

by these rules or under any written law be served out of the jurisdiction without leave.

(5) Rule 4(1), (2) and (3) shall, so far as applicable, apply in relation to an application for the grant of leave under this rule as they apply in relation to an application for the grant of leave under rule 1.

(6) An order granting under this rule leave to serve out of the jurisdiction an originating summons must limit a time within which the defendant to be served with the summons must acknowledge service.

(7) Rules 5, 5A, 6, 8 and 8A shall apply in relation to any document for the service of which out of the jurisdiction leave has been granted under this rule as they apply in relation to a writ.

(L.N. 39 of 1999) (Enacted 1988)

NOTES

[11.9.1] Service of other originating process, summonses and orders out of the jurisdiction

Order 11 rule 9 provides that leave to serve out of the jurisdiction is normally required for other forms of originating process, as well as summonses, notices and orders. Leave is not required for documents not issued by the court, such as a statutory demand: *Re Fung Kwok On, William* HCB 9590/2008 (Recorder Patrick Fung SC, 06.08.2010) (para 36).

Rule 9(1) extends the provisions of rule 1 to originating summonses, notices of motion and petitions, with the result that the leave will only be granted where the case comes within one of the grounds set out in that rule.

Rule 9(4), providing that leave is normally required for *ex juris* service of summonses, notices and orders, does not expressly apply rule 1. It follows that it is not necessary to bring the application within one of the lettered paragraphs in that rule. See *A&B v C* HCMP 2261/2006 (A Cheung J, 06.07.2007) (para 5) where, in relation to an *inter partes* summons, it was said that the relevant provisions of rule 9 'form a code of their own', so there is 'no need to bring the application within a limb of rule 1(1)'.

The leave requirements of rule 9 expressly do not apply to *ex juris* service of originating or interlocutory process in arbitration proceedings, which is catered for by Order 73 rule 7.

Failure to obtain leave, where required, may result in service being set aside. In both *Li Fook Chu v Chung Shau Ching* [2001] 4 HKC 681 (CA) and *Gainford Int'l Ltd v Kingbo Holdings Ltd* DCCJ 5079/2004 (Deputy Judge ST Poon, 08.02.2006) default judgments were set aside where leave had not been obtained for service of an order (in the first of those cases) and an *inter partes* summons (in the second case).

ORDER 12

ACKNOWLEDGMENT OF SERVICE OF WRIT OR ORIGINATING SUMMONS

1. Mode of acknowledging service (O. 12 r. 1)

(1) Subject to paragraph (2) and to Order 80, rule 2, a defendant to an action begun by writ may (whether or not he is sued as a trustee or personal representative or in any other representative capacity) acknowledge service of the writ and defend the action by a solicitor or in person.

(2) The defendant to such an action who is a body corporate may acknowledge service of the writ and give notice of intention to defend the action either by a solicitor or by a person duly authorized to act on the defendant's behalf but, except as expressly provided by or under any enactment or where leave is given under paragraph (2A) for such defendant to be represented by one of its directors, such defendant may not take any further step in the action otherwise than by a solicitor.

(2A)(a) An application by a body corporate for leave to be represented by one of its directors shall be made *ex parte* to a Registrar and supported by an affidavit, made by the director and filed with the application, stating and verifying the reasons why leave should be given for the body corporate to be represented by the director.

(L.N. 103 of 1994) (L.N. 108 of 2002)

(b) The relevant resolution of the board of the body corporate authorizing the director to appear on its behalf if leave is granted shall be exhibited to the affidavit.

(2B) No appeal shall lie from an order of the Registrar under paragraph (2A) giving or refusing leave.

(2C) Leave given by a Registrar under paragraph (2A) may be revoked by the Court at any time.

(2D) No appeal shall lie from an order of the Court revoking leave given by a Registrar.

(3) Service of a writ may be acknowledged by properly completing an acknowledgment of service as defined by rule 3 and handing it in at, or sending it by post to, the Registry.

