instance to the Court of Appeal;
(o) providing for many interlocutory appeals to be dealt with as 'paper' appeals; and
(p) improving the system of taxation of costs.

5.3 The underlying objectives

[1-16] The English Civil Procedure Rules introduced 'overriding objectives' to which the courts were directed to give effect when exercising their procedural powers and discretions. The Hong Kong Working Party, however, concluded that, since the Rules would be revised by selective amendment rather than by way of introducing an entirely new code, it would not be appropriate to introduce overriding objectives but rather to identify 'underlying objectives'. These objectives are applicable to proceedings in both the High Court and District Court. Accordingly, the Rules now provide that their underlying objectives 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.[30]

[1-17] The court is directed to give effect to these underlying objectives when it exercises any of its powers (whether under its inherent jurisdiction or under the Rules) and when it interprets any of the Rules or Practice Directions.[31] In giving effect to the underlying objectives, the court must always recognise 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.[32] In other words, justice must not give way to expediency. Further, the parties and their lawyers are mandated to assist the court in furthering the underlying objectives.[33]

[1-18] The court's application of the underlying objectives is considered in Chapter 10 'Case Management and Interlocutory Proceedings'.

30 RHC and RDC O 1A r 1.
31 RHC and RDC O 1A r 2(1).
32 RHC and RDC O 1A r 2(2).
33 RHC and RDC O 1A r 3.

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6. Active Case Management

[1-19] The court is also directed to further the underlying objectives by actively managing cases which 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 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 court;
(k) making use of technology; and
(l) giving directions to ensure that the trial of a case proceeds quickly and efficiently.[34]

[1-20] More specifically, in the context of its discretion as to costs, the court is expressly directed to take these underlying objectives into account.[35]

7. The Sources of Hong Kong Civil Procedure

[1-21] The main sources of Hong Kong civil procedure are:

(a) statute law;
(b) subsidiary legislation;
(c) case law;
(d) High Court and District Court Practice Directions;
(e) the inherent jurisdiction of the court; and
(f) practice books.

7.1 Statute law

[1-22] Statute constitutes the primary source of civil procedural law. The most significant statutes dealing with civil procedure in Hong Kong are the Hong Kong Court of Final Appeal Ordinance (Cap 484), the High Court Ordinance (Cap 4) and the District Court Ordinance (Cap 336). There are several other statutes

34 RHC and RDC O 1A r 4(1) and (2).
35 RHC and RDC O 62 r 5(1)(aa).

containing rules of civil procedure, including the Fatal Accidents Ordinance (Cap 22), the Law Amendment and Reform (Consolidation) Ordinance (Cap 23), the Limitation Ordinance (Cap 347), the Crown Proceedings Ordinance (Cap 300) and the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap 319).

7.2 Subsidiary legislation

[1-23] Subsidiary legislation comprises, in particular, the Hong Kong Court of Final Appeal Rules (Cap 484A), which lay down the detailed rules of procedure to be followed in the hearing of appeals by the Court of Final Appeal; the Rules of the High Court (Cap 4A), which prescribe the detailed procedural rules to be applied to all proceedings in the High Court; and the Rules of the District Court (Cap 336H), which govern the procedure to be applied in the District Court. Rules that have been properly made have the effect of statute.

[1-24] These Rules are made by the respective Rules Committees established by Ordinance.[36] Since the Rules are a form of delegated or subordinate legislation, the Rules Committees are only empowered to make rules within the ambit of their delegated powers and such rules must be confined to 'practice and procedure'. Any rules made that fall outside the scope of 'practice and procedure' and embrace substantive law will, therefore, be ultra vires and void. There have been several Hong Kong decisions as to whether rules made by the respective Rules Committees were ultra vires on the ground that they purported to prescribe matters of substantive law rather than practice and procedure.[37] It is also clear that rules made by the Rules Committees must not contradict statutory provisions.[38]

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36 Accordingly, the Hong Kong Court of Final Appeal Rules Committee has been established by the Hong Kong Court of Final Appeal Ordinance s 39, the High Court Rules Committee has been established by the High Court Ordinance s 54(1) and the District Court Rules Committee has been established by the District Court Ordinance s 17.

37 In *Mohan v McElney* [1983] 1 HKC 243, [1983] HKLR 308 (CA), the Court of Appeal ruled that RHC O 20 r 5(5), which provided for the right to amend the writ and pleadings to the extent of adding or substituting a fresh cause of action after the limitation period had expired, was ultra vires the powers of the Rules Committee as this was not a matter of practice and procedure but affected substantive rights. It also offended the express provisions of the Limitation Ordinance (Cap 347). Similarly, in *Kwok Cheung v Kowloon Motor Bus Co (1933) Ltd* (unreported, HCA 2057/1980, 15 February 1984) (HC), the vires of RHC O 20 r 5(4) was challenged successfully on the grounds that the Rules Committee did not have power to make a rule providing for the amendment of the capacity in which a person sued after the limitation period had expired.

38 See, for example, *Chau Hon-leung v Kong Kwok-choi* [1975] HKLR 529, [1975] HKCU 55 (FC), where the Full Court ruled that RHC O 58 r 2, which purported to give a right of appeal to the Full Court, was ultra vires as the rule contradicted the provision of the High Court Ordinance which restricted the right of appeal to a judge in chambers; *Mohan v McElney* [1983] 1 HKC 243, [1983] HKLR 308 (CA), where the court held that RHC O 20 r 5(5) was ultra vires and void since it contradicted provisions of the Limitation Ordinance; and *Merck Sharp & Dohme Ltd v Registrar of Patents* [2002] 4 HKC 463, [2002] 3 HKLRD 812 (CFA) where

7.3 Case law

[1-25] Judicial decisions have played a significant role in developing and interpreting the rules of civil procedure. Some of the cases decided by the courts are of far-reaching importance and may be said to have virtually a legislative effect, so much have they changed the operation of procedural law.[39] The Basic Law expressly provides that the courts in Hong Kong may refer to precedents of other common law jurisdictions,[40] and cases are frequently cited from England, Australia, Canada and New Zealand and, occasionally, from other jurisdictions.

