4. Cross-examination of court expert (O. 40 r. 4)

Any party may, within 14 days after receiving a copy of the court expert's report, apply to the Court for leave to cross-examine the expert on his report, and on that application the Court shall make an order for the cross-examination of the expert by all the parties either–

(a) at the trial, or

(b) before an examiner at such time and place as may be specified in the order.

5. Remuneration of court expert (O. 40 r. 5)

(1) The remuneration of the court expert shall be fixed by the Court and shall include a fee for his report and a proper sum for each day during which he is required to be present either in court or before an examiner.

(2) Without prejudice to any order providing for payment of the court expert's remuneration as part of the costs of the cause or matter, the parties shall be jointly and severally liable to pay the amount fixed by the Court for his remuneration, but where the appointment of a court expert is opposed the Court may, as a condition of making the appointment, require the party applying for the appointment to give such security for the remuneration of the expert as the Court thinks fit.

NOTES

[40.5.1] Payment of court expert

Order 40 rule 5 provides that a court expert's remuneration is to be fixed by the court. Parties are jointly and severally liable to pay the court expert, but sums so paid may be recovered if the court makes an order for the costs of the proceedings.

In *Re Forecast Nominee Ltd* [1996] 4 HKC 12, 27A–B the court ordered that the cost of the court expert's report in winding-up proceedings be in the cause of the petition, to first be disbursed out of the funds of the company.

6. Calling of expert witnesses (O. 40 r. 6)

Where a court expert is appointed in a cause or matter, any party may, on giving to the other parties a reasonable time before the trial notice of his intention to do so, call one expert witness to give evidence on the question reported on by the court expert but no party may call more than one such witness without the leave of the Court, and the Court shall not grant leave unless it considers the circumstances of the case to be exceptional. **(Enacted 1988)**

ORDER 41

AFFIDAVITS

[41.0.1] Application of Order 41 to affirmations

In Order 41, and throughout these rules, the word 'affidavit' is used. An affirmation is an equivalent document, of 'the same force and effect': Oaths and Declarations Ordinance (Cap 11), s 7(5). According to the definition of 'oath' and 'affidavit' in section 3 of the Interpretation and General Clauses Ordinance (Cap 1), those words are to be construed as including 'affirmation'.

[41.0.2] Distinction between affidavit and affirmation

In Hong Kong affirmations are generally used in preference to affidavits, unlike the situation in some other common law jurisdictions. The distinction between an affidavit and an affirmation is historical, and has little, if any, remaining legal significance.

Notionally an affidavit is made on oath, meaning that the maker invokes belief in a deity in swearing to tell the truth. See section 5 of the Oaths and Declarations Ordinance. Affirmations were introduced in the 19th century to enable persons without such belief to give evidence of equal weight. An interesting historical source on this point is Norton-Kyshe, History of the Laws and Courts of Hong Kong (HK: Veitch & Lee, 1971) vol 1, 144–5.

Does it matter whether an affidavit or an affirmation is used? Certainly not from the point of view of the weight of the evidence given. See section 7(5) of the Oaths and Declarations Ordinance. Indeed it has been argued that the distinction should be abolished: see Litton, (1985) 15 HKLJ 1. However, there may be room to argue that whereas an affidavit made by a non-believer is acceptable, an affirmation made by a believer may not. This results from the wording of sections 6 and 7(2) of the Oaths and Declarations Ordinance. The former provides that an oath (affidavit) is acceptable whether or not the deponent has any religious belief; whereas the latter uses permissive language suggesting that only a non-believer may make an affirmation. Whatever the strict legal position, no court in modern Hong Kong is likely to welcome argument on this point.

[41.0.3] Purpose and use of affidavits

Affidavits are a means of placing evidence before the court in writing. They are suitable for circumstances where there are unlikely to be contentious issues of fact. They are usually used in interlocutory applications and may be used at some types of substantive hearing, such as proceedings by way of originating summons (Order 28 rule 1A) and judicial review (Order 53 rules 3 & 6). In unusual circumstances affidavit evidence may be used at the trial of an action begun by writ (Order 38 rule 2).

