

summons under O.14 (see *Crockfords Club Ltd v. Mehta* [1992] 1 W.L.R. 355; [1992] 2 All E.R. 748), and likewise it may be included in a summons for striking out any pleadings under O.18, r.19 or under the inherent jurisdiction of the court. However, the important distinction should be observed between the contents of the affidavits for the purposes of O.14 (see O.14, r.2(2) and r.4(2)) or for the purposes of O.18, r.19 (see O.41, r.5(1)) which may contain statements of information and belief with the sources and grounds thereof, and the affidavits for the purposes of r.1, which may contain only such facts as are within the personal knowledge of the deponent (O.41, r.5(1)).

14A/2/8 Oral application—A helpful innovation has been made which enables a party to make an application under r.1 orally in the course of any interlocutory application to the court (r.2). Experience has shown that occasionally a question of law emerges during the hearing of an interlocutory application, e.g. relating to pleadings or discovery or evidence, the determination of which would finally dispose of the whole action or at any rate a claim or issue in it. In such event, instead of adjourning the proceedings to enable an application under r.1 to be made at a later date, the court is enabled on the application of a party, and after having heard or after hearing the parties on that question, to proceed directly there and then to determine that question and finally to dispose of the whole action or the particular claim or issue in it. Indeed, in such event, the court may act of its own motion, after hearing the parties, to determine the question of law and dispose of the action (see r.1(1)).

14A/2/9 Final judgment or order—Upon making its determination of the question of law or construction, the court may dismiss the action or make such order or judgment as it thinks just (r.1(2); cf. O.33, r.7). In this way, the action will be finally disposed of without a full trial and the judgment or order will have the same force and effect as the judgment or order after a full trial of the action.

14A/2/10 Appeal—An appeal against the order or judgment made or given by the master under r.1(2) lies in the ordinary way to the judge in chambers (O.58, r.1).

Under the new O.59, r.2B, leave to appeal against an interlocutory judgment of the court is necessary, save that this does not apply in respect of judgments or orders which determine, in a summary way, the substantive rights of a party to an action, which includes a judgment or order determining any question of law or the construction of any document under O.14A, r.1(1), or a judgment or order made under O.14A, r.1(2) dismissing any cause or matter upon determination of a question of law or construction of any document: see O.59, r.21(1) (a) and O.59, r.21(2) (c) and (d). As to what other judgments or orders determine the substantive rights of a party "in a summary way", it may be that some guidance can be sought from the pre-CJR decisions of *Shell Hong Kong Ltd v. Yeung Wai Man Kin Yip Co. Ltd & Anor.* (2003) 6 H.K.C.F.A.R. 222 (see paras 31-33, per Chan P.J.) and *Huaxin (Hong Kong) Co. Ltd v. Cheerful Corp. and Ors* (unrep., CACV 343/2003) (see para.33, per Waung J.).

ORDER 15

CAUSES OF ACTION, COUNTERCLAIMS AND PARTIES

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- Related Sources**
- Limitation Ordinance (Cap. 347), s.35 (new claims in pending actions: rules of court)
 - RHC, 1A (Objectives)
 - RHC, 1B (Case Management Powers)
 - RHC, O.4, r.9 (Consolidation, etc., of causes or matters)
 - RHC, O.5 (Mode of beginning civil proceedings in the Court of First Instance)
 - RHC, O.16 (Third party and similar proceedings)
 - RHC, O.18, r.2 (Service of defence)

- Forms**
- The following Prescribed Form in Appendix A is relevant to O.15:
- No. 14—Acknowledgment of Service of Writ of Summons (O.15, r.3)
 - No. 17—Notice to be indorsed on copy of counterclaim (O.15, r.3(6))

Joinder of causes of action (O.15, r.1)
1.—(1) Subject to rule 5(1) a plaintiff may in one action claim relief against the same defendant in respect of more than one cause of action—

- (a) if the plaintiff claims, and the defendant is alleged to be liable, in the same capacity in respect of all the causes of action, or
- (b) if the plaintiff claims or the defendant is alleged to be liable in the capacity of executor or administrator of an estate in respect of one or more of the causes of action and in his personal capacity but with reference to the same estate in respect of all the others, or
- (c) with the leave of the Court.

(2) An application for leave under this rule must be made ex parte by affidavit before the issue of the writ or originating summons, as the case may be, and the affidavit must state the grounds of the application.

Effect of rule—Rule 1 relates to the joinder of causes of action, and it assumes that the action has been rightly constituted: once two or more persons have properly been joined as plaintiffs, the question what causes of action can be joined with claims in respect of which they were joined as plaintiffs depends on this rule (*Harris v. Ashworth* [1962] 1 W.L.R. 193; [1962] 1 All E.R. 438).

Subject to r.5, and to sub-para (a) and (b), a plaintiff may without leave join in one action several causes of action, even if in the alternative against the same defendant. No leave is now required to join other causes of action with a claim for the recovery of land.

Where relief is sought in respect of several distinct claims founded on distinct grounds, they must be stated separately and distinctly.

Although any number of causes of action may be joined in the first instance, some of these may be excluded or ordered to be tried separately if the joinder may embarrass or delay the trial or is otherwise inconvenient, see r.5. The plaintiff must therefore, if necessary, justify the joinder as being reasonable and convenient. Where a joinder may cause delay, it is necessary to weigh up the advantages from a joinder against the delay (see *Fortis Bank Asia HK v. Sino Global International Ltd* [2002] 2 H.K.L.R.D. 1062).

Since the introduction of the 2009 Civil Justice Reforms the Court will also consider the underlying objectives.

15/1/2

Meaning of "cause of action"—The words "cause of action" comprise every fact (though not every piece of evidence) which it would be necessary for the plaintiff to prove, if traversed, to support his right to the judgment of the court (see *Read v. Brown* (1888) 22 Q.B.D. 128, per Lord Esher M.R. at 131). "If the plaintiff alleges the facts which, if not traversed, would prima facie entitle him to recover, then he makes out a cause of action" (per Lord Esher M.R. in *Coburn v. Colledge* [1897] 1 Q.B. 702 at 707, CA, approved and applied in *Central Electricity Board v. Halifax Corp.* [1963] A.C. 785, see, per Lord Reid at 800). The phrase comprises every fact which is material to be proved to enable the plaintiff to succeed (see *Cooke v. Gill* (1873) L.R. 8 C.P. 107, per Brett J. at 108, and cf. *Buckley v. Hann* (1850) 5 Exch. 43; *Herrneman v. Smith* (1855) 10 Exch. 659, per Parke B. at 666, but as to where a cause of action arises, see *Distillers Co. (Biochemicals) Ltd v. Thompson* [1971] A.C. 458, PC, applying *Jackson v. Spittall* (1870) L.R. 5 C.P. 542). The words have been defined as meaning "simply a factual situation the existence of which entitles one person to obtain from the Court a remedy against another person" (per Diplock L.J. in *Letang v. Cooper* [1965] 1 Q.B. 232 at 242, who also explained *ibid.* at 243 the historical and terminological connections between "forms of actions" and "causes of action"); *Yan How Yee v. Yu Kin Sang Paul* (unrep., HCA 1069/2008, [2009] H.K.E.C. 1889) (commenting on the status of a company where a derivative action is brought).

The requirement for the service of a "demand for payment for work done" is a mere procedural step which does not form part of the cause of action and therefore the period of limitation begins to run from the date of the completion of the work (*Swansea City Council v. Glass* [1992] Q.B.; [1992] 2 All E.R. 680, CA).

15/1/3

Party in more than one capacity—The same person cannot be both a plaintiff and a defendant in the same action, or an applicant and a respondent to the same summons; see *Lias v. Kerr* [1910] 1 Ch. 529 at 537. It makes no difference that the same person is in different capacities, i.e. he cannot be defendant as administrator of A and also plaintiff as executor of B. "Person" in this connection means legal person; consequently there is no objection to a plaintiff being a member of a defendant corporation. A committee of a corporation cannot sue the plaintiff, guardian *ad litem* of a defendant.

The name of a person who is a party in more than one capacity, e.g. in a personal and a representative capacity, must be inserted only once in the record. A note will be added that he sues or is sued both personally and "as trustee of the will of—" or, as the case may be (per Sargant L.J., in *Hardie and Lane Ltd v. Chilern* [1928] 1 K.B. 663 at 699).

15/1/4

Claims by or against executor or administrator—Sub-paragraph (b) excludes personal claims by or against an executor or administrator which have no reference to the estate (*Whitworth v. Darbishire* (1919) 41 W.R. 317). If the plaintiff desires to join such claims in one action, he must first obtain leave under sub-para.(c) and if such joinder will not cause inconvenience, it may be allowed (reversing *Tredegar v. Roberts* [1944] 1 K.B. 283, CA, where the joinder was not allowed under the former rule). Thus, where arising out of the same accident a widow has a claim in her personal capacity for personal injuries and also a claim as administratrix of the estate of her husband under the Law Amendment and Reform (Consolidation) Ordinance (Cap. 23) and under the Fatal Accidents Ordinance (Cap. 22), she may now obtain leave to join these claims in one action.