7.4 Practice Directions

[1-26] By virtue of its inherent jurisdiction, the High Court may issue Practice Directions[41] regulating the court's practice and procedure, and there is a clearly discernible trend that Practice Directions are playing an ever-increasing significance in litigation practice. There are many Practice Directions currently in force embracing such diverse matters as rights of audience,[42] appeals to the Court of Final Appeal and Court of Appeal,[43] applications for injunctions,[44] the listing of

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the Patents (General) Rules (Cap 514C) s 39(1), relating to applications under the Patents Ordinance (Cap 514) s 46, was held to be ultra vires since it was inconsistent with the Patents Ordinance s 46.

39 Examples would include *Mareva Cia Naviera SA v International Bulk Carriers SA, The Mareva* [1980] 1 All ER 213, [1975] 2 Lloyd's Rep 509 (CA, Eng), where the English Court of Appeal ruled that it had jurisdiction to make an interlocutory injunction restraining a defendant from disposing of his assets; see now the High Court Ordinance s 21L(3) and the District Court Ordinance s 52(1); *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55, [1976] 1 All ER 779 (CA, Eng), where the English Court of Appeal held that the court had inherent power to order the detention and preservation of property by permitting a plaintiff to enter the defendant's premises and take possession of documents and other property to prevent a defendant from destroying evidence; and *Norwich Pharmacal Co v Customs and Excise Comrs* [1974] AC 133, [1973] 2 All ER 943 (HL), which empowered the court to compel disclosure by a third person of the names of persons likely to have violated the plaintiff's rights.

40 Basic Law art 84.

41 A Practice Direction is defined in RHC and RDC O 1 r 4(1) as meaning: (a) a direction issued by the Chief Justice as to the practice and procedure of the court; or (b) a direction issued by a specialist judge for his specialist list. See *Re Boon Voon King & Ors, ex p Nedcor Asia Ltd* [1998] 3 HKC 537, [1998] 2 HKLRD 456 (CFI).

42 See Practice Direction No 21.1 'Solicitors – Appearance in Open Court'; Practice Direction No 14.1 'Rights of Audience Before a Master'.

43 See Practice Direction No 2.1 'Application for Leave to Appeal to the Court of Final Appeal Filed in the Court of Appeal in Civil Cases'; Practice Direction No 4.1 'Civil Appeals to the Court of Appeal'.

44 See Practice Direction No 11.1 'Ex parte, Interim and Interlocutory Applications for Relief (Including Injunctive Relief)'; Practice Direction No 11.2 'Mareva Injunctions and Anton Piller Orders'.

cases in the fixture and running lists,[45] case management,[46] the general practice to be adopted at the hearing of ex parte applications,[47] the certification of translations from Chinese,[48] mediation,[49] costs,[50] actions in the Personal Injuries List[51] and the matters which must be heard before a master in open court.[52]

[1-27] Not all Practice Directions apply to the District Court, but many do and Practice Direction No 27 'Civil Proceedings in the District Court' lists those Practice Directions which apply to civil proceedings in the District Court.[53]

7.5 The inherent jurisdiction of the court

[1-28] The inherent jurisdiction of the court is a virile doctrine which has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial

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45 See Practice Direction No 7.1 'Court of First Instance – Civil Listing'.

46 See Practice Direction No 5.2 'Case Management'.

47 See Practice Direction No 11.1 'Ex parte, Interim and Interlocutory Applications for Relief (Including Injunctive Relief)'.

48 See Practice Direction No 10.2 'Chinese Translations'.

49 See Practice Direction No 31 'Mediation'.

50 See Practice Direction No 14.3 'Costs'.

51 See Practice Direction No 18.1 'The Personal Injuries List'.

52 See Practice Direction No 14.2 'Proceedings before Masters'.

53 See Practice Direction No 27 'Civil Proceedings in the District Court'. Some Practice Directions which have been made in respect of High Court proceedings are stated to apply to civil proceedings in the District Court: in this category fall, inter alia, the Practice Directions in respect of sealing of writs of summons (Practice Direction No 24.1 'Sealing of Writ of Summons, Newspaper Advertisements, Filing of Documents'), endorsements in the Chinese language to be made on court documents (Practice Direction No 24.2 'Endorsements in the Chinese Language to be made on Court Documents'), preparation of summonses for hearing (Practice Direction No 5.4 'Preparation of Interlocutory Summonses and Appeals to Judge in Chambers for Hearing'), submission of authorities (Practice Direction No 5.5 'Submission of Authorities'), case management (Practice Direction No 5.2 'Case Management'), documents for use at trial (Practice Direction No 5.6 'Documents for use at trial'), personal injury actions (Practice Direction No 18.1 'The Personal Injuries List'), originating summonses set down to be heard by judges (Practice Direction No 5.8 'Originating Summonses set down for hearing by Judges'), affidavit evidence (Practice Direction No 10.1 'Affidavit Evidence'), ex parte, interim and interlocutory applications for relief (including injunctive relief) (Practice Direction No 11.1 'Ex parte, Interim and Interlocutory Applications for Relief (Including Injunctive Relief) and 11.2 'Mareva Injunctions and Anton Piller Orders'), costs (Practice Direction No 14.3 'Costs'), settling draft orders and judgments, judgments in a foreign currency, interest on judgments, execution to enforce judgments for possession and peremptory orders (Practice Direction No 16.1 'Setting Draft Orders and Judgments'–16.5 'Peremptory Orders') and wasted costs orders (Practice Direction No 14.5 'Application for Wasted Costs Order under Order 62, Rules 8, 8A, 8B and 8C').