[41.0.4] Affidavits should be confined to evidence

Because an affidavit is a vehicle for putting evidence before the court, argument or submissions should not normally be included. In *Nelson Delivery Service Ltd v Wong Kan & Anor* CACV 136/1986 (Fuad JA & Power J; 11.12.1986) the court quoted with

approval from *Alfred Dunhill Ltd & Anor v Sunoptic SA & Anor* [1979] FSR 337, 352 where Roskill LJ said:

> Affidavits are designed to place facts, whether disputed or otherwise, before the tribunal for whose help they are prepared. They are not designed as a receptacle for or as a vehicle for legal arguments. Draftsmen of affidavits should not, as a general rule, put into the mouths of the intended deponents legal arguments of which those deponents are unlikely ever to have heard. Legal arguments, especially in interlocutory proceedings, should come from the mouths of those best qualified to advance them and not be put into the mouths of deponents.

In the same case Megaw LJ said, at 373, that 'submissions of law' and 'forensic argument' are 'wholly out of place in an affidavit, as it would be in the oral evidence of a witness'.

In *Deak & Ors v Deak Perera FE Ltd* [1990] 2 HKC 198, 208 (CA) the court was highly critical of affidavit material which was 'extremely argumentative and, what is worse, argumentative in a heated sort of way'. It was suggested that the court should consider striking out such material, possibly with costs against the responsible solicitor. See also *Dah Sing Bank Ltd v Sing Hai Handbags Manuf'y Ltd & Ors* [2007] 3 HKC 515 (paras 14–19) where the court was highly critical of 'lawyerese' designed to prove a case being put into the affirmations of lay persons, and held that very little weight could be given to them. Similarly speculation, supposition and innuendo have no place in an affidavit or affirmation: *Re Wah Ying Cheong Co Ltd* HCCW 225/1996 (Kwan J; 05.10.2007).

See also Betts, 'Practice and Procedure: A Master's View', in Law Lectures for Practitioners 1987 (HK: Hong Kong Law Journal Ltd, 1987), 227, 235–6, where a former Registrar advised practitioners that padding an affidavit with irrelevancies and arguments can obscure good points of fact.

[41.0.5] Cross-examination upon affidavit

See the commentary under Order 38 rule 2.

1. Form of affidavit (O. 41 r. 1)

(1) Subject to paragraphs (2) and (3), every affidavit sworn in a cause or matter must be entitled in that cause or matter.

(2) Where a cause or matter is entitled in more than one matter, it shall be sufficient to state the first matter followed by the words "and other matters", and where a cause or matter is entitled in a matter or matters and between parties, that part of the title which consists of the matter or matters may be omitted.

(3) Where there are more plaintiffs than one, it shall be sufficient to state the full name of the first followed by the words "and others", and similarly with respect to defendants.

(4) Every affidavit must be expressed in the first person and, unless the Court otherwise directs, must state the place of residence of the deponent and his occupation or, if he has none, his description, and if he is, or is employed by, a party to the cause or matter in which the affidavit is sworn, the affidavit must state that fact. In the case of a deponent who is giving evidence in a professional, business or other occupational capacity the affidavit may, instead of stating the

deponent's place of residence, state the address at which he works, the position he holds and the name of his firm or employer, if any.

(5) Whether or not both sides of the paper are used, the printed, written or typed sides of the paper of every affidavit must be numbered consecutively.

(6) Every affidavit must be divided into paragraphs numbered consecutively, each paragraph being as far as possible confined to a distinct portion of the subject.

(7) Dates, sums and other numbers must be expressed in an affidavit in figures and not in words.

(8) Every affidavit must be signed by the deponent and the jurat must be completed and signed by the person before whom it is sworn.

(HK)(9) Where any affidavit has been interpreted to the deponent before being sworn it shall contain a statement to that effect, state the name and address of the person who interpreted it, and be signed by him.

NOTES

[41.1.1] Formal requirements for affidavits and affirmations

Order 41 rule 1 lays down certain formal requirements for affidavits and affirmations. In addition reference should be made to the Oaths and Declarations Ordinance (Cap 11) and to Practice Direction 10.1 (which may be viewed on the judiciary website, or that of HKLII).