(4) If two or more defendants to an action acknowledge service by the same solicitor and at the same time, only one acknowledgment of service need be completed and delivered for those defendants.

(5) The date on which service is acknowledged is the date on which the acknowledgment of service is received at the Registry.

NOTES

[12.1.1] Manner of acknowledging service

Service of a writ is acknowledged by properly completing the appropriate form of acknowledgment of service (as to which see rule 3 and the commentary thereunder) and handing it in or sending it by post to the court registry. See Order 12 rule 1(3). Upon receipt of the acknowledgment of service, the court registry is required to take

the steps set out in Order 12 rule 4, which includes sending it by post to the plaintiff. The defendant acknowledging service is not required to effect service on the plaintiff.

[12.1.2] Body corporate defending in person

Order 12 rule 1(2) allows a body corporate to acknowledge service and give notice of intention to defend by person authorised to do so. Thereafter a body corporate may not take any step to defend the action save by solicitor unless the body corporate applies for and obtains leave to be represented by one of its directors. In 2002 the previous requirement in Order 12 rule 1(2A)(a) that the affidavit in support of such an application demonstrate 'lack of resources or ... other good reasons' was repealed.

As to companies commencing proceedings otherwise than through a solicitor, see Order 5 rule 6. And see Order 9 rule 6 in relation to Petitions.

A company which obtains leave to be represented by one of its directors may be entitled to claim costs as a litigant in person under Order 62 rule 28A. See the commentary under that rule.

In *Wing Hang Bank Ltd v Kit Choy Development Ltd & Anor* [2005] 3 HKC 312, 315BH (CA), the court rejected a submission that where both a company and a director thereof are named as defendants in an action, the director may represent the company without leave.

[12.1.3] Acknowledgment of service by partnership

Particular provisions as to acknowledgment of service of partners sued in the name of the partnership or firm are set out at Order 81 rule 4.

[12.1.4] Numbering

There is no rule 2 in Order 12.

3. Acknowledgment of service (O. 12 r. 3)

(1) An acknowledgment of service must be in Form No. 14, 15 or 15A in Appendix A, whichever is appropriate, and except as provided in rule 1(2), must be signed by the solicitor acting for the defendant specified in the acknowledgment or, if the defendant is acting in person, by that defendant. (L.N. 152 of 2008)

(2) An acknowledgment of service must specify –

(a) in the case of a defendant acknowledging service in person, the address of his place of residence 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, and

(b) in the case of a defendant acknowledging service by a solicitor, a business address to which may be added a numbered box at a document exchange of his solicitor within the jurisdiction;

and where the defendant acknowledges service in person the address within the jurisdiction specified under sub-paragraph (a) shall be his address for service, but otherwise his solicitor's business address shall be his address for service.

In relation to a body corporate the references in sub-paragraph (a) to the defendant's place of residence shall be construed as references to the defendant's registered or principal office.

(3) Where the defendant acknowledges service by a solicitor who is acting as agent for another solicitor having a place of business within the jurisdiction, the acknowledgment of service must state that the first-named solicitor so acts and must also state the name and address of that other solicitor.

(4) If an acknowledgment of service does not specify the defendant's address for service or the Court is satisfied that any address specified in the acknowledgment for service is not genuine, the Court may on application by the plaintiff set aside the acknowledgment or order the defendant to give an address or, as the case may be, a genuine address for service and may in any case direct that the acknowledgment shall nevertheless have effect for the purpose of Order 10, rule 1(5), and Order 65, rule 9.

NOTES

[12.3.1] Acknowledgment of service by solicitor

Only a Hong Kong qualified solicitor may acknowledge service of proceedings issued out of the Hong Kong court: see *Li Fook Chu v Chung Shau Ching* [2001] 4 HKC 681 (CA).

[12.3.2] Address for service

Order 12 rule 3(2) requires that the defendant give an address within the jurisdiction for service of documents. In *Li Fook Chu v Chung Shau Ching* [2001] 4 HKC 681 the Court of Appeal held that an acknowledgment of service by an English solicitor, giving an address in England for service was defective. Service at that address of pleadings and summonses was set aside.

