

**CIVIL PROCEDURE
IN
HONG KONG**

**Seventh Edition
Volume 1**



**Eric Cheung
Carter Chim
Gary Meggitt**

 **LexisNexis®**

**CIVIL PROCEDURE
IN
HONG KONG**

**Seventh Edition
Volume 2**



**Eric Cheung
Carter Chim
Gary Meggitt**

 **LexisNexis®**

TABLE OF CONTENTS

<i>Preface to the Seventh Edition</i>	v
<i>About the Authors</i>	vii
<i>Publisher's Note</i>	ix
<i>Table of Cases</i>	xxi
<i>Table of Legislation</i>	cclv
<i>Table of Practice Directions</i>	cccxxvii

Volume 1

CHAPTER 1 SOME INTRODUCTORY MATTERS

Eric Cheung and Carter Chim

1. Scope of this Book	1
2. The Nature of Civil Procedural Law	2
3. Civil Procedure Distinguished from Criminal Procedure	2
4. The Adversarial System of Justice	4
4.1 Main differences between the pure adversarial system and the inquisitorial system of justice	4
4.2 Incremental changes to the adversarial system made prior to the Civil Justice Reform 2009 and the changing role of the judge.....	5
5. The Civil Justice Reform 2009.....	7
5.1 Selective amendment rather than enactment of entire set of new rules	8
5.2 The most significant changes to the Rules	8
5.3 The underlying objectives	9
6. Active Case Management.....	10
7. The Sources of Hong Kong Civil Procedure.....	10
7.1 Statute law	10
7.2 Subsidiary legislation	11
7.3 Case law.....	12
7.4 Practice Directions.....	12
7.5 The inherent jurisdiction of the court.....	13
7.6 Practice books.....	15
8. The Scope of the Application of the Rules of the High Court	16
9. The Main Differences between the Rules of the High Court and the Rules of the District Court.....	17
10. Prescribed Forms.....	18
11. The Language of the Courts	19
11.1 The language of the courts	19
11.2 Requests for translation of documents	20
12. The Effect of Non-Compliance with the Rules.....	22
12.1 The effect of non-compliance with the Rules.....	22
12.2 Power to rectify irregularities.....	23
12.3 Application to set aside proceedings for irregularity.....	24

12.4 Non-compliance with rules and court orders: order for payment into court.....	25
12.5 Self-executing sanctions and applications for relief from such sanctions.....	25
13. General Provisions as to Time.....	26
13.1 Where no time prescribed for doing an act.....	26
13.2 Duty to comply with provisions as to time.....	26
13.3 General rules as to the calculation of periods of time.....	27
13.4 Intervening Sundays or general holidays.....	28
13.5 Time expiring on day when court offices closed.....	28
13.6 Service of documents on Sundays and after certain hours.....	29
13.7 Computation of time where last day is public holiday, gale warning day or black rainstorm warning day.....	29
13.8 Effect of the Summer Vacation on the computation of time in High Court actions.....	29
14. Extension of Time.....	30
14.1 Jurisdiction of court to order extension of time: 'time summonses'.....	30
14.2 Principles upon which court's discretion will be exercised.....	31
14.3 Extension of time by consent.....	34
14.4 Notice to proceed after a year's delay.....	34

CHAPTER 2 JURISDICTION OF THE COURTS AND TRIBUNALS AND TRANSFER OF PROCEEDINGS

Eric Cheung and Carter Chim

1. General Principles Affecting Jurisdiction of the Courts.....	35
1.1 Introduction.....	35
2. Limitations upon Courts' Jurisdiction.....	35
2.1 No jurisdiction over acts of state.....	35
2.2 Limitation on jurisdiction in respect of civil wrongs committed by members of the Hong Kong Garrison.....	36
2.3 Court of First Instance and District Court have no jurisdiction over actions exclusively within jurisdiction of Labour Tribunal, Small Claims Tribunal or Competition Tribunal.....	37
2.4 The courts will not generally rule on hypothetical, academic or future issues.....	37
3. Limits on Financial Jurisdiction of Certain Courts.....	38
4. Limits of Courts' Territorial Jurisdiction.....	39
4.1 Where jurisdiction is lacking, parties cannot confer jurisdiction on courts.....	40
4.2 Ouster of court's jurisdiction by agreement.....	40
4.3 Ouster of access to courts by statute.....	41
5. Jurisdiction of the Court of First Instance.....	43
6. Jurisdiction of the District Court.....	43
6.1 Introduction.....	43
6.2 General jurisdiction in actions of contract, quasi-contract and tort.....	44
6.3 Money recoverable by enactment.....	44
6.4 Abandonment of part of claim to give court jurisdiction.....	45
6.5 Jurisdiction in respect of recovery of land.....	45
6.6 Jurisdiction where title to land in question.....	45
6.7 Equity jurisdiction.....	46
6.8 No splitting of causes of action to confer jurisdiction.....	47

6.9 Jurisdiction as to counterclaims and transfer of counterclaims to Court of First Instance.....	48
6.10 Matrimonial jurisdiction of the District Court.....	49
6.11 Jurisdiction of the District Court under specific legislations.....	52
6.12 Appellate jurisdiction of the District Court.....	52
7. Establishment and Jurisdiction of the Lands Tribunal.....	52
8. Establishment and Jurisdiction of the Small Claims Tribunal.....	53
8.1 Establishment and jurisdiction of the Small Claims Tribunal.....	53
8.2 Abandonment of part of claim to give tribunal jurisdiction.....	54
8.3 Jurisdiction as to counterclaims.....	55
9. Establishment and Jurisdiction of the Labour Tribunal.....	55
10. Establishment and Jurisdiction of the Competition Tribunal.....	58
11. Transfer of Proceedings.....	59
11.1 Proceedings commenced in District Court which are beyond its jurisdiction.....	59
11.2 Transfer to the Court of First Instance of proceedings within jurisdiction of District Court.....	60
11.3 Transfer of proceedings to District Court from Court of First Instance.....	60
11.4 Proceedings transferred from the Family Court to the Court of First Instance.....	62
11.5 Proceedings transferred from the Court of First Instance to the Family Court.....	62
11.6 Proceedings transferred from a tribunal to the Court of First Instance or District Court.....	62
11.7 Proceedings transferred from Court of First Instance or District Court to the Lands Tribunal.....	63
11.8 Proceedings transferred from the Court of First Instance to the Competition Tribunal.....	63
12. Costs in Transferred Cases.....	64
12.1 Transfer from District Court to Court of First Instance.....	64
12.2 Transfer from Court of First Instance to District Court.....	64

CHAPTER 3 PRE-COMMENCEMENT CONSIDERATIONS

Eric Cheung and Carter Chim

1. Introduction.....	67
2. Preliminary Issues to be Considered.....	68
2.1 Matters to be considered before accepting instructions.....	68
2.2 Matters to be considered before commencing proceedings.....	74
3. Initial Contact or Meeting with Client.....	84
4. Matters to be done Immediately after the Initial Contact/Meeting.....	85
5. Civil Legal Aid.....	86
5.1 Availability.....	86
5.2 Eligibility.....	87
5.3 Means test.....	87
5.4 Merits test.....	90
5.5 Contribution by aided person.....	91
5.6 Choice of legal representation if the case is assigned out.....	93
5.7 Stay of proceedings upon application for legal aid.....	93
5.8 Appeal against the Director's decision.....	95

CHAPTER 4 COMMENCEMENT OF PROCEEDINGS

Eric Cheung and Carter Chim

1. Mode of Commencement of Proceedings	97
2. Writ of Summons	98
2.1 Form and indorsement of writ	103
2.2 Issue of the writ	107
2.3 Duration and extension of writ	113
2.4 Amendment of the writ	116
3. Originating Summons	
3.1 Proceedings which are required by the Rules to be begun by originating summons	117
3.2 Proceedings which may, in accordance with any written law, be begun by originating summons	118
3.3 Proceedings which are appropriate to be begun by originating summons	118
3.4 Form of originating summons	120
3.5 Contents of originating summons	121
3.6 Issue of originating summons	122
3.7 Duration and renewal of originating summons	123
3.8 Amendment of originating summons	124
3.9 Discontinuance of action commenced by originating summons	124
4. Originating Motion	124
4.1 Proceedings which must or may be begun by originating motion	125
4.2 Form and issue of notice of originating motion	126
5. Petition	126
5.1 Proceedings brought by petition	127
5.2 Form, presentation and contents of petitions	128
6. Commencement by the Wrong Mode of Originating Process	129
7. Access to the Courts; Right to Sue in Person or by a Solicitor	130
7.1 General rule	130
7.2 Use of a 'McKenzie' friend	132

CHAPTER 5 SERVICE OF PROCESS AND ACKNOWLEDGMENT OF SERVICE

Eric Cheung and Carter Chim

1. Service Generally	135
2. Service of Originating Process within the Jurisdiction	137
2.1 Introduction	137
2.2 Methods of service	138
2.3 Service of originating process on particular parties	156
2.4 Service in particular types of action	168
3. Service of Documents in Ongoing Proceedings	171
3.1 Ordinary service at proper address	172
3.2 Leaving document at the proper address	174
3.3 Ordinary service by post	174
3.4 Service by way of a document exchange	175
3.5 Time for ordinary service	175
4. Proving Due Service	176
5. Service Out of the Jurisdiction	177
5.1 Introduction	177
5.2 Service of originating process with leave	179

5.3 The applicant must establish a good arguable case that the claim falls within one of the sub-paragraphs of Order 11 rule 1(1)	181
5.4 The applicant must show that there is a serious issue to be tried (the merits)	193
5.5 The plaintiff must show that the case is a proper one for the court to exercise its discretion in favour of granting leave to serve the writ out of the jurisdiction: application of doctrines of <i>forum non conveniens</i> and <i>lis alibi pendens</i>	194
5.6 Service out of the jurisdiction without leave	201
5.7 Dispensing with leave to serve out of the jurisdiction	202
5.8 Methods of effecting service out of the jurisdiction	203
5.9 Application by defendant to set aside service effected out of the jurisdiction	208
6. Acknowledgment of Service	210
6.1 Introduction	210
6.2 Completion of the acknowledgment of service in writ action	211
6.3 Completion of acknowledgment of service of originating summons	212
6.4 Time and place for return of the acknowledgment of service	212
6.5 Withdrawal and amendment of acknowledgment of service	213
6.6 Court procedure on receipt of acknowledgment of service	213
6.7 Special rules for particular defendants	214
7. Disputing the Jurisdiction of the Court	215
7.1 Introduction	215
7.2 Procedure	215
7.3 Order on application disputing jurisdiction	219

CHAPTER 6 PARTIES

Eric Cheung and Carter Chim

1. Introduction	221
2. Special Rules of Procedure in Relation to Particular Parties	221
2.1 Persons under a disability	227
2.2 Corporations	229
2.3 Actions by liquidators	230
2.4 Unincorporated associations	231
2.5 Partnerships and firms	232
2.6 Sole proprietorships	233
2.7 Trustees	233
2.8 Attorneys acting under powers of attorney	234
2.9 The Government	238
2.10 Foreign and Commonwealth states	240
2.11 Trade unions	240
3. Joinder of Parties	240
3.1 Joinder of parties generally	242
3.2 Joinder of parties in the alternative	242
4. Change of Parties on Death, Bankruptcy, Assignment, Transmission or Devolution	245
4.1 Death or bankruptcy of a party	245
4.2 Assignment, transmission or devolution of interest or liability	246
4.3 Application for order to carry on proceedings	248

5. Proceedings By and Against Estates	249
5.1 Proceedings by estates	249
5.2 Proceedings against estates	251
5.3 Proceedings commenced by deceased persons	252
5.4 Order to carry out proceedings	252
6. Adding, Substituting and Removing Parties	253
6.1 Adding, substituting and removing parties generally	253
6.2 Adding or substituting a new party after expiry of the limitation period	260
6.3 Procedure	261
6.4 Party in possession of land	262
7. Relator Actions	262
8. Representative Proceedings	263
8.1 Representative proceedings generally	263
8.2 Same interest in same proceedings	266
8.3 Special points arising in representative proceedings	268
8.4 Representation of interested persons who cannot be ascertained	269
8.5 Notice of action to non-parties	269
8.6 Representation of deceased person	271
9. Third Party Proceedings	271
9.1 Third party proceedings generally	271
9.2 Claims covered by third party proceedings	272
9.3 Procedure	273
9.4 Contribution notices against an existing party	279
9.5 Claims by third and subsequent parties	280

CHAPTER 7 CAUSES OF ACTION, JOINDER OF ACTIONS AND CONSOLIDATION OF ACTIONS

Eric Cheung and Carter Chim

1. Meaning Of 'Cause of Action'	281
2. Joinder of Causes of Action against Same Defendant	282
2.1 Introduction	282
2.2 When can causes of action be joined?	282
3. Consolidation of Actions	283
3.1 The court's jurisdiction to order consolidation etc	283
3.2 Application for consolidation etc	287

CHAPTER 8 PLEADINGS

Eric Cheung and Carter Chim

1. The Nature and Purpose of Pleadings	289
1.1 Introduction; the meaning of 'pleadings'	289
1.2 The purpose of pleadings	290
1.3 Close of pleadings and joinder of issue	291
2. The Form of Pleadings	292
2.1 Formalities of pleadings	292
2.2 Title of the pleadings: names and capacity of the parties	294
2.3 Signature of pleadings	295
3. Verification of Pleadings by Statements of Truth	295
4. The Principles Governing the Drafting of Pleadings	298
4.1 General principles of good pleading	298
4.2 Inconsistency within pleadings; pleading inconsistent alternatives	303
4.3 Consistency between pleadings and witness statements	305

