his supply of raw materials from another source and if he suffered a loss because the alternative source was more expensive, then he could be compensated for that loss by an award of damages.

6.007 It should be noted that it is possible for both damages and an injunction to be awarded in the same action. For example, in an action for trespass, the plaintiff could be awarded damages to compensate him for damage to his land caused by the trespass in the past and an injunction to prevent the trespass being repeated in the future.

(b) Discretion to grant

6.008 In every case where an injunction is sought, the court has, in theory, a discretion as to whether or not the remedy should be granted. In the case of prohibitory injunctions there are, in practice, many cases where an injunction will be ordered as a matter of course, but the grant of a mandatory injunction is entirely discretionary. Every case depends upon its own particular facts.

(c) Mandatory injunction

6.009 An example of a mandatory injunction would be a case where an easement is interrupted by the construction of a building along the path of the easement. In such a case, the court can order that the building should be demolished to allow the easement to be used once again. However, in some cases the cost of undoing what has already been done may involve the defendant in expenses disproportionate to the infringement of the plaintiff's rights. For example, in the case of the easement referred to above, if the plaintiff used the blocked right of way extremely infrequently, the court might, in its discretion, decide that an award of a small amount of damages would be a more appropriate remedy than granting a mandatory injunction which would cause great expense to the defendant.

6.010 In deciding whether and how to exercise its discretion, the court may take account of the conduct of both the plaintiff and the defendant. Conduct can be especially important in the case of mandatory injunctions. Where a defendant has acted without regard to his neighbour's rights, "wantonly and quite unreasonably", he may be ordered to restore the *status quo* even if the expense to the defendant is disproportionate to the advantage to the plaintiff. Alternatively, where the defendant has acted "reasonably", though wrongly, the court may refuse to make a mandatory order involving the defendant in heavy expenditure.

6.011 A further important factor in connection with mandatory injunctions is that the injunction should define precisely what the defendant is ordered to do. This principle was decided in *Redland Bricks Ltd v Morris*[1] which contains a general discussion about the factors affecting the decision whether a mandatory injunction should or should not be granted. In that case, the then English House of Lords refused to grant a mandatory injunction requiring the defendant to restore support to the plaintiff's

[1] [1970] AC 652.

land partly because the injunction requested gave the defendant no indication of what exactly was to be done to restore the support.

(d) *Quia timet* injunction

6.012 It is also possible to apply for *quia timet* injunctions. Damages can only be awarded in respect of an injury which was actually suffered before the action was brought. However, if the plaintiff learns that the defendant is about to infringe his legal rights, he may obtain an injunction to prevent such an infringement from occurring. Such an injunction is called a *quia timet* injunction. For example, if a plaintiff learns that a newspaper containing a libel against him is about to be printed, then subject to the law concerning injunctions in the case of defamation generally, the plaintiff may obtain an injunction to prevent the publication of the libellous statement. The injunction is available even though, technically, no libel is committed until the publication occurs.

(e) Availability of injunctions

6.013 Examples of the areas of the substantive law where injunctions may be sought as remedies include:

- *disputes related to property and to landlord and tenant matters:* injunctions may be awarded to prevent trespass or nuisance from occurring, to prevent interference with easements or rights to light or to require compliance with the covenants in a lease;
- *intellectual property matters:* injunctions are often sought as remedies for infringement of intellectual property rights such as copyright, patents, designs, trade marks and also in connection with the tort of passing-off; and
- *commercial matters and confidential information:* injunctions can be awarded to prevent disclosure of information passed by one party to another in confidence. This often occurs in the context of an employment contract where the employee has taken up new employment with a rival to his former employer and the former employer considers that the employee will or may pass on confidential trade secrets. Injunctions may also be issued in these circumstances to enforce valid restrictive covenants in an employment contract.

These are only a few of the common circumstances where resort may be had to the remedy of an injunction. *Mareva* injunctions and *Anton Piller* orders are discussed further from paras 6.077 onwards.

(f) Interlocutory injunction

6.014 A permanent injunction can only be granted after the full trial of an action. The steps taken before a trial in an action seeking injunctive relief are identical to the steps in an action for damages. In other words, there must be a writ, the service of a statement of claim, the usual exchange of pleadings, witness statements and discovery and

inspection of documents, case management conference, pre-trial review, the exchange of experts' reports (where appropriate) and any other interlocutory proceedings.

6.015 As the various steps can take considerable time, the plaintiff often considers that he will suffer an irreparable loss if the defendant is permitted to continue to infringe the plaintiff's rights in the period up to trial. In those circumstances, the plaintiff may choose to apply for an interlocutory injunction which, if granted, would require that, "until Judgment or further order" the defendant should not continue with or repeat the acts of which the plaintiff complains. (The quoted phrase is used in the order itself, making clear that the injunction only binds the defendant until judgment is granted in the action or until some other order is made varying the terms of the injunction, if that is sooner.)