Where the executor or administrator has been dealing with the assets, or making contracts in the course of the administration, properly and fairly, in his character of executor or administrator, it becomes a question whether, the contracts being personally entered into by him, he should be sued in his character of legal personal representative, or in his personal character (Hall V.-C., *Padwick v. Scott* (1876) 2 Ch.D. 736 at 743; *Harding v. Harding* (1886) 17 Q.B.D. 442 at 446). See *Prince v. Haworth* [1905] 2 K.B. 768.

In *Re Richardson* [1933] W.N. 90 (overruling *Macdonald v. Carrington* (1879) 4 C.P.D. 28), it was held that when a plaintiff sued personally, a counterclaim may be raised against him as executor.

15/1/5

Leave to join causes of action—Sub-paragraph (c) confers on the court power to give leave for several causes of action to be joined in the same action, in whatever capacity the claims are made by or against a party. Thus, personal claims by or against executors or administrators

may with leave be joined with claims against them in their representative capacity, see para.15/1/4. Again, claims by or against a trustee in bankruptcy may with leave be joined with any claim by or against him in any other capacity.

The practice is for the supporting affidavit to be left with the master's secretary with a copy of the proposed writ, and the practice master will indorse his leave on the affidavit. The order is not usually drawn up.

Unless the proposed joinder of causes of action is glaringly improper or is obviously embarrassing or likely to cause delay or inconvenience, leave to join several causes of action will generally be allowed, leaving the defendant to object that they cannot be conveniently tried together or that the joinder may cause embarrassment or delay, see r.5.

Objection to misjoinder of causes of action—Where the plaintiff has not obtained the requisite leave and so has improperly joined several causes of action in the same action, the defendant may give notice of intention to defend and apply to set aside the writ under O.12, r.8. Subject to the question of costs, the court may give leave retrospectively under its powers under O.2, r.1.

If the defendant takes a step in the action without raising the objection, he waives the irregularity (*Lloyd v. G. W., etc., Dairies Co.* [1907] 2 K.B. 727, CA, explaining *Re Pilcher, Pilcher v. Hinds* (1879) 11 Ch.D. 905. See also *Au Hin Man v. Au Yat Chor*, unreported, HCA No. 10353 of 2000, November 19, 2003, [2003] H.K.E.C. 1375); but the objection may be taken after giving notice of intention to defend before taking any step (*Hunt v. Worsfold* [1896] 2 Ch.224). It is too late to object at the trial (*Re Derbon* (1888) 58 L.T. 519). This contrasts with an application under r.5 which may be made even as late as the trial; see para.15/5/1.

Where the plaintiff has properly joined several causes of action in the same action, with or without leave, the defendant cannot apply to set aside the writ or the service (*Sandes v. Wildsmith* [1893] 1 Q.B. 771) but must apply under r.5, on the ground that such joinder may embarrass or delay the trial or is otherwise inconvenient. In the case in which joinder of causes of action is permissible under this rule, such joinder is a matter of right, but it is discretionary in the court under r.5, whether to allow such joinder to continue.

Counterclaim against plaintiff (O.15, r.2)

2.—(1) Subject to rule 5(2), a defendant in any action who alleges that he has any claim or is entitled to any relief or remedy against a plaintiff in the action in respect of any matter (whenever and however arising) may, instead of bringing a separate action, make a counterclaim in respect of that matter; and where he does so he must add the counterclaim to his defence.

(2) Rule 1 shall apply in relation to a counterclaim as if the counterclaim were a separate action and as if the person making the counterclaim were the plaintiff and the person against whom it is made a defendant.

(3) A counterclaim may be proceeded with notwithstanding that judgment is given for the plaintiff in the action or that the action is stayed, discontinued or dismissed.

(4) Where a defendant establishes a counterclaim against the claim of the plaintiff and there is a balance in favour of one of the parties, the Court may give judgment for the balance, so, however, that this provision shall not be taken as affecting the Court's discretion with respect to costs.

Application of rule—A counterclaim may be looked at from two aspects, first, in relation to parties, as dealt with in this rule and r.3, and secondly, in relation to pleadings, as dealt with in O.18, r.18.

The procedure by counterclaim is now encapsulated in High Court Ordinance (Cap. 4), s.16. In the RHC, so far as practicable the counterclaim is assimilated to the position of a statement of claim indorsed on a writ of summons. Under these rules the position of a counterclaim is as follows:

1. Defendant may apply for summary judgment on counterclaim (see O.14, r.5).
2. Defendant may counterclaim against plaintiff (see para.(1)).
3. Defendant making a counterclaim institutes proceedings in respect of the counterclaim, just as the plaintiff institutes proceedings in respect of the claim (*Att.-Gen. v. Jones* [1990] 1 W.L.R. 859; [1990] 2 All E.R. 636, CA).
4. Defendant may counterclaim against added party along with plaintiff or for relief relating to or connected with the original subject-matter of the action, r.3(1) and with leave serve it out of the jurisdiction (see r.3(5)).
5. Defendant counterclaiming against additional party or parties must issue the counterclaim out of the appropriate court office and serve it as if it was a writ (see r.3(2)).
6. Plaintiff may counterclaim to counterclaim by defendant, para.(2) and see *Renton, Gibbs & Co. v. Neville* [1900] 2 Q.B. 181.

7. Third-party procedure applies to a counterclaim, O.16, r.11, and see *The Normar* [1968] P. 362; [1968] 1 All E.R. 753 (defendant counterclaiming against counterclaim of third party).
8. Rules of pleading apply to counterclaim and defence to counterclaim as though they are respectively a statement of claim and a defence (see O.18, r.18).
9. Defendant counterclaiming against added party may enter, or apply by summons for, judgment in default of acknowledgment of service against such party under O.15, r.3(5).
10. Defendant counterclaiming against plaintiff may enter, or apply by summons for, judgment in default of defence to counterclaim under O.19, r.8.
11. Counterclaim may be amended without leave (see O.20, r.3).
12. Counterclaim may be discontinued or withdrawn without leave (see O.21, r.2(b)).
13. Rules of offers to settle and payment into court apply to a counterclaim, so that (1) the defendant must state whether his offer to settle or payment in has taken his counterclaim into account (see O.22, r.5(3) and r.8(2)) and (2) an offer to settle or payment into court may be made to satisfy a counterclaim.
14. Counterclaim may be made in an action begun by originating summons (see O.28, r.7).

Where the counterclaim ought to be disposed of, not together with or as part of the action, but by a separate action, the court may order it to be struck out or tried separately (see r.5(2)). The court may refuse to allow a late addition of a counterclaim if to do so would lead to an unreasonable delay to the proceedings: *City Express Investments Ltd & Others v. Zhang Da Wai* (unrep., CACV 310/2007, July 2, 2008 and CACV 311/2007, November 7, 2008; [2008] H.K.E.C. 1873).

As to counterclaim for revocation in an action for infringement of patent, see O.103, r.19(4).

In actions for damage by collision where the defendants counterclaim, the court has no power under O.75, r.27 to order security to be given by the defendants or to stay defendants' counterclaim in default thereof (negating *The Neptune* [1919] P. 17). As to arrests, see O.75, r.5(1). A defendant may only make a counterclaim against the plaintiff under O.15, r.2, not another defendant. Thus, a defendant in a derivative action may not make a counterclaim against the company on whose behalf the derivative action is brought under this rule since that company is joined as defendant and is not a plaintiff. See *Yan How Yee v. Yu Kin Sang Paul* (unrep., HCA 1069/2008, [2009] H.K.E.C. 1889).

15/2/2 Extent of counterclaim—A counterclaim may be for either liquidated or unliquidated damages; it may exceed in amount the plaintiff's claim, or be less than it. It may have arisen since writ (*Beddall v. Maitland* (1881) 17 Ch.D. 174 at 187) and may be amended so as to add a cause of action which was not in existence at the date of the writ (see *Fong Yock Yee v. Hong Kong Chung Shan Lung Chan Clan Association* [2004]). In short, if the defendant has a valid cause of action of any description against the plaintiff, there is no necessity for him to bring a cross-action, unless his cause of action is of such a nature that it cannot be conveniently tried by the same tribunal or at the same time as the plaintiff's claim (see r.5(2)).

A counterclaim may be barred by the Limitation Ordinance (Cap. 347) but for the purposes of that Ordinance a claim by way of set-off or counterclaim is deemed to be a separate action and in some circumstances to have been commenced on the same date as the action in which it is pleaded. (See s.35, Limitation Ordinance (Cap. 347).) This section, however, does not apply to actions for which a period of limitation is prescribed by any other enactment. See e.g. the Carriage of Goods by Sea Ordinance (Cap. 462).

A set-off remains what it was—a defence to the plaintiff's claim or to a portion of it, see O.18, r.17. Every set-off can be pleaded as a counterclaim, if the defendant so desires; but not every counterclaim can be pleaded as a set-off. As to the distinction between a set-off and a counterclaim, see *Sun Legend Investments Ltd v. Ho Yuk Wah David* (unrep., HCA 1212 and 2915/2002, [2010] H.K.E.C. 213). A counterclaim is practically a cross-action; and the court will give judgment in the plaintiff's action both on claim and counterclaim, see para. (4).