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between them.[54] The purpose of the inherent jurisdiction of the Court of Final Appeal[55] and the High Court is to enable the courts to fulfil their judicial role properly and effectively as courts of law. The court's inherent jurisdiction exists concurrently with its statutory and common law powers and may be exercised even in respect of matters that are dealt with by statute or the common law. The court may not, however, fall back upon its inherent jurisdiction to circumvent a clear provision found in statute or subsidiary legislation.[56] The overriding feature of the inherent jurisdiction of the court is that it is part of the procedural law and not part of the substantive law.

[1-29] The inherent jurisdiction of the court enables it to exercise (a) control over the court process by regulating its proceedings, by preventing abuse of process and by compelling the observance of the process;[57] (b) control over persons who

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54 See Jacob 'The Inherent Jurisdiction of the Court' (1970) 23 Current Legal Problems 23 at p 51. This definition has been approved and applied by the Court of Appeal of Manitoba in *Montreal Trust Co v Churchill Forest Industries (Manitoba) Ltd* [1971] 4 WWR 542 at 548, [1972] 21 DLR (3D) 75 (CA, Man) at 81, per Freedman CJM and by the Court of Appeal of New Zealand in *Taylor v A-G* [1975] 2 NZLR 675 (CA, NZ).

55 For example, the Court of Final Appeal has said in *Ng Ka Ling v Director of Immigration (No 2)* [1999] 1 HKC 425, (1999) 2 HKCFAR 141, [1999] 1 HKLRD 577 (CFA), that it has inherent jurisdiction to clarify its own judgments, although such a course of action will only be taken in exceptional circumstances. Cf *Lo Siu Lan v Hong Kong Housing Authority* (2004) 7 HKCFAR 631, [2005] 2 HKLRD 208, [2004] HKCU 1474 (CFA) where the Court of Final Appeal held that it had no inherent jurisdiction to abridge time for bringing an appeal.

56 See *Wishbone Trading Co Ltd v Abdur Rauf* (unreported, HCA 3599/1987, 11 March 1988) (CA) and *Wo Fung Paper Making Factory Ltd v Sappi Kraft (Pty) Ltd* [1988] HKC 10, [1988] 2 HKLR 346 (CA) (both cases decided that the court has no inherent jurisdiction to extend the time for an application to be made to the court where the Rules expressly provide the period within which application may be made).

57 See, for example, *Kwong Fat Cheung Construction Co v Un Long Hop Yick Co Ltd* [1961] 1 HKLR 121, [1961] HKCU 4 (FC) (court's refusal to accept further affidavits during hearing of an appeal); *K Master & Co Ltd v Eagle Star Insurance Co Ltd* [1968] HKLR 215, [1968] HKCU 16 (OJ) (court's inherent jurisdiction in marine insurance actions to order the widest discovery of documents); *Jetour Holiday Ltd v Lee Shek Yu* [1988] HKCU 11 (unreported, SCT App 8/1988, 27 May 1988) (HC) (court's inherent jurisdiction to set aside its own prior order); *Welwin Knitting Garment Factory Ltd v Welmade Fabric Manufacturing Ltd* [1983] 2 HKC 378 (HC) (court's inherent jurisdiction to strike out a counterclaim to a counterclaim as superfluous); *Killenny Ltd v A-G* [1996] 1 HKC 30 (CA) (Court of Appeal had no jurisdiction by way of appeal, but court's inherent jurisdiction used to discharge order that third party be joined, strike out party, strike out notice of appeal and vary order of judge); *Comr of Inland Revenue v Registrar of Companies* [1998] 1 HKLRD 875, [1998] HKCU 2619 (CFI) (order made declaring dissolution of company to be void without giving notice to liquidator as required by RHC O 8 r 2; order set aside under court's inherent jurisdiction); *L v Equal Opportunities Commission* [2002] 3 HKC 571, [2002] 3 HKLRD 178 (CA) (court has inherent jurisdiction in an appropriate case to make an anonymity order in respect of the names of parties).

appear before the court whether as lawyers or as litigants;[58] and (c) control over the powers of inferior courts and tribunals. The court also has inherent jurisdiction to order that the bailiff attend the master's chambers for the purpose of protecting those present and ensuring that there is no abuse of the court's process.[59] Inherent jurisdiction also enables the court to supplement and facilitate the Rules, where necessary, by filling in lacunae.[60]

7.6 Practice books

[1-30] From very early times, books on practice and procedure have provided both the courts and practitioners with a convenient and valuable source of civil procedural law.[61]

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58 For the court's inherent jurisdiction to control which lawyers have right of audience, see *Ex parte Evans* (1846) 9 QB 279 (quarter sessions had an inherent power to order that barristers should have exclusive audience at all times); *Re Gunston and Smart's Application* [1965] 4 HKLR 1034, [1965] HKCU 90 (OJ); *Brentwood Wig Manufacturing Ltd v RF Poncher* [1965] 4 HKLR 1042, [1965] HKCU 97 (HC) (solicitors have right of audience in the Court of First Instance in cases of emergency); *Abse v Smith* [1986] QB 536, [1986] 1 All ER 350 (CA, Eng) (courts have inherent power to regulate their own practices and judges may decide, by collective decision, who may exercise rights of audience). As to the court's inherent jurisdiction to permit unqualified persons to appear to assist a litigant by acting as a 'McKenzie friend', see *McKenzie v McKenzie* [1971] P 33, [1970] 3 All ER 1034 (CA, Eng); *Lobo v Kripalani* [1998] 2 HKLRD 325, [1998] HKCU 718 (CA); *Susan Caroline Berry v William Allan* [1997] HKCU 146 (unreported, CACV 170/1996, 27 February 1997) (CA) (court permitted sister of litigant to act for him on hearing of summons in view of litigant's medical history); *Law Siu Yin Ada v Lo Hung Kwan* [2001] HKCU 366 (unreported, CACV 1034/2000, 3 May 2001) (CA) (plaintiff aged 80; leave granted for her son to argue the case, although plaintiff required to be present in court throughout the proceedings); *Ng Jack Fong v Ng Chan Ning* [2007] HKCU 490 (unreported, DCCJ 2830/2005, 19 March 2007) (DC) (McKenzie friend had no authority to issue appeal summons). The court also has inherent jurisdiction to prevent vexatious litigants from abusing the court's process either (a) by making a *Grepe v Loam* order (see *Grepe v Loam* (1887) 37 Ch D 168 (CA, Eng): court could require a vexatious litigant to obtain leave to issue any fresh application in present action), or (b) by making an extended *Grepe v Loam* order (leave of court could be required for litigant to make any fresh application): see *Ebert v Venvil* [2000] Ch 484, [1999] All ER (D) 354 (CA, Eng); *Bhamjee v Forsdick (No 2)* [2003] EWCA Civ 1113, [2004] 1 WLR 88, [2003] All ER (D) 429 (Jul) (CA, Eng); *Ng Yat Chi v Max Share Ltd* (2005) 8 HKCFAR 1, [2005] 1 HKLRD 473, [2005] HKCU 69 (CFA).