6.016 When the court is hearing an application for an interlocutory injunction, it acts on the basis of affidavit evidence presented to it by the parties. It does not undertake a full investigation of the facts such as would take place at the trial itself. The court's objective is to preserve the *status quo* in difficult circumstances where the court does not know whether the plaintiff or the defendant will ultimately prove to be right.

6.017 The court's position in these circumstances is difficult because, whichever way it goes, it may do injustice: denying an interlocutory injunction to a plaintiff with a good claim for an injunction at trial may result in the plaintiff suffering a loss for which an award of damages is not adequate compensation, but granting an injunction against a defendant who is successful at trial may result in the defendant being inhibited from acting in a perfectly lawful manner and thereby suffering loss.

6.018 Section 21L of the High Court Ordinance and RHC O.29 gives the court jurisdiction to grant interlocutory injunctions. RHC O.29 r.1(1) provides:

> "An application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of the cause or matter, whether or not a claim for the injunction was included in that party's writ, originating summons, counterclaim or third party notice, as the case may be."

6.019 This rule does not, however, give guidance about the circumstances in which an interlocutory injunction will be granted. Guidelines for such applications were laid down by Lord Diplock in the English House of Lords in *American Cyanamid Co v Ethicon Ltd*[2]. The guidelines may be summarised as follows:

- the plaintiff must show that he has a good arguable claim to the right he seeks to protect—he must show that there is a serious question to be tried;
- if there is a serious question to be tried, the court should consider the adequacy of damages as a remedy for either side if the interlocutory injunction is granted or denied; and
- if the question of whether or not the interlocutory injunction should be granted cannot be resolved by addressing the two questions above, then the court

[2] [1975] AC 396.

considers the balance of convenience. In other words, the court considers the relative amounts of non-compensatory damage which would be suffered by each of the parties if an interlocutory injunction was to be granted or denied.

6.020 There are, however, some particular cases where the *American Cyanamid v Ethicon* guidelines may not apply. These include the following:

- *actions against a public authority:* governmental authorities should not be prevented from exercising their statutory powers unless the plaintiff has shown a real prospect that his claim for a permanent injunction will succeed at trial;
- *where the grant or refusal of an injunction at the interlocutory stage will dispose of the action:* in such cases, a higher standard is required of the plaintiff before the defendant will be deprived of his right to dispute the plaintiff's case at a full trial (see *CEF Holdings Ltd v City Electrical Factors Ltd*[3]); and
- *where there is no dispute on the facts:* where a case is plain and uncontroversial, the court will not consider the adequacy of damages as a remedy nor the balance of convenience.

(c) Procedure

6.021 In common with the vast majority of other interlocutory applications, an application for an interlocutory injunction should be made by issuing a summons. A master has no jurisdiction to hear a contested application for an injunction (RHC O.32 r.11); so the summons must be issued to be heard before a judge. The summons must be served in the usual way to give two clear days' notice before the date fixed for the hearing of the summons, which is normally a Friday morning at 10.00am (Summons Day). If a Friday falls on a public holiday, then the Summons Day will be held on Thursday that week. Evidence in the form of affidavits or affirmations should also be served at least two clear days before the hearing (RHC O.32 r.3).

6.022 The summons can be issued at any time after the writ is issued. It may even be issued immediately after the issue of the writ so that when you send the clerk to court to deal with the issue of the writ, he can, at the same time, be given the blank copies of the summons to allow that to be issued straightaway. In such cases, the common practice is to serve the summons at the same time and in the same manner as serving the writ. This is necessary because, before the defendant has acknowledged service of the writ there will be no address for service on the record to allow ordinary service in accordance with RHC O.65 to take place.

6.023 The Clerk of Court will mark on the summonses for all injunction applications the date of the next Summons Day provided that two clear days' notice can be given to the respondent.

[3] [2012] EWHC 1524 QB.

If the matter is urgent but not so urgent as to apply *ex parte* on notice to the Duty Judge, an order for abridgment of time can be sought and should be included in the summons.

6.024 You should take great care in drafting the summons because, in effect, this amounts to drafting the operative part of the injunction itself. Care is required in order to make the injunction effective and because the court will refuse to grant an injunction which is too imprecise (see para.6.011).

6.025 The procedure which is often adopted is for the plaintiff to issue a summons seeking an injunction at the same time as his writ is issued. The writ, the summons and the affidavit evidence in support of the application for the interlocutory injunction will then all be served at the same time. The affidavit in support of the application should be sworn by the plaintiff, or if a company, by a director wherever possible. It should be limited to evidence necessary to give a clear, concise and fair statement of relevant facts. It should not contain matters of argument, which should be contained in the skeleton argument (see para.6.027 below). Exhibits to affidavits should be strictly limited to the issues in the application (see para.23, PD 11.1 "*Ex Parte*, Interim and Interlocutory Applications for Relief (including Injunctive Relief)"). The first hearing of the summons will already have been fixed and it is likely to be no more than a minimum two clear days after the summons has been served.