[12.3.3] Service of documents after acknowledgment of service of originating process

After the filing of an acknowledgement of service, documents relating to the proceedings should be served at the address for service stated on the acknowledgement. At this stage service is known as 'ordinary service' and the provisions of Order 65 rule 5 apply.

[12.3.4] Acknowledgement of service of amended writ

It is clear from form No. 14 in Appendix A that an acknowledgement of service giving notice of intention to defend relates to 'the proceedings', which should mean the legal action identified by the unique proceedings number. It should follow that the acknowledgement is good for the entire proceedings, no matter how they may subsequently be modified by amendment or otherwise, and a fresh acknowledgement of service should not be required when an amended writ is served. This was the position under the pre-1981 procedure whereby a defendant was required to enter an 'appearance' rather than an acknowledgement of service. See *Paxton v Baird* [1893] 1 QB 139 (CA) where Lord Coleridge CJ said (at 141) that it is 'not necessary that there should be a fresh appearance where a writ is amended'. In *Thian Sui Ching v Au Yeung Kwai Chuen & Ors* HCPI 1245/1998 (Suffiad J; 22.10.1999) the court left no room for doubt as to whether a fresh acknowledgement of service would be required by including in an order granting leave to amend the writ, a direction that the previous acknowledgement of service do stand.

[12.3.5] Form of acknowledgement of service
Rule 3(1) prescribes three different forms of acknowledgement of service, for use in different types of proceedings. Note that Forms 14 and 15 (for acknowledgement of service of a writ and originating summons respectively) were amended as part of the civil justice reforms taking effect in 2009, notably to reflect the admission procedure under the new Order 13A.

4. Procedure on receipt of acknowledgment of service (O. 12 r. 4)

On receiving an acknowledgment of service an officer of the Registry must –

- (a) affix to the acknowledgment an official stamp showing the date on which he received it;
- (b) enter the acknowledgment in the cause book with a note showing, if it be the case, that the defendant has indicated in the acknowledgment an intention to contest the proceedings or to apply for a stay of execution in respect of any judgment obtained against him in the proceedings;
- (c) make a copy of the acknowledgment, having affixed to it an official stamp showing the date on which he received the acknowledgment, and send by post to the plaintiff or, as the case may be, his solicitor at the plaintiff's address for service.

NOTES

[12.4.1] Tasks for registry on receipt of acknowledgement of service

Order 12 rule 4 prescribes what the court registry is required to do when it receives an acknowledgement of service. This includes sending a copy to the plaintiff or the plaintiff's solicitor by post. It is thus the duty of the court, not the defendant, to bring the acknowledgement of service to the plaintiff's attention.

Rule 4(b) requires that the registry note in the cause book if the defendant has indicated in the acknowledgment an intention to apply for a stay of execution.

This requirement is obsolete. It refers to the previous form of acknowledgement of service in which the defendant could indicate an intention to apply for a stay of execution of judgment when giving notice that it did not intend to defend the proceedings. The purpose was to enable the defendant to apply for terms of payment so as to discourage frivolous defences designed to procure delay and postpone an inevitable judgment. The forms of acknowledgement of service were amended as part of the civil justice reforms which took effect in 2009; see the commentary under rule 3. Rather than allowing the defendant to indicate an intention to apply for a stay of execution they now allow the defendant to indicate an intention to make an admission under the new Order 13A procedure whereby payment terms can be requested and fixed by the court if not agreed.

5. Time limited for acknowledging service (O. 12 r. 5)

References in these rules to the time limited for acknowledging service are references –

- (a) in the case of a writ served within the jurisdiction, to fourteen days after service of the writ (including the day of service) or

where that time has been extended by or by virtue of these rules, to that time as so extended; and

- (b) in the case of a writ served out of the jurisdiction, to the time limited under Order 10, rule 2(2), Order 11, rule 1(3), or Order 11, rule 4(4), or, where that time has been extended as aforesaid, to that time as so extended.