59 See *Choy Bing Wing v Hong Kong Institute of Engineers* [2015] HKCU 2099 (unreported, HCA 309/2015, 10 September 2015) (CFI).

60 See, for example, *Cinerent Ltd v Gan Assurances Iard Compagnie Francaise D'Assurances et de Reassurances Incendie Accidents et Risques Divers* [2010] 1 HKLRD 378, [2009] HKCU 2088 (CFI) (court has inherent power to order that a writ be backdated); *Re Hawkins Development Ltd* [2010] 1 HKC 131, [2010] 1 HKLRD 535 (CFI) (court has inherent jurisdiction to make an interim order for the paying party to pay a sum towards the receiving party's costs before the taxation is completed).

61 In particular, reference may be made to *Hong Kong Civil Procedure* (ed Martin Rogers) (Sweet & Maxwell); *Hong Kong Civil Court Practice* (ed WS Clarke)

A Guide to Civil Procedure in Hong Kong

Seventh Edition (Volume 2)

Eric Cheung
Carter Chim
Gary Meggitt

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CHAPTER 12

DISPOSAL OF ACTIONS WITHOUT TRIAL

1. INTRODUCTION

[12-1] The majority of legal proceedings commenced in courts do not end with a trial. Indeed, it is very costly and time-consuming to have a dispute resolved by the court at a full trial. Such a costly exercise should be reserved for the fair resolution of genuine disputes. The Rules of Court are, therefore, designed with procedural devices to enable the court to dispose of actions without trial in cases where there is no genuine dispute or where a party is unjustifiably delaying matters or otherwise abusing the court process.

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[12-2] In this chapter, we examine the various procedural devices for the disposal of actions without trial, namely, default judgment, admissions in monetary claims, summary judgment, striking out pleadings, dismissal pursuant to unless orders, stay of dismissal of actions for want of prosecution or for abuse of process, and stay of proceedings. Disposal of actions through settlement will be examined in the next chapter.

2. DEFAULT JUDGMENT

2.1 Introduction

[12-3] If a defendant does not seek to contest a plaintiff's claim, it will generally be a waste of time and resources to require the plaintiff to proceed to a trial in order to obtain judgment. For an action begun by writ, there are two stages where a defendant is required to take steps to show his intention or commitment to defend. First, within 14 days after service of the writ (including the day of service), a defendant is required to file an acknowledgment of service[1] in the prescribed form[2] giving notice whether or not he intends to defend. Second, after giving notice of intention to defend the action, a defendant is required to serve a defence before the expiration of 28 days after the time limited for filing the acknowledgment of service or after he has been served with the statement of claim, whichever is the later.[3] If a defendant fails to give notice of intention to defend at the first stage or

1 RHC and RDC O 12 rr 3 and 5.
2 RHC and RDC App A Form 14.
3 RHC and RDC O 18 r 2(1). Note that the period used to be 14 days before the Civil Justice Reform. Note also that the rule refers to 'the time limited for filing the

fails to serve a defence at the second stage, the plaintiff may be entitled to obtain judgment in default.[4]

2.2 Judgment in default of notice of intention to defend under Order 13

2.2.1 Scope of Order 13

[12-4] The rules in Order 13[5] which allow a plaintiff to obtain judgment in default of notice of intention to defend apply only to proceedings begun by writ of summons.[6] Even for proceedings begun by writ of summons, there are also some special cases where the default judgment procedures under Order 13 are not applicable, for example: admiralty actions *in rem*,[7] actions against a person under a disability until a guardian *ad litem* has been appointed,[8] probate actions,[9] and third party proceedings.[10]

[12-5] If the claim falls within rules 1 to 5 of Order 13, judgment in default may be entered by the plaintiff as of right,[11] and the application for entry of default judgment involves a purely administrative act by the Registrar without any need for the court to exercise any discretion.[12]

[12-6] Rules 1 to 5 cover the following claims: a claim for a liquidated demand only (rule 1); a claim for unliquidated damages only (rule 2); a claim relating to the detention of goods only (rule 3); a claim for possession of land[13] only (rule 4), and two or more of the claims mentioned in rules 1 to 4 above (rule 5).

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acknowledgment of service' but not the actual time of filing the acknowledgment of service, so that a defendant will not be prejudiced by having less time to file his defence if he files the acknowledgment of service earlier than the time limited for it.