6.026 When serving a writ accompanied by a summons for an interlocutory injunction and supporting evidence, it is most important to ensure that whoever serves the writ and accompanying documents swears an affidavit of service. This is because the defendant may not appear on the date for the hearing of the summons so, unless there is evidence to show the court that the documents were properly served, the court will refuse to grant the injunction even if the case appears to be clear on the basis of the plaintiff's affidavit evidence.

6.027 Agreed court bundles (comprising relevant court documents) should be lodged not less than 24 hours and where possible 48 hours before the hearing (see para.7.3, Practice Direction 5.3 *Listing and hearing of summonses for interlocutory orders and injunctions*). The applicant's skeleton argument should be filed in court by 9:30am one clear day before the hearing, and the respondent's skeleton should be filed no later than 2:30pm on the day before the hearing (see para.7.3, PD 5.3). Where the application is made *ex parte*, the applicant should ensure that the papers, together with a draft of the order which the court is invited to make, are delivered to the court as soon as possible to enable the judge to have sufficient time to read and digest them all before the hearing (see para. 19, PD 11.1). The application should be accompanied by a skeleton argument setting out precisely how the case meets the requirements for the order sought and, if applicable, specifying any exceptional circumstances claimed to justify the grant of the relief sought. The skeleton argument should also identify the precise passages in the evidence relied upon (see para.27, PD 11.1) and should, including in applications made *ex parte* on notice, be served on the opposite party together with the draft order and the evidence at the same time as it is lodged with the court (see. para 7.3, PD 5.3 and para.30, PD 11.1).

6.028 On the date for hearing the summons, the defendant may appear with some affidavit evidence answering the plaintiff's evidence in support of his application for an interlocutory injunction. In such a case, the court may be able to deal with the

application but, more commonly, the application will be adjourned because there is no time available to deal with it. In those circumstances, the plaintiff may wish to apply for an interim injunction *ex parte* (see para.6.030).

6.029 In such cases, the defendant may appear on the date fixed for the hearing of the summons, but he may not have had sufficient time to prepare evidence in response to the plaintiff's application. The defendant will, therefore, wish to have the summons adjourned. In practice, he may offer undertakings to the court in order to persuade the plaintiff to agree to the adjournment. If acting for the plaintiff, you and counsel (if instructed) must decide whether to agree to the adjournment and accept the undertakings or attempt to fight the summons.

6.030 In most cases, the court will allow the defendant some time to prepare his evidence, so, in reality, the plaintiff must decide whether the undertakings offered by the defendant are adequate or whether he is likely to obtain a more satisfactory result by applying to the court *ex parte* for an interim injunction which will last until the hearing of the summons can take place. The common practice is for undertakings to be negotiated, for a timetable for the service of evidence to be agreed between the solicitors for the plaintiff and the defendant and for a date to be obtained when the court can set aside enough time to hear the case properly.

6.031 The undertakings may be in the same terms as the injunction sought by the plaintiff or they may be in some slightly varied form. If acting for the defendant, you may wish to negotiate with the plaintiff so that he will accept some more limited protection for the short period until the hearing for the interlocutory injunction can take place.

6.032 Where the respondent offers any undertaking to the court, the letter or other document offering the undertaking must be signed by the respondent personally; the solicitors must certify on their headed notepaper that the signature is the signature of the respondent; and the solicitors must similarly certify, in certain cases, that they have explained to the respondent the consequences of giving the undertaking and that the respondent has signified his understanding of the explanation (see para.8.3, PD 5.3).

6.033 The undertakings are not merely contractual undertakings between the parties but are undertakings given to the court by the solicitor or counsel on behalf of the party. A breach of such an undertaking is punishable as contempt of court in exactly the same way as a breach of an injunction. For this reason, it is important for both the plaintiff and the defendant to be precise when agreeing upon the terms of the undertakings. You should ensure that the terms are written down. It is usually best to draw up the undertakings and incorporate them into some order such as the order of the court adjourning the summons for an interlocutory injunction. This has the result of recording the undertaking so that the terms will be clear to everyone and the defendant can regulate his conduct accordingly.

(b) Evidence

6.034 In cases which are subject to the *American Cyanamid v Ethicon* guidelines, the affidavit evidence should cover all of the matters which the court may wish to address in accordance with those guidelines. However, the affidavit evidence should be limited to evidence necessary to give a clear, concise and full statement of relevant facts and

6. There is a duty to search for all relevant documents and care should be taken to ensure that all documents possibly relevant to the proceedings are identified at the earliest opportunity. No documents at all (in particular documents that you may regard as damaging to your case) should be destroyed, defaced or altered in any way. You should refer any question with regard to documents to us before you take any action.