The defendant's counterclaim need not be "an action of the same nature as the original action" (*per Fry J.*, in *Beddall v. Maitland* (1881) 17 Ch.D. 174 at 181) or even analogous thereto. A claim founded on tort may be opposed to one founded on contract, or *vice versa* (*per Cockburn, C.J.*, in *Stoake v. Taylor* (1880) 5 Q.B.D. 569 at 576). But if a third person is added as a co-defendant to the counterclaim against the plaintiff, the relief must relate to or be connected with the subject-matter of the original action (see r.3).

To a joint claim by two plaintiffs, a counterclaim against them jointly or a separate counterclaim against each of them will be allowed (*M. S. & L. Ry and L. & N. W. Ry v. Brooks* (1877) 2 Ex.D. 243); or the defendant may counterclaim against one plaintiff and deny all liability to the other. And on a counterclaim against two plaintiffs, the defendant may recover judgment against one (*Hall v. Fairweather* (1902) 18 T.L.R. 58). A joint claim against two partners may be set up as a counterclaim against a separate claim by one of them (*Eyre v. Moring* [1884] W.N. 58). And where a plaintiff brought an action against a married woman, and joined her husband as a co-defendant for conformity, a joint counterclaim by husband and wife was allowed (*Hodson v. Mochi* (1878) 8 Ch.D. 569).

15/2/3 Making a counterclaim—The right of action by way of counterclaim can only be exercised by the service of a pleading embodying the counterclaim or of some other document which the court orders to stand as a pleading, since a counterclaim is not made by referring to facts,

alleged to constitute such a counterclaim, in an affidavit filed in opposition to an application for summary judgment under O.14 (*Impex Transport Aktieselskabet v. A.G. Thames Holdings Ltd* [1981] 1 W.L.R. 1547; [1982] 1 All E.R. 897; [1981] C.M.L.R. 153). A counterclaim is made when it is properly formulated and pleaded and, when made, it must be added to the defence (see para. (1)). But the service or filing of a "notice of counterclaim" without any previous pleadings is not a proceeding directed or recognised by the rules and does not constitute the "making" of a counterclaim and such a notice will be set aside as an irregular proceeding (*The Gniezno* [1968] P. 418; [1967] 2 All E.R. 738).

A Mareva injunction was held to be the "making" of a counterclaim in *Fahih Brothers v. Moller (Copenhagen)* [1994] 1 Lloyd's Rep. 103. Hobhouse J. ruled it would not have been proper to grant defendants this relief except on the basis that a counterclaim was being made.

A statement to the plaintiff of an intention to make a counterclaim does not amount to making it within the rule.

On the other hand, where a counterclaim has been raised but has not been formally pleaded or made the subject of a case management summons or no directions are given on the summons for summary judgment under O.14, once judgment for a party has been obtained and fully satisfied, there is no action in existence in which the counterclaim can be made and therefore no counterclaim can be served by the defendant on the plaintiff (*CSI International Co. Ltd v. Archway Personnel (Middle East) Ltd* [1980] 1 W.L.R. 1069; [1980] 3 All E.R. 215, CA).

To what extent a counterclaim is an independent action—A counterclaim is substantially a cross-action, not merely a defence to the plaintiff's claim. It must be of such a nature that the court would have jurisdiction to entertain it as a separate action (*Bow McLachlan & Co. Ltd v. Ship Camosun* [1999] A.C. 597; *Williams v. Agius* [1914] A.C. 510). "A counterclaim is to be treated, for all purposes for which justice requires it to be so treated, as an independent action" (*per Bowen L.J.*, in *Amon v. Bobbett* 22 Q.B.D. 543 at 548, approved in *Fong Yock Yee v. Hong Kong Chung Shan Lung Chan Clan Association* [2004] H.K.C.U. 329; see also *Hong Kong Jie Hing Trading Co. Ltd v. Pacific Commercial Co. Ltd.* (unrep., HCA 2167 of 2005) [2006] H.K.E.C. 1933). If, after the defendant has pleaded a counterclaim, the action of the plaintiff is for any reason stayed, discontinued or dismissed, the counterclaim may nevertheless be proceeded with (para. (3)). As discussed or dismissed, the counterclaim may proceed as a separate action when a defence has been properly pleaded a counterclaim may proceed as a separate action when a defence has been struck out (*ASA Engineering Co. Ltd v. Super Link Co. Ltd.* unreported, CACV No. 33 of 1991, struck out (April 24, 1991) [1991] H.K.L.Y. 81, CA). Thus, where the plaintiff's claim was held to be frivolous, the court still granted the defendant the relief prayed for by his counterclaim (*Adams v. Adams* (1892) 45 Ch.D. 426; [1892] 1 Ch. 369). In short, for all purposes except those of execution, a claim and a counterclaim are two independent actions (*per Lord Esher M.R.*, in *Stamore v. Campbell & Co.* [1892] 1 Q.B. 314 at 317). And the court will therefore in a proper case order a counterclaiming defendant to give security for costs (*Sykes v. Sacerdoti* (1885) 15 Q.B.D. 423; *Lake v. Haseltine* (1885) 53 L.J.Q.B. 205), but not where the counterclaim is in substance a defence to the action (*Neck v. Taylor* [1893] 1 Q.B. 560). The issues of fact raised by the claim and counterclaim should as a rule be tried together, as that was the defendant's object in pleading the counterclaim (*Piery v. Young* (1880) 15 Ch.D. 475 at 478) and an order will not be made on the application of the defendant to have the issues raised by his counterclaim tried before the plaintiff's issues in the action (*Win Source Int'l v. William Abvia Hui & Ors* [2008] H.K.C.U. 1836). A defendant cannot amend its counterclaim to plead a cause of action which arose after the date of the counterclaim (see *obiter dicta* of Mutrie D.J. in *Fong Yock Yee v. Hong Kong Chung Shan Lung Chan Clan Association* [2004] H.K.C.U. 329, c.f. *Vax Appliances Ltd v. Hoover plc*, [1990] R.P.C. 656).

A counterclaim may be stayed under s.6 of the Arbitration Ordinance (Cap. 341) (see *Pollard Construction Co. Ltd v. Yung Yat Fan (t/a Golden Year & Co.)* [1999] 3 H.K.C. 109 and *Spartali v. Van Hoorn* [1884] W.N. 32; *Chappell v. North* [1891] 2 Q.B. 252).

For two instances in which a counterclaim operates only as a defence and not as a cross-action, see para.15/2/8.

Counterclaim to a counterclaim—Paragraph (2) enables the plaintiff to raise a counterclaim to the counterclaim raised by the defendant against him, even though the plaintiff's counterclaim may be no more than a mere protection against the defendant's counterclaim, and even though the cause of action on which it is founded arose after the issue of the writ. See *Take v. Andrews* (1882) 8 Q.B.D. 428; *Renton Gibbs & Co. Ltd v. Neville & Co.* [1900] 2 Q.B. 181, CA; *Lewis Faulk Ltd v. Jacobowitz* (1944) 171 L.T. 36.

A defendant claiming against a third party may counterclaim against the counterclaim made by a third party (see *The Normar* [1968] P. 363; [1968] 1 All E.R. 753).

Proceeding on counterclaim—Paragraph (3) further illustrates the principle that a counterclaim is to be treated as a cross-action, and is not affected by anything which relates solely to the plaintiff's claim. Thus, where the plaintiff discontinues his action after the counterclaim has been served, he cannot prevent the defendant from enforcing against him the causes of action contained in the counterclaim (*McGowan v. Middleton* (1883) 11 Q.B.D. 464, CA). So, where the plaintiff served no reply and his action was accordingly dismissed, the defendant moved for judgment on his counterclaim under O.19, set the motion down as a short cause, and obtained

judgment (*Roberts v. Booth* [1893] 1 Ch. 52, following *Jones v. Macaulay* [1891] 1 Q.B. 221). So if an action is dismissed as being frivolous, the counterclaim is not affected and the defendant may be granted the relief which he seeks thereby (*Adams v. Adams* (1892) 45 Ch.D. 426; [1892] 1 Ch. 369). So, it is submitted, if the plaintiff admits facts pleaded in the counterclaim (*Wood v. Goodwin* [1884] W.N. 17). On the other hand, where the defendant applies to dismiss the action for want of prosecution and he has made a counterclaim against the plaintiff arising out of the same facts as were to be investigated in the action, and both parties are guilty of corresponding delays, both claim and counterclaim will ordinarily be dismissed for want of prosecution (*Zimmer Orthopaedic Ltd v. Zimmer Manufacturing Co.* [1968] 1 W.L.R. 1349; [1968] 3 All E.R. 449, CA).

15/2/7 Judgment and costs where counterclaim succeeds—Paragraph (4) specifically preserves the court's discretion with regard to costs. See s.52A of the High Court Ordinance in relation to the court's discretion on costs and O.62, rr.2(4) and 3(2).