4.4 Specific matters relating to the drafting of pleadings	305
4.5 The defence and defence to counterclaim; pleading in answer to an opponent's case	313
4.6 Pleading particulars	318
5. Particular Pleadings	322
5.1 Statements of claim	322
5.2 Defences	328
5.3 Set-offs and counterclaims	331
5.4 Replies and defences to counterclaim	335
5.5 Pleadings subsequent to reply	337
6. Service and Filing of Pleadings and Consequence of Default of Pleadings	337
6.1 Service of pleadings	337
6.2 Time for service of pleadings	338
6.3 Filing of pleadings	339
6.4 Consequences of default of pleadings	340
7. Further and Better Particulars of Pleadings	340
7.1 Request and order for further and better particulars	340
7.2 Time when application should be made	342
7.3 Form of particulars	343
7.4 Particulars binding on party furnishing them	343
8. Amendment of Pleadings	344
8.1 Reasons for amendment	344
8.2 Mode of amendment	345
8.3 Amendment without leave	346
8.4 Amendment with leave	357
8.5 Pleading to amendments	358
9. Objections to Pleadings	358
10. Trial Without Pleadings	358

CHAPTER 9 DISCOVERY

Eric Cheung and Carter Chim

1. Introduction	361
1.1 Meaning and function of discovery	361
1.2 The different kinds of discovery	361
1.3 Discovery distinguished from other processes by which information is obtained from the opposing party	362
2. Persons Upon Whom the Obligation to Make Discovery Falls	363
2.1 The general rule is that discovery can only be obtained against parties to the proceedings	363
2.2 Discovery against non-parties to the action	364
3. Discovery in Actions Commenced by Writ	379
3.1 Automatic discovery in High Court and District Court actions	379
3.2 The list of documents	382
3.3 Relevance; discovery only of documents relating to matters in issue	386
3.4 Documents in possession, custody or power of party	389
3.5 The duty of the solicitor	390
3.6 Affidavit verifying list of documents	391
3.7 Subsequent discovery of other documents	392
3.8 How far list of documents and affidavit conclusive	392
3.9 Court order for general discovery	393
3.10 Methods of obtaining further disclosure	394

3.11 Further and better list.....	394
3.12 Specific discovery of documents.....	395
4. Discovery in Special Cases.....	398
4.1 Proceedings begun by originating summons or notice.....	398
4.2 Discovery in third party proceedings.....	399
4.3 Limited discovery in personal injury actions.....	400
4.4 Limited discovery in 'running down' actions.....	400
4.5 Discovery against the Government.....	402
4.6 Disclosure of experts' reports.....	403
5. How and When to Apply for Discovery.....	403
5.1 Application for discovery made to master in chambers.....	404
5.2 Discovery not usually granted before close of pleadings.....	404
5.3 Discovery where split trial or separate issues as to liability and quantum.....	404
6. Production and Inspection of Documents.....	405
6.1 Introduction: the general obligation to produce documents for inspection.....	405
6.2 Production for inspection of documents referred to in party's list.....	407
6.3 Production for inspection of documents referred to in pleadings, affidavits, witness statements and experts' reports.....	407
6.4 Production for inspection of other relevant documents.....	409
6.5 Order for production for inspection.....	409
6.6 Provision of copies of documents.....	410
6.7 Claims to privilege.....	411
7. Documents Disclosed not to be Used for Collateral or Ulterior Purpose.....	411
7.1 The general principle.....	414
7.2 Documents disclosed subsequently read out in court.....	415
8. Privileged Documents.....	415
8.1 Grounds of privilege.....	415
8.2 Inspection by court to determine validity of claim for privilege and duty of judge where he has seen privileged material.....	416
8.3 Legal professional privilege.....	445
8.4 Public interest immunity.....	450
8.5 Privilege against incrimination of self or spouse.....	453
8.6 Statutory secrecy.....	453
8.7 Agreement not to disclose and 'without prejudice' communications.....	457
9. Oppression.....	457
10. Procedure on Inspection.....	457
10.1 Place of inspection.....	458
10.2 Who may inspect.....	458
11. Order Limiting Discovery.....	458
12. Non-compliance with Duty to Make Discovery and Sanctions for Non-compliance.....	459
12.1 Non-compliance with duty to make discovery and sanctions for failure to comply.....	459
12.2 Destruction of discoverable documents.....	462

CHAPTER 10 CASE MANAGEMENT AND INTERLOCUTORY PROCEEDINGS

Eric Cheung and Carter Chim

1. Case Management.....	463
1.1 Introduction: The role of active case management.....	463
1.2 The underlying objectives.....	463

1.3 Statutory facilitation and judicial application of the underlying objectives.....	464
1.4 Objective (1): To increase the cost-effectiveness of any practice and procedure to be followed.....	464
1.5 Objective (2): Cases to be dealt with as expeditiously as reasonably practicable.....	465
1.6 Objective (3): Proportionality.....	466
1.7 Objective (4): Fairness between the parties.....	466
1.8 Objective (5): To facilitate the settlement of disputes.....	467
1.9 Objective (6): To ensure that the court's resources are distributed fairly.....	468
1.10 Active case management.....	468
1.11 Self-executing sanctions and relief from such sanctions.....	473
1.12 Duty of practitioners to comply with court directions and timetable and consequences of non-compliance.....	475
1.13 Brief summary of the management of a typical case.....	477
1.14 The advantages of having clear case directions.....	478
1.15 The timetabling questionnaire.....	479
1.16 The case management summons.....	482
1.17 Case management conference.....	485
1.18 Discrete interlocutory applications.....	486
1.19 Variation of case management timetable and milestone dates.....	487
1.20 The pre-trial review.....	488
1.21 Court's approach to last-minute applications.....	488
1.22 Failure to appear at case management conference or pre-trial review.....	491
1.23 Costs sanctions.....	493
2. Appeals from Case Management Decisions.....	493
3. Automatic Directions in Respect of Personal Injury Actions.....	494
4. Special Directions in Respect of Cases in the Court of First Instance Likely to Last 15 Days or More: Long Cases.....	495
4.1 Early assignment of long cases to trial judge.....	495
4.2 Preliminary hearing for directions.....	496
4.3 Further directions from trial judge.....	497
4.4 Agreed list of issues to be filed in court before trial.....	498
5. Interlocutory Proceedings.....	498
5.1 The scope and use of interlocutory proceedings.....	498
5.2 Reform of the system of case management.....	500
5.3 Mode of application for interlocutory relief or remedy.....	500
5.4 Differences between interlocutory proceedings in the Court of First Instance and District Court.....	501
6. Applications by way of Inter Partes Summons.....	501
6.1 When application by inter partes summons appropriate.....	501
6.2 Preparation of summonses for hearing.....	502
6.3 Failure to attend hearing.....	504
6.4 Court's powers on the hearing and powers of rehearing.....	505
7. Ex Parte Applications.....	506
7.1 When ex parte applications appropriate.....	506
7.2 Ex parte applications to be made by affidavit.....	506
7.3 Full and frank disclosure required.....	506
7.4 Procedure to be followed in the case of urgent ex parte applications to a judge.....	507
7.5 No disclosure of confidential information to judge that cannot be disclosed subsequently to the other party.....	508
7.6 Setting aside an ex parte order.....	508

8. Affidavits and Affirmations	509
8.1 The distinction between affidavits and affirmations.....	509
8.2 The role of affidavits.....	509
8.3 The formal requirements of affidavits	510
8.4 The drafting and filing of affidavits	511
8.5 The exhibiting of documents, letters and objects to affidavits	514
8.6 The swearing of affidavits (the 'jurat').....	515
9. Proceedings in Chambers	515
9.1 Introduction	515
9.2 Jurisdiction of a judge in chambers	516
9.3 Jurisdiction of Registrar and masters in chambers	517
9.4 Chambers proceedings are normally open to the public	520
9.5 Report of business conducted in chambers.....	522
9.6 Rights of audience in chambers.....	522
9.7 Conduct of business before the masters	523
9.8 The classes of business that come before Masters	525
9.9 Orders made by judge or master.....	528
9.10 Notes of proceedings in chambers.....	529
10. Interrogatories	529
10.1 Nature of interrogatories	529
10.2 When and upon whom may interrogatories be served?	530
10.3 Interrogatories without leave of court in Court of First Instance.....	530
10.4 Interrogatories with leave of the court	531
10.5 Discretion of the court in allowing interrogatories	531
10.6 Interrogatories must be necessary for disposing fairly of the action or for saving costs	532
10.7 Interrogatories must not be unreasonable, vexatious, prolix, oppressive or scandalous.....	534
10.8 Interrogatories must relate to a matter in question between the parties and 'fishing interrogatories' will not be allowed	535
10.9 Objections to interrogatories on grounds of privilege.....	536
10.10 Using answers at the trial	536
10.11 Procedure relating to interrogatories	536
10.12 Failure to answer interrogatory adequately.....	537
10.13 Revocation or variation of order.....	537
11. Admissions	537
11.1 Introduction	537
11.2 Making admissions in pleadings or otherwise.....	537
11.3 Notice to admit facts or case.....	538
11.4 Withdrawal of admission of liability	539
11.5 Judgment on admissions.....	541
11.6 Deemed admission as to authenticity of documents discovered by list or affidavit.....	541
11.7 Notice to admit authenticity of documents.....	542
12. Discontinuance and Withdrawal	543
12.1 Introduction	543
12.2 Discontinuance of action or withdrawal of claim by plaintiff without leave.....	543
12.3 Withdrawal of defence or counterclaim by defendant without leave	544
12.4 Withdrawal of action by consent without leave.....	544
12.5 Discontinuance or withdrawal with leave.....	544

12.6 Effect of discontinuance or withdrawal.....	545
12.7 Withdrawal of acknowledgment of service and summons	546
13. Security for Costs	547
13.1 Introduction	547
13.2 Power to order security for costs	547
13.3 Plaintiff ordinarily resident out of the jurisdiction	549
13.4 Plaintiff a company.....	553
13.5 No security from defendant	555
13.6 Counterclaiming defendant	555
13.7 Security for costs from appellant.....	556
13.8 Discretion to order security for costs.....	556
13.9 Application for security for costs	559
13.10 Manner of giving security and the amount of security.....	561
13.11 The order for payment of security.....	562
14. Appeals from Orders Made on Interlocutory Applications	563

CHAPTER 11 INTERLOCUTORY OR INTERIM REMEDIES

Eric Cheung and Carter Chim

1. Introduction	565
2. Interlocutory Injunctions	565
2.1 Court's power to grant injunctions	565
2.2 'Free-standing' interlocutory injunctions in support of foreign proceedings.....	567
2.3 Principles governing the grant of interlocutory injunctions	570
2.4 Interlocutory <i>mandatory</i> injunctions and interlocutory injunctions to restrain breaches of negative covenants	575
2.5 Mareva injunction to prevent dissipation of assets; jurisdiction of the court.....	577
2.6 Grounds upon which and conditions subject to which a Mareva injunction will be granted	582
2.7 Discovery and disclosure in aid of Mareva injunction	587
2.8 Release of assets from the injunction	591
2.9 Application for an interlocutory injunction	593
2.10 Ex parte application for interlocutory injunction in case of urgency	593
2.11 Variation or discharge of injunction	598
2.12 Inter partes application for interlocutory injunction by way of summons	599
2.13 Breach of an interlocutory injunction.....	600
3. Interim Payments.....	601
3.1 Nature of interim payment.....	601
3.2 Application for interim payment	602
3.3 Order for interim payment in respect of damages	605
3.4 Order for interim payment in respect of sums other than damages.....	606
3.5 Manner of payment.....	606
3.6 Non-disclosure of interim payment	607
3.7 Payment-in by defendant after interim payment made.....	607
3.8 Adjustment on final judgment or order or on discontinuance	607
4. Provisional Damages for Personal Injuries	607
4.1 Jurisdiction to award provisional damages.....	608
4.2 Award of provisional damages	609
5. Detention, Custody, Preservation and Inspection of Property.....	609

6. Anton Piller Orders	612
6.1 Jurisdiction of the court and purpose and scope of the order	612
6.2 Application for Anton Piller order	613
6.3 Grounds for granting Anton Piller order	614
6.4 Order to supply information; privilege from self-incrimination	615
6.5 Manner of execution of an Anton Piller order	617
6.6 Failure on the part of the defendant to comply with the order	619
6.7 Application to discharge Anton Piller order and regrant of the order	619
7. Appointment of Receiver	620