7. The other party may be denied access to certain relevant documents on the grounds of "privilege". For present purposes, it is sufficient to say that privilege will apply to those documents which comprise communications with lawyers and/or documents coming into existence for the purpose of giving or getting advice, and/or those documents coming into existence for the sole or dominant purpose of getting either legal advice or evidence for use in litigation. Privilege can be lost if you show your documents to other persons. Please therefore check with us before doing so.

8. Please ensure that all appropriate employees and staff are aware of the need to preserve all relevant documents whether or not those documents are privileged.

9. The obligation to disclose relevant documents to the opposition continues after the list of documents has been served. Sometimes relevant documents do come into existence, or are found, after the list is served and these will have to be disclosed in a supplementary list or in a letter. It is important, therefore, to ensure that further relevant (and possibly harmful) documents are not created which will have to be disclosed to the other side. In the circumstances, if you wish to put anything in writing regarding the case (except in letters written to us or in documents prepared at our request) please consult us first.

10. Failure to give proper discovery can also amount to contempt of court and may lead to serious consequences, including dismissal of your claim or entry of judgment against you.

11. The discovery procedure must be started now. Accordingly, we should be grateful if you would begin to examine your files carefully and would provide us with all potentially relevant materials. It may assist you in carrying out this work if we were to visit your offices so that we have a better understanding of your filing system and document retention policy. In this way, the risk of relevant documents coming to light at a later stage (and perhaps embarrassing you) will be reduced.

12. Once we have been able to consider the documents you provide, we shall return to you those that we do not consider relevant, together with a copy of any relevant documents that we retain for use in the litigation process.

Yours sincerely,

7.2 List of Plaintiff's Documents

HCA [*number*]/20[*year*]

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
ACTION NO. [*number*] OF 20[*year*]

BETWEEN

[*Plaintiff Co Ltd*] *Plaintiff*

and

[*Defendant Co Ltd*] *Defendant*

LIST OF DOCUMENTS OF THE PLAINTIFF

The following is a List of the documents relating to the matters in question in this action which are or have been in the possession, custody or power of the abovenamed Plaintiff and which is served in compliance with [O.24 r.2/the Order of] [*judge's name*] [dated/*date*].

1. The Plaintiff has in its possession, custody or power the documents relating to the matters in question in this action enumerated in Sch.1.

2. The Plaintiff objects to production of the documents enumerated in Pt 2 of Sch.1 on the following grounds:

   (i) The documents at para.1 are privileged in that they consist of either documents which came into existence for the purpose of seeking or obtaining legal advice or documents which came into existence after the proceedings were in contemplation and in view of such proceedings for the purposes of collecting and obtaining evidence;

   (ii) Production of the documents at para.2 would be contrary to the public interest;

   (iii) The Plaintiff has undertaken to use the documents at para.3 only for the purposes of the action in which they were produced and may not produce such documents without leave of the court in that action;

   (iv) The documents at para.4 would, if produced for inspection, tend to incriminate the Plaintiff.

3. The Plaintiff has had, but has not now in its possession, custody or power, the documents relating to the matters in question in this action enumerated in Sch.2.

4. Of the documents in Sch.2:

   (i) Those at para.1 were last in the Plaintiff's possession on the dates that they was sent to the addressees and their whereabouts are now unknown.

   (ii) Those at para.2 were last in the Plaintiff's possession not earlier than [date] but cannot now be traced and their whereabouts are unknown.

5. Neither the Plaintiff, nor its solicitors nor any other person on its behalf, has now, or ever had in their possession, custody or power, any documents of any description whatever relating to any matter in question in this action other than the documents enumerated in Schs.1 and 2.

SCHEDULE 1

Part 1

No	Description	Date
1.	Copy Agreement between the Plaintiff and the Defendant.	28.05.2010
2.	Copy file entitled "Supplies to [*Defendant Co Ltd*]" containing invoices from the Plaintiff to the Defendant (pages 1 to 250).	01.06.2010
3.	Bundle of memoranda passing between the Plaintiff and the Defendant (pages 1 to 300).	01.05.2010–30.08.2010
4.	Bundle of original and copy correspondence passing between the Plaintiff's and the Defendant's solicitors (pages 1 to 55).	02.07.2010–15.03.2011
5.	Pleadings, summonses and orders in this action and copies thereof.	Various

Part 2

No	Description	Date
1.	Correspondence, reports and other documents passing between the Plaintiff and its solicitors and/or in-house lawyers for the purpose of seeking or obtaining legal advice, instructions to Counsel, their advice, opinions and drafts and/or correspondence, reports and other documents passing between the Plaintiff and its solicitors and others written or prepared for the purposes of obtaining evidence or furnishing to the Plaintiff's solicitors information which might lead to the obtaining of evidence to be used in legal proceedings, statements of witnesses, notes, memoranda and other documents prepared by or for the use of the Plaintiff's solicitors for the purposes of legal proceedings.	Various
2.	Correspondence and copy correspondence passing between the Plaintiff and the Department of Trade and Industry.	26.09.2010–14.10.2010