[41.1.2] Oath or affirmation must be made orally

When swearing a written affidavit, the deponent should orally state his oath. The same applies to affirmations and statutory declarations. See *R v Low Robert Eli* [1996] 4 HKC 125.

[41.1.3] Prescribed form

There is no prescribed form of written affidavit in these rules. Reference may be made to the form which is posted on the judiciary's website. In addition reference should be made to relevant legislation. Section 7(4) of the Oaths and Declarations Ordinance (Cap 11) provides that an affirmation in writing shall commence with the words 'I, of, solemnly and sincerely affirm' and end 'Affirmed at this day of 19 , Before me .' The wording in section 7(4) is mandatory. However, in practice one often encounters written affirmations which are embellished with extra words. As to the consequences of defects of form see Order 41 rule 4 and the commentary thereunder.

[41.1.4] Affidavit to be headed with style of cause

Affidavits and affirmations are normally made for use in legal proceedings. Order 41 rule 1(1) requires that they be headed with the style of cause of those proceedings.

[41.1.5] Shortened form of style of cause for use in affidavits

Order 42 rule 1(2) & (3) permit a shortened form of style of cause to be used on an affidavit. In order to save paper in cases where the style of cause is lengthy, the profession has been encouraged to make greater use of those paragraphs. See the

letter from the Registrar dated 21 August 2003 included in Law Society circular 03–306 (PA), the text of which is available to members on the society's website.

[41.1.6] Rule 1(4) – affidavit to be expressed in the first person

Affidavits and affirmations are required by rule 1(4) to be expressed in the first person. This is invariably the practice and it is difficult to imagine the third person being used, though older editions of the English Supreme Court Practice refer to that having been permitted in the past.

[41.1.7] Rule 1(4) – address of deponent

Rule 1(4) requires that an affidavit state the address of the deponent. This must be the deponent's 'place of residence' but, if the affidavit is made in a 'professional, business or other occupational capacity', the place of work may be stated. An affidavit is not made in an occupational capacity merely because the cause of action arose during the course of or at the place of employment: *Tsui Koon Wah v Lam King Yuen & Ors* HCA 890/2003 (Tang J; 27.05.2004). However, a solicitor, agent or employee of a party making an affidavit on its behalf may, and normally will state the place of work.

Although mandatory language is used in the rule, the court is unlikely to reject an affidavit which does not comply with the requirement to set out the deponent's address. The purpose of the requirement is identification, and where there is no doubt as to the identity of the deponent the court will be reluctant to give effect to a technical objection: *Tsui Koon Wah* (above). Instead the court may proceed on the basis of a direction or undertaking that a corrective affidavit be filed, as in *Standfast Int'l Insurance Co Ltd v Lau Ming Kit & Anor* HCA 2295/1971 (Registrar Jones; 14.12.1971) and *Liu Yiu Keung Stephen v Akan Group Ltd* HCA 926/2004 (Chu J; 22.02.2005). See also the commentary under rule 4.

An affidavit which gives only an 'illusory' address for the deponent may be rejected: *Ka Wah Bank Ltd v Low Chung Song & Ors* HCA 4191/1987 (Deputy Judge Cruden; 23.06.1988) (appeal allowed on other grounds – see [1989] 1 HKLR 451), citing *Hyde v Hyde* (1888) 59 LT 523.

And see *Nelson Telecommunications Group (Asia) Ltd v United Land Network Technologies Ltd* DCCJ 5962/2005 (Judge Lok; 24.11.2008) where the court struck out two affidavits where there was evidence that the deponents were not actually residing at or occupying the addresses given.

[41.1.8] Rule 1(4) – occupation of deponent

Order 41 rule 1(4) requires that an affidavit state the deponent's occupation or, if he has none, 'his description'. It is insufficient to state 'clerk' or 'trainee solicitor' without naming the firm or principal: *Shakespear v Willan* (1850) 19 LJ Ex 184; *R v Reeve* (1843) 114 ER 877. Similarly a company director should state the name of the company: *Re Church Press Ltd* (1917) 116 LT 247. Appropriate descriptions would include 'unemployed', 'retired' and 'of no occupation', but not 'gentleman': *Re Orde* (1883) 24 Ch D 271 (CA).