NOTES

[12.5.1] Service must be acknowledged within 14 days

Order 12 rule 5(a) provides that where a writ is served within Hong Kong, the time limited for acknowledging service is normally 14 days. In the case of a writ served outside Hong Kong, the time limited for acknowledging service will have been fixed by the court granting leave to serve out under one of the provisions referred to in rule 5(b).

Failure to acknowledge service and give notice of intention to defend within the prescribed time may result in default judgment being entered under Order 13. However, if judgment has not been entered, late acknowledgement of service may be given under rule 6.

6. Late acknowledgment of service (O. 12 r. 6)

(1) Except with the leave of the Court, a defendant may not give notice of intention to defend in an action after judgment has been obtained therein.

(2) Except as provided by paragraph (1) nothing in these rules or any writ or order thereunder shall be construed as precluding a defendant from acknowledging service in an action after the time limited for so doing, but if a defendant acknowledges service after that time, he shall not, unless the Court otherwise orders, be entitled to serve a defence or do any other act later than if he had acknowledged service within that time.

NOTES

[12.6.1] Late notice of intention to defend

Order 12 rule 6 provides that a defendant may acknowledge service after the time limited for doing so, and may give notice of intention to defend provided that judgment has not been entered. Such late notice of intention to defend is valid, and any default judgment entered thereafter will be irregular, even if an application for such judgment was submitted before notice of intention to defend was given: *Kwan Tat Chung v Ho Cheuk Kwun (t/a Fat Fai Eng'g Co)* HCPL 381/2002 (Suffiad J, 05.12.2002); *Kerry Freight (HK) Ltd v Del Prado Asia Ltd* [2005] 3 HKLRD 804.

7. Acknowledgment not to constitute waiver (O. 12 r. 7)

The acknowledgment by a defendant of service of a writ shall not be treated as a waiver by him of any irregularity in the writ or service thereof or in any order giving leave to serve the writ or extending the validity of the writ for the purpose of service.

ORDER 21

WITHDRAWAL AND DISCONTINUANCE

1. Withdrawal of acknowledgment of service (O. 21 r. 1)

A party who has acknowledged service in an action may withdraw the acknowledgment at any time with the leave of the Court.

2. Discontinuance of action, etc., without leave (O. 21 r. 2)

(1) Subject to paragraph (2A) the plaintiff in an action begun by writ may, without the leave of the Court, discontinue the action, or withdraw any particular claim made by him therein, as against any or all of the defendants at any time not later than 14 days after service of the defence on him or, if there are two or more defendants, of the defence last served, by serving a notice to that effect on the defendant concerned.

(2) Subject to paragraph (2A) a defendant to an action begun by writ may, without the leave of the Court –

- (a) withdraw his defence or any part of it at any time,
- (b) discontinue a counterclaim, or withdraw any particular claim made by him therein, as against any or all of the parties against whom it is made, at any time not later than 14 days after service on him of a defence to counterclaim or, if the counterclaim is made against two or more parties, of the defence to counterclaim last served,

by serving a notice to that effect on the plaintiff or other party concerned.

(2A) A party in whose favour an interim payment has been ordered, in accordance with Order 29, may not discontinue any action or counterclaim, or withdraw any particular claim therein, except with the leave of the Court or the consent of all the other parties.

(3) Where there are two or more defendants to an action begun by writ not all of whom serve a defence on the plaintiff and the period fixed by or under these rules for service by any of those defendants of his defence expires after the latest date on which any other defendant serves his defence, paragraph (1) shall have effect as if the reference therein to the service of the defence last served were a reference to the expiration of that period.

This paragraph shall apply in relation to a counterclaim as it applies in relation to an action begun by writ with the substitution for references to a defence, to the plaintiff and to paragraph (1), of references to a defence to counterclaim, to the defendant and to paragraph (2) respectively.