3.	Documents produced by [*Defendant Co Ltd*] in proceedings commenced against them by the Plaintiff in the High Court of Hong Kong, High Court Action No. [*number*].	Various
4.	Report of [*Consultants Ltd*] to the Plaintiff's directors.	26.09.2010

SCHEDULE 2

No	Description	Date
1.	Original letters from the Plaintiff to the Defendant and original letters from the Plaintiff's solicitors to the Defendant's solicitors copies of which have been disclosed in Sch.1 Pt 1.	Various
2.	Correspondence between the Plaintiff and [*Truck Co Ltd*].	Various

Dated the [*date*] day of [*month*] 20[*year*].

[Name of Firm]
Solicitors for the Plaintiff

TAKE NOTICE that the documents in the above list, other than those listed in Pt 2 of Sch.1 and Sch.2, may be inspected at the offices of [name of firm], the solicitors of the Plaintiff at [address of firm] by prior appointment during normal business hours.

To: [*name of firm*]
Solicitors for the Defendant
[*address*]
[*reference*]

SERVED the [*date*] day of [*month*] 20[*year*] by [*name of person*], [*position*] at [*name of firm*], solicitors for the Plantiff at [*address of firm*].

HCA [*number*]/20[*year*]

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
ACTION NO. [*number*] OF 20[*year*]

BETWEEN

[*Plaintiff Co Ltd*] *Plaintiff*

and

[*Defendant Co Ltd*] *Defendant*

LIST OF DOCUMENTS OF THE PLAINTIFF

Dated the [*date*] day of [*month*] 20[*year*].
Filed the [*date*] day of [*month*] 20[*year*].

[*name of firm*]
Solicitors for the Plaintiff
[*address*]

Tel:
Fax:
Ref:

7.3 Interrogatories

Note

Assume that the solicitors acting for the defendants in the action brought by Henry Yip have discovered as a result of enquiries made by them, subsequent to serving the defence, that Mr Yip had been involved in a road accident (due to his driving into a tree after drinking a bottle of brandy) six months prior to the accident in question. As a result of that accident, he suffered a fractured skull. They therefore serve interrogatories to find out more about the effects of the said injury.

HCA [*number*]/20[*year*]

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
ACTION NO. [*number*] OF 20[*year*]

BETWEEN

Henry Yip — *Plaintiff*

and

John Cole — *First Defendant*
David Chan — *Second Defendant*

INTERROGATORIES

On behalf of the first and second Defendants for the examination of the Plaintiff pursuant to the Order of Master [*name*] made herein on the [*date*] day of [*month*] 20[*year*].

1. Were you involved in a road accident on 15 September 2010, six months prior to the date of the accident in respect of which you now claim?
2. Did you suffer a fractured skull as a result of that accident?
3. Did you, from the date of the accident, suffer from recurring migraines and nightmares?
4. If the answer to the third interrogatory is yes;
   (a) Did the migraines and nightmares occur on an average of two to three times a week or at some other and what intervals?
   (b) Did you on the following dates consult a neurologist, Dr Peter Ching, about such migraines and nightmares, namely on 22 September 2010, 29 September 2010, and 30 October 2010?

SAMPLE DOCUMENTS

10.1 Application to Set a Case Down for Trial

HCA [*number*] / 20[*year*]

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
ACTION NO. [*number*] OF 20[*year*]

BETWEEN

Henry Yip	*Plaintiff*
and	
John Cole	*First Defendant*
David Chan	*Second Defendant*

APPLICATION TO SET A CASE DOWN FOR TRIAL

(1) The time estimated for trial in the Order for Directions dated the [*date*] day of [*month*] 20[*year*] is three days.

(2) This estimated length of hearing continues to hold good.

(3) It is anticipated that three witnesses will be called to give evidence for the Plaintiff and two witnesses will be called to give evidence on behalf of the First Defendant and Second Defendant.

(4) The following unusual features are likely to prolong the hearing of this case: None.

(5) The solicitors for all parties have consulted together concerning the estimated length of trial. There is agreement concerning the length of time estimated for trial.

(6) The time now estimated for the trial of this case is three days.

(7) Take notice that pursuant to the Order made by [Master/Judge] [*name*] on the [*date*] day of [*month*] 20[*year*] this action is now set down for trial without a jury.

Dated the [*date*] day of [*month*] 20[*year*].

[*name*]
Solicitors for the Plaintiff
[*address*]

10.2 Notice of Setting Down

HCA [*number*] / 20[*year*]

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
ACTION NO. [*number*] OF 20[*year*]

BETWEEN

Henry Yip	*Plaintiff*
and	
John Cole	*First Defendant*
David Chan	*Second Defendant*

NOTIFICATION OF SETTING DOWN

Take notice that we have this day set down the above action for trial.