In *Estate of Yang Sen Hui (deceased) v Pao Yuen Tung Hsing Yieh Co Ltd* [1982] HKC 81, 101G–102D (CA) the court rejected an objection that an affirmation did not spell out clearly whether or not the deponent was an employee of the party on whose behalf the affirmation was made.

[41.1.9] Rule 1(5) – physical assembly of an affidavit

Order 41 rule 1(5) contemplates both sides of the paper being used in preparing an affidavit. Pages are to be numbered sequentially. In England (after implementation of the Woolf reforms) it is provided by practice direction 32 that only one side of the paper should normally be used. Unlike England there is no requirement in Hong Kong that A4 size paper be used. See also practice direction 10.1 which sets out additional requirements for the physical assembly of affidavits.

[41.1.10] Rule 1(8) – signature and jurat

An affidavit must be signed by the deponent and the person before whom it is sworn. A clause known as the 'jurat' at the end of the affidavit will state when, where and before whom it was sworn. An affidavit may be sworn before a solicitor holding a current practising certificate (Legal Practitioners Ordinance (Cap 159), section 7A), commissioner for oaths appointed by the Chief Justice under Order 114, justice of the peace (Justices of the Peace Ordinance (Cap 510), section 5) or notary public (Legal Practitioners Ordinance (Cap 159) section 40B(2)(c)). Barristers are not empowered to administer oaths in Hong Kong, unlike the situation in England under the Commissioner for Oaths Acts.

[41.1.11] Rule 1(9) – language and interpretation of affidavits

Affidavits, like all other documents required to be filed or served, may be written in English or Chinese: see article 9 of the Basic Law of the HKSAR and see rule 4 of the High Court Civil Procedure (Use of Language) Rules (Cap 5). Where the deponent does not understand the language in which the affidavit is written it must be interpreted to him (Oaths and Declarations Ordinance (Cap 11), section 8). Order 41 rule 1(9) requires that where an affidavit has been interpreted this fact must be stated, along with the name, address and signature of the interpreter. Section 8 of the Oaths and Declarations Ordinance (Cap 11) additionally requires that the interpreter be sworn.

The common practice is to append to the affidavit or affirmation a declaration by the interpreter in a form similar to that set out in Schedule 1 Part III of the Oaths and Declarations Ordinance which prescribes the following form of declaration or oath by the interpreter:

> I, CD, of , solemnly and sincerely declare [or swear] that I well understand the official language in which this document is written and [state the language in which the contents of this document are interpreted] language and that I have truly, distinctly, and audibly interpreted the contents of this document to the declarant [insert name], and that I will truly and faithfully interpret the declaration about to be administered to him.
>
> (Signed) CD
>
> Interpreter
>
> Declared at in Hong Kong this day of 19 .
>
> Before me,
>
> [Signature and designation,
> ie Justice of the Peace/Notary Public/Commissioner for Oaths.]

ORDER 60A

(HK) APPEALS FROM TRIBUNALS TO COURT OF APPEAL ON A QUESTION OF LAW OTHER THAN BY WAY OF CASE STATED

[60A.0.1] Comparison with English rules

Order 60A is unique to Hong Kong in the sense that there was no Order of that number in the former English RSC.

1. Application of Order (O. 60A r. 1)

This Order applies to appeals that lie from any tribunal to the Court of Appeal on a question of law other than by way of case stated.

NOTES

[60A.1.1] Scope of Order

This Order provides the procedure for appeals to the Court of Appeal against decisions of tribunals where such appeals may be made on questions of law other than by case stated. The right to appeal is a matter of statute and not common law. Reference should normally be made to the Ordinance governing the particular tribunal.

In *Ng Chiu Yuen Jacob v Lam Che Cheung* [1999] 1 HKC 468 the Court of Appeal dismissed an appeal on the ground that it related solely to disputes of fact and not to questions of law.