4 RHC and RDC O 13 and O 19 respectively.

5 RHC and RDC O 13.

6 Proceedings by originating summons are governed by RHC and RDC O 28.

7 RHC O 75 r 21.

8 RHC and RDC O 80 r 6. This rule is designed to protect the interests of a person under disability (ie an infant or a mental patient). No judgment in default can be entered against him unless and until someone is appointed to act for him and look after his interests in the action. For the proper approach to appointing a guardian *ad litem* in respect of a mentally incapacitated person, see the Court of Final Appeal judgment in *Cheung Kwai Yin v Moral Luck Finance Ltd* [2015] 5 HKC 532, (2015) 18 HKCFAR 343 (CFA).

9 RHC and RDC O 76 r 6(1).

10 RHC and RDC O 16 r 5.

11 Subject, however, to rules governing setting aside default judgment as discussed later in this Chapter.

12 There are, however, certain exceptions, where judgment in default of notice of intention to defend may only be obtained with the leave of the court. For example: actions against the Government (RHC and RDC O 77 r 9(1)); mortgage actions (RHC and RDC O 88 r 6(1)); actions by a money lender (RHC and RDC O 83A r 4); actions arising out of hire-purchase or conditional sale agreements (RHC and RDC O 84A r 3); actions in tort between husband and wife (RHC and RDC O 89 r 2).

13 With the exception of mortgage actions which are governed by RHC and RDC O 88

2.2.2 Time for entering default judgment

[12-7] Judgment under Order 13 may only be entered in default of notice of intention to defend, which may happen in two ways. First, in the case where no acknowledgment of service has been filed at the Registry, a plaintiff may enter default judgment under Order 13 after the expiry of the 14-day period from (and inclusive of) the date of service of writ (which must have been properly served together with the prescribed form for acknowledgment of service).[14]

[12-8] Second, in the case where the defendant has filed an acknowledgment stating an intention not to defend, a plaintiff may enter default judgment under Order 13 after the date on which the acknowledgment of service was filed.[15]

2.2.3 Proof of service

[12-9] Default judgment should only be granted where a defendant, having been properly served with the writ, chooses not to defend the action.[16] Hence, to obtain default judgment, the plaintiff must, according to Order 13 rule 7, show either:

(a) the defendant has acknowledged service but stated his intention not to defend;[17]

(b) an affidavit of due service has been filed on behalf of the plaintiff; or

(c) the plaintiff produces the writ indorsed with the defendant's solicitor's statement that he accepts service on the defendant's behalf.

2.2.4 Final or interlocutory judgment

[12-10] Depending on the nature of the claim, a default judgment may be in the form of a final judgment or of an interlocutory judgment on liability with damages to be assessed, or a mixture of both. The basic rationale is that a final judgment upon default by way of a purely administrative act by the Registrar is

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14 RHC and RDC O 13 r 6A and O 12 r 5.

15 RHC and RDC O 13 r 6A.

16 In *GM Commercial Consultants Corp v Euro Asia Zhong Ji (HK) Ltd & Anor* [2021] HKCU 2240, [2021] HKCFI 1378 (CFI) at para 74, DHCJ Le Pichon held that where a writ was served upon the registered office of a company pursuant to the provisions of s 356 of the Companies Ordinance (Cap 32) (repealed) (now s 827 of the Companies Ordinance (Cap 622)), it was sufficient for the writ to be physically left at the registered office and it was not necessary to give the writ to a person at the registered office.

17 The defendant who is a body corporate may acknowledge service of the writ and give notice of intention to defend the action either by a solicitor or by a person duly authorised to act on the defendant's behalf. Hence, a director not properly authorised by the board could not validly sign the acknowledgment of service form and state an intention not to defend, and any default judgment based on such an invalid acknowledgment was held to be irregular: *Richie Interiors Ltd (FKA Wan Chung Trading Ltd) v Sanko Technology Ltd* [2002] 3 HKLRD 441, [2002] HKCU 1557 (CFI).

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inappropriate if there is a need for judicial investigations on the evidence or f the exercise of judicial discretion.

[12-11] If the claim is only for a liquidated demand[18] or only for the recove of land,[19] final judgment may be entered. If the claim is only for unliquidate damages[20] or relates to the detention of goods only,[21] interlocutory instead of fin judgment may be entered. If the writ is indorsed with two or more of the abov mentioned claims and no others,[22] final judgment may be entered for the liquidate claim and/or possession of land claim and interlocutory judgment entered for th unliquidated claim and/or detention of goods claim.

[12-12] If the claim does not fall within the abovementioned categories (fo example, the claim is for a declaration, specific performance or injunction), th plaintiff cannot obtain judgment in default of notice of intention to defend but must serve the statement of claim and proceed as if the defendant had given notic of intention to defend.[23] The reason is that those claims involve discretionar remedies and so the plaintiff should not be entitled to judgment automatically.

18 RHC and RDC O 13 r 1. If the liquidated demand is expressed in a foreign currenc the form of the default judgment will be for the amount of the foreign curren claimed or its Hong Kong dollar equivalent at the time of payment: see Practic Direction No 16.2 'Judgment: Foreign Currency'.

19 RHC and RDC O 13 r 4, and the plaintiff is required to produce a certificate of hi solicitor or, if he sues in person, an affidavit, stating that the plaintiff is not claimin any relief in the nature of a mortgage action under O 88.

20 RHC and RDC O 13 r 2.

21 Under RHC and RDC O 13 r 3(1)(a), the plaintiff has an option to enter eithe interlocutory judgment for delivery of the goods or their value to be assessed; o interlocutory judgment for the value of the goods to be assessed. If the plaintif wishes to obtain a final judgment for delivery of the goods without giving th defendant the alternative of paying their assessed value, he has to apply by summons supported by affidavit and serve the same on the defendant (O 13 r 3(1)(b) and (2)).

22 RHC and RDC O 13 r 5. In *Russell Peter Brown & Ors v Edward Eugene Lehman* [2017] 4 HKC 6 (CA), Barma JA held that where a writ contained a claim other than of the nature specified in O 13 rr 1 to 4, and such claim had not been expressly and finally abandoned, the court did not have jurisdiction to allow default judgment to be entered in respect of any of the claims in the writ.