When the plaintiff recovers a sum of money on his claim and the defendant on his counterclaim, the court may enter one judgment only for the balance (*Lowe v. Holme* (1883) 10 Q.B. 286; *Westacott v. Bevan* [1891] 1 Q.B. 774; *Stumore v. Campbell & Co.* [1892] 1 Q.B. 314 at 317). But the court may give the plaintiff judgment on the claim and costs of the action, save in so far as they were increased by the counterclaim, and the defendant judgment on the counterclaim with costs solely referable to the counterclaim. And this course was approved in *Provincial Bill Posting Co. v. Low Moor Iron Co.* [1909] 2 K.B. 344; *Sharpe v. Haggith* (1912) 106 L.T. 13; *Chell Engineering Ltd v. Unit Tool and Engineering Co. Ltd* [1950] 1 All E.R. 378. See also *Lowther v. Lewin* (1964) 109 S.J. 33. Where both parties fail, the same principle is applied (*James v. Jackson* [1910] 2 Ch. 92). On the other hand, this form of order "does not always give a just result" (*per Denning L.J.*, in *Chell Engineering Ltd v. Unit Trust, etc., Ltd* (above) at 383) and it is desirable that the court should consider making a special order as to costs. As to the principles to be applied where a plaintiff fails on his claim by reason of a set-off, but the defendant also fails on a counterclaim related to the set-off, see *Sun Legend Investments Ltd v. Ho Yuk Wah David* [2010] 2 H.K.L.R.D. 424 and [2010] 2 H.K.L.R.D. 559, where the court awarded the defendant costs of the claim and the plaintiff a share only of the costs of the counterclaim. As to the principles to be applied in taxing where plaintiff and defendant, being both found negligent, have judgment with costs on counterclaim and claim respectively, see *Medway Oil and Storage Co. v. Continental Contractors Ltd* [1929] A.C. 88. Where exactly the same sum was recovered on both claim and counterclaim, no order was made except that plaintiff should pay the costs of both (*Sprange v. Lee* [1908] 1 Ch. 424). In the case of a pure set-off, it is still proper to enter judgment solely for the balance (*Provincial Bill Posting Co. v. Low Moor Iron Co.* [1909] 2 K.B. 344); and so also, even in the case of an equitable set-off, so that if the plaintiff's claim is extinguished, the proper order is to enter judgment for the defendant with costs on the claim, and for the balance of the amount of the counterclaim with costs (*Childs v. Gibson; Childs v. Blacker* [1954] 1 W.L.R. 809; [1954] 2 All E.R. 243, CA; *Hanah v. Green* [1958] 2 Q.B. 9, CA). So again, where the defendant admits the claim but succeeds on his counterclaim, the proper order is that the plaintiff does have the costs up to the date of admission and the defendant does have the costs on the counterclaim which is the only matter litigated (*N.V. Amsterdamsche, etc. v. H. & H. Trading Agencies Ltd* [1940] 1 All E.R. 587, CA). See, however, *Procter and Lavender v. G. T. Crouch* (1966) 110 S.J. 273, where the plaintiffs were awarded half their costs, and see also *Nicholson v. Little* [1956] 1 W.L.R. 829; [1956] 2 All E.R. 699, where the claim of the plaintiff was reduced by the amount found due on the counterclaim, and the judge dismissed the counterclaim and gave judgment for the plaintiff for the balance with costs.

15/2/8 There are, however, two cases in which a counterclaim serves only as a defence, and is not a cross-action—or, to employ the time-honoured metaphor, can be used only "as a shield, not as a sword" (*per Cockburn C.J.*, in *Stook v. Taylor* (1880) 5 Q.B.D. 569 at 575) so that the defendant can recover nothing on his counterclaim, even though it overtops the plaintiff's claim.

1. If a debt be assigned, the debtor may in certain cases set off or counterclaim against the assignee a debt due from the assignor to himself; but if the amount of such set-off or counterclaim exceeds the amount of the debt assigned, the defendant can recover nothing from the assignee; he must sue the assignor for the balance (*Young v. Kitchin* (1877) 3 Ex.D. 127; approved in *Government of Newfoundland v. Newfoundland Ry* (1888) 13 App.Cas. 199; *Roxburgh v. Cox* (1881) 17 Ch.D. 520 at 526; and see *Stoddart v. Union Trust Ltd* [1912] 1 K.B. 181, CA; *Parsons v. Sovereign Bank of Canada* [1913] A.C. 160; *Sun Legend Investments Ltd v. Ho Yuk Wah David* (unrep., HCA 1212 and 2915/2002, [2010] H.K.E.C. 213). But this rule does not apply in the case of an assignment of a reversion expectant on the termination of a lease (*Reeves v. Pope* [1914] 2 K.B. 284, CA). In general, any claim arising under the same contract may be set off against an assignee (*Baker v. Adam* (1910) 102 L.T. 248; but see *Phoenix Assurance Co. v. Earl's Court Ltd* (1913) 30 T.L.R. 50, CA).

2. A similar rule applies when a sovereign prince or state over whom the court has no jurisdiction (*Mighell v. Sultan of Johore* [1894] 1 Q.B. 149) submits to bring an action in the court. The defendant is allowed to plead any set-off or counterclaim against him which is an answer to his demand; but not to recover any judgment against him for the excess, or to raise any counterclaim which is "outside of and independent of the subject matter of" the claim (*Strousberg v. Republic of Costa Rica* (1881) 29 W.R. 125; 44 L.T. 199; *South African Republic v. La Compagnie, etc.* [1897] 2 Ch. 487; [1898] 1 Ch. 190; *Imperial Japanese Government v. P. and O. Steam Navigation Co.* [1895] A.C. 644).

Counterclaim against additional parties (O.15, r.3)

3.—(1) Where a defendant to an action who makes a counterclaim against the plaintiff alleges that any other person (whether or not a party to the action) is liable to him along with the plaintiff in respect of the subject-matter of the counterclaim, or claims against such other person any relief relating to or connected with the original subject-matter of the action, then, subject to rule 5(2), he may join that other person as a party against whom the counterclaim is made.

(2) Where a defendant joins a person as a party against whom he makes a counterclaim, he must add that person's name to the title of the action and serve on him a copy of the counterclaim and, in the case of a person who is not already a party to the action, the defendant must issue the counterclaim out of the Registry and serve on the person concerned a sealed copy of the counterclaim together with a form of acknowledgment of service in Form No. 14 in Appendix A (with such modifications as the circumstances may require) and a copy of the writ or originating summons by which the action was begun and of all other pleadings served in the action; and a person on whom a copy of a counterclaim is served under this paragraph shall, if he is not already a party to the action, become a party to it as from the time of service with the same rights in respect of his defence to the counterclaim and otherwise as if he had been duly sued in the ordinary way by the party making the counterclaim.

(3) A defendant who is required by paragraph (2) to serve a copy of the counterclaim made by him on any person who before service is already a party to the action must do so within the period within which, by virtue of Order 18, rule 2, he must serve on the plaintiff the defence to which the counterclaim is added.

(4) The appropriate office for issuing and acknowledging service of a counterclaim against a person who is not already a party to the action is the Registry.

(5) Where by virtue of paragraph (2) a copy of a counterclaim is required to be served on a person who is not already a party to the action, the following provisions of these rules, namely, Order 6, rule 7(3) and (5), Order 10, Order 11, Orders 12 and 13 and Order 75, rule 4, shall, subject to the last foregoing paragraph, apply in relation to the counterclaim and the proceedings arising from it as if—

- the counterclaim were a writ and the proceedings arising from it in an action; and
- the party making the counterclaim were a plaintiff and the party against whom it is made a defendant in that action.

(5A) Where by virtue of paragraph (2) a copy of a counterclaim is required to be served on any person other than the plaintiff, who before service is already a party to the action, the provisions of Order 14, rule 5 shall apply in relation to the counterclaim and the proceedings arising therefrom, as if the party against whom the counterclaim is made were the plaintiff in the action. (*L.N. 363 of 1990*)

(6) A copy of a counterclaim required to be served on a person who is not already a party to the action must be indorsed with a notice, in Form No. 17 in Appendix A, addressed to that person. (*L.N. 404 of 1991*)

Effect of rule—The procedure under this rule is alternative and additional to third-party procedure under O.16, and arises when the defendant makes a counterclaim against the plaintiff and an additional party or a co-defendant. It does not permit a defendant to make a counterclaim solely against another defendant, e.g. where a derivative action is brought, the company on whose behalf the action is brought; see *Yan How Yee v. Yu Kin Sang Paul* (unrep., HCA 1069/2008, [2009] H.K.E.C. 1889).

ORDER 81

PARTNERS

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Editorial Introduction

81/0/2 This Order provides a code for civil proceedings by or against partnerships and must be construed as a whole. Unlike corporations, which have a legal identity apart from their members, two or more people carrying on business, whether under their own name or under a firm name, do not. This rule therefore does not confer corporate status on such businesses but merely provides a convenient way in which they may sue and be sued. In addition an individual carrying on business under a name other than his own may be sued in that name (r.9).