(3A) The plaintiff in an action begun by originating summons may, without the leave of the Court, discontinue the action or withdraw any particular question or claim in the originating summons, as against any or all of the defendants at any time not later than 14 days after service on him of the defendant's affidavit evidence filed pursuant to Order 28, rule 1A(2) or, if there are two or more defendants, of such evidence last served, by serving a notice to that effect on the defendant concerned.

(3B) When there are two or more defendants to an action begun by originating summons not all of whom serve affidavit evidence on the plaintiff, and the period fixed by or under these rules for service by any of those defendants of his affidavit evidence expires after the latest date on which any other defendant serves his affidavit evidence, paragraph (3A) shall have effect as if the reference therein to the service of the affidavit evidence last served were a reference to the expiration of that period.

(4) If all the parties to an action consent, the action may be withdrawn without the leave of the Court at any time before trial by producing to the Registrar a written consent to the action being withdrawn signed by all the parties.

NOTES

[21.2.1] Bringing proceedings to an end by withdrawal or discontinuance

Under Order 21 a party may abandon all or part of his claim or defence by 'discontinuance' of the action, statement of claim or counterclaim, or 'withdrawal' of the acknowledgment of service, defence or of a particular claim pleaded.

Where an action is discontinued it comes to an end, but a counterclaim made in the action may continue: see Order 15 rule 2(3).

Where a particular claim in an action or counterclaim is discontinued the claim will continue in its reduced form. Where an acknowledgment of service or defence is withdrawn, the opposing party will be at liberty to enter judgment in default provided that the terms of Order 13 or 19 are complied with.

[21.2.2] Discontinuance without leave

Leave of the court is not required to discontinue an action, claim or counterclaim at the early stages of the proceedings, generally up to 14 days after the opposing party's pleading in response has been served. In other circumstances an action may be withdrawn with consent of all the parties (Order 21 rule 2(4)) or with leave of the court under Order 21 rule 3. An acknowledgment of service may not be withdrawn without leave (Order 21 rule 1). Where there has been order for an interim payment under Order 29, proceedings may not be discontinued or withdrawn save by consent of all the parties or with leave of the court (Order 21 rule 2(2A)).

[21.2.3] Order 21 rule 2 – comparison with English rule

Order 21 rule 2 is similar but not identical to the rule of the same number in the previous English RSC. The equivalent provision in England is now in CPR Part 38.

Order 21 rule 2(2A) (which provides that a party in whose favour an interim payment has been ordered must obtain leave to discontinue or withdraw) was, under the English RSC, confined to interim payments under Order 29 rule 11, whereas the Hong Kong rule simply refers to Order 29. Hence the Hong Kong rule is wide enough to cover interim payments under Order 29 rule 12 as well.

[21.2.4] Wording of Order 21 rule 2

Order 21 rule 2(3A) (which provides for discontinuance or withdrawal of claims in proceedings commenced by originating summons) mistakenly refers to sub-

rule 1A(2) of Order 28, which deals with plaintiffs' rather than defendants' evidence. It should refer to sub-rule 1A(4), as did its counterpart under the English RSC.

[21.2.5] Costs on withdrawal or discontinuance without leave

A plaintiff who withdraws or discontinues without leave under Order 21 rule 1 or 2 is liable for costs up to that point and the defendant may proceed to taxation under Order 62 rule 10(1). The situation is different where leave is sought under Order 21 rule 3, in which case the court has a discretion as to costs. See the commentary under that rule.

It is open to a party who might withdraw or discontinue without leave instead to apply for leave under rule 3 simply in order to have an opportunity to seek a more favourable order as to costs: *Trend Publishing (HK) Ltd v Vivien Chan & Co* [1996] 3 HKC 433, 436D-G.

In *Supply Chain Logistics Technology Ltd v NEC Hong Kong Ltd* HCA 1939/2006 (Lam J; 24.11.2008) notice of discontinuance was served without leave after the expiration of the period within which that is permitted. The court treated the notice as an application for leave to discontinue and held that it retained jurisdiction to decide what costs order to make.