Appeals from tribunals on a case stated as to a question of law are dealt with separately, under Order 61.

[60A.1.2] Appeals from Lands Tribunal

This Order governs appeals under section 11(2) of the Lands Tribunal Ordinance (Cap 17) from decisions of the Lands Tribunal to the Court of Appeal against a determination or order of the tribunal on the ground that such determination or order is erroneous in point of law. Leave to appeal is required by section 11AA(1) of the Lands Tribunal Ordinance (applicable only to judgments orders and decisions delivered after the commencement of that provision in 2009 as part of the civil justice reforms). According to section 11(3), subject to subsection (4), any appeal under subsection (2) shall be brought in such manner and shall be subject to such conditions as are prescribed by the Rules of the High Court. Subsection (4) says that the time within which a notice of appeal must be served shall be calculated from the date of the making of the determination or order appealed from. This differs from the normal provision governing appeals to the Court of Appeal (see Order 59 rule 4(1)) where the time for making an appeal runs from the date the judgment or order is sealed or otherwise perfected.

[60A.1.3] Appeals from Labour Tribunal

Order 60A does not apply to appeals from the Labour Tribunal. This is because such appeals are initially to the Court of First Instance (with leave, on a point of law or jurisdiction only, pursuant to the Labour Tribunal Ordinance (Cap 25), s 32) whereas Order 60A applies only to appeals to the Court of Appeal. A Labour Tribunal appeal to the Court of First Instance may in certain circumstances result in a subsequent

appeal to the Court of Appeal (section 35A), but any such appeal is from the Court of First Instance and not the Tribunal itself, hence Order 60A still does not apply.

Appeals to the Court of First Instance, such as those from the Labour Tribunal, are governed by Order 55.

See *Lin Zhen Man t/a Yat Chong Electric Co v Soo Yun Wah* [1999] 1 HKC 630 (CFA) for discussion of appeals from the Labour Tribunal to the Court of First Instance and beyond.

2. Notice of appeal from tribunal (O. 60A r. 2)

(1) An appeal to which the Order applies must be brought by motion, notice of which is referred to in this Order as "notice of appeal".

(2) A notice of appeal must specify the grounds of the appeal, together with the question of law to be decided by the Court of Appeal.

NOTES

[60A.2.1] Notice of appeal must state question of law

The notice of appeal from the tribunal to the Court of Appeal must state the grounds of appeal and the question of law to be decided: rule 2(2).

Given that appeals under this Order are limited to questions of law, failure to state a point of law is fatal and the appeal may be struck out under inherent jurisdiction: *Chan Cheuk Tong v Director of Lands* [1996] 3 HKC 485 (CA); *Ng Shek Po & Anor v Director of Lands* [1996] 4 HKC 616 (CA)

Non-compliance with rule 2(2) can be cured by amendment: *Parasram v Kuscene Development Ltd* [1991] 2 HKC 13, 15I–16A (CA).

3. Time for appealing (O. 60A r. 3)

Subject to the provisions of any Ordinance, a notice of appeal must be served on all parties to the proceedings before the tribunal, and on the tribunal, within 28 days of the date on which the judgment or order of the tribunal was given.

(L.N. 152 of 2008)

NOTES

[60A.3.1] Time for service of notice of appeal

Order 60A rule 3 provides that a notice of appeal from a tribunal to the Court of Appeal in accordance with the Order must be served within 28 days of the judgment or order appealed. The time, which was previously 21 days, was increased to 28 days as part of the civil justice reforms which took effect in April 2009.

Note that the notice of appeal must be served not only on the other parties, but on the tribunal itself.

4. Setting down appeal (O. 60A r. 4)

(1) The appellant must, within 7 days after service of the notice of appeal, or within such further time as may be allowed by the Registrar, produce to the Registrar–

(a) a copy of the sealed judgment or order of the tribunal and a copy of its reasoned decision (if any); **(L.N. 152 of 2008)**

(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 tribunal was not required to set down an appeal; however, a sealed copy is now required as a result of the amendment of rule 4(1)(a) as part of the civil justice reforms which came into effect in 2009.