In a straightforward debt action against a small firm it may be better to sue the individual trader or partners in their own names rather than the firm name as it is easier to enforce a default judgment against the individuals. In order to enforce a default judgment entered in the firm name, the partners or proprietor have to be identified and leave has then to be obtained on a summons served personally before execution can issue (r.5(4)). Judgment entered against the individuals, who may be served by post, may be enforced immediately.

When suing a firm care must be taken to ensure that the requirements of service set out in r.3 are followed. Equally when acknowledging service (r.4) care must be taken to acknowledge in the proper form, otherwise persons who are not partners or were not at the material time may find themselves liable to satisfy any judgment obtained.

This order does not enable foreign partnerships to be served out of the jurisdiction in the firm name.

Related Sources

- 81/0/3
- Partnership Ordinance, Cap. 38 (Partnership Act 1890)
 - Limited Partnerships Ordinance, Cap. 37 (Limited Partnership Act 1967)
 - Business Registration Ordinance, Cap. 310 (Business Names Act 1925)
 - Companies Ordinance, Cap. 32, and Insolvency Act 1986
 - RHC, O.10, r.1
 - RHC, O.11
 - RHC, O.49, r.1
 - Chancery Guide, para.12.8, Partnership actions (*The Supreme Court Practice 1999*, Vol.2, Section 2B, para.2B-287)

Forms

81/0/4 The following Practice Form in Volume 3 is relevant to O.81:

- No. 3, FM-PF3

Actions by and against firms within jurisdiction (O.81, r.1)

81/1 1. Subject to the provisions of any written law, any 2 or more persons claiming to be entitled, or alleged to be liable, as partners in respect of a cause of action and carrying on business within the jurisdiction may sue, or be sued, in the name of the firm (if any) of which they were partners at the time when the cause of action accrued.

Scope of Order—This Order was taken from the former English RSC (Rev.) 1962, O.81, which had been taken, without any material change, from the former O.48A, which itself was introduced by RSC 1891, apparently as the result of observations made by the judges in *Davies & Co. v. Andrie & Co.* (1890) L.R. 24 Q.B.D. 598, CA, and *Western National Bank, etc. v. Perez Triana & Co.* [1891] 1 Q.B. 304, CA.

The rules of this Order form a code relating to partnership firms and must be construed together (*Worcester City and County Banking Co. v. Firbank Pauling & Co.* [1894] 1 Q.B. 784, per Lord Esher M.R. at 788; *Mactoy v. G. & J. Burns* [1895] 2 Ch. 630, per Lindley L.J. at 634).

This Order only applies to firms and single individuals suing or being sued in their firm or trading name, and not to cases where the partners or a single individual are or is sued in their individual names or name. For instance, it applies to actions by or against "Jones & Smith", or "John Jones & Co.", or "The Dairy Supply Co.", or whatever other name has been adopted as the firm or trading name, but not to actions by or against John Jones and Thomas Smith sued as individuals, even though the description "trading as Jones & Smith", or whatever the firm name may be, is added.

This is important, especially (1) with regard to the question of service, since the special mode of serving a firm by service upon the controller or manager of the business cannot be employed where partners are sued individually only; and (2) with regard to the question of execution against partnership goods, since such execution can only be issued when the judgment is against the firm, and not when the judgment is against the individual partner or the individual partners, at any rate not without leave (see r.6).

Registration of firms and persons carrying on business—See the Business Registration Ordinance, Cap. 310.

Application of rule—This rule was taken from the former English RSC (Rev.) 1962, O.81, r.1, which had been taken from the former O.48A, r.1. It applies to actions by and against firms within the jurisdiction.

(a) *When firm are plaintiffs*—The rule enables two or more persons carrying on business within the jurisdiction to issue a writ or originating summons (r.8) in the name of their firm, without giving out the names of all the individual partners, and to give as their address that of their place of business instead of the private addresses of the individual members. It applies whenever they are carrying on business within the jurisdiction notwithstanding that they may not be Hong Kong subjects, nor residents within the jurisdiction. But if they are not carrying on business within the jurisdiction, even though they may be Hong Kong subjects or resident within the jurisdiction, the rule does not apply and the individual names and addresses must be set out.

(b) *When firm are defendants*—The firm may, under like circumstances to the above, be sued in their firm-name without the necessity of finding out the names of the individual partners, and they may be described as of the address at which their business is carried on. But it must be remembered that they may be sued "in the name of the firm of which they were co-partners at the time of the accruing of the cause of action", and that the firm name is merely a convenient method of expressing those persons. A plaintiff who sues such partners in their firm-name sues them individually just as much as if he had set out all their names (*Western National Bank, etc. v. Perez Triana & Co.* [1891] 1 Q.B. 304, CA, per Lindley L.J. at 314). Inaccuracy in the description of a defendant firm's trade name will not affect the defendants' liability, as long as the partners have been individually identified and collectively named as defendants in the action (*Liu Moon Ping v. Wong Kwok Tung & Others* [2006] 1 H.K.L.R.D. 358 per Kwok D.J. at 364).

Where, therefore, there has been a change in the firm since the cause of action accrued, it must be taken prima facie that the firm name used to describe the defendants means those persons who constituted the firm at the time of the accrual of the cause of action, and not at the time of issue of the writ. Where there has been an entire change in the persons constituting the firm between the accrual of the cause of action and the issue of the writ, suing in the firm name might cause difficulty. See *Re Sawers, ex p. Blain* (1879) L.R. 12 Ch.D. 522 at 533, per James L.J. Cf. *Tam Yuen Fun v. Day & Chan & Others* (unrep., DCCJ 17040 of 2001) [2004] H.K.E.C. 296, where it was held that notwithstanding such an entire change, an action could still be brought against the defendant in its firm-name even though each partner had also been sued individually. There was nothing in the Order that prevented this course being taken and no conceivable prejudice, procedural or substantive, could arise therefrom. And where there has been a partial dissolution to the knowledge of the plaintiff, it may not advantage the plaintiff much if he sues in the firm name, since he must serve every person within the jurisdiction whom he seeks to make liable (r.3(3)).

"May sue or be sued"—A firm consisting of "two or more persons" may sue or be sued, even though one of them is under a disability (*Harris v. Beauchamp Bros.* [1894] 1 Q.B. 801). If one of the partners is an infant the minority of one partner cannot be utilised by the other or others, as a means of deferring payment of the firm's debt (*Harris v. Beauchamp Bros.* [1894] 1 Q.B. 801). See also n. "Minor partner", para.81/5/8. The action may be brought against the firm, but the judgment

should be against the firm "other than A.B. a minor". In such a case bankruptcy proceedings will lie against the firm other than the minor partner (*Lovell v. Beauchamp* [1894] A.C. 607). A person other than a moneylender trading by himself as a firm, or in an assumed or trading name, must sue in his own name, though he may be sued in his trading name (*Mason v. Mogridge* (1892) 8 T.L.R. 805). However, it has been held that the incorrect naming of such a plaintiff on the writ only amounts to an irregularity which is curable by amendment, and does not render the proceedings a nullity: *Wong Ming-chin v. Tai Lak School v. Hong Kong Times Ltd* [1968] H.K.L.R. 99. See r.9. As to "owners of cargo" in an Admiralty action in rem suing as such in lieu of trading name, see *The Assunta* [1902] P. 150.

81/1/7 Firm name—The firm name is a mere expression, for a firm is not a legal entity, nor for some purposes is it a "person," although for convenience under this Order, the firm name may be used for the purpose of suing and being sued (*per Farwell L.J.*, in *Sadler v. Whiteman* [1910] 1 K.B. 868 at 889, cited, *per Hamilton J.* in *R. v. Holden* [1912] 1 K.B. 483 at 487 *per Godfrey J.A.* in *Kao, Lee & Yip v. Koo Hoi Yan Donald* [1995] 1 H.K.L.R. 248 at 250; [1994] 2 H.K.C. 228 at 231; and see *Re Vagliano Anthracite Collieries Ltd* (1910) 79 L.J.Ch. 769; *Chan, Leung & Cheung (A Firm) v. Tse Mei Lin*; [2005] 1 H.K.L.R.D. 251 at 259). Order 81, r.1 is a rule of procedural convenience only. While a partnership may be sued in the firm's name and service effected on any partner, or at the firm's principal place of business (O.81, r.3), the firm has no separate legal identity outside its partners (*Kao, Lee & Yip v. Koo Hoi Yan & Others* [2003] 1 H.K.L.R.D. 125 at 134, 135; [2002] 3 H.K.C. 323 at 331, *per Ma J.*, referring to Godfrey J.A.'s observations in *Kao Lee & Yip v. Koo Hoi Yan Donald* [1995] 1 H.K.L.R. 248 at 250; [1994] 2 H.K.C. 228 at 231; *Chan, Leung & Cheung (A Firm) v. Tse Mei Lin*; [2005] 1 H.K.L.R.D. 251 at 259).