23 RHC and RDC O 13 r 6. Where injunction is being sought, the correct Order should be O 19 r 7: see *Go Fun Group Holdings Ltd & Anor v Sun Chengye & Anor* [2019] HKCU 3555, [2019] HKCFI 2308 (CFI). In *Shue Huei Yue v Tang Chung Meng* [2014] HKCU 1825 (unreported, DCCJ 2294/2013, 1 August 2014) (DC), DDJ J Chow held that service of the summons for a default judgment for declaratory judgment must be served on the defendant who had failed to file an acknowledgment of service, despite O 65 r 9. However, in *Chan Pui Lok Daniel v The Personal Representatives of Leung Shu Ming & Ors* [2017] 4 HKLRD 625, [2017] HKCU 2161 (CFI), DHCJ J Kwan, correctly in the author's view, refused to follow that decision given the plain meaning of O 65 r 9, which dispenses with the need for service of documents other than the originating Writ of Summons on the defendant who is in default as to acknowledgment of service or has no address for service subject only to two things: any contrary direction by the court or if any of the rules of RHC/RDC provides otherwise.

upon default. The plaintiff may however decide to abandon those other claims in order to obtain a default judgment under Order 13.[24]

2.2.5 Distinction between liquidated demand and unliquidated damages

[12-13] A liquidated demand is in the nature of a debt and its amount must either be already ascertained or capable of being ascertained as a mere matter of arithmetic. A claim for a stated sum of money paid to the defendant for a consideration which has failed is a recognised form of liquidated demand. The mere fact that interest is also claimed under section 48 of the High Court Ordinance (Cap 4) or section 49 of the District Court Ordinance (Cap 336) does not prevent the claim from being a liquidated claim.[25] Hence, in the case of a liquidated claim, final default judgment can be entered on the principal sum claimed together with interest thereon at the contractual interest rate (if any) or at the discretionary interest rate ordered by the court.[26]

[12-14] If the ascertainment of the amount of claim requires investigation beyond mere calculation, then the sum is not a liquidated demand but constitutes unliquidated damages.[27]

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24 *Morley London Developments Ltd v Rightside Properties Ltd* (1973) 231 EG 235 (CA, Eng), followed by the Hong Kong court in 深圳市量子景順投資管理有限公司 *v Huang Binghuang & Anor* [2011] HKCU 258 (unreported, HCA 1093/2009, 9 February 2011) (CFI); *Russell Peter Brown & Ors v Edward Eugene Lehman* [2017] 4 HKC 6 (CA) at paras 19–21.

25 RHC and RDC O 13 r 1(2).

26 In the absence of contractual provision entitling the plaintiff to claim interest at a fixed rate, the normal practice is to allow under the default judgment interest on the sum claimed as from the date of the writ to the date of judgment at the applicable post-judgment rate fixed by the Chief Justice from time to time. This judgment award shall then automatically carry interest at the said rate fixed by the Chief Justice unless otherwise ordered: High Court Ordinance (Cap 4) s 49; District Court Ordinance (Cap 336) s 50. In an ordinary case where a contract provides incidentally that interest at a certain rate is payable on the outstanding sum or any part thereof, such rate will cease to apply upon judgment being made because the liability to repay the sum is merged in the judgment. After merger, the liability of the debtor to make payment stems from the judgment and not the contract. The obligation to pay interest, if it is incidental to the sum, also merged in the judgment. But the covenant to pay interest in the contract may be so expressed as not to merge in a judgment but to continue to be applicable after judgment, in which case the default judgment can expressly specify that the contractual interest rate shall continue to be accrued on the principal sum until actual repayment: see *Freeway Finance Co Ltd v Tam Chuen On Raymond* [2010] 4 HKC 448 (CFI).

27 *Knight v Abbott, Page & Co* (1882) 10 QBD 11 (QB). In *Tian Yao (Xiamen) Property Development Co Ltd & Anor v Right Margin Ltd* [2016] 2 HKLRD 175, [2016] HKCU 380 (CA), the Court of Appeal explained at para 20 that 'the fact that further information was required in order to establish the amount of the debt or liquidated demand, and that there might be some dispute as to what the position actually was, or indeed that the calculations required under the contract to ascertain the amount might

[12-15] In general, a claim in tort or for a breach of contract is an unliq... damages claim. Such a claim does not become liquidated merely by bei... expressed as a definite or specific figure. For example, in *Joseph Yen & Co v Luen Cheong Hong*,[28] the defendant failed to take delivery of the goods ... from the plaintiff. The court held that the plaintiff's claim for an ex... $54,503.77 (being the balance due under the contract less the amount ... the plaintiff on resale by public auction) was an unliquidated damages claim ... it was founded on a breach of contract.

[12-16] Where, however, a sum of money is stipulated as being payable ... event of a breach of contract, whether a claim for that sum is a liquidated d... or constitutes unliquidated damages depends on whether it represents a ge... pre-estimate of the probable damage flowing from the breach (ie liqu... damages versus penalty clause).[29]

[12-17] If final judgment is entered in respect of a claim for unliqu... damages, the judgment is irregular and may be set aside on this ground alo...

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be complicated, did not make the claim in question an unliquidated one. Wh... important was that once the inputs were known, the amount due was ascert... by a process of calculation specified by the parties in their contract, without th... for further agreement from the parties, or assessment by the court by refere... general legal principles, thus going beyond what was provided for by the contr...