Dated the [*date*] day of [*month*] 20[*year*].

[*name*]
Solicitor for the Plaintiff
[*address*]

To: The First and Second Defendants.

- Has the decision at first instance been made "appeal-proof"?
- Are there other factors affecting the likelihood of success?

(a) Likely benefits versus time, cost and effort

11.007 This balance will often be relevant in cases where, although you have had a degree of success in the initial application, you have not been completely successful. So, for example, if you have issued a time summons seeking a 14-day extension of time for serving a defence, but the master only ordered an extension of seven days, you may well advise that an appeal is inappropriate, however good your chances of success. You may form the view that the defence can, in fact, be prepared in the time available (although it may be inconvenient to do so). You may also feel that the best thing to do would be to try to prepare the pleading within the shorter time period and then to make a further application for an extension of time if it proves impossible to do so.

11.008 The question of whether an appeal is worth the cost and effort will most commonly arise in interlocutory situations such as the example given above. This is because it is commonly the case that a party can tolerate an unfavourable decision at an interlocutory stage because he wants to concentrate his efforts upon proceeding to the trial of the action, rather than being side-tracked into running an appeal on an interlocutory decision.

11.009 The question of benefits versus disadvantages can also arise after the trial of an action. For example, in a case concerning damages for breach of a commercial contract, a plaintiff may have sought to recover the loss and expense which he suffered as a result of the breach, and also to recover the profit which he would have made if the contract had continued. If the judge awards damages for the loss and expense, but refuses to make an award in respect of the loss of profits, the client should be advised that an appeal by him on the lost profits issue might prompt the other side to appeal against the judge's award of compensation for loss and expense.

11.010 Conversely, there are cases where the consequences for the client of an unfavourable decision at first instance are so serious that he will wish to appeal, almost regardless of the cost and effort which may be required in doing so. An example of this would be a client whose business has, in effect, been paralysed as a result of an interlocutory injunction.

(b) Appealing against findings of fact or law

11.011 Although in general, decisions of a master or a Court of First Instance judge on both fact and law may be the subject of an appeal, there are some cases where an appeal may only be made against a decision on the law and not against a decision on a factual dispute. Examples of this include cases where there is a challenge to the jurisdiction of an inferior court or tribunal. In those cases it is important to analyse carefully the decision which may be the subject of the appeal in order to assess whether the decision on the law is open to attack, or whether the basis of the unfavourable decision is a decision on the facts which are not open to challenge. A detailed analysis of considerations of this type is outside the scope of this book, instead you should refer to the substantive law governing the court or tribunal in question.

(c) Is the first instance decision "appeal-proof"?

11.012 Although a judgment at first instance may be the subject of an appeal, and the appeal is said to be "by way of rehearing", there are, in practice, a number of decisions which cannot be the subject of a successful appeal. This is because there are certain categories of decision with which the appeal court will be very reluctant to interfere.

11.013 An important example of a decision in this "unappealable" category is the judge's view of the credibility of witnesses. Where there is a factual dispute in which the only available evidence is the oral evidence from two witnesses then, in practical terms, it is almost inconceivable that the appeal court would overturn the decision of the judge who finds the evidence from witness A to be more credible than the evidence from witness B. This is because the appeal court takes the view that the original judge heard the witnesses give their evidence and be cross-examined upon it, so he is the person who is best able to form a view on their credibility.

11.014 Another important example of an unappealable decision is one which results from the exercise of a discretion given to a judge by a statute or by the RHC. The appeal court will only interfere with the exercise of a discretion if the judge has misdirected himself, or if there is no material on which he could properly have arrived at his decision (*Hadmor Productions Ltd v Hamilton*[1]). In "discretionary" cases, care must be taken to distinguish between the position of a judge deciding an appeal from a master and the position of the Court of Appeal. A judge has to exercise the discretionary jurisdiction himself, and may exercise that discretion in a different way from the master, even if the master originally applied the right principles, or was not plainly wrong.

11.015 Decisions made by masters or judges in relation to case management are a type of exercise of discretion, so are very unlikely to be appealable.

(d) Other factors affecting the likelihood of success

11.016 Clearly, it is impossible in a general book to give a comprehensive list of matters which you should look out for when considering whether to appeal against a judgment at first instance. However, the following paragraphs cover some general points.

11.017 An appeal will have a greater chance of success where the issues turn on documentary evidence, or inferences drawn from primary facts, and you consider that the tribunal at first instance has clearly not considered, or has misunderstood, a key document or fact.

11.018 Where the appeal would deal only with matters of law, or with the construction of a contract, it will be less difficult to persuade the appeal court not to follow the views of the tribunal at first instance.