As the composition of a partnership may change over time, by the admission or departure of partners, it is necessary to ascertain the time for determining who are partners. Upon every admission of a new partner, the law considers there is an implied dissolution of the old partnership, and the formation of a new partnership. Hence, a firm is not the same after a change in composition, even if the same firm name is used after the change. As a matter of fact, they are a different group of people, and regarded as such in law. (*Lo Wai Sing v. Allianz Insurance (Hong Kong) Ltd* (unrep., HCA 4084 of 2001) [2005] H.K.E.C. 231 Lam J.)

Nevertheless, when the firm is suing or is sued in the firm name, especially where the firm name might be taken for the name or names of one or more individuals, e.g. "John & James Smith", it is advisable in the title of the action to add in brackets after the firm name the words "a firm" or "sued as a firm".

The name of a newspaper is not usually a firm name under which the proprietors carry on business, and they should not be so sued (*De Bernales v. New York Herald* [1893] 2 Q.B. 97n.).

Executors carrying on business in the testator's firm name, as authorised by the will, are not partners, and cannot be sued as such (*Re Fisher & Sons* [1912] 2 K.B. 491).

For a case in which a cost-book mining company was sued in its partnership name, see *Esco v. Gray* (1878) 39 L.T. 121.

81/1/8 Action against club—A proprietary club may be sued in the name of the club as a firm name (*Firmin & Sons v. The International Club* (1889) 5 T.L.R. 614, CA).

A members' club cannot be sued in the club name (*Grossman v. Granville Club* (1884) 28 S.J. 513; *Campbell v. Thompson* [1953] 1 Q.B. 445; [1953] 1 All E.R. 831; [1953] 2 W.L.R. 656).

81/1/9 Trade unions and employers' associations—The registration of a trade union renders it a body corporate by the name under which it is registered, and, subject to the provisions of the Trade Unions Ordinance (Cap. 332) with power to *inter alia*, institute and defend suits and other legal proceedings: see s.13 of Cap. 332. An action against a registered trade union, whether of employees or employers, in respect of any tortious act alleged to have been committed in contemplation or furtherance of a trade dispute by or on behalf of such trade union, shall not be entertained in court; see s.43 of Cap. 332. This provision does not affect the liability of a registered trade union, or any trustees thereof, to be sued in any court touching and concerning any property, or any right or claim to property, of such trade union, except in respect of any tortious act committed by or on behalf of such trade union in contemplation or furtherance of a trade dispute: see s.43(2) of Cap. 332. Notice of intention to defend shall be in the name of the trade union. For the definition of "trade union," see s.2 of Cap. 332 (s.28(1) of the 1974 Act).

81/1/10 Partners generally—The liability of partners for debts is joint; *Kendall v. Hamilton* (1879) 4 App.Cas. 504; *Pilley v. Robinson* (1888) L.R. 20 Q.B.D. 155; and *cf.* the Partnership Ordinance, Cap. 38, ss.11, 14 (Partnership Act 1890, ss.9, 10, 12), and *Weall v. James* (1893) 68 L.T. 515). As a general rule a suit by or against an ordinary partnership would have been defective for want of parties, unless all the partners were before the court (*Lindley and Banks on Partnership* (18th ed., 2002)) but now the firm may be sued without first ascertaining who all the partners are. It must be noted, however, that although a partner's liability is joint, it is not several. Consequently, a partner cannot set off his personal debts against a debt owed to the partnership, and a pleading consisting of such a set off is liable to be struck out: *Chan Shu Kong v. Kwong Hing Trading Co. Ltd & Another* [2007] H.K.E.C. 1119 and [2007] H.K.E.C. 1971.

Executors who carry on the business of their testator in the firm name in which he traded should be sued individually on their liability as joint debtors. In an action against a firm so carried on it was held that executors so trading were not partners within s.1 of the Partnership Act, 1890 (s.3 of Partnership Ordinance, Cap. 38), and the court refused to adjudicate them bankrupt (*Re Fisher & Sons* [1912] 2 K.B. 491).

"Partners at the time when the cause of action accrued"—These words enable the co-partners in a firm dissolved before action to sue or be sued as a firm provided the co-partnership existed at the time the cause of action accrued. The composition of the firm at the date of the issue of the proceedings is normally irrelevant. Therefore a suggestion that a plaintiff described by its firm-name in an action referred to the current and not the former partnership at the time when the cause of action accrued was held to be misconceived (*Chan, Leung & Cheung (A Firm) v. Tse Mei Lin* [2005] 1 H.K.L.R.D. 251). Where the fact of dissolution is known to the plaintiff before the action against the firm is commenced, the writ must be served personally on every person within the jurisdiction sought to be made liable, r.3(2). If one or some of such persons are out of the jurisdiction leave to serve would have to be obtained under O.11. And by the operation of r.9, it enables an individual trading in a name other than his own name at the time the cause of action accrued to be sued in his trading name, although he has ceased to so trade at the time the action is brought.

It is only possible to sue or be sued in a firm name if the partners were using that firm name at the time when the cause of action accrued (*Ernst & Young v. Butte Mining Plc (No. 2)* [1997] 1 W.L.R. 1485).

Partners disagreed—Where one partner commenced an action in the name of the firm against the express wishes of his co-partners, the action was stayed until the partner bringing the action had given his co-partner a full indemnity, coupled with security, against all costs, charges, or liability by reason thereof (*Davey & Co. v. Alby United Carbide Factories Ltd*, unreported, Coleridge J., in chambers, March 19, 1914; *Chan, Leung & Cheung (A Firm) v. Tse Mei Lin* [2005] 1 H.K.L.R.D. 251 at 259). In these cases the decision in *Seal and Edgelow v. Kingston* [1908] 2 K.B. 579, was referred to. See n. "Discovery against firm", para.81/1/15. In the last case a similar order was made, but was held not to exempt the objecting partner from complying with an order for discovery. While financial ability to honour an indemnity to co-partners is a relevant factor, there is no provision in the Rules or elsewhere which limits the relevant factors in determining whether security should be given to support such an indemnity. The court has jurisdiction to order security where the justice of the case so requires (*Kao, Lee & Yip v. Koo Hoi Yan & Others* [2003] 1 H.K.L.R.D. 125 at 138, 139; [2002] 3 H.K.C. 323 at 336, 337, *per Ma J.*). For instance, where an unwilling partner has nothing to gain from pursuing litigation, but potentially much to lose, and has no control over the conduct of the proceedings.

It may be just to limit such security to an unwilling partner's potential liability for the opposite party's future costs, as opposed to past costs, where the partner had previously been a willing participant (*Kao, Lee & Yip v. Koo Hoi Yan & Others* [2003] 1 H.K.L.R.D. 125 at 140; [2002] 3 H.K.C. 323 at 337, 338, *per Ma J.*).

Deceased partner—Where a partner dies before action, and the action is brought against the firm alone in the firm name, the deceased partner is not a party to the action at all so far as his private estate is concerned. If in an action against a firm in the firm name a partner dies between service of the writ and judgment, the estate of the deceased partner is not bound. Unless his personal representative is a defendant, judgment is against the surviving partners and can only be enforced against them and the partnership assets (*Ellis v. Wadeson* [1899] 1 Q.B. 714; and see *Phillips v. Homfray* (1883) L.R. 24 Ch.D. 439; *Re Shephard* (1890) L.R. 43 Ch.D. 131 at 136). Where a person who was a partner at the date of the accrual of the cause of action dies before action brought, it would seem that his executors need not be made parties to the action.

The estate of a deceased partner is not liable for goods ordered before, but not delivered till after, his death (*Bagel v. Miller* [1903] 2 K.B. 212).

Actions between partners—It was not quite clear that actions between a firm and one of its members, or between two firms with a common member, were maintainable in the firm's name; but this doubt was removed by O.81, r.6 which applies the rules of this Order to such actions, provided the firm or firms carry on business within the jurisdiction; and with the further proviso that execution in such case may not issue except with the leave of the court.

Discovery against firm—An order for discovery against a firm suing or being sued is an order against the partners. Where the dissolution of partnership one partner in the firm brought an action in the firm name and indemnified against costs his co-plaintiff and former partner who dissented from the action being brought, an order for discovery of documents was, at the instance of the defendant, made against the firm. The dissenting partner refused to file his affidavit, and his co-plaintiff was held entitled to apply for attachment against him to enforce obedience to the order (*Seal & Edgelow v. Kingston* [1908] 2 K.B. 579, CA).