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 2008)

(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 2008)

(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 1988)

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, 263G–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 (Cap 112), which was subsequently further appealed to the Court of Appeal. As to appeals under the Inland Revenue Ordinance, see the commentary under Order 55 rule 1.

NOTES

[76.16.1] Application for rectification of will

Order 76 rule 16 applies to applications for rectification of wills under section 23A of the Wills Ordinance (Cap 30). It is there provided that the court may order that a will be rectified so as to carry out the testator's intentions in cases of clerical error or failure to understand the testator's instructions.

[76.16.2] Procedure

The procedure to be followed on an application for rectification of a will is set out in para 37 *et seq* of practice direction 20.2.

Unopposed applications may be made *ex parte* on affidavit evidence, but opposed applications should be commenced by writ, originating summons or probate counterclaim.

The procedures set out in the practice direction reflect rule 55 of the English Non-Contentious Probate Rules 1987. Before the practice direction came into force (1 August 2012) it had been held that the English rule should be followed in Hong Kong: *Wu Man Shan v Registrar of Probate* [2006] 2 HKC 106.

ORDER 77

PROCEEDINGS BY AND AGAINST THE CROWN

[77.0.1] Order 77 – preliminary note on colonial language

Order 77, which deals with civil proceedings by and against the government, has not been amended to reflect the resumption of Chinese sovereignty in 1997. Pending appropriate amendment under the ongoing adaptation of laws exercise, references to 'the Crown' should be interpreted as provided in Schedule 8 to the Interpretation and General Clauses Ordinance (Cap 1), introduced by the Reunification Ordinance on 1 July 1997. It is there provided that in certain circumstances references to 'the Crown' are to be taken as references to the Central People's Government, and in others to the government of the HKSAR.

[77.0.2] Comparison with English rules

Hong Kong's Order 77 differs from the equivalent in the former English Rules of the Supreme Court in that rules 2, 5, 8 and 13 are omitted.

[77.0.3] Primary legislation

The provisions of Order 77 should be read together with the Crown Proceedings Ordinance (Cap 300) which is the statutory basis for many civil claims against the government. Pending amendment under the on-going Adaptation of Laws exercise, that Ordinance must, like this Order, be construed in accordance with the interpretative devices enacted by the Reunification Ordinance in 1997 (see above).

At common law it was not possible to bring civil claims in contract or tort against the government. The government and the courts both exercised power in the name of the Crown and it was thought not possible for the monarch to summon herself to appear in her own court. The private citizen's remedy was at best the reasonable expectation of *ex gratia* compensation. This unsatisfactory situation was remedied in the 20th century by statute, in Hong Kong, by the Crown Proceedings Ordinance. See in particular section 3 of that Ordinance which enables the private citizen to make claims for compensation against the government.

[77.0.4] Appropriate defendant in proceedings against government

Section 13(1) of the Crown Proceedings Ordinance (Cap 300) provides that the Secretary for Justice should be named as defendant in proceedings against the government under that Ordinance. The same is true when the government is said to be vicariously liable for the acts of a government servant: it is the government itself which may be vicariously liable, not the head of the department or unit in which the tortfeasor is employed. See *Lai Hing v Cater & AG* [1976] HKLR 1022 where the court struck out proceedings as against the Commissioner of the ICAC personally for alleged torts committed by ICAC officers, leaving the action to proceed against the Attorney General (as the Secretary for Justice was then known) as the government's representative under the Ordinance.

The situation is sometimes different in proceedings concerning government property. Under the Financial Secretary Incorporation Ordinance (Cap 1015) the FS is constituted as a corporation sole known as The Financial Secretary Incorporated

for the purpose of holding government property which may be transferred to it. There are many examples of proceedings in which the FSI is named as the party to proceedings concerning tenancy agreements entered into inrespect of government-owned buildings which have been transferred to that corporation.

In the case of judicial review proceedings under Order 53, where allegations of illegality, procedural impropriety or irrationality are made against the holder of a government office or instrumentalities of the state, claiming public law relief, it is appropriate to name the particular government office or body as a party. There are many examples where the Chief Executive of the HKSAR, the Secretary for the Civil Service, the Director of Immigration and many other government offices have been named as parties in such proceedings.