Volume 2

CHAPTER 12 DISPOSAL OF ACTIONS WITHOUT TRIAL

Eric Cheung and Carter Chim

1. Introduction	623
2. Default Judgment	623
2.1 Introduction	623
2.2 Judgment in default of notice of intention to defend under Order 13	624
2.3 Judgment in default of defence under Order 19	630
2.4 The effect of a default judgment	634
2.5 Setting aside a judgment in default	635
2.6 Setting aside a regular default judgment	636
3. Admissions in Monetary Claims under Order 13A	649
3.1 Requests for time to pay	654
3.2 Interest	655
3.3 Application of the scheme to counterclaims and third party proceedings	656
4. Summary Judgment	656
4.1 Use and abuse of the procedure	656
4.2 Scope of summary judgment	657
4.3 Exceptions to summary judgment procedure	659
4.4 Procedure	660
4.5 Principles governing the determination of the application	665
4.6 Possible outcomes	671
4.7 Parallel application for interim payment	675
5. Summary Disposal of a Case on a Point of Law	677
6. Striking Out	679
6.1 Introduction	679
6.2 Jurisdiction	680
6.3 Time and manner of application	680
6.4 Grounds for striking out	683
6.5 Consequential remedies granted by the court	689
7. Dismissal Pursuant to Unless Orders	690
7.1 Unless order	690
7.2 Sanction stipulated under the unless order	691
7.3 Effect of non-compliance with an unless order	693
7.4 Relief from sanction	696
7.5 Subsequent proceedings	701
8. Dismissal for Want of Prosecution	701
8.1 The traditional approach under <i>Birkett v James</i>	701
9. Stay of Proceedings	710
9.1 Introduction	710
9.2 Forum non conveniens	711

CHAPTER 13 SETTLEMENT

Eric Cheung and Carter Chim

1. Introduction	727
2. Procedural Safeguards	728
2.1 Ostensible authority to compromise	728
2.2 Without prejudice rule	728
2.3 Subject to contract rule	731
2.4 Settlement by person under disability	732
3. Procedural Devices for Encouraging Settlement	734
3.1 Sanctioned offer and sanctioned payment under new Order 22	734
3.2 Calderbank offer	767
3.3 Open offer	769
4. Methods of Concluding Settlement	770
4.1 Useful discussions on various settlement methods	770
4.2 By contract without a court order	771
4.3 By court order/judgment	772
5. Agreeing Settlement Terms	774
5.1 Client's ability to comply with terms	774
5.2 Potential claims between the parties	776
5.3 Potential claims against other persons	776
5.4 Cost and other matters	778

CHAPTER 14 CERTAIN ASPECTS OF EVIDENCE

Eric Cheung and Carter Chim

1. Introduction	779
2. Modes of Giving Evidence	779
2.1 Introduction: The principle of orality	779
2.2 Evidence by way of affidavit or affirmation	780
2.3 Evidence by way of deposition	782
3. Evidence by way of Video Link	784
4. Exchange of Witness Statements	788
4.1 Mutual duty to exchange witness statements in actions commenced by writ	788
4.2 Formal requirements and contents of witness statements	790
4.3 Supplemental witness statements, amendment of witness statements and additional witness statements	791
4.4 Use of witness statements	793
4.5 Failure to comply with order for exchange of witness statement	794
4.6 Inspection of witness statements	795
4.7 Court's power to override certain provisions	795
5. Hearsay Evidence	796
5.1 Statutory admission of hearsay evidence	797
5.2 Procedure governing admission of hearsay evidence	798
5.3 Weight to be given to hearsay evidence	798
6. Expert Evidence	798
6.1 The function and nature of expert evidence	801
6.2 Restrictions on adducing expert evidence	804
6.3 Application for directions in respect of expert evidence	804
6.4 Joint examinations by joint or single experts or separate examinations by separate experts and joint or separate reports	806

6.5	Separate experts preparing a joint report.....	808
6.6	Separate experts preparing separate reports.....	809
6.7	Appointment of substitute experts.....	809
6.8	Meeting of experts and preparation of joint statement.....	810
6.9	Order for disclosure of expert's report.....	811
6.10	Appointment of court expert.....	812
6.11	The expert's Code of Conduct.....	813
6.12	The expert's overriding duty to court.....	814
6.13	The expert's report.....	815
6.14	The expert's declaration and verification of the expert's report.....	815
7.	Subpoenas Ad Testificandum and Duces Tecum.....	817
7.1	Issue of writ of subpoena.....	817
7.2	Nature of the writs of subpoena.....	818
7.3	Time at which application should be made.....	820

CHAPTER 15 THE TRIAL PROCESS

Eric Cheung and Carter Chim

1.	The Expanding Role of the Court in Case Management.....	821
1.1	Civil Justice Reforms; setting time limits within the trial.....	822
2.	Place and Mode of Trial.....	823
2.1	Determination of place of trial.....	823
2.2	The technology court and use of information technology and text-based communications in courtrooms.....	823
2.3	Mode of trial generally.....	824
3.	Trial of Separate Issues.....	829
3.1	The general principle: single trial of all issues.....	829
3.2	Trial of preliminary point of law or other issue.....	830
3.3	Split trials of issues of liability and damages.....	833
3.4	Assessment of damages.....	836
4.	Setting Down for Trial.....	837
4.1	The lists, fixing of trial dates and transfer of actions between lists.....	837
4.2	Setting down in the lists for trial.....	840
5.	Proceedings at Trial.....	846
5.1	Failure of party to appear at the trial.....	846
5.2	Adjournment of trial and vacation of trial dates.....	848
5.3	The course of the trial generally.....	851
5.4	Public or private hearings?.....	853
5.5	Duty of trial judge to recuse himself in appropriate circumstances.....	856
5.6	The role of the trial judge.....	858
5.7	The role and professional duties of counsel (including solicitor advocates) at the trial.....	860
5.8	Order of speeches.....	862
5.9	Presentation of parties' cases at the trial.....	863
5.10	Examination of witnesses.....	868
5.11	Representation of co-plaintiffs and co-defendants.....	871
5.12	Submission of no case to answer.....	872
5.13	Inspection by judge of places or things.....	872
5.14	Delivery of judgment.....	873
5.15	Certificate of judicial clerk.....	875
6.	Recording Proceedings and Transcripts.....	876
6.1	Recording proceedings and official transcript.....	876
6.2	Payment for transcripts for use in the Court of Appeal.....	876

7.	Exhibits.....	877
7.1	Exhibits at the trial.....	877
7.2	Exhibits retained by Registrar pending appeal.....	877

CHAPTER 16 JUDGMENTS AND ORDERS

Eric Cheung and Carter Chim

1.	Form of Judgments and Orders.....	879
2.	Distinction between Final and Interlocutory Judgments and Orders.....	879
3.	Peremptory Orders, 'Unless' Orders, Self-Executing Sanctions and Relief from Self-Executing Sanctions.....	882
4.	Drawing Up and Entering Judgments and Orders.....	882
4.1	Drawing up judgments.....	882
4.2	Drawing up court orders.....	882
4.3	Effective date of judgment or order.....	884
4.4	Correction and review of judgment before perfection.....	884
4.5	Amendment of judgments and orders after perfection: the 'slip rule'.....	887
4.6	Setting aside judgment obtained by fraud.....	890
5.	Judgments in Foreign Currency.....	890
6.	Entitlement to Interest.....	891
6.1	Introduction.....	891
6.2	Pre-judgment interest on debt or damages.....	891
6.3	Interest payable under the High Court Ordinance and the District Court Ordinance on award for debt or damages.....	892
6.4	Special rules in respect of interest payable on damages for personal injuries and death.....	895
6.5	Post-judgment interest; interest on judgment debts.....	898

CHAPTER 17 PERSONAL INJURY ACTIONS AND OTHER PARTICULAR PROCEEDINGS

Eric Cheung and Carter Chim

1.	Particular Proceedings and the Particular Lists.....	901
1.1	The particular lists.....	901
1.2	Entry of action in particular list and transfer to particular list.....	902
1.3	Pleadings in particular proceedings.....	902
1.4	Case management and directions in particular proceedings.....	903
2.	The Personal Injuries List.....	903
2.1	Establishment and ambit of the Personal Injuries List.....	904
2.2	Introduction: guidance to solicitors.....	905
2.3	Requirements of pre-action protocol.....	906
2.4	Alternative dispute resolution.....	906
2.5	Commencement of proceedings: The writ and statement of claim.....	907
2.6	Documents to be served with the statement of claim.....	912
2.7	Documents to be served with defence.....	913
2.8	Automatic directions.....	914
2.9	Expert reports.....	918
2.10	Interlocutory applications.....	918
2.11	The case management questionnaire and check list review hearing.....	919
2.12	Case management conference.....	922
2.13	Pre-trial review and setting down for trial.....	922
2.14	Variation of court determined directions or milestones.....	923

2.15 Case managing trial	924
2.16 Other matters dealt with in the Practice Direction	924
3. The Commercial List	925
3.1 Establishment and ambit of the Commercial List	925
3.2 Applications in the Commercial List	925
3.3 Procedure governing cases in the Commercial List	925
4. The Construction and Arbitration List	926
4.1 The establishment and ambit of the Construction and Arbitration List	926
4.2 Applications in the Construction and Arbitration List	926
5. The Constitutional and Administrative Law List	926
5.1 Establishment and ambit of the Constitutional and Administrative Law List	926
6. The Admiralty List	927
7. The Employees' Compensation List	928
8. The Equal Opportunities List	928
9. The Intellectual Property List	929
10. Other Particular Proceedings	929

CHAPTER 18 ENFORCEMENT OF JUDGMENTS

Eric Cheung and Carter Chim

1. Introduction	931
2. Execution and Enforcement Generally	931
2.1 Money judgments: judgment or order for the payment of money, not being a judgment or order for the payment of money into court	933
2.2 Judgment or order for the payment of money into court	934
2.3 Judgment for possession of land	934
2.4 Judgment for the delivery of goods	934
2.5 Judgment to do or abstain from doing any act	934
3. Oral Examination of the Judgment Debtor	935
3.1 The procedure for applying for an order	936
3.2 Who may be examined	937
3.3 Nature and scope of the examination	938
3.4 Court's powers following an examination	941
4. Prohibition Orders	945
4.1 Jurisdiction of the court to make a prohibition order	946
4.2 Procedure	949
4.3 Effect of the prohibition order	949
4.4 Duration of the order	950
4.5 Discharge of order	950
4.6 Power to award compensation	951
5. Order for Interim Attachment of Property	952
5.1 Jurisdiction to order interim attachment	952
5.2 Procedure	953
5.3 Issue of warrant to furnish security or to appear to show cause	953
5.4 Procedure following issue of the warrant	954
5.5 Rights of third parties	954
5.6 Compensation	954
6. Enforcement by Writ of Execution	955
6.1 General principles	955
6.2 Writ of fieri facias (fi fa)	962
6.3 Writ of possession	976

6.4 Writ of delivery of goods	979
6.5 Writ of sequestration	980
6.6 Writs in aid of execution	988
7. Committal Proceedings	989
7.1 Judgments enforceable by committal and prerequisites to committal	990
7.2 Procedure	992
8. Garnishee Proceedings	995
8.1 Conditions for instituting garnishee proceedings	995
8.2 Procedural requirements	1001
8.3 Making the order absolute and exercise of the court's discretion	1004
8.4 Effect of the garnishee order absolute	1007
8.5 Effect of insolvency of the judgment debtor	1008
8.6 Discharge of the garnishee	1009
9. Charging Orders	1009
9.1 What may be charged?	1010
9.2 Limitation periods	1012
9.3 Procedural requirements	1013
9.4 Effective operating date of the order	1020
9.5 Effect of insolvency of judgment debtor	1020
9.6 Effect of the charging order	1021
9.7 Enforcement of charging orders	1025
9.8 Discharge or variation of charging order	1028
10. Stop Orders and Stop Notices	1029
10.1 Stop orders in respect of funds in court	1030
10.2 Stop notices in respect of securities not in court	1030
11. Appointment of Receiver by way of Equitable Execution	1031
11.1 Equitable execution against land and other property	1033
11.2 Where a receiver may be appointed	1034
11.3 Procedure for appointment of receiver	1035
11.4 Effect of appointment of receiver	1036
11.5 Role of receiver: Giving of security, remuneration and duty to account	1036
12. Stay of Execution	1037
12.1 Stay of execution pending appeal	1037
12.2 Stay of execution on the grounds of matters occurring after judgment under Order 45 rule 11	1042
12.3 Stay of execution by writ of fi fa under Order 47 rule 1(1)	1043
12.4 Stay of execution under the inherent jurisdiction of the court	1045
13. Bankruptcy and Winding Up	1045

CHAPTER 19 COSTS

Eric Cheung and Carter Chim

1. Introduction	1049
2. Amendments Relating to Costs Introduced by the Civil Justice Reform	1050
3. The Meaning of the More Common Orders for Costs	1050
4. The Court's Jurisdiction to Award Costs	1053
5. Costs Orders Nisi and Costs Orders Absolute	1054
6. Costs Only Proceedings	1055
7. Costs for and Against Non-Parties	1056
8. The Indemnity Principle	1060
9. Costs in Legal Aid Cases	1063
10. The Exercise of the Courts' Discretion to Award Costs	1064
10.1 Courts' discretion must be exercised judicially	1064