3. Discontinuance of action, etc., with leave (O. 21 r. 3)

(1) Except as provided by rule 2, a party may not discontinue an action (whether begun by writ or otherwise) or counterclaim, or withdraw any particular claim made by him therein, without the leave of the Court, and the Court hearing an application for the grant of such leave may order the action or counterclaim to be discontinued, or any particular claim made therein to be struck out, as against any or all of the parties against whom it is brought or made on such terms as to costs, the bringing of a subsequent action or otherwise as it thinks just.

(2) An application for the grant of leave under this rule may be made by summons or by notice under Order 25, rule 7.

(L.N. 252 of 2008)

NOTES

[21.3.1] Discretion to grant leave to discontinue or withdraw

The court has a broad discretion under Order 21 rule 3 to grant leave to discontinue or withdraw. It is necessary to make an *inter partes* application for leave in any case outside Order 21 rule 2 (relating to discontinuance and withdrawal without leave or by consent).

In *Hang Seng Bank Ltd v Yeung Sau-min* [1986] HKLR 273 it was held that the court's power under Order 21 rule 3 extends to granting leave to discontinue foreclosure proceedings even after an order *nisi* has been granted. *Stevens v Theatres Ltd* [1903] 1 Ch 860 was not followed.

[21.3.2] Power to impose terms on leave to discontinue or withdraw

Under Order 21 rule 3(1) the court has power to impose terms when it grants leave to discontinue or withdraw. The rule specifically mentions terms as to costs and as to the bringing of a subsequent action. Terms prohibiting the bringing of subsequent

proceedings have the effect of ousting application of Order 21 rule 4 which provides that in the absence of such terms discontinuance or withdrawal is not a bar to fresh proceedings for the same cause of action. See the commentary under Order 21 rule 4.

The court's power to impose terms on leave to discontinue or withdraw is discretionary. The circumstances in which the court will exercise the discretion were considered in *Inchroy Credit Corp Ltd v Cheung Man Cheung* [1992] 1 HKLR 120. There Kaplan J cited with approval the test laid down in *Chappie Ltd v Warrington Cammery Ltd* (1955) 72 RPC 343, where Wynn-Parry J said, at 344:

It is quite clear from the authorities that I ought only to impose conditions if, upon a fair view of the whole of the relevant circumstances, the imposition thereof is necessary, either for the protection of the defendants or in the public interest.

In the *Inchroy Credit* case the plaintiff sought leave to discontinue an action claiming outstanding instalment payments under a hire-purchase agreement. The debt had been paid by a third party. Kaplan J upheld a master's order granting leave to discontinue subject to the condition that no fresh proceedings be commenced against the defendant under the hire-purchase agreement. In *Trend Publishing (HK) Ltd v Vivien Chan & Co (a firm)* [1996] 3 HKC 433 it was held that an order prohibiting fresh proceedings is appropriate where leave to discontinue is granted in circumstances where the dispute is at an end.

[21.3.3] Costs on withdrawal or discontinuance with leave

The court's power under Order 21 rule 3(1) to impose terms on granting leave to discontinue or withdraw expressly extends to terms as to costs. In considering what order to make the court has a 'complete discretion to do justice between the parties': *Trend Publishing (HK) Ltd v Vivien Chan & Co* [1996] 3 HKC 433, 437A.

In exercising the discretion the court will normally order costs against the party given leave to withdraw or discontinue, particularly where the application for leave can be equated with an acknowledgement of likely defeat: *Trend Publishing* (above); *Inchroy Credit Corp Ltd v Cheung Man Cheung* [1991] 2 HKC 619; [1992] 1 HKLR 120. However, even in such cases the court retains a discretion: see (*Trend Publishing* above at 437A) and *Inchroy* (above). In 'exceptional' cases the court may depart from the usual rule: *Leung Yuet Ching v Leung Yuet Kuen* [2001] 4 HKC 562, 569G, citing *Drown v Gaumont-British Picture Corp Ltd* [1937] 2 All ER 609. In *Lai Kwok Bah Kenneth & Ors v Leung Kwok Hung Jonathan & Ors* LDBM 292/2004 (Judge Wong; 25.05.2010), adopting the approach in *Brawley v Marczynski & Anor* [2004] 4 All ER 1060, no order as to costs was made where it was not possible to say what the likely outcome would have been. In *Robbins & Anor v Peaktop Technologies (USA) HK Ltd* HCMP 2456/2006 (Barma J; 16.05.2007) the court went so far as to make an order for costs in favour of the applicants on granting them leave to withdraw an application. Examples of circumstances where the court might exercise its discretion differently include:

- The matter has become academic: *Standard Chartered Bank (HK) Trustee Ltd v Brogan* [1990] 2 HKC 560, 564G-H, particularly where this results from something done by the defendant: *Hachette Filipacchi Presse v Kador Ltd* [1995] 1 HKC 352, 356D.

(b) 2 copies of the notice of appeal, one of which shall be endorsed with the amount of the fee paid, and the other endorsed with a certificate of the date of service of the notice.

(2) Upon the said documents being left, the Registrar shall file one copy of the notice of appeal and cause the appeal to be set down in the list of appeals, and the appeal shall come on to be heard according to its order in that list unless the Court of Appeal or a single judge or the Registrar otherwise orders.

NOTES

[60A.4.1] Procedure on setting down appeal

Order 60A rule 4, not Order 59 rule 5, prescribes the procedures for setting down an appeal from a tribunal to which this Order applies: *Gallium Development Ltd & Ors v Winning Properties Management Ltd & Anor* CACV 186/2003 (Registrar Levy, 31.10.2003). In that case it was held that a sealed copy of the order of the Lands Tribunal is not required to set down the appeal.

5. Application of Order 59 (O. 60A r. 5)

Order 59, rules 9 and 10 shall, so far as applicable, apply to an appeal to which this Order applies.

NOTES

[60A.5.1] Powers of the Court of Appeal

According to Order 60A rule 5, Order 59 rule 10 shall, so far as is applicable, apply to an appeal to which Order 60A applies. For the effect of this rule, see the notes under Order 59 rule 10.

Also relevant in this context is section 13(4) of the High Court Ordinance which provides that, for the purposes of and incidental to the hearing and determination of an appeal to the Court of Appeal, the Court of Appeal shall have all the authority and jurisdiction of the court or tribunal from which the appeal was brought. The effect is that, for example, when hearing an appeal from the Lands Tribunal, the Court of Appeal will have all the powers of the Lands Tribunal in making appropriate orders.

6. Duty of Registrar to notify tribunal of result (O. 60A r. 6)

The Registrar shall notify the tribunal of the decision of the Court of Appeal on the appeal and of any direction given by the Court therein. (Enacted 1988)

ORDER 61

APPEALS FROM TRIBUNALS TO COURT OF APPEAL BY WAY OF CASE STATED

2. Statement of case by tribunals (O. 61 r. 2)

(1) Where any tribunal is empowered or may be required to state a case on a question of law for determination by the Court of Appeal, any party to the proceedings who is aggrieved by the tribunal's refusal to state a case may apply to the Court of Appeal or a single judge of that Court for an order requiring the tribunal to state a case.

(2) An application under this rule must be made by motion and the notice of the motion, stating in general terms the grounds of the application, together with the question of law on which it is desired that a case shall be stated and any reasons given by the tribunal for its refusal, must within 28 days after the refusal, be served on the clerk or registrar of the tribunal and on every other party to the proceedings before the tribunal. (L.N. 152 of 2008)

(3) Within 2 days after service of the notice of motion, the applicant must lodge two copies of the notice with the Registrar who shall enter the motion in the list of appeals.

(4) Where a tribunal is ordered under this rule to state a case, the tribunal must, within such period as may be specified in the order, state a case stating the facts on which the decision of the tribunal was based and the decision, sign it and cause it to be sent by post to the applicant.