28 *Joseph Yen & Co (A Firm) v Luen Cheong Hong* [1952] 36 HKLR 215, ... HKCU 18 (HC). See also *Yu Hon Wah Alexis t/a Permanent Engineering C... International Realty Ltd & Ors* [2016] 1 HKLRD 1353, [2016] HKCU 156... where DDJ Winnie Tsui held that even though a fixed sum was claimed ... prayer for relief, it was still an unliquidated damages claim given that the c... action pleaded in the statement of claim is for a breach of warranty of auth... *Copytron (Hong Kong) Ltd v Lee Chin Leong* [2006] HKCU 202 (unreported, H... 1345/2003, 20 January 2006) (CFI), DHCJ Carlson held that if the primary ... is in the nature of a liquidated claim, final default judgment may still be ... even if the plaintiff has included as an alternative a claim for unliquidated da... (NB His judgment on the regularity of the final judgment was upheld on appe... his decision to impose condition of payment in for setting aside the judgment ... reversed so that the defendant was given unconditional leave to defend: see *Co... (Hong Kong) Ltd v Lee Chin Leong* [2007] 2 HKLRD 1, [2006] HKCU 1855 (C...

29 See, for example, *Dunlop Pneumatic Tyre Co v New Garage and Motor Co Ltd* [... AC 79, (1915) 83 LJKB 1574, [1914–15] All ER 739 (HL). As explained by ... Dunedin in that case, 'The essence of a penalty is a payment of money stipula... in terrorem of the offending party; the essence of liquidated damages is a ge... covenanted pre-estimate of damage … [the] question whether a sum stipula... penalty or liquidated damages is a question of construction to be decided up... terms and inherent circumstances of each particular contract, judged of as at th... of the making of the contract, not as at the time of the breach.' See also the P... Council decision in *Philips Hong Kong Ltd v The A-G of Hong Kong* [1993] 1 H... 269, [1993] HKCU 623 (PC) and the Court of Final Appeal decision in *Pol... Panhandat Ltd* (2002) 5 HKCFAR 234, [2002] 3 HKLRD 319, [2002] HKCU ... (CFA) (the latter case stressed that the right to forfeiture of deposit is different fr... the consideration of a penalty or liquidated damage clause).

30 *UDL Contracting Ltd v Apple Daily Printing Ltd & Anor* [2008] 2 HKC 534 (C...

2.2.6 Assessment of damages

[12-18] Where interlocutory judgment is given with damages to be assessed, the damages are assessed at a subsequent hearing before a master.[31] The defendant must be given at least seven days' notice of the hearing.[32] The rules governing mutual discovery and exchange of documents and witness statements also apply automatically unless the master directs otherwise.[33]

[12-19] Where the interlocutory default judgment is obtained against some but not all of the defendants, the damages will be assessed at the trial unless the court orders otherwise.[34] This is to avoid multiplicity of hearings on damage assessment and inconsistencies in the assessment.

2.2.7 Amount for which judgment for liquidated demand be entered

[12-20] The amount to be entered under the final default judgment should be limited to the amount actually due at the time of judgment, and credit should be given for payments made after commencement of the action. Hence, if a cheque from the defendant is accepted by the plaintiff after the issue of the writ, the judgment must not include the amount of the cheque during its currency.[35] To play safe, the plaintiff should first present the cheque for payment. If the cheque is duly honoured, the plaintiff may then seek default judgment on the remaining sum. If the cheque is dishonoured, then the plaintiff may enter judgment for the full sum.

[12-21] A judgment entered for too large a sum is an irregular judgment.[36] But the court has the jurisdiction to amend the judgment by reducing the judgment sum to the correct amount instead of setting it aside, and will normally do so unless the defendant can show a meritorious defence or there is any prejudice to the defendant.[37]

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31 RHC and RDC O 37.

32 RHC and RDC O 37 r 1.

33 RHC and RDC O 37 r 1(1A).

34 RHC and RDC O 37 r 3.

35 *Bolt & Nut Co (Tipton) Ltd v Rowlands Nicholls & Co Ltd* [1964] 2 QB 10, [1964] 1 All ER 131, [1964] 2 WLR 98 (CA, Eng).

36 This applies only to cases where payment has been made after the issue of the writ, but not cases where there has been payment made before issue of the writ which has the effect of reducing the plaintiff's claim. The latter cases go to whether there is a meritorious defence to the plaintiff's claim, but not regularity of the default judgment obtained: *Re Mai Xi Hong (Also known as Mak Sik Hung), Applicant/Bankrupt* [2004] HKCU 1477 (unreported, HCB 550/1996, 17 December 2004) (CFI).

37 See, for example, *Muir v Jenks* [1913] 2 KB 412 (CA, Eng) at 417, per Buckley LJ; *Armitage v Parsons* [1908] 2 KB 410 (CA, Eng); *Tonway Ltd v Margan Ltd* [1998] HKCU 267 (unreported, HCA 7752/1997, 27 March 1998) (HC); *Pollard Construction Co Ltd v Yung Yat Fan (t/a Golden Year & Co)* [1999] 3 HKC 109 (CFI) and *Au Chow Electrical Co Ltd v Cherison Engineering Ltd & Anor* [2009] HKCU 966 (unreported, HCA 2736/2008, 30 June 2009) (CFI). Once the plaintiff is aware that the judgment sum is incorrect, he should apply by summons to the master for

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2.2.8 Judgment against only one of the defendants

[12-22] If there is more than one defendant, the plaintiff may obtain default judgment against one and proceed with the action against the other(s).[38]

[12-23] But if a plaintiff's claim against one defendant is alternative to his claim against the other defendant in circumstances that the claims against the defendants are based on mutually inconsistent assumptions of facts (for example, against A as the contracting party and alternatively against B as the contracting party), default judgment entered against one defendant might be treated as an irrevocable election and constitute a bar to the action against the other.[39] Hence it is important not to enter default judgment against an alternative defendant precipitately.