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[1] [1983] 1 AC 191.

11.019 An appeal which attempts to extend the boundaries of the law will meet with more difficulty than one which is based firmly on established precedents.

11.020 Where no question of discretion at first instance is relevant, higher courts will sometimes take a more "robust" approach to a case than a first instance judge. There are some cases where a master or a judge might be tempted to take the path of least resistance if he has any doubt at all about the application. Applications for summary judgment and applications to strike out pleadings often fall within this category. In each of those cases, if the master or the judge hearing the application has any doubt whatever about the case, he may refuse the application, believing that the applicant is not permanently deprived of his rights because the claim, or the defence (as the case may be), can still be argued at the full hearing of the action. Advocates often use that type of reasoning, so masters or judges can sometimes be persuaded to find "doubts" even in strong cases. Higher courts often have greater "confidence", so they are less likely to be swayed by such advocacy and, in the right case, may allow an appeal notwithstanding the doubts of the judges in the lower court.

(e) Judges' "grudges"

11.021 The possibility of creating ill-will in the judge at first instance by appealing against their decision is often mentioned in the context of interlocutory appeals. This should not be a relevant factor in deciding whether or not to appeal. Judges and masters are professionals who realise that their decisions may be subject to review by others. They accept appeals against their decisions as part of their work and proceed accordingly.

3. Appeals to the Court of First Instance from the Decision of a Tribunal, Government Department or other Administrative Officer

(a) Commencing the appeal

11.022 Where any legislation provides for an appeal to the Court of First Instance from the decision of a tribunal, government department or other administrative officer, such appeals are commenced by an originating motion which must state the grounds of appeal (RHC O.55 r.3(1) and (2)). Bringing an appeal will not operate as a stay of proceedings on the decision against which the appeal is brought (RHC O.55 r.3(3)), unless an order for a stay has been made. For example, if the result of the decision is that your client must pay a penalty, then he is not relieved of that liability simply because you have started an appeal. You should consider whether your client needs to seek a stay of proceedings or of execution pending an appeal. Where a stay of proceedings or of execution is sought under RHC O.55, an application for such a stay must be made by motion or summons (RHC 55/3/1).

11.023 The originating motion commencing the appeal is set out in the form of a notice known as a notice of originating motion which must be sealed (stamped with the court's official rubber stamp) and filed in the High Court Registry. The notice must

be served on the chairman of the tribunal, the government department or other administrative officer, and on every party to the proceedings (other than the appellant) in which the decision appealed against was given (RHC O.55 r.4(1)(b)). The appeal process begins officially once the notice has been sealed and filed. The appeal is then said to have been "entered" (see para.11.027).

(i) Procedure for sealing / filing the originating motion

11.024 The original notice of originating motion, duly signed by the appellant or by you (in your firm's name) as his solicitor, must be taken to the High Court Registry, with at least three copies. The court will keep two of these, the original and a further copy for the Registry file. It is important to make sure that the documents have a hole punched in the top left-hand corner before they are presented to the Registry for filing. The use of cardboard corners is also advisable.

11.025 The remaining two copies will be sealed by the court as set out in para.11.026; you should retain one as your file copy, the other should be used for service. If the originating motion is required to be served on more than one person, then one additional sealed copy will be required for each additional person to be served.

11.026 For sealing, the original notice should be presented to the Accounts Office on Floor LG2 at the High Court Building, and the appropriate fee tendered (HK$1,045 at present). Either cash or a solicitors' cheque drawn on one of the firm's accounts made payable to "The Government of the Hong Kong Special Administrative Region" are acceptable. Once the Accounts Office has indorsed a fee stamp on it, the original should then be taken to any one of the filing counters on Floor LG1 where the Clerk will check that it is duly signed and dated and has a backsheet. The clerk will then input the parties' names and details of the matter into the computer and will issue a case number. This number must then be filled in on the original and the copies. The Clerk will then seal the original and the copies by using the court's rubber stamp. He will retain the original and the Registry copy, and return to you the other sealed copies.

(ii) Time for entry and service of the appeal

11.027 An appeal must be entered, and the notice of originating motion served, within 28 days after the date of the decision of the tribunal, government department or other administrative officer (RHC O.55 r.4(2)).

(iii) Date of the hearing

11.028 An appeal from a decision of a tribunal, government department or other administrative officer cannot be heard less than 21 days after service of the notice of originating motion, unless the court otherwise directs (RHC O.55 r.5). A common example of a case where an urgent hearing of an appeal might be required would be an immigration case where the decision appealed against would have the effect of the appellant being deported before their appeal could be heard. The court will only make this direction if you apply for it. The application should usually be made by summons supported by affidavit evidence to explain the need for urgency. In an extremely important case, the application could be made *ex parte*.