(4A) Where the decision of the tribunal in respect of which a case is stated states all the relevant facts found by the tribunal and indicates the questions of law to be decided by the Court of Appeal, a copy of the decision signed by the person who presided at the hearing shall be annexed to the case, and the facts so found and the question of law to be decided shall be sufficiently stated in the case by referring to the statement thereof in the decision.

NOTES

[61.2.1] Comparison with English rules

Order 61 rule 1 of the former English RSC has been omitted from the Hong Kong rules. It dealt specifically with appeals by way of case stated from the English Lands Tribunal. Appeals from the Hong Kong Lands Tribunal are dealt with by the Court of Appeal under Order 60A (above).

Order 61 rule 2(4A) is taken from Order 61 rule 1(4) of the former English RSC. Whereas the former English RSC applies to appeals from the Lands Tribunal, in Hong Kong the rule has general effect.

[61.2.2] Scope of Order 61

Order 61 governs some aspects of the procedure for an appeal from a tribunal to the Court of Appeal by case stated on a point of law. Such an appeal may only be brought where provided for in primary legislation, which is rare.

The following are some examples of legislation providing for reference of points of law to the Court of Appeal by way of case stated:

- Air Pollution Control Ordinance (Cap 311) s 36
- Waste Disposal Ordinance (Cap 354) s 29
- Water Pollution Control Ordinance (Cap 358) s 34
- Dumping at Sea Ordinance (Cap 466) s 31
- Hong Kong War Memorial Pensions Ordinance (Cap 386) s 15

[61.2.3] Rule 2 – order to compel tribunal to state case

Order 61 rule 2 provides a remedy to a party aggrieved by the failure or refusal of a tribunal to state a case. The aggrieved party may, under the rule, apply for an order to compel the tribunal to state a case. The rule applies where a tribunal is empowered or may be required to state a case on a question of law for determination by the Court of Appeal. Note that the time for making application was increased from 21 to 28 days under the civil justice reforms which took effect in 2009.

3. Proceedings on case stated (O. 61 r. 3)

(1) The party at whose instance a case has been stated by any tribunal to which this Order applies must, within 28 days after receiving the case—

(L.N. 152 of 2009)

(a) serve on every other party to the proceedings before the tribunal a copy of the case, together with a notice setting out his contentions on the question of law, and

(b) serve a copy of the notice on the clerk or registrar of the tribunal.

(2) Within 2 days after service of the notice, the said party must lodge the case and two copies of the notice with the Registrar who shall enter the case in the list of appeals, and the case shall not be heard until after the expiration of 28 days from the date of entry.

(L.N. 152 of 2009)

(3) Where any enactment under which the case is stated provides that a government department shall have a right to be heard in the proceedings on the case, a copy of the case and of the notice served under paragraph (1) must be served on that department and on the Secretary for Justice.

(4) On the hearing of the case, the Court of Appeal may amend the case or order it to be sent back to the tribunal for amendment.

(5) Order 59, rule 10, shall, so far as applicable, apply in relation to a case stated by a tribunal to which this Order applies.

(6) The Registrar shall notify the clerk or registrar of the tribunal of the decision of the Court of Appeal on the case and of any directions given by that Court thereon.

(Enacted 1986)

NOTES

[61.3.1] Comparison with English rule

Note that in Hong Kong, unlike England, service of the Secretary for Justice is required where a government department has a right to be heard on a reference by case stated. See rule 3(3).

[61.3.2] Scope of hearing

In *Commissioner of Inland Revenue v Emerson Radio Corp* [1999] 2 HKC 255, 263C–264E (CA) Rogers JA held that the Court of Appeal is not confined to questions of law raised in the case stated. The other judges on that appeal did not make this point, nor is it dealt with in the subsequent appeal to the CFA ([2000] 1 HKC 155), but it may be supported by Order 61 rule 3(4) which allows the Court of Appeal to amend the case stated.

On the other hand, the decision might be distinguishable on the basis that it did not concern an appeal to the Court of Appeal under Order 61, but an appeal to the Court of First Instance under the Inland Revenue Ordinance, which was subsequently further appealed to the Court of Appeal.