2.3 Judgment in default of defence under Order 19

2.3.1 Entering judgment in default of defence

[12-24] Where a defendant fails to serve his defence within the prescribed time (ie 28 days after the time limited for acknowledging service of the writ or after

leave to amend such judgment, and should also offer to pay the costs of rectifying the judgment and the debtor's costs thrown away to protect his position as to the costs of any contested hearing on setting aside the judgment: see Cheung J in *Tomkins v Margan Ltd* [1998] HKCU 267 (unreported, HCA 7752/1997, 27 March 1998).

38 RHC and RDC O 13 rr 1–5 and Civil Liability (Contribution) Ordinance (Cap 377).

39 See *Morel Bros & Co Ltd v Earl of Westmoreland* [1904] AC 11, (1904) 73 LJKB 93, [1900–03] All ER 397 (HL) and *Moore v Flanagan* [1920] 1 KB 919, [1920] All ER Rep 254 (CA, Eng); followed by the Hong Kong Court of Appeal in *Bonus Garment Co (A Firm) v Karl Rieker GmbH & Co KG & Anor* [1995] 3 HKC 721 (CA). The decision was overturned on appeal to the Privy Council on the ground that the plaintiff's claims against the two defendants were not based on mutually inconsistent assumptions of facts (*Bonus Garment Co (A Firm) v Karl Rieker GmbH & Co KG & Anor* [1997] 2 HKLRD 735, [1997] 2 HKC 460 (PC)). Their Lordships, however, did not see fit to express any view as to whether the *Morel* case did establish a proposition as stated above or was more limited in its scope. See also *Asia Television Ltd v Mak Chi* & *Anor* [2006] 4 HKC 347 (CA) where Cheung JA commented that the *Morel* line of cases was a problematic area.

In *Goei Tsusho Co Ltd v Leader Engineering & Construction Ltd & Anor* [2010] 2 HKLRD 1084, [2010] HKCU 906 (CA), the Court of Appeal affirmed the District Judge's decision that the default judgment entered against the second defendant constituted no bar to the plaintiff's claim against the first defendant based on a joint liability claim. In *Yu Hon Wah Alexis t/a Permanent Engineering Co v International Realty Ltd & Ors* [2016] 1 HKLRD 1353, [2016] HKCU 15..., DDJ Winnie Tsui followed the Court of Appeal's decision in *Bonus Garment* and held that the plaintiff's claims against D1 and D4 were clearly alternative to each other and based on mutually inconsistent assumptions of fact so the earlier default judgment against D1 had the effect of barring the plaintiff from pursuing D4.

service of the statement of claim on him, whichever is the later),[40] the plaintiff may enter judgment in default of defence.[41]

[12-25] The forms of judgment (ie whether final or interlocutory judgment for damages to be assessed) that the court will grant are essentially the same as those for judgment in default of notice of intention to defend under Order 13 as discussed above.[42] The only exception is that for claims not falling within the specified categories in Order 19 rules 2–5 (which are the same as those in Order 13 rules 1–4), the plaintiff may by summons apply to the court for default judgment and the court 'shall' give such judgment as the plaintiff appears entitled to on his statement of claim.[43] However, notwithstanding the word 'shall', the court retains the right to refuse the plaintiff judgment even when upon his pleading he appears entitled to it, particularly if the court should see some reason to doubt whether justice may not be done by giving judgment.

[12-26] When what is sought is a declaration, there is the risk of irremediable injustice because others may have acted upon the declaration before the judgment is later set aside. Hence, it has been said that the general practice of the court is not to grant declaratory relief upon default, but to require the plaintiff to prove his case by evidence.[44] However, such a general practice should only be followed

40 RHC and RDC O 18 r 2. See the Court of Appeal's judgment in *The Decurion* [2012] 1 HKLRD 1063, [2012] HKCU 219 (CA) for the principles to be adopted for granting an extension of time to file the defence.

41 The plaintiff has no jurisdictional basis to apply for default judgment under O 19 before the expiration of the period for service of defence: see *Yau Kar Kwai v Shan Jigesh Rajnibhai & Anor* [2018] HKCU 480 (unreported, DCCJ 4752/2017, 22 December 2017) (DC).

42 RHC and RDC O 19 rr 2–6.

43 RHC and RDC O 19 r 7. Under this rule, the plaintiff is not entitled to judgment beyond the relief claimed in the statement of claim: *Lam Man Lai v OJ VC Ltd & Ors* [2020] 6 HKC 6, [2020] HKCFI 975 (CFI) at para 28. See for example *Andrew Ronald Taylor v Christopher William Jorgensen* [2011] HKCU 41 (unreported, HCA 596/2010, 4 January 2011) (CFI) for an illustration of the plaintiff taking out a summons for specific performance under this rule.

44 *Wallersteiner v Moir* [1974] 3 All ER 217, [1974] 1 WLR 991 (CA, Eng). See also *Fung Shek Wa v Chang Lai Yue* [2014] HKCU 2197 (unreported, HCA 2258/2013, 18 September 2014) (CFI) and *Chan Pui Lok Daniel v Personal Representatives of Leung Shu Ming & Ors* [2017] 4 HKLRD 625, [2017] HKCU 2161 (CFI), where the court refused in the exercise of its discretion to grant a declaration in default of defence based on a claim for adverse possession. In *Sky Joy Investment Ltd v Zheng Dunmu & Anor* [2017] HKCU 2083 (unreported, HCA 395/2016, 16 August 2017) (CFI), DHCJ William Wong SC set aside part of the declaratory reliefs obtained in default and commented that given the nature of an application for default judgment, akin to an ex parte application, the applicant must make a full and frank disclosure of matters which militates against the grant of declaratory relief to the court so that the court can properly assess the merits of granting the same without the benefit of full submissions from both sides. This was approved in *Alan Chung Wah Tang and Kan Lap Kee (Joint and Several Liquidators of Wan Hin And Co Ltd (In liq)) v Chung Chun Keung* [2021] HKCU 645, [2021] HKCFI 369 (CFI) (land purportedly transferred from company (later run into liquidation) to third party under breach of

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