11.029 The date for hearing an appeal can be fixed at the time when the originating motion is filed with the court, but this seldom happens. This is usually because the party who is appealing does not at that stage know when counsel for both parties will be available. In practice, therefore, the date for the hearing of an appeal is fixed later, after the parties have had an opportunity to consult with counsel over their availability and the estimated length of the hearing. It is common for the parties during this time to check with the Clerk of Court on the court's diary. The usual practice is then for the appellant to arrange attendance with the other side before the Clerk of Court to fix a hearing date before a judge in chambers.

(iv) *Amendments to the grounds of appeal*

11.030 The grounds of appeal stated in the originating motion may be amended by the appellant, without leave, by a supplementary notice served on each of the persons on whom the originating motion was served, not less than seven days before the date appointed for the hearing of the appeal (RHC O.55 r.6(1)). Within two days after service of a supplementary notice, the appellant must lodge two copies of the notice with the Clerk of Court in the general office of the High Court Registry. No grounds other than those stated in the originating motion or any supplementary notice may be relied upon except with the leave of the court hearing the appeal. The court may grant leave to amend the grounds of appeal (RHC O.55 r.6(3)), and that power of the court is without prejudice to the powers of the court under RHC O.20.

(v) *Documents for the hearing*

11.031 When acting for the appellant, you should ensure that the documents for the hearing are served on the other parties to the appeal and lodged with the court at least 72 hours before the time fixed for the hearing (excluding Saturdays, Sundays and general holidays). In preparing the documents, you should have regard to Part A of PD 5.4 "Preparation of Interlocutory Summonses and Appeals to Judge in Chambers for Hearing".

11.032 The parties to the appeal should jointly prepare a bundle of the documents relevant to the appeal, a *dramatis personae* and a chronology of events. In the absence of any agreement, the appellant is responsible for their physical compilation, and if agreement cannot be reached it is the duty of the appellant to prepare them. If there is disagreement as to the documents to be included in the hearing bundle, the disputed documents should be included with the objections to their inclusion noted in the index.

11.033 The requirements for the preparation of the hearing bundle are set out in Part A of PD 5.4. Documents that are likely to comprise the bundle will therefore include:

- the originating motion;
- any supplementary notice amending the grounds of appeal;
- the decision of the tribunal, government department or other administrative officer under appeal;
- the reasons for the decision (if these have been provided);

- any note of the proceedings made by the chairman of the tribunal, the government department or any other administrative officer (see para. 11.035);
- all documents which were before the tribunal, government department or other administrative officer; and
- affidavit evidence, if any (see para.11.036).

11.034 Each party must also lodge a short and succinct skeleton containing the information required by PD 5.4(3) (see item 7 of Checklist 11.2). The appellant's skeleton should be lodged at least 72 hours before the hearing and the respondent's skeleton at least 48 hours before the hearing (excluding Saturdays, Sundays and general holidays). If you and your counsel, propose to rely on any authorities at the hearing of the appeal, a list of authorities should be lodged with the skeleton arguments. If counsel is instructed, preparation of the list of authorities is primarily their responsibility, but you should ensure that they comply with the time limit. If any textbooks are to be relied upon, the editions also ought to be stated in the list of authorities.

11.035 With regard to the note of the proceedings, it is the duty of the appellant to apply in writing to the person who presided over the original proceeding, for a signed copy of any note made by him of the proceedings, and to furnish that copy for the use of the appellate court. Unless directed by the court, an affidavit or note by a person present at the proceedings may not be submitted in evidence unless it was previously submitted to the person presiding over the proceedings for his comments (RHC O.55 r.7(4)).

11.036 On the hearing of an appeal from a tribunal, government department or administrative officer, the Court of First Instance has power to receive further evidence on questions of fact. That evidence may be given in such manner as the court may direct (RHC O.55 r.3(1)). Even though the appeal is said to be by way of a rehearing (RHC O.55 r.3(1)), the court will normally rely on the evidence given to the tribunal or department when the original decision was made. Accordingly, if you wish to bring any further evidence to the attention of the court, you should issue a summons seeking the court's directions as to this subject. You may, for example, seek a direction that affidavit evidence may be given (subject to the right of the opposition to require the deponents to attend for cross-examination), or a direction that oral evidence shall be given.

11.037 The court may draw any inferences of fact which might have been drawn in the proceedings out of which the appeal arose (RHC O.55 r.7(3)). The court may also give any judgment or decision or make any order which ought to have been made by the tribunal, government department or other administrative officer. In addition, the appeal court may make such further order or other order as the case may require, or may remit the matter back to the tribunal, government department or administrative officer along with the opinion of the appeal court, for rehearing and determination (RHC O.55 r.7(5)).

11.038 However, the court is not bound to allow the appeal on the grounds merely of misdirection, or of the improper admission or rejection of evidence unless, in the opinion of the court, some substantial wrong or miscarriage has thereby been occasioned (RHC O.55 r.7(7)).