- 81/1/16 Judgment against firm—action against partner upon the judgment**—A judgment against the firm has the same effect that a judgment against all the partners had formerly. See *Clark v. Cullen* (1882) (1881–1882) L.R. 9 Q.B.D. 355.
- 81/1/17 Action against firm and partner**—A firm cannot acknowledge service as a firm; but if a partner is made co-defendant together with the firm, he may put in separate defences, one for himself, and one for the firm (*Taylor v. Collier* (1882) 30 W.R. 701).
- 81/1/18 Joint creditor—deceased partner**—As to the remedies of a joint creditor against estate of a deceased partner, *Re Hodgson* (1886) L.R. 31 Ch.D. 177.
- 81/1/19 "Carrying on business within the jurisdiction"**—If the firms carry on business within the jurisdiction within the meaning of the cases cited below, they may sue or be sued in the firm name. It happens that in all the cases cited in this and the n. "Foreign firms", para.81/1/20, the points raised turned upon the question whether the defendants were rightly sued. But the principle laid down in those cases applies equally to a plaintiff firm as to a defendant firm, the right to "sue or be sued" being given by the same sentence of this rule. It is therefore the practice of the High Court Registry to refuse to issue a writ wherein a foreign firm is either plaintiff or defendant, unless the individual names of the partners are given.
- "Carrying on business" means the possession within the jurisdiction of a place of business held in the name of the firm, where business is carried on on behalf of the firm by a partner or by a person or persons in the pay of the firm. It makes no difference whether the partners are or are not out of the jurisdiction, or whether or not they have another place of business out of the jurisdiction. If they are carrying on business within the jurisdiction in the firm name they can be sued as a Hong Kong firm, and service at their Hong Kong place of business on the person having the management or control, as prescribed by r.3, is good service on the firm and its partners, so far as regards any partnership property within the jurisdiction. See *Worcester City and County Banking Co. v. Firbank Pauling & Co.* [1894] 1 Q.B. 784, CA; *Shepherd v. Hirsch, Prichard & Co.* (1890) L.R. 45 Ch.D. 231; *Lysaght v. Clark* [1891] 1 Q.B. 552. If the firm have no place of business in Hong Kong held in the name of the firm, they do not carry on business within the jurisdiction, even though the partners come to Hong Kong regularly and employ an agent here to purchase goods to be sent to the firm abroad (*Singleton v. Roberts & Co.* (1894) 70 L.T. 687). See also *Heinemann & Co. v. S.B. Hale & Co.* [1891] 2 Q.B. 83, CA. If two or more persons claim to be entitled in respect of a cause of action as partners under O.81, r.1, and use a firm's name, but do not "carry on business" within the jurisdiction, the institution of such proceedings is irregular, but are not nullified. (*Frank Dinardo Jnr & Others t/a one Sylvan Road North Associates v. Lark International Ltd.* unreported, HCA 14565 of 1998, June 2, 1999, Yuen J.).
- 81/1/20 Foreign corporations**—A foreign corporation is different from a firm, and may be sued as an individual, and service may be ordered under O.11.
- 81/1/21 Foreign firms**—A partnership firm which has no place of business in Hong Kong within the meaning of the words "carrying on business within the jurisdiction", as defined in that note, can neither sue nor be sued in the firm's name. The partners must sue or be sued individually in their own names and served as ordinary defendants.
- The procedure in O.81, r.1 where a local partnership could be sued in the firm's name as an alternative to suing the partnership in the names of all the individual partners in their capacity as partners, did not apply to foreign partnerships which do not carry on business within the jurisdiction (*Oxnard Financing SA v. Rahn (Legal Personality of Swiss Partnership)* [1998] 1 W.L.R. 1465, CA; [1998] 3 All E.R. 19).
- In *Western National Bank, etc. v. Penz Triana & Co.* [1891] 1 Q.B. 304, CA, it was held, following the principle laid down in *Russell v. Cambefort* (1889) L.R. 23 Q.B.D. 526, that a firm, none of whose partners was resident or domiciled in England, ought not to be sued in the firm name, Lindley L.J. saying that if one of the partners was resident abroad it would not be prudent to sue them in the firm name. Since those cases were decided, namely in June, 1891, the Rules as to actions by and against partnership firms were altered and collected together under this Order. The words "carrying on business within the jurisdiction" were introduced with the object of bringing within the scope of this Order any foreign firm which had a place of business in Hong Kong. Such firms may therefore be now sued and served in the same way as Hong Kong firms are sued and served (*Worcester City and County Banking Co. v. Firbank Pauling & Co.* [1894] 1 Q.B. 784, CA, cited n. "Carrying on business within the jurisdiction", para.81/1/19). Subject to that qualification foreign firms cannot be sued as firms, and even where the claim was within O.11, r.1, and leave was obtained to serve a foreign firm out of the jurisdiction, judgment was refused because the order was for service on the firm (*Dobson v. Festi Rasini & Co.* [1891] 2 Q.B. 92; *Von Hellfeld v. Rechner* [1914] 1 Ch. 748, CA). An order for substituted service of a writ on a foreign firm carrying on business outside the jurisdiction may be made, although the firm also carries on business within the jurisdiction, as Orders 11 and 81 are to be read together (*Hobbs v. Australian Press Association* [1933] 1 K.B. 1, CA). In that case such an order was made; but when the plaintiff applied for leave to serve out of the jurisdiction he was unaware of the fact that the defendants carried on business within the jurisdiction.

Where partners in a foreign firm are sued individually, they are subject to the general rules as to service. Service on any one of them while temporarily in Hong Kong is good service so far as the individual is concerned, otherwise they can only be served by order for service out of the jurisdiction. See, as to the converse of this, *Carrick v. Hancock* (1895) 12 T.L.R. 59. As to service on the manager of an English branch, see *Meyer v. Louis Dreyfus* [1940] 4 All E.R. 157, CA; (1940) 67 L.L.Rep. 562.

Foreign firm employing agent in Hong Kong—The mere employment of an agent in Hong Kong who collects orders for the firm on commission, but has no power to accept or reject such orders, is not carrying on business in Hong Kong, even though the firm's name is painted on the door of the agent's office (*Grant v. Anderson & Co.* [1892] 1 Q.B. 108, CA, followed, and applied to a foreign corporation having an agent in England, in *Okura & Co. Ltd v. Forsbucka Jenverks Aktiebolag* [1914] 1 K.B. 715, CA; *Thames and Mersey Marine Insurance Co. v. Austrian-Lloyd Co.* (1914) 111 L.T. 97, CA; *Baillie v. Godwin* (1886) L.R. 33 Ch.D. 604). See also *Morgan Crucible Co. Ltd v. Vulcan Crucible Co.* (1906) 23 R.P.C. 229.

As to the liability of one partner where the other partner has ratified the act of an agent done in excess of his authority, see *Keen v. Mear* [1920] 2 Ch. 574.

Foreign individual trading as a firm—A single individual residing abroad and being a foreign subject, trading in a name other than his own must be sued individually in his own name, even though he has an office in England (*St Gobain v. Hoyermann's Agency* [1893] 2 Q.B. 96, CA; *Taylor Brothers & Co. Ltd v. A. Johnson & Co.* [1917] W.N. 341). See r.9.

Foreign firms agreeing to be served within the jurisdiction—A defendant firm may contract itself out of the rules and rulings as to foreign firms by agreeing to receive service at some place within the jurisdiction (*Tharsis Sulphur and Copper Co. Ltd v. Société des Métaux* (1889) 58 L.J.Q.B. 43; *Montgomery Jones & Co. v. Liebenthal & Co.* [1898] 1 Q.B. 487). But an agreement that the court shall have power to order service on the foreign firm, even though the case is not within O.11, is of no effect. The jurisdiction of the court as to ordering service out of the jurisdiction cannot be extended by agreement (*British Wagon Co. Ltd v. Gray* [1896] 1 Q.B. 35).

Counterclaim against a foreign firm—A foreign firm suing in the Hong Kong court is liable to have a counterclaim pleaded against it, even though the nature of the counterclaim is such as to preclude the possibility of bringing an action upon it under O.11 (*Griendtvoeven v. Hamlyn & Co.* (1892) 8 T.L.R. 231).

Limited partnerships—The Limited Partnerships Ordinance, Cap. 37 (Limited Partnerships Act 1907) authorises the formation of limited partnerships—i.e. firms trading in a firm name having one or more "general partners" whose liability is not limited, and one or more "limited partners" whose liability is limited to a stated amount which they contribute as capital, and beyond which they are not liable, provided the partnership is duly registered as prescribed, including the names of the limited partners and the sum contributed by them respectively. A corporate body may be a limited partnership. See ss.3, 4, 7, 8, 9 of Cap. 37 (ss.4, 5, 8, 9, 10).

A limited partnership must be registered with the Registrar of Companies. On partnerships liable to be wound up, see r.5 n. "Dissolution or winding-up of limited partnership", para.81/5/15.

The Limited Partnerships Ordinance, Cap. 37 is silent as to the procedure to be adopted in actions by or against limited partnerships, and the following suggestions may be found useful:

(1) *Suing or being sued*—The expressions "firm", "firm name" and "business" mean the same in the case of limited partnerships as in the case of ordinary partnerships defined by s.2 and 6 of Partnership Ordinance, Cap. 38 (s.4(1) and s.45 of the Partnership Act 1890); Limited Partnerships Ordinance, Cap. 37, s.2 (Limited Partnerships Act 1907, s.3). They therefore come within this rule as to suing and being sued in the name of the firm. It would seem that a limited partnership, being registered as such, could only sue or be sued in the firm name, and could not adopt the alternative open to ordinary partnerships of suing in the names of the partners, with the description "trading as —"; nor could it be so sued. It hardly seems that limited partners could be properly imported into an action by or against the firm, though, after judgment they might be made liable to execution: see r.5 n. "Limited partners, execution against", para.81/5/14.