10.2	The general principle: costs follow the event.....	1065
10.3	Special provisions as to the incidence of costs	1069
10.4	Costs where action discontinued.....	1070
10.5	Costs where proceedings settled before trial save as to costs	1071
10.6	Costs where co-defendants.....	1072
10.7	Costs where set-off or counterclaim.....	1073
10.8	Where costs not awarded to successful party.....	1074
10.9	Costs arising from party's misconduct or neglect.....	1078
10.10	Personal liability of solicitors and counsel for costs (wasted costs orders).....	1079
10.11	Costs of action which should have been commenced in the District Court.....	1085
10.12	Costs of trustees, personal representatives and mortgagees.....	1087
11.	Summary Assessment of Costs and Provisional Summary Assessment of Costs of Interlocutory Applications and Appeals.....	1089
11.1	Time for complying with order for summary assessment, preparation of statement of costs and the assessment.....	1092
12.	Summary Assessment of Costs in Other Cases.....	1093
13.	Taxation of Costs.....	1094
13.1	Order for taxation of costs.....	1094
13.2	Powers of taxing masters and chief judicial clerk to tax costs.....	1095
13.3	Order for interim payment of costs.....	1095
13.4	Preparing the bill of costs for taxation.....	1096
13.5	When to tax costs and time within which taxation proceedings must be commenced and the consequences of delay in prosecuting taxation proceedings	1097
13.6	Mode of commencing taxation proceedings, directions from the taxing master and setting down for taxation	1100
13.7	Provisional taxation (paper taxation)	1101
13.8	Taxation with a hearing.....	1102
13.9	Conduct of the taxation hearing.....	1102
13.10	Principles governing taxing masters' exercise of discretion.....	1103
13.11	The taxing master's interim and final certificates	1105
13.12	Stay of taxation of costs pending appeal.....	1106
13.13	Taxation of contentious business agreements	1106
13.14	Wasted costs orders in taxation proceedings against legal representatives	1107
14.	Sanctioned Costs Offers and Sanctioned Payments.....	1107
14.1	Sanctioned costs offers by receiving parties.....	1107
14.2	Sanctioned costs payments by paying parties	1108
14.3	Clarification of sanctioned offer and sanctioned payment notice.....	1109
14.4	Acceptance of sanctioned payments.....	1109
14.5	Acceptance of sanctioned offers.....	1109
14.6	Consequences of sanctioned offer or sanctioned payment.....	1110
15.	Assessment of Costs.....	1112
15.1	The several bases for assessment.....	1112
15.2	Costs on the party and party basis.....	1113
15.3	Costs on the common fund basis.....	1115
15.4	Costs on the indemnity basis.....	1117
15.5	Costs on the trustee basis	1121
15.6	Costs as between a solicitor and own client.....	1122
15.7	Scales of costs	1124

15.8	Costs of Government lawyers	1127
15.9	Costs of litigant in person	1127
15.10	Counsel's fees.....	1129
15.11	Interest on costs.....	1133
16.	Liability for Costs of Taxation	1133
17.	Review of Taxation.....	1134
17.1	Application for review of taxation.....	1134
17.2	Review by taxing master	1135
17.3	Review by judge	1135

CHAPTER 20 APPEALS

Eric Cheung and Carter Chim

1.	Introduction	1139
2.	Outlines of Civil Appeals System.....	1140
3.	Extension of Time for Appeal	1144
3.1	Out of time application as a result of a change in the law.....	1149
4.	Stay of Execution Pending Appeal.....	1150
5.	Security for Costs of an Appeal.....	1157
6.	Admission of Fresh Evidence.....	1161
7.	Appeals from Master to Judge in Chambers	1166
7.1	Nature of appeal	1166
7.2	Relevant rules and practice.....	1167
8.	Appeals to the Court of Appeal	1168
8.1	Composition of the Court of Appeal	1168
8.2	Nature of appeal	1171
8.3	Application for leave to appeal.....	1171
8.4	Procedure for lodging appeal.....	1180
8.5	Approaches of the Court of Appeal.....	1183
8.6	Taking fresh points on appeal.....	1186
8.7	Determination of interlocutory application on papers.....	1187
9.	Appeals to the Court of Final Appeal.....	1188
9.1	Requirement for leave to appeal.....	1188
9.2	Abolition of the As of Right Appeal Mechanism	1188
9.3	Appeal by discretion.....	1189
9.4	Procedure for leave application	1190
9.5	Nature of hearing and approaches in determining appeals.....	1193

CHAPTER 21 ALTERNATIVE DISPUTE RESOLUTION

Gary Meggitt

1.	What is Alternative Dispute Resolution ('ADR')?	1195
2.	Types of ADR.....	1198
2.1	The advantages and disadvantages of ADR.....	1199
3.	How Mediation Works.....	1201
3.1	Generally	1201
3.2	The stages of a mediation	1204
3.3	The lawyer's role in mediation	1205
4.	ADR in Hong Kong.....	1207
4.1	History	1207
4.2	The pilot schemes	1208
4.3	The post-CJR court rules.....	1209

4.4 Practice Direction No 31 'Mediation'	1215
4.5 The Mediation Ordinance (Cap 620) and Apology Ordinance (Cap 631)	1218
4.6 The Singapore Convention and other developments	1225
5. Arbitration	1228
5.1 Generally	1228
5.2 Arbitration in Hong Kong	1230
5.3 Arbitration and the courts	1239
5.4 Arbitration funding	1240

CHAPTER 22 JUDICIAL REVIEW

	<i>Carter Chim</i>
1. Introduction	1243
2. Jurisdiction of the Administrative Court	1244
2.1 Introduction	1244
2.2 Exercise of public function	1244
2.2.1 Decisions by public/statutory bodies	1245
2.2.2 Decisions by non-public/statutory bodies	1249
2.3 The standing rule – the 'sufficient interest' test	1251
2.4 Exclusion by Basic Law or domestic legislation	1254
2.4.1 Exclusion by Basic Law	1254
2.4.2 Exclusion by domestic legislation	1256
3. Justiciability	1257
4. Discretion	1259
4.1 Merits test	1259
4.2 Delay	1260
4.3 Pre-maturity	1263
4.4 Availability of alternative remedies	1264
5. Procedures	1265
5.1 Stage 1 – Application for leave	1265
5.2 Stage 2 – Substantive application	1268
6. Remedies	1271
6.1 Certiorari, prohibition and mandamus	1272
6.2 Declaration	1273
6.3 Injunction	1273
6.4 Damages	1273
6.5 Suspension of relief	1274
7. Appeal	1275
8. Costs	1275
8.1 Refusal of leave by the Court of First Instance	1276
8.2 Appeal from the refusal of leave to the Court of Appeal	1277
8.3 Appeal to the Court of Final Appeal	1278
8.4 Costs in substantive hearing	1278
<i>Index</i>	1281

TABLE OF CASES

References are to paragraph numbers

佛山市順德區金鳳製衣有限公司 v First Dragon Fashion (Hong Kong) Ltd [2011] HKCU 1200 (unreported, CACV 38/2011, 13 May 2011) (CA)	[20-23]
匯力(天津)股權投資基金管理有限公司 & Anor v Sunfund Investment & Management Co Ltd & Anor [2020] 1 HKLRD 828, [2020] HKCU 275, [2020] HKCFI 236 (CFI)	[11-24]
廈門新景地集團有限公司 v Eton Properties [2012] HKCU 350 (unreported, HCMP 13/2012, 14 February 2012) (CFI)	[20-58]
張才奎所託管中國山水投資有限公司股份相關員工 & Ors v 張才奎 & Anor [2018] HKCU 352, [2018] HKCFI 194 (CFI)	[18-325]
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)	[12-12], [12-71]
胡少芬 v 葉玉枝 & Anor [2019] HKCU 3558, [2019] HKCFI 2329 (CFI)	[5-39]
釋照月 v S-J [2019] 6 HKC 273, [2019] HKCA 278 (CA)	[15-113], [19-74]
3D-Gold Jewellery Holdings Ltd v Pricewaterhouse Coopers (a firm) [2014] 4 HKC 528 (CFI)	[5-67]
3D-Gold Jewellery Holdings Ltd (in liq) v Pricewaterhouse Coopers (a firm) [2016] HKCU 1220 (unreported, HCCL 13/2015, 16 May 2016) (CFI)	[8-100]
9 Orpen Road, Stoke Newington, Re [1971] 1 All ER 944 (Ch)	[5-79], [5-80]
A	
A v B [1883] WN 174	[5-86]
A v B [2021] 1 HKC 658, [2021] HKCFI (CFI)	[2-40], [2-69]
A v C [1981] QB 956, [1980] 2 All ER 347	[9-21], [11-33]
A v C (No 2) [1981] QB 961, [1981] 2 All ER 126	[11-36]
A v Comr of Police [2021] 5 HKC 282, [2021] 3 HKLRD 300, [2021] HKCFI 1801 (CFI)	[9-147]
A v R (Arbitration: Enforcement) [2010] 3 HKC 67, [2009] 3 HKLRD 389 (CFI)	[19-142]
A v The Comr of the Independent Commission Against Corruption [2013] 1 HKC 334, (2012) 15 HKCFAR 362 (CFA)	[9-181]
A, Re [2020] HKFLR 41, [2020] HKCU 705, [2020] HKCFI 493 (CFI)	[21-158]

CHAPTER 3

PRE-COMMENCEMENT CONSIDERATIONS

1. INTRODUCTION

[3-1] Civil litigation practice is not just about helping your client to pursue litigation in court. The majority of civil disputes referred to lawyers by clients do not result in any court proceedings at all. Out of those that lead to court proceedings, the majority are resolved or settled without a trial. Most clients would like to achieve a quick resolution of the dispute at minimal costs without the need to be engaged in expensive and convoluted litigation.

[3-2] Hence, before commencing proceedings in court on behalf of a client, a lawyer needs to consider thoroughly and discuss with the client various options, plan ahead and formulate good litigation strategy. This may help to avoid dragging the client into an unnecessary legal saga, having paid substantial legal expenses, but just to find that the client cannot afford the expense and trouble of proceeding further and is eventually forced to abandon his claim or accept a miserable offer from his opponent. Very often, a lay client does not appreciate the consideration (time, psychological pressure, publicity, legal costs, etc.) that may be involved in litigation until it is too late. It is the duty of his lawyer to ensure that the client can make an informed decision at the outset.

[3-3] If the pre-commencement issues can be handled properly, it may help to resolve a dispute at an early stage. For example, a carefully written pre-action letter may convince your opponent that his case is weak or even hopeless, thereby enhancing the prospect for an immediate resolution of the dispute. Even in cases where litigation or a full-blown trial is inevitable, proper treatment of pre-commencement issues often helps to maximise the prospect of settlement during the proceedings or the prospect of success at trial. It may also help to avoid opportunities being lost and, more importantly, mistakes being made by taking or failing to take certain steps which may eventually jeopardise your client's case. Mechanical employment of the 'normal' procedural steps one may learn from this book or other literature may sometimes be detrimental or even disastrous. For example: a standard letter before action giving 14 days for the other side to respond may jeopardise your client's case for an urgent ex parte injunction;¹ obtaining a default judgment against a defendant may in some cases bar your

¹ See Chapter 11 on 'Interlocutory or Interim Remedies'.

client's alternative claim against the co-defendant;² an unnecessary request for further particulars of your opponent's pleadings may help him to 'improve' his case.³

[3-4] This chapter examines various matters that the solicitor normally needs to consider before accepting instructions and before commencing proceedings on behalf of the client, what the solicitor normally needs to do at the initial contact or meeting with the client and what he needs to do immediately thereafter. A discussion of the general scope and operational details of civil legal aid is also included at the end of this chapter.

2. PRELIMINARY ISSUES TO BE CONSIDERED

2.1 Matters to be considered before accepting instructions

2.1.1 Conflict of interest

[3-5] One should check if there is any conflict of interest before accepting instructions. The respective professional conduct rules for solicitors⁴ and for barristers⁵ lay down detailed instructions as to when one must or should⁶ decline instructions.⁷ For example, a solicitor must not act where his own interests conflict or are likely to conflict with the interests of a client or potential client.⁸ Moreover, a solicitor must not accept instructions to act for two or more clients where there is a conflict or a significant risk of conflict between the interests of those clients.⁹ The aforesaid principles apply not only where a solicitor is personally placed

² See Chapter 12 on 'Disposal of Actions Without Trial'.

³ See Chapter 8 on 'Pleadings'.

⁴ The Hong Kong Solicitors' Guide to Professional Conduct ('Solicitors' Guide').

⁵ The Hong Kong Bar Code of Conduct ('Bar Code').

⁶ As stated in the introductory paragraphs of its chapter one, the choice of words in the Solicitors' Guide is deliberate. If there is a compelling obligation, this will be indicated by the words 'must' or 'shall' and any breach of such principles will be a disciplinary matter. Where there is room for discretion, this will be indicated by the words 'should' or 'may', usually coupled with guidance about the steps to be taken by the prudent solicitor. Breaches of the latter guidelines may incur sanctions.

⁷ The ethical standards and obligations, while in many cases are derived from judicial principles, may sometimes exceed the requirements of the law. They are not directly enforceable by the court, but 'they do illustrate appropriate professional conduct such as may assist the court in deciding whether and how it may enforce its supervisory power. In my view, an expression of a professional standard in a code of ethics relating to a matter before the court should be considered an important statement of public policy ... any departure from the approach laid down in the rules of a professional body should, in my view, be scrutinised with care' (per Rogers JA in *Nishimatsu-Costain-China Harbour Joint Venture v Ip Kwan & Co (a firm)* [2000] 2 HKC 445, [2001] 1 HKLRD 84 (CA)).

⁸ Solicitors' Guide Principle 7.02; see similar restrictions in the Bar Code paras 6.2-6.4.

⁹ *ibid.*, Principle 9.01; see similar restrictions in the Bar Code para 6.2(g).

in such a conflict position, but equally where a member or staff of his firm is so placed.¹⁰

[3-6] If a solicitor or his firm has acquired relevant confidential knowledge concerning an existing or former client during the course of acting for him, he must not accept instructions where it is likely that he would be duty bound to disclose or use such relevant confidential knowledge in breach of his duty of confidentiality to that client.¹¹ For example, where a solicitor has acted for both lender and borrower in the making of a loan, he should not subsequently act for the lender against the borrower to enforce repayment if he has obtained relevant confidential knowledge of the borrower's financial position, when acting for him in connection with the original loan.¹²

[3-7] Apart from the professional rules stated above, the court may also intervene to restrain (for example by an injunction) a solicitor or a counsel from acting or continuing to act on behalf of a party in case of conflict. The power to intervene flows from the court's jurisdiction to control its own process as well as its own officers, or to protect the right of a party. Here a distinction should be drawn between a lawyer acting against his existing client and against his former client.

[3-8] In the case of existing clients, the basis for the prohibition is that '... a fiduciary cannot act at the same time both for and against the same client, and his firm is in no better position. A man cannot without the consent of both clients act for one client while his partner is acting for another in the opposite interest. His disqualification has nothing to do with the confidentiality of client information. It is based on the inescapable conflict of interest which is inherent in the situation'.¹³

¹⁰ See, for example, the Solicitors' Guide Principle 7.02 Commentary. However, it is acceptable for a barrister to accept instructions even if another barrister in his chambers is acting for an opposing or related party. Barristers sharing chambers work on an individual basis. They owe no duty collectively to a client and they are not allowed to share or disclose confidential information with one another.

¹¹ *ibid.*, Principle 9.03. Any confidential knowledge acquired by a solicitor whilst acting for an existing or former client cannot be disclosed without that client's consent. However, a solicitor may be under a duty to another client to inform him of all matters which are material to his retainer. Consequently, a solicitor in possession of confidential knowledge concerning one client which is, or might be, relevant to another client is put in an impossible position because he owes duties to both clients which conflict (see Commentary 1 to Principle 9.03). See similar restrictions in the Bar Code para 57.

¹² *ibid.*, Principle 9.03 Commentary 5. Further illustrations are given in the Commentaries. For example, if a solicitor has acted either for a partnership or has acted in the formation of that partnership, he may only accept instructions to act against an individual partner or former partner provided he has not obtained relevant confidential knowledge about that individual whilst acting for the partnership, or in its formation (Commentary 6); a solicitor who has acted for a company and has also separately acted for directors or shareholders in their personal capacity may not act for any of them if he has relevant confidential knowledge concerning the party against whom he is now instructed to act (Commentary 7).

¹³ *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 2 AC 222 at 234-235, [1999] 1 All ER 517 (HL) at 526 per Lord Millett, applied in *Nishimatsu-Costain-China Harbour*

However, the legal prohibition against acting for two clients with conflicting interests is not absolute, as a lawyer is permitted to act with the informed consent of both clients.¹⁴ Informed consent means consent given in the knowledge that there is a conflict between the parties and that as a result the solicitor may be disabled from disclosing to each party the full knowledge which he possesses as to the transaction or may be disabled from giving advice to one party which conflicts with the interests of the other.¹⁵ However, even where a solicitor has the informed consent of both clients, he must still take care to act in good faith in the interests of each of his principals, and not to act with the intention of furthering the interests of one of them to the prejudice of the other, nor allow the performance of his obligations to one principal to be influenced by his relationship with the other, nor put himself in a position of actual conflict so that he is unable to fulfil his obligations to one principal without failing in his obligations to the other.¹⁶

[3-9] As to former clients, the fiduciary relationship which subsists between solicitor and client comes to an end with the termination of the retainer. Thereafter, the solicitor has no obligation to defend and advance the interests of his former client. The only duty to the former client which survives the termination of the client relationship is a continuing duty to preserve the confidentiality of information imparted during its subsistence.¹⁷ While there is no substantive rule

Joint Venture v Ip Kwan & Co (a firm) [2000] 2 HKC 445, [2001] 1 HKLRD 84 (CA). The conflict need not be actual, but there must be a reasonable apprehension of a potential conflict, not a mere theoretical possibility: see *Baron Investments (Holdings) Ltd (in liq), Halstuk v Vemvil* [2000] 1 BCLC 272 (Ch). In *Marks and Spencer plc v Freshfields Bruckhaus Deringer* [2004] EWHC 1337 (Ch), [2004] 3 All ER 773, [2004] 1 WLR 2331 (Ch), Lawrence Collins J held that the rule was not limited to the context of conflicting interests in the same transaction, although there did have to be some reasonable relationship between the transaction with the new client and that with the existing client. In that case, the defendant firm of solicitors was advising the claimant in connection with negotiations in relation to one of its main contractual arrangements with a view to restructuring it. The claimant successfully obtained an injunction prohibiting the defendant from acting for G in relation to a possible bid for the claimant by a consortium of G's family interests and financial institutions.

¹⁴ Solicitors' Guide Principle 9.04, Commentary 1.

¹⁵ See *Clark Boyce v Mouat* [1994] 1 AC 428 (PC) at 435 per Lord Jauncey (quoted and applied by the Hong Kong Court of Appeal in *Nishimatsu-Costain-China Harbour Joint Venture v Ip Kwan & Co (a firm)* [2000] 2 HKC 445, [2001] 1 HKLRD 84 (CA)).

¹⁶ See *Bristol and West Building Society v Mothew* [1998] Ch 1, [1996] 4 All ER 698 (CA, Eng). Hence, a solicitor cannot act for opposing parties in the same proceedings. See also Solicitors' Guide Principle 9.04, Commentary 3.

¹⁷ *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 2 AC 222 at 235, [1999] 1 All ER 517 (HL) at 527 per Lord Millett. As summarised by Clarke LJ in *Koch Shipping Inc v Richards Butler (a firm)* [2002] EWCA Civ 1280, [2002] 2 All ER (Comm) 957, [2002] Lloyd's Rep PN 604 (CA, Eng) at para 24: '... the relevant principles in this class of case may be stated as follows: (1) The court's jurisdiction to intervene is founded on the right of the former client to the protection of his confidential information ... (2) The only duty to the former client which survives the termination of the client relationship is a continuing duty to preserve the confidentiality of

of law that a firm of solicitors can never act for a new client with interests adverse to those of its former client, the court will readily enjoin the firm from so acting unless it is satisfied (the firm having an evidential burden in this respect) that no risk of misuse or disclosure of the former client's confidential information, whether conscious or inadvertent, attaches to the firm taking up the new client's instructions.¹⁸ The duty to preserve confidentiality applies also to an informal or quasi client.¹⁹

[3-10] Apart from these two situations, a lawyer may also be prohibited from acting if he is affected by some personal factors which prejudice, or may prejudice, the proper administration of justice. For example, in *Re L (children)*

information imparted during its subsistence ... (3) The duty to preserve confidentiality is unqualified. It is a duty to keep the information confidential, not merely to take all reasonable steps to do so ... (4) The former client cannot be protected completely from accidental or inadvertent disclosure, but he is entitled to prevent his former solicitor from exposing him to any avoidable risk. This includes the increased risk of the use of the information to his prejudice arising from the acceptance of instructions to act for another client with an adverse interest in a matter to which the information may be relevant ... (5) The former client must establish that the defendant solicitors possess confidential information which is or might be relevant to the matter and to the disclosure of which he has not consented ... (6) The burden then passes to the defendant solicitors to show that there is no risk of disclosure. The court should intervene unless it is satisfied that there is no risk of disclosure. The risk must be a real one, and not merely fanciful or theoretical, but it need not be substantial ... (7) It is wrong in principle to conduct a balancing exercise. If the former client establishes the facts in (5) above, the former client is entitled to an injunction unless the defendant solicitors show that there is no risk of disclosure. (8) In considering whether the solicitors have shown that there is no risk of disclosure, the starting point must be that, unless special measures are taken, information moves within a firm ... the courts should restrain the solicitors from acting unless satisfied on the basis of clear and convincing evidence that all effective measures have been taken to ensure that no disclosure will occur ... This is a heavy burden ... each case turns on its own facts.' See also *Wright v Hampton, Winter & Glynn* [2008] 2 HKLRD 341, [2008] HKCU 144 (CFI).

¹⁸ See *PCCW-HKT Telephone Ltd v David Matthew McDonald Aitken* [2009] 2 HKC 342, (2009) 12 HKCFAR 114, [2009] 2 HKLRD 274 (CFA) at para 31, quoting with approval *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 2 AC 222, [1999] 1 All ER 517 (HL). See also *Shih Mei Ling v Chung & Kwan (a firm)* [2020] HKCU 1447, [2020] HKCFI 921 (CFI), where the Court granted an interim injunction against the defendant firm of solicitors to restrain the same from acting for S in an action brought by P, on the basis that a solicitor who previously acted for P in the action against S has moved to the defendant firm of solicitors.

¹⁹ See, for example, *Re A Firm of Solicitors* [1992] 1 QB 959, applied in *Time Success Profits Ltd v Andrew Lam & Co* [2004] 1 HKC 214 (DC). In the latter case, DJ To granted an interim injunction against the defendant firm of solicitors to restrain the same from acting for L in defending a debt recovery action instituted by the plaintiff. The basis for the injunction was to prevent the risk of disclosure of confidential information previously given by the plaintiff to the partner of the defendant firm at a dinner party when the partner attended as a guest and discussed with the plaintiff and offered some informal advice on his debt recovery matter against L.

(*care proceedings: cohabitating solicitors*),²⁰ it was alleged in care proceedings that there was an intimate rather than a social relationship between the advocate for a local authority and the advocate for another party. Wilson J held that an independent and fair-minded observer might consider that because of that intimate relationship there was a real possibility that the court might not receive independent and impartial representations from the local authority, whose role was of great importance in care proceedings. Wilson J accordingly made an order declaring that the solicitors were no longer acting.

[3-11] As a solicitor cannot possibly remember the names of all his existing or former clients and cannot possibly know whether another member of his firm has acted or is acting for the opposing or related party, there should be in place a system and standing procedure for doing a 'conflict search' before accepting instructions. With the advance of computer technology, it should not be difficult to devise such a system and procedure.

2.1.2 Ability and capacity to handle the case

[3-12] One should consider whether one has the ability and time to handle the particular matter before accepting instructions. A lawyer owes his client a duty to be competent in performing any legal services undertaken on the client's behalf and should serve his client in a conscientious, diligent, prompt and efficient manner.

[3-13] The Hong Kong Solicitors' Guide to Professional Conduct expressly provides that a solicitor must not act or continue to act in circumstances where he has insufficient time to devote to the matter, or insufficient experience or skill to deal with the instructions.²¹ This, however, will not prevent a solicitor from acting if he is able to do so competently by instructing suitable counsel, but he must still be able to exercise sufficient care and control in the matter.²²

2.1.3 Authority to give instructions

[3-14] One should ensure that the person giving instructions has the authority to represent the actual client.

²⁰ *Re L (children) (care proceedings: cohabitating solicitors)* [2000] 3 FCR 71, [2000] All ER (D) 1087, [2001] 1 WLR 100. In *R v Batt* [1996] Crim LR 910 (CA, Eng), replacement counsel for the prosecution brought in on the second day of the trial cohabited with counsel for the defence but the accused had waived his objections. The Court of Appeal dismissed the appeal because of the accused's agreement but observed that it was undesirable for cohabiting counsel to appear on opposite sides in a contested criminal case. See *Geveran Trading Co Ltd v Skjevesland* [2002] EWCA Civ 1567, [2003] 1 All ER 1, [2003] 1 WLR 912 (CA, Eng).

²¹ Solicitors' Guide Principle 5.03 Commentary 2.

²² *ibid.*, Principle 5.03 Commentary 3.

[3-15] In particular, if the client is a corporation, the legal authority to institute legal proceedings normally rests with the board of directors²³ so that one should obtain a written directors' resolution before commencing any litigation. If a company goes into liquidation, it can only sue with the leave of the court or with the consent of the Committee of Inspection overseeing its liquidation.²⁴ Any proceedings instituted without proper authorisation may subsequently be ratified by proper authorisation.²⁵ In the absence of proper authorisation or subsequent ratification, the proceedings will generally be stayed or struck out by the court, normally with costs of both parties to be borne personally by the solicitor acting without authority.²⁶ Procedurally, a challenge to authority has to be taken promptly instead of being raised at the trial. Such challenge would have to be determined definitively at a hearing by way of striking out application, trial of preliminary issue or other pre-trial applications, and it is not open to the defendant to raise that question by way of defence to the action.²⁷

²³ Depending on the contents of the articles of association of the company, sometimes not even the majority shareholders may authorise the institution of proceedings in the absence of a proper directors' resolution. For example, in the case of *Mercury (London) Ltd & Anor and Mercury International (Hong Kong) Ltd v Mercury Shipping and Trading Ltd & Ors* [1991] HKCU 86 (unreported, HCCL 75/1990, 12 April 1991) (HC) digested in (1991) HKLY 855, the solicitors commenced legal action for the plaintiff corporations on the authorisation of the majority shareholder without proper board resolution. Godfrey J granted a stay of the proceedings upon the application of the defendant with costs of the application to be borne by the plaintiffs' solicitors on an indemnity basis.

²⁴ In *B+B Construction Co Ltd/Wai Nai Yip Formerly t/a Ka Yip Machine & Engineering Co v Lai Ki* [2007] HKCU 330 (unreported, HCA 3402/2003, 7 February 2007) (CFI), DJ Carlson held that the insurer could not validly give the authorisation on behalf of the company once it has gone into liquidation.