(2) *Service upon*—From the terms of the Limited Partnerships Ordinance, Cap. 37 it would appear that r.3, applies to service on limited partnerships, subject only to one limitation. The first method of service prescribed by that rule, namely "upon one or more of the partners", should apparently be read as excluding a limited partner. The Limited Partnerships Ordinance, Cap. 37, s.5 (Limited Partnerships Act 1907, s.6), provides that a limited partner "shall not take part in the management of the partnership business, and shall not have power to bind the firm". It would appear from this that if the limited partner cannot bind the firm, neither can the firm be bound by service of legal process upon him. Therefore the writ should be served only on the general partners, or the person in control of the business, not on the limited partners.

81/1/29 (3) *Acknowledgment of service by limited partners*—Rule 4 provides that partners sued in the name of their firm shall acknowledge service individually in their own names. As stated in the preceding n. (2) a limited partner cannot bind the firm, or take any part in its business. The word "business" is defined as "every trade, occupation or profession" Partnership Ordinance, Cap. 38, s.2 and Limited Partnership Ordinance, Cap. 37, s.2 (Partnership Act 1890, s.45; Limited Partnerships Act 1907, s.3) which does not appear to include defending an action. It has been held that any one partner in a firm sued may himself defend on behalf of the firm; see n. "Defence", para.81/4/6. Whether this can be applied to limited partners is a question which awaits decision. If a limited partner wishes to acknowledge service as a partner, the words of the rule clearly entitle him to do so, but it is doubtful if it would be to his interest to do so: see n. "Limited partners, execution against", para.81/5/14. He should describe himself as "a limited partner in the defendant firm".

Disclosure of partners' names (O.81, r.2)

81/2 2.—(1) Any defendant to an action brought by partners in the name of a firm may serve on the plaintiffs or their solicitor a notice requiring them or him forthwith to furnish the defendant with a written statement of the names and places of residence of all the persons who were partners in the firm at the time when the cause of action accrued; and if the notice is not complied with the Court may order the plaintiffs or their solicitor to furnish the defendant with such a statement and to verify it on oath or otherwise as may be specified in the order, or may order that further proceedings in the action be stayed on such terms as the Court may direct.

(2) When the names of the partners have been declared in compliance with a notice or order given or made under paragraph (1), the proceedings shall continue in the name of the firm but with the same consequences as would have ensued if the persons whose names have been so declared had been named as plaintiffs in the writ.

(3) Paragraph (1) shall have effect in relation to an action brought against partners in the name of a firm as it has effect in relation to an action brought by partners in the name of a firm but with the substitution of references to the defendant and the plaintiffs, of references to the plaintiff and the defendants respectively, and with the omission of the words "or may order" to the end.

81/2/1 HISTORY OF RULE—This rule is taken from the former English RSC (Rev. 1962, O.81, r.2, which had been taken from the former O.48A, rr.1 and 2, and is derived through RSC 1883, O.7, r.2, from the Common Law Procedure Act 1852, s.7.

81/2/2 **Effect of rule**—The effect of the rules is as follows: (1) under paras (1) and (2) it enables a defendant to call upon a plaintiff firm, even if it is out of the jurisdiction, to disclose the names and addresses of all the partners at the time when the cause of action accrued (not the date of the issue of the writ) and, in default, an order may be obtained compelling such disclosure or staying the action, but if the request is complied with, the action continues as if it had been brought by the partners as plaintiffs; (2) under para.(3) it enables a plaintiff suing a defendant firm to call upon the defendant firm to disclose the names and addresses of all the partners at the time when the cause of action accrued, and in default an order may be obtained compelling such disclosure.

Order 81, r.2 arises because O.81, r.1 is a rule of procedural convenience, where a partnership sues or is sued in the firm's name. In effect, O.81, r.1 is mere shorthand for the individual partners as the plaintiffs or defendants as the case may be (*Kao, Lee & Yip v. Koo Hoi Yan & Others* [2003] 1 H.K.L.R.D. 125 at 134, 135; [2002] 3 H.K.C. 323 at 331, per Ma J.; *Chan, Leung & Cheung (A Firm) v. Tse Mei Lin* [2005] 1 H.K.L.R.D. 251 at 259). See para.81/1/7.

In an action by or against a limited partnership, this rule would appear to be inapplicable, as all partners' names are registered under the Limited Partnerships Ordinance, Cap. 37, s.7(d) (Limited Partnerships Act 1907, s.8).

81/2/3 **Application for disclosure of names of plaintiff or defendant firm**—The application for an order to furnish the names and places of residence of the partners to the plaintiff or defendant firm at the time when the cause of action accrued is made by summons to the master or district judge. The making of the order is discretionary, and presumably the defendant or the plaintiff, as the case may be, should show the grounds upon which the order is sought.

An order to disclose the names of partners hereunder is not an order for discovery within O.24, r.16 (*Pike v. Keene* (1876) 24 W.R. 322). Where an affidavit has been filed stating the names of the partners in the plaintiff firm, there is no power to direct a cross-examination on

such affidavit, or the trial of an issue as to whether a person whose name had been disclosed was a partner in the firm at the time of the accruing of the cause of action (*Abrahams & Co. v. Dunlop Pneumatic Tyre Co.* [1905] 1 K.B. 46, CA). Where a firm is sued in the firm's name and a single individual appears as the sole partner, the plaintiff is nevertheless entitled to an order, see *The Supreme Court Practice 1999*, Vol.2, Section 1B, para.1B-135.

Service of writ (O.81, r.3)

3.—(1) Where by virtue of rule 1 partners are sued in the name of a firm, the writ may, except in the case mentioned in paragraph (3), be served— 81/3

- on any one or more of the partners, or
- at the principal place of business of the partnership within the jurisdiction, on any person having at the time of service the control or management of the partnership business there, or
- by sending a copy of the writ by registered post (in accordance with Order 10, rule 1(2)) to the firm at the principal place of business of the partnership within the jurisdiction; (*L.N. 165 of 1992*)

and, subject to paragraph (2), where service of the writ is effected in accordance with this paragraph, the writ shall be deemed to have been duly served on the firm, whether or not any member of the firm is out of the jurisdiction.

(2) Where a writ is served on a firm in accordance with paragraph (1)(c)—

- the date of service shall, unless the contrary is shown, be deemed to be the seventh day (ignoring Order 3, rule 2(5)) after the date on which the copy was sent to the firm, and
- any affidavit proving due service of the writ must contain a statement to the effect that—
 - in the opinion of a deponent (or, if the deponent is the plaintiff's solicitor or an employee of that solicitor, in the opinion of the plaintiff) the copy of the writ, if sent to the firm at the address in question, will have come to the knowledge of one of the persons mentioned in paragraph (1)(a) or (b) within 7 days thereafter, and
 - the copy of the writ has not been returned to the plaintiff through the post undelivered to the addressee.

(3) Where a partnership has, to the knowledge of the plaintiff, been dissolved before an action against the firm is begun, the writ by which the action is begun must be served on every person within the jurisdiction sought to be made liable in the action.

(4) Every person on whom a writ is served under paragraph (1)(a) or (b) must at the time of service be given a written notice stating whether he is served as a partner or as a person having the control or management of the partnership business or both as a partner and as such a person; and any person on whom a writ is so served but to whom no such notice is given shall be deemed to be served as a partner.

HISTORY OF RULE—Amended by S.I. 1979 No. 402 and S.I. 1982 No. 1111. 81/3/1

Application of rule—This rule was taken from the former English RSC (Rev. 1962, O.81, r.3, which had been taken, as to paras (1) and (2) from the former O.48A, r.3 and as to para. (4) from the former O.48A, r.4. 81/3/2

This rule only applies where the writ has been properly issued against the firm in their firm name under r.1. Therefore it does not apply where the firm does not carry on business within the jurisdiction; a foreign firm not carrying on business within the jurisdiction cannot sue or be sued as a firm. This rule provides a mode of service within the jurisdiction, on firms trading within the jurisdiction, whether the partners reside within or without the jurisdiction. Therefore, it does apply where the business is carried on within the jurisdiction, and it is immaterial that the partners are outside the jurisdiction so far as service on the manager is concerned. Therefore, though all the partners reside and are domiciled out of the jurisdiction, service upon a partner temporarily within the jurisdiction is a sufficient service upon the firm (*Pollexfen v. Sibson* (1885-86) L.R. 16 Q.B.D. 792; *Lysaght Ltd v. Clark & Co.* [1891] 1 Q.B. 552; *Worcester City and County Banking Co. v. Firbank Pauling & Co.* [1894] 1 Q.B. 784; *Hobbs v. Australian Press Association Ltd* [1933] 1 K.B. 1, CA). So also would be service at the principal place of the partnership upon the person having the