²⁵ See *Win Source International Ltd v William Alvin Hui & Ors t/a Hui & Lam, Solicitors* [2008] HKCU 1836 (unreported, HCA 2464/2003, 16 June 2008) (CFI) and *Kammy Town Ltd v Super Glory Corp Ltd* [2005] HKCU 93 (unreported, HCA 3524/2003, 14 January 2005) (CFI) per A Cheung J, cited with approval the English case of *Danish Mercantile Co Ltd v Beaumont* [1951] Ch 680, [1951] 1 All ER 925 (CA, Eng) where an action improperly instituted by a company, which was subsequently wound up, was retrospectively and effectively ratified by the liquidator who was thereafter appointed.

²⁶ *Eg Yonge v Toynbee* [1910] 1 KB 215, [1908-10] All ER 204 (CA, Eng) and *Danish Mercantile Co Ltd v Beaumont* [1951] Ch 680, [1951] 1 All ER 925 (CA, Eng). For an example of the court departing from the normal rule, see *Lieu Tseng Van v Jiuzhou Development Co Ltd* [2010] HKCU 1336 (unreported, HCA 1645/2009, 17 June 2010) (CFI), where Au J struck out the Notice to Act and Acknowledgment of Service filed by the solicitors for want of authority, but made no order as to costs for this application on the ground that both sides had acted inappropriately in the way they had advanced in the application, which had escalated costs and wasted time.

²⁷ See *Kammy Town Ltd v Super Glory Corp Ltd* [2005] HKCU 93 (unreported, HCA 3524/2003, 14 January 2005) (CFI); *The Incorporated Owners of Champion Court v Pang Ping Fan* [2008] 5 HKC 312, [2008] CPR 189 (CA); *Liquidation Committee of Foshan Hongda Development Ltd v East Legend Investment Ltd* [2009] 1 HKLRD 169; *Waddington Ltd v Chan Chun Hoo Thomas* [2016] HKCU 1192 (unreported,

[3-16] A partner has an implied authority in law to commence proceedings for the partnership firm in the ordinary course of its business.²⁸ So normally one can act upon the instructions of one partner without seeking confirmation from the other partners. However, in case the matter involves partnership disputes or where one has reason to suspect that the other partner(s) may not approve the litigation, it is advisable to obtain proper written authorisation from the partners before commencing litigation.

2.1.4 Entitlement to legal aid

[3-17] One should consider whether the client is entitled to legal aid.²⁹ Where a solicitor considers that his client may be eligible for legal aid, he must inform the client of its availability and where to apply for it, and must recommend that the client apply for it.³⁰ Failure to do so may lead to a claim in negligence or may amount to professional misconduct, particularly if it also appears that the solicitor exploited the client's ignorance of his right to legal aid.³¹

2.2 Matters to be considered before commencing proceedings

2.2.1 Should the matter be resolved through litigation?

[3-18] Legal proceedings should not generally be commenced without due consideration of their viability and desirability. In terms of viability, one should bear in mind that some disputes or problems may not be appropriately resolved through litigation. In particular, no legal proceedings should be instituted unless there is a recognised cause of action. One should also check whether there is any valid arbitration clause in the contract governing the subject dispute. If so, any legal proceedings commenced will generally be stayed by the court upon the application of the defendant so long as the application is made before the filing of its defence.³²

CACV 10/2014, 20 May 2016) (CA) and *Qiyang Ltd & Ors v Mei Li New Energy Ltd & Ors* [2017] HKCU 918 (unreported, CACV 146/2016, 11 April 2017) (CA).

²⁸ *Eg Court v Berlin* [1897] 2 QB 396 (CA, Eng). In that case, action was commenced to recover the firm's debt upon instructions given by the active partner of the firm. While the action was pending, unbeknown to the solicitors, the dormant partners retired from the partnership. It was held that notwithstanding their retirement during the retainer, the dormant partners remained liable for the solicitors' costs.

²⁹ See further discussions on legal aid at section 5 below.

³⁰ If such advice is given but the client chooses not to apply for legal aid, either a written note of the advice given should be made and put on the file or, preferably, the advice given should be recorded in a letter to the client (the Solicitors' Guide Principle 4.01 Commentary 9 and 10).

³¹ *ibid.* Principle 4.01 Commentary 9 and Principle 5.21 Commentary 1.

³² See the Arbitration Ordinance (Cap 609) s 20 applying the UNCITRAL Model Law on International Commercial Arbitration art 8 to both domestic and international arbitration agreements, rendering it mandatory for the court to order a stay of the proceedings if a party to a valid arbitration agreement so requests before submitting

[3-19] As to the desirability of litigation, one should always consider and discuss with the client at the outset whether he can afford the trouble and expense of litigation as well as the prospect of settlement. Even in the absence of a contractual arbitration or alternative dispute resolution clause, one may still consider the desirability of resorting to arbitration and other forms of alternative dispute resolution³³ to help resolve the dispute in a particular case. In matrimonial proceedings, it is mandatory for the solicitor to advise his client before commencement of the proceedings as to the availability of the family mediation service and how it may assist in the proceedings, and give his client an official information leaflet on the mediation service.³⁴ In Practice Direction No 31 on Mediation introduced under the Civil Justice Reform, there is a duty imposed on the solicitors to advise the party on mediation in all cases.³⁵

[3-20] One also needs to consider and discuss with the client whether the likely outcome of litigation will justify the expense or risk involved.³⁶ One should, therefore, not just consider the legal merits of the client's case, but should also discuss with the client the prospect of successful recovery of the judgment award and legal costs against the other party. No client will thank his lawyer for obtaining a 'successful victory' in court proceedings at huge legal expenses but just to find

his first statement on the substance of the dispute. See, for example, *Tommy CP Sze & Co v Li & Fung (Trading) Ltd* [2003] 1 HKC 418 (CFI), for a useful discussion of the usual questions to be considered by the court in a stay application in favour of arbitration (applied in *Zhang Qiyun v Shun Shing Construction & Engineering Co Ltd* [2010] 2 HKLRD 358, [2010] HKCU 604 (CFI); *Lee Cheong Construction & Building Materials Ltd v The Incorporated Owners Of The Arcadia* [2012] 2 HKLRD 975, [2012] HKCU 739 (CFI) and *Polytec Overseas Ltd & Anor v Grand Dragon International Holdings Co Ltd & Ors* [2017] HKCU 878 (unreported, HCA 2776/2016, 22 March 2017) (CFI). See *Cox v Group Employment Management Ltd* [2005] 1 HKC 199 (CA) for the application of the exception under the Arbitration Ordinance s 6(2) in respect of claims within the jurisdiction of the Labour Tribunal. In *Quiksilver Greater China Ltd v Quiksilver Glorious Sun JV Ltd* [2014] HKCU 1750 (unreported, HCCW 364/2013, 25 July 2014) (CFI), Harris J held that even though winding-up petition is not an 'action' covered by the Arbitration Ordinance s 20, the court still has a discretionary jurisdiction to stay the petition.

³³ For example: mediation by a third party mediator, joint appointment of an independent expert to make an advisory appraisal or binding determination of issues or facts in dispute between the parties. With effect from 1 October 2008, a new Commentary 3 to Principle 10.17 of the Solicitors' Guide was introduced as follows: 'A litigation solicitor should consider and if appropriate advise his client on alternative dispute resolution procedures such as mediation, conciliation and the like.' See further discussions in Chapter 21.

³⁴ Practice Directions No 15.10 'Family Mediation' para 2.1.1; the solicitor shall, at the time the petition for divorce or separation is filed, file with the Family Court Registry a 'Petitioner's Certificate as to Family Mediation' in the specified form duly signed by the petitioner and the solicitor. If the petitioner indicates a desire to attempt family mediation, the Registry staff shall refer the case to the Mediation Co-ordinator: see para 2.1.2.

³⁵ See Chapter 21 for further details.

³⁶ Solicitors' Guide Principle 4.01 Commentary 5.

[3-70] It has been held that the Registrar is exercising an administrative instead of a judicial function in hearing an appeal under section 26 of the LAO. Therefore, although the Registrar's decision on the appeal shall be final, his decision is still amenable to judicial review.¹²⁷

[3-71] An applicant for legal aid or an aided person who is aggrieved by any order or decision of the Director made in relation to an application for legal aid to appeal to, or to apply for leave to appeal to, the Court of Final Appeal may bring the order or decision on review before a committee composed of the Registrar of the High Court and a representative each of the Bar Association and the Law Society of Hong Kong.¹²⁸ Such a review shall be initiated by notice in writing delivered to the Director and the chairman within 28 days of the order or decision complained of or within such longer period as the chairman may allow. The notice shall be accompanied by a certificate by counsel practising in Hong Kong stating that the person aggrieved has a reasonable prospect of success in the appeal and the grounds for that opinion.¹²⁹

[3-72] If the Review Committee is satisfied that the person aggrieved has a reasonable prospect of success on appeal, and that it is reasonable in the particular circumstances of the case that he should be granted legal aid, it may reverse or vary the order or decision of the Director refusing or limiting legal aid in respect of the appeal and may direct the Director to grant a legal aid certificate to him.¹³⁰ The chairman of the Review Committee shall provide adequate reasons for the decision of the Review Committee in writing.¹³¹ The decision of the Review Committee shall be final.¹³²

¹²⁷ *Bui Thi Chin v Director of Legal Aid* [1994] 1 HKC 441 (HC); *Tsao Yung v Director of Legal Aid* (unreported, HCAL 99/2002, 13 May 2002) (CFI) at para 42. For principles relating to judicial review against the decision of the Registrar on legal aid appeals, see *To Kwan Ho v Deputy Registrar of the High Court* [2021] HKCU 1647, [2021] HKCFI 874 (CFI) at paras 33–37.

¹²⁸ LAO s 26A(1). The Bar Association representative must be eligible to be appointed as a judge of the High Court and who is appointed by the Chairman of the Bar Association. The Law Society representative must be a solicitor qualified to practise in Hong Kong who has practised as a solicitor for not less than ten years in a common law jurisdiction and who is appointed by the President of the Law Society.

¹²⁹ LAO s 26A(3).

¹³⁰ LAO s 26A(6).

¹³¹ LAO s 26A(10).

¹³² LAO s 26A(7).

CHAPTER 4

COMMENCEMENT OF PROCEEDINGS

1. MODE OF COMMENCEMENT OF PROCEEDINGS

[4-1] Civil proceedings in both the Court of First Instance and the District Court may be begun by one of four methods, namely by: (a) writ; (b) originating summons; (c) originating motion; or (d) petition. Each of these methods will be discussed below. The most commonly used mode of commencement is a writ of summons. By contrast, proceedings by way of originating motion and petition are rather specialised and may only be used where any written law expressly so requires or authorises.

[4-2] The general rule is that, except in proceedings which under any written law (including the Rules themselves) are required or authorised to be begun by a specific form of originating process, civil proceedings may be begun by writ or originating summons as the plaintiff considers appropriate.¹ The former provisions in the Rules, which required certain actions to be commenced by writ or originating summons, have been repealed.² In determining the proper mode of commencement of an action, the plaintiff must, therefore, consider the nature of the proceedings and decide whether the commencement of those proceedings by writ or originating summons is more appropriate. The Rules give some guidance by providing that the following proceedings are appropriate to be begun by originating summons:

- (a) proceedings in which the sole or principal question at issue is one of construction of any legislation or of any document or one of pure law; and
- (b) proceedings in which there is unlikely to be any substantial dispute of fact.³

¹ See the Rules of the High Court (Cap 4A) ('RHC') and the Rules of the District Court (Cap 336H) ('RDC') O 5 r 1 and O 5 r 4(1). For examples of rules which require proceedings to be commenced by originating summons, see below.

² By the Rules of the High Court and Rules of the District Court (Amendment) Rules 2008.

³ RHC and RDC O 5 r 4(2). See below.

[4-3] It follows that proceedings which involve issues of disputed fact are more appropriate to be begun by writ. For example, actions in tort and actions involving allegations of fraud⁴ should be commenced by writ.

2. WRIT OF SUMMONS

2.1 Form and indorsement of writ

2.1.1 Form of the writ of summons

[4-4] Every writ of summons must be in the prescribed form.⁵ Each copy of the writ for service must be sealed with the seal of the Court out of which it is issued.⁶ The writ is directed to the defendant and is expressed in imperative terms requiring him either to satisfy the plaintiff's claim, or return to the Registry the accompanying acknowledgment of service in due time (normally 14 days) stating his intention to contest the proceedings or to make an admission.⁷ Otherwise the plaintiff may proceed with the action and enter judgment in default against the defendant without further notice.⁸

[4-5] Failure to complete the form in accordance with these rules is treated as an irregularity only and does not render the proceedings void.⁹

[4-6] Per Practice Direction 24.2 'Endorsements in the Chinese Language to be made on Court Documents', where the party that the writ of summons is intended to be served upon is likely to be Chinese-speaking and not proficient in English, the writ of summons in English must be accompanied by the appropriate Chinese language version with formal particulars identifying the cause of action and giving the names and addresses of the parties and relevant dates in Chinese. The writ must also be endorsed with a statement in prescribed wording in Chinese warning

⁴ A claim involving or based upon an allegation of fraud ought not to be begun by originating summons but, if it is commenced, it will be ordered to be continued as if begun by writ: RHC and RDC O 28 r 8. See *Re Deadman (deceased), Smith v Garland* [1971] 2 All ER 101, [1971] 1 WLR 426. See also *De Lasala-Debring v De Lasala* [2014] 2 HKLRD 674, [2014] HKCU 721 (CFI) (where allegations of fraud are involved, the case should be commenced by writ).

⁵ RHC and RDC O 6 r 1. See RHC and RDC App A Form 1. There are also special forms prescribed for Admiralty actions in the Court of First Instance: see RHC O 75 r 3. Note that the District Court has no Admiralty jurisdiction.

⁶ RHC and RDC O 10 r 1(6). Failure to have the originating process duly sealed is an irregularity that will not nullify the proceedings: *A-G v Bui Thi Ngoan* (unreported, HCMP 3311/1993, 29 November 1993) (HC) (originating motion not sealed). See also *Dickson v Law and Davidson* [1895] 2 Ch 62 (mere irregularity that writ not indorsed for service out of the jurisdiction).

⁷ See RHC and RDC App A Form 1.

⁸ See RHC and RDC O 13 r 1.

⁹ Therefore, it can be dealt with under RHC and RDC O 2 r 1. See *Smalley v Robey & Co Ltd* [1962] 1 QB 177 (CA, Eng); *Brady v Barrow Steel Works Ltd* [1965] 2 QB 182 (failure to insert the name of the Registry); *A-G v Bui Thi Ngoan* (unreported, HCMP 3311/1993, 29 November 1993) (HC) (failure to seal).

the recipient as to the serious consequences of ignoring a legal document and the recipient should consider taking advice of a solicitor or applying for legal aid.

2.1.2 Indorsement on the writ

[4-7] Before a writ of summons can be duly issued it must bear the following indorsements:

- (a) an indorsement of the claim;¹⁰
- (b) where the plaintiff's claim is for a debt or liquidated demand only, with a statement of the amount claimed and for costs, with a further statement that the proceedings will be stayed if the defendant pays the amount so claimed within the time limited for acknowledging service;¹¹
- (c) where appropriate, an indorsement as to any representative capacity,¹² ie where the plaintiff is suing or the defendant is being sued as a representative of another person or a class of persons;
- (d) where appropriate, an indorsement as to the solicitor by whom the plaintiff sues;¹³
- (e) the plaintiff's address and details of the plaintiff's solicitors;¹⁴
- (f) where the only remedy that the plaintiff is seeking is the payment of money, with a statement that the defendant may make an admission within the period fixed for service of the defence.¹⁵

[4-8] These indorsements are considered in more detail below.

2.1.3 Indorsement of claim

[4-9] Order 6 rule 2 states that before a writ of summons is issued it must be indorsed 'with a statement of claim or, if the statement of claim is not indorsed on the writ, with a concise statement of the nature of the claim made or the relief or remedy required in the action'.¹⁶ Further, in the District Court, all writs must contain a plea that the relief sought falls within the jurisdiction of the District Court, specifying which section(s) of sections 32 to 39 of the District Court Ordinance apply.¹⁷

¹⁰ See RHC and RDC O 6 r 2(1)(a). This may be either a general indorsement or a full statement of claim.

¹¹ RHC and RDC O 6 r 2(1)(b). This may be either a general indorsement or a full statement of claim.

¹² RHC and RDC O 6 r 3.

¹³ RHC and RDC O 6 r 5.

¹⁴ *ibid.*

¹⁵ RHC and RDC O 6 r 2(1)(c).

¹⁶ RHC and RDC O 6 r 2(1)(a).

¹⁷ See the District Court Practice Direction No 27 'Civil Proceedings in the District Court' para 4. Failure to comply will not, however, be fatal to a plaintiff's claim so as to lead to the action being struck out: *Sunbeam Investment Ltd v Mannitop Investment Co Ltd* [2007] HKCU 1366 (unreported, DCCJ 1985/2006, 9 August 2007) (DC), per DDJ Abu B bin Wahab.

[4-10] A writ indorsed with a full statement of claim is commonly called a 'specially indorsed writ' or a writ with 'special indorsement'. It is important to note that a statement of claim indorsed on the writ is a pleading and must, therefore, comply with the provisions of Order 18.¹⁸

[4-11] A writ indorsed with a concise statement of the nature of the claim is commonly called a 'generally indorsed writ' or a writ with 'general indorsement'. Three points require emphasis here. First, a general indorsement is not a pleading and, therefore, does not need to comply with Order 18. Secondly, it has been held that the word 'or' in Order 6 rule 2 separating the two requirements should be read as 'and'.¹⁹ In other words, the general indorsement must specify both the nature of the claim and the relief or remedy required. Thus, a general indorsement which stated that 'The plaintiff's claim is for £500 damages for loss of earnings and for special damages and costs' was held to be defective because it failed to state the nature of the claim.²⁰ Finally, where a general indorsement is used, the full statement of claim must be served before the expiry of 14 days after the defendant gives notice of intention to defend.²¹

[4-12] Why, one may ask, would a plaintiff use a general indorsement rather than a full statement of claim? One reason is that the matter in dispute may have taken on some urgency, for example, because the plaintiff may require immediate interlocutory relief (for example, an application for a Mareva injunction or an Anton Piller order),²² when a claim may need more time to draft, or because the limitation period is about to expire. Another possible reason may be to provoke a settlement of the dispute, particularly where there have been ongoing negotiations between the parties for some time.

[4-13] A general indorsement has been described as a blueprint²³ of what the statement of claim must contain. Accordingly, a full statement of claim served subsequently may only include the causes of action specifically mentioned in the writ or those that arise from the same facts that gave rise to the cause of action specified in the writ.²⁴ The general indorsement must, therefore, mention the relevant cause of action or the facts upon which the subsequently pleaded cause of action will be based. It is not required to be a précis of the proposed statement of claim, but must give sufficient information to enable the recipient to identify the breach of contract or other wrong that he is alleged to have committed.²⁵

¹⁸ Ie RHC and RDC O 18.

¹⁹ *Sterman v EW & WJ Moore* [1970] 1 QB 596, [1970] 1 All ER 581 (CA, Eng). The nature of the claim in this case was for negligence or breach of statutory duty.

²⁰ *ibid.*

²¹ RHC and RDC O 18 r 1.

²² See Chapter 11 'Interlocutory and Interim Remedies'.

²³ O'Hare and Hill, *Civil Litigation* (8th edn, Oyez Longman, 1997) at p 196.

²⁴ RHC and RDC O 18 r 15(2). Where a plaintiff wishes to include in his statement of claim a cause of action which was not included in the general indorsement, he should first apply to amend the general indorsement under RHC or RDC O 20 in order to comply with this rule.

²⁵ See *The Jangmi known as 'Grigorpan'* [1988] 2 Lloyd's Rep 462 per Sheen J. on appeal [1989] 2 Lloyd's Rep 1 (CA, Eng). See also *Nintendo Co Ltd v The World*

2.1.4 Indorsement on liquidated demand

[4-14] Where the plaintiff's claim is for a debt or liquidated demand only²⁶ (for example, the price of goods sold and delivered), the writ must be indorsed with a statement of the amount claimed²⁷ and a demand for costs and also with a statement that, if, within the time limited for acknowledging service,²⁸ the defendant pays the amount so claimed together with the costs to the plaintiff, his solicitor or agent, further proceedings will be stayed.²⁹

[4-15] Regarding the meaning of debt and liquidated demand, there is no substantial difference between the terms. Both are specified sums of money due and payable under or by virtue of a contract, which sum is ascertained or ascertainable as a matter of mere arithmetic.³⁰

[4-16] The amount of costs demanded in the notice is fixed by reference to Order 62, Schedule 2 Parts I and II.³¹ The effect of the notice is twofold. First, if the defendant pays the debt within the 14-day period, all further proceedings against him are automatically stayed. Secondly, provided that payment is made within the prescribed period, the maximum amount of costs for which the defendant is liable is the amount specified in the notice.

2.1.5 Indorsement as to capacity

[4-17] Where a plaintiff sues in a representative capacity or a defendant is being sued in such a capacity, that capacity must be indorsed on the writ.³² It is

Camera and Radio Co Ltd (unreported, HCA 13066/1997, 19 October 1998) (CFI), where part of the statement of claim which alleged infringement of trademark was struck out since such infringement had not been alleged in the writ of summons.

²⁶ A writ is not indorsed with a claim for a liquidated demand only if it contains an alternative claim for a tracing order: *GL Baker Ltd v Barclays Bank Ltd* [1956] 3 All ER 519, [1956] 1 WLR 1409 (CA, Eng).

²⁷ Where appropriate, the amount may be claimed in a foreign currency; see *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443, [1975] 3 All ER 801 (HL). See also Practice Direction No 16.2 'Judgment: Foreign Currency', applied to the District Court by Practice Direction No 27 'Civil Proceedings in the District Court' para 33.

²⁸ This will normally be 14 days after service of the writ: see RHC and RDC O 12 r 5(a).

²⁹ RHC and RDC O 6 r 2(1)(b).

³⁰ See *Knight v Abbott, Page & Co* (1882) 10 QBD 11; *Underwood v Underwood* [1894] P 204 (CA, Eng). If further investigation is necessary in order to arrive at the amount, it will not be treated as a liquidated demand: see *Workman, Clark & Co Ltd v Lloyd Brazilleno* [1908] 1 KB 968 (CA, Eng). A liquidated demand includes a claim for conversion of a specified sum (*GL Baker Ltd v Barclays Bank Ltd* [1956] 3 All ER 519, [1956] 1 WLR 1409 (CA, Eng)), but not an unliquidated claim for damages in respect of which the plaintiff has named a specific figure (*Knight v Abbott, Page & Co* (above)); *Abbey Panel and Sheet Metal Co Ltd v Barson Products* [1948] 1 KB 493, [1947] 2 All ER 809 (CA, Eng). A claim on a quantum meruit for professional work is a liquidated demand: *Lagos v Grunwaldt* [1910] 1 KB 41, [1908-1910] All ER Rep 939 (CA, Eng).

³¹ RDC O 62, Sch 2 Parts I and II.

³² RHC and RDC O 6 r 3(a) and (b).

important to note that a description of the representative capacity of one of the parties in the title of the writ is not sufficient: the capacity must also be stated in the indorsement itself.³³ Further, the plaintiff's representative capacity has to exist at the date of the issue of the writ. However, an amendment to alter the plaintiff's capacity may be allowed provided that the new capacity is one that he had at the date of issue of the writ or subsequently acquired.³⁴

[4-18] In the case of a writ beginning a contentious probate action, it must be indorsed with a statement of the nature of the interest of the plaintiff and of the defendant in the estate of the deceased to which the action relates.³⁵

2.1.6 Indorsement as to solicitor and address

[4-19] The writ of summons must also be indorsed:

- (a) where the plaintiff sues by a solicitor,³⁶ with the plaintiff's address and the solicitor's name or firm and a business address of his within the jurisdiction. If the solicitor is acting as an agent of another, the writ must be indorsed with the name or firm and business address of his principal.³⁷ Additionally, where the solicitor has a box at a document exchange, the box number may be indorsed on the writ;³⁸ or
- (b) where the plaintiff sues in person, with his residential address and, if his place of residence is not within the jurisdiction, or if he has no place of residence, the address of a place within the jurisdiction at or to which documents for him may be delivered or sent.³⁹

[4-20] The plaintiff's address for service will be his solicitors' business address indorsed on the writ, or where the plaintiff sues in person, the address within the jurisdiction indorsed on the writ.⁴⁰ If the address is not correctly stated, the plaintiff

33 See *Bowler v John Mowlem & Co Ltd* [1954] 3 All ER 556, [1954] 1 WLR 1445 (CA Eng); *Shing Hai-doing v Genius Knitting Factory Ltd* [1978] HKLR 305, [1978] HKCU 50 (HC). However, if it is not but the capacity is such that it relates back to the date of the issue of the writ (for example, as in the case of an executor) the writ and subsequent proceedings remain valid: *Stebbings v Holst & Co Ltd* [1953] 1 All ER 925, [1953] 1 WLR 603; *Bowler v John Mowlem & Co* (above).

34 RHC and RDC O 20 r 5(4). Claims by plaintiffs as personal representatives may be joined with claims made with reference to the same estate in a personal capacity: RHC and RDC O 15 r 1(1)(b).

35 RHC O 76 r 2(2). This only applies in the Court of First Instance since such actions may only be brought in the Court of First Instance.

36 Note that in the Court of First Instance, a body corporate must sue by a solicitor: RHC O 5 r 6(2). As to the position in the District Court, see RDC O 5A r 2(1) and (2). In both the Court of First Instance and the District Court, the next friend of a person under a disability must also sue by a solicitor: RHC and RDC O 80 r 2(3). As to the procedure on a change of solicitor, see RHC and RDC O 67.

37 RHC and RDC O 6 r 5(1)(a).

38 RHC and RDC O 6 r 5(2)(a).

39 RHC and RDC O 6 r 5(1)(b).

40 RHC and RDC O 6 r 5(2).

may be ordered to amend by stating the correct address, or the proceedings may be stayed, or he may be ordered to give security for costs.⁴¹

[4-21] If a solicitor's name is indorsed without his authority, the proceedings may be stayed.⁴²

2.1.7 Indorsement as to right to make admission

[4-22] Where the only remedy that the plaintiff is seeking is the payment of money, the writ must be indorsed with a statement that the defendant may make an admission⁴³ within the period fixed for service of the defence.

2.1.8 Indorsement as to claim nature

[4-23] The writ must be indorsed at the top of its first page identifying the nature of the claim (provided in a prescribed list).⁴⁴

2.2 Issue of the writ

[4-24] A writ is issued when it is sealed,⁴⁵ ie either with the seal of the High Court,⁴⁶ or the District Court,⁴⁷ depending on the Court in which proceedings are commenced. The plaintiff (or his legal representative) is required to attend personally⁴⁸ at the High Court Registry or the District Court Registry and produce the following:

41 RHC and RDC O 23 r 1(c).

42 A defendant who has been served with a writ or who has acknowledged service of it may request a solicitor whose name is indorsed on it to declare in writing whether the writ was issued by him or with his authority or privity: RHC and RDC O 6 r 5(3). If the solicitor declares that it was not, any such defendant may apply by summons for all the proceedings to be stayed: RHC and RDC O 6 r 5(4).

43 Ie in accordance with RHC and RDC O 13A. See Chapter 10 'Case Management and Interlocutory Proceedings'.

44 Practice Direction 24.1 'Sealing of Writ of Summons, Newspaper Advertisements, Filing of Documents' para 7.

45 RHC and RDC O 6 r 7(3). Note, however, that failure to seal the originating process is an irregularity that does not nullify the writ: *A-G v Bui Thi Ngoan* (unreported, HCMP 3311/1993, 29 November 1993) (HC).

46 All writs must be sealed with the seal of the High Court: High Court Ordinance (Cap 4) s 51(1). Any writ so sealed and any copy thereof will, when purporting to be so sealed, be admitted in evidence in any civil or criminal proceedings before any court on its production without further proof: High Court Ordinance s 51(3).

47 All writs must be sealed with the seal of the District Court: District Court Ordinance (Cap 336) s 13(1). Any writ so sealed and any copy thereof will, when purporting to be so sealed, be admitted in evidence in any civil or criminal proceedings before any court on its production without further proof: District Court Ordinance s 13(3).

48 Unlike the position in England, there is no provision in Hong Kong for the issue of a writ by post, although a recent amendment to the Rules provides for a litigant in person to file documents by post: RHC and RDC O 63 r 3A(2).

- (a) One copy of the writ for each defendant named in the writ⁴⁹ together with two extra copies. One of the extra copies (after franking with the appropriate fee) will be filed in the Court Registry. The plaintiff will retain the remaining copy.
- (b) Three copies of the prescribed form of acknowledgment of service (the formal parts duly completed) for each defendant named in the writ.⁵⁰ The acknowledgment of service will accompany the service of the writ.⁵¹
- (c) The requisite fee.

[4-25] Upon presentation of the above at either the High Court or District Court Registry, the court officer will first check the forms for completeness. He will then assign an action number to the writ, which number will be written in the right top corner of the writ. Next, he will seal⁵² the writ and date the same. In the High Court Registry, an action number will be allocated to the action either as a High Court Action or Miscellaneous Proceedings, or the action may be assigned to the Commercial List, Personal Injuries List, Construction and Arbitration List, Admiralty List, Bankruptcy List or Winding-up List. In the District Court Registry, the court officer will allocate an action number to the action either as District Court Civil Action, Miscellaneous Proceedings, Personal Injuries List or Employee's Compensation List.⁵³

[4-26] Particulars of the action number, the parties, the solicitors' firms involved and the nature of the claim will be entered manually in the appropriate Cause Book.⁵⁴ A case file will be opened on which the original writ is filed⁵⁵ and the Registry staff will then return the other copies of the writ to the issuing party. Once entered in the Cause Book, the writ may be searched for, inspected and a

⁴⁹ Sufficient copies should be presented to the Registry at the same time when the writ is issued for sealing and not as and when they are required for service: see Notes on Procedures in the High Court Registry, issued by the Registry in June 1986. To facilitate the processing of an originating document, practitioners should identify the dominant cause on the top of the document: see Practice Direction No 24.1 'Sealing of Writs of Summons, Newspaper Advertisements, Filing of Documents' para 7 and App A.

⁵⁰ See Notes on Procedures in the High Court Registry, issued by the Registry in June 1986.

⁵¹ As to service, see Chapter 5 'Service of Process and Acknowledgment of Service'.

⁵² As to sealing, see above.

⁵³ See also Chapter 8 'Pleadings'.

⁵⁴ Each List has its own Cause Book.

⁵⁵ RHC and RDC O 6 r 7(5). Practice Direction No 24.1 'Sealing of Writs, Newspaper Advertisement, Filing of Documents' para 3 provides that, when a writ of summons is tendered for sealing in the Registry, the party tendering it must lodge with the Registrar an additional copy. This Practice Direction applies to the District Court by virtue of Practice Direction No 27 'Civil Proceedings in the District Court' para 5. The purpose of lodging the copy is to facilitate the inspection of originating process under RHC and RDC O 63 r 4(1)(a).

copy of it taken.⁵⁶ In certain circumstances, a writ may only be discontinued or withdrawn with the leave of the court, on an ex parte application.⁵⁷

[4-27] If concurrent writs are required, these may be issued at the plaintiff's request.⁵⁸ A concurrent writ will be stamped with an official stamp marked 'concurrent', by the officer by whom the writ is sealed.⁵⁹ One example of a concurrent writ is where a writ for service within the jurisdiction is issued as concurrent with one that is to be served outside the jurisdiction or vice versa.⁶⁰

[4-28] The date of issue of the writ marks the commencement of the action⁶¹ and is significant for two reasons. First, in calculating the time for service of the writ.⁶² Secondly, for the purposes of calculating time under the Limitation Ordinance (Cap 347).⁶³

2.2.1 Court's power to backdate writ

[4-29] In an appropriate case the court has inherent power to order that a writ be backdated.⁶⁴

2.2.2 Leave to issue writ

[4-30] Leave to issue a writ is necessary in both the Court of First Instance and the District Court where the writ is to be served out of the jurisdiction, unless every claim made by the writ is one which, by virtue of any written law, the court has power to hear and determine, notwithstanding that the person against whom

⁵⁶ RHC and RDC O 63 r 4(1)(a).

⁵⁷ RHC and RDC O 21 r 3. For discontinuance without leave, see RHC and RDC O 21 r 2.

⁵⁸ RHC and RDC O 6 r 6(1). A concurrent writ cannot be issued after the original has expired: *Doyle v Kaufman* (1876) 3 QBD 7.

⁵⁹ RHC and RDC O 6 r 7(4).

⁶⁰ RHC and RDC O 6 r 6(2).

⁶¹ *Godard v Benjamin* (1813) 3 Camp 331; *The Espanoleto* [1920] P 223.

⁶² As to service, see Chapter 5 'Service of Process and Acknowledgment of Service'.

⁶³ For a consideration of the limitation provisions, see Chapter 3 'Pre-Commencement Considerations'.

⁶⁴ See *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) (plaintiff took writ to Registry for registration but clerk at Registry, having inspected the writ, refused to register it on the grounds that there was no accompanying letter stating that the claim was for more than \$1 million; writ only issued next day; as a result of concerns about possible limitation issues, plaintiff applied for writ to be backdated to date of first attempt to register; held first that there was no requirement for any letter to the effect that the claim exceeded \$1 million to accompany the draft writ and Registry was wrong to have refused to issue the writ on this ground; secondly, the court had inherent power to order a writ to be backdated: *Riniker v University College of London* [1999] All ER (D) 371; order made that writ be backdated to date when Registry wrongfully refused to issue the writ, per Recorder Patrick Fung SC).

the claim is made is not within the jurisdiction, or that the wrongful act, neglect or default giving rise to the claim did not take place within the jurisdiction.⁶⁵

[4-31] Additionally, leave is required in the Court of First Instance in the following four cases:

- (a) where the person issuing the writ has been declared by the Court of First Instance to be a vexatious litigant;⁶⁶
- (b) where a creditor, to whom a debtor is indebted for a debt provable in bankruptcy, seeks to commence proceedings against the debtor's person or property after a bankruptcy order has been made;⁶⁷

⁶⁵ RHC and RDC O 6 r 7(1). See further below.

⁶⁶ The powers of the Court of First Instance to declare a person a vexatious litigant are found in the High Court Ordinance ss 27(1) and 27A(1). There is no equivalent provision in the District Court Ordinance. Application to make a person a vexatious litigant is made by the Secretary for Justice or by an affected person to the Court of First Instance: High Court Ordinance s 27(1). An affected person is a person who (a) is or has been a party to any of the vexatious legal proceedings; or (b) has directly suffered adverse consequences resulting from such proceedings: High Court Ordinance s 27(5). If the court is satisfied that that person against whom the order is to be made has habitually and persistently, and without any reasonable ground, instituted vexatious legal proceedings, whether in the High Court or any inferior court, and whether against the same persons or different persons, then, after giving him an opportunity of being heard, the court may order: (i) that no legal proceedings be instituted by him in any court without the leave of the Court of First Instance; and (ii) that any legal proceedings already instituted by him in any court are not to be continued by him without such leave: High Court Ordinance s 27(1), (2). A copy of such an order must be gazetted: *ibid.* s 27(4). Leave for the institution or continuance of any legal proceedings by a person who is the subject of an order in force under s 27(1) shall not be given unless the Court of First Instance is satisfied that (a) the proceedings are not an abuse of the process of the court in question; and (b) there are reasonable grounds for the proceedings: High Court Ordinance s 27A(1). No appeal lies from a decision of the Court of First Instance granting or refusing leave required under s 27A(1) unless leave to appeal has been granted by the Court of First Instance: High Court Ordinance s 27A(2). The precursor to s 27(1) was first introduced into Hong Kong as a result of the actions culminating in *Wong Yu Kwong v The Hong Kong Society for the Blind* [1987] 3 HKC 186 (CA). On an application to have a person declared to be a vexatious litigant, the civil standard of proof applies, but regard must be had to the seriousness of the issue at stake: *A-G v Hayward* (1995) Times, 20 November (CA, Eng) applying *R v Secretary of State for the Home Department, ex p Khawaja* [1984] AC 74, [1983] 1 All ER 765 (HL). Where a person has been declared a vexatious litigant, he should only be granted leave to institute or continue proceedings sparingly and after a careful consideration of all the circumstances: *Becker v Teale* [1971] 3 All ER 715, [1971] 1 WLR 1475 (CA, Eng); *Wong Yu Kwong v Hong Kong Society for the Blind* [1987] 3 HKC 186 (CA); *Re C* (1989) Times, 14 November. In an appropriate case, the court may order that the restriction will not apply where the fresh proceedings have been approved by a solicitor or counsel practising in Hong Kong who has certified that he has read the order and the reasons therefore: see *Siberian Mining Group Co Ltd v Zhi Charles* [2016] 4 HKLRD 88, [2016] HKCU 1563 (CFI).

⁶⁷ Bankruptcy Ordinance (Cap 6) s 12.

- (c) where it is sought to commence proceedings against a company after an order has been made for winding up or for the appointment of a provisional liquidator;⁶⁸ and
- (d) where a person seeks to sue any person carrying out the provisions of the Mental Health Ordinance.⁶⁹

2.3 Duration and extension of writ

2.3.1 Duration of the writ

[4-32] For the purposes of service, a writ of summons (other than a concurrent writ)⁷⁰ is valid for 12 months beginning with the date of issue.⁷¹ This means that, once issued, the writ is valid and available for service upon a defendant within the jurisdiction for a period of 12 months. Thus, a writ issued on 10 September 2010 will expire on 9 September 2011 and service on 10 September 2011 will be one day too late.⁷² The wording of a writ of summons in Form No 1 explicitly states that the writ may not be served later than 12 calendar months beginning with the date of the writ unless renewed by an order of the court. Service of a writ that is beyond its validity will render the service irregular and liable to be set aside.⁷³ However, it does not mean that the action is liable to be struck out.⁷⁴

[4-33] Where a party is joined or substituted,⁷⁵ service of the writ on the new party must be effected within one year of the date of joining or substitution of the

⁶⁸ Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) s 186. Note that most of the provisions in the old Companies Ordinance (Cap 32) have been repealed by the Companies Ordinance (Cap 622) with effect from 3 March 2014. The old Companies Ordinance has remained in force with a narrower scope of content and has been retitled the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32).

⁶⁹ Mental Health Ordinance (Cap 136) s 69(2). An application for leave under the Ordinance must be made by originating summons in the form of RHC App A Form 10 (RHC O 32 r 9(2)) to a judge in chambers (RHC O 32 r 9(1)), accompanied by an affidavit setting out the grounds on which such leave is sought and any facts necessary to support those grounds (RHC O 32 r 9(3)).

⁷⁰ A concurrent writ is valid for the period of validity of the original writ which is unexpired at the date of issue of the concurrent writ: RHC and RDC O 6 r 8(1).

⁷¹ RHC and RDC O 6 r 8(1).

⁷² *Trow v Ind Coope (West Midlands) Ltd* [1967] 2 QB 899, [1967] 2 All ER 900 (CA, Eng) (service on 10 September 1966 of a writ issued on 10 September 1965 was set aside); *Yung Mei Chun Jessie v Merrill Lynch (Asia Pacific) Ltd* [2015] HKCU 324 (unreported, DCCJ 3068/2013, 11 February 2015) (DC) (writ issued on 15 August 2013 and received by defendant on 15 August 2014; held by Andrew Li J that, according to RDC O 6 r 8(1), a writ was only valid for 12 months beginning on the date of issue; it followed that the last date to serve the writ was, accordingly, 14 August 2014 and the writ had not been properly served).

⁷³ *Yung Mei Chun, Jessie v Merrill Lynch (Asia Pacific) Ltd*, above.

⁷⁴ *Khalil Muhammad v The Incorporated Owners of Nam Yeung Mansion (Mut Wah Street)* [2015] HKCU 2076 (unreported, DCPI 1429/2013, 8 September 2015) (DC).

⁷⁵ *le* under RHC and RDC O 15 r 6(2).