1. Application and interpretation (O. 77 r. 1)

(1) These rules apply to civil proceedings to which the Crown is a party subject to the following rules of this Order.

(2) In this Order –

"civil proceedings by the Crown" and "civil proceedings against the Crown" have the same respective meanings as in Part III of the Crown Proceedings Ordinance (Cap. 300), and do not include any of the proceedings specified in section 19(3) of that Ordinance;

"civil proceedings to which the Crown is a party" has the same meaning as it has for the purposes of Part V of the Crown Proceedings Ordinance (Cap. 300), by virtue of section 2(4) of that Ordinance;

"order against the Crown" means any order (including an order for costs) made in any civil proceedings by or against the Crown, or in connection with any arbitration to which the Crown is a party, in favour of any person against the Crown or against a government department or against an officer of the Crown as such;

"order" includes a judgment, decree, rule, award or declaration.

3. Particulars to be included in indorsement of claim (O. 77 r. 3)

(1) In the case of a writ which begins proceedings against the Crown the indorsement of claim required by Order 6, rule 2, shall include a statement of the circumstances in which the Crown's liability is alleged to have arisen and as to the government department and officers of the Crown concerned.

(2) If in civil proceedings against the Crown a defendant considers that the writ does not contain a sufficient statement as required by this rule, he may, before the expiration of the time limited for acknowledging service of the writ, apply to the plaintiff by notice for a further and better statement containing such information as may be specified in the notice.

(3) Where a defendant gives a notice under this rule, the time limited for acknowledging service of the writ shall not expire until 4 days after the defendant has notified the plaintiff in writing that the defendant is satisfied with the statement supplied in compliance with the notice, or 4 days after the Court has, on the application of the plaintiff by summons served on the defendant not less than 7 days before the return day, decided that no further information as to the matters referred to in paragraph (1) is reasonably required.

4. Service on the Crown (O. 77 r. 4)

(1) Order 10, Order 11 and any other provision of these rules relating to service out of the jurisdiction shall not apply in relation to the service of any process by which civil proceedings against the Crown are begun.

(HK)(2) Personal service of any document required to be served on the Crown for the purpose of or in connection with any civil proceedings is not requisite; but where the proceedings are by or against the Crown service on the Crown must be effected by service on the Secretary for Justice.

(3) In relation to the service of any document required to be served on the Crown for the purpose of or in connection with any civil proceedings by or against the Crown, Order 65, rules 5 and 9, shall not apply, and Order 65, rule 7, shall apply as if the reference therein to rules 2 and 5(1)(a) of that Order were a reference to paragraph (2) of this rule.

6. Counterclaim and set-off (O. 77 r. 6)

(1) Notwithstanding Order 15, rule 2, and Order 18, rules 17 and 18, a person may not in any proceedings by the Crown make any counterclaim or plead a set-off if the proceedings are for the recovery of, or the counterclaim or set-off arises out of a right or claim to repayment in respect of, any taxes, duties or penalties.

(2) Notwithstanding Order 15, rule 2, and Order 18, rules 17 and 18, no counterclaim may be made, or set-off pleaded, without the leave of the Court, by the Crown in proceedings against the Crown, or by any person in proceedings by the Crown –

(a) if the Crown is sued or sues in the name of a government department and the subject-matter of the counterclaim or set-off does not relate to that department; or

(b) if the Crown is sued or sues in the name of the Secretary for Justice.

(3) Any application for leave under this rule must be made by summons.

NOTES

[77.6.1] Restriction on counterclaim and set-off in proceedings involving the government

Order 77 rule 6 imposes, for the purpose of proceedings involving the government, restrictions on the usual right to counterclaim or rely on the defence of set-off. No counterclaim or set-off is permitted against or in respect of taxes, duties or penalties owing to or repayable by the government. In other circumstances a cross-claim is possible, but leave is required. The court's discretion to grant such leave has been described as 'seemingly unfettered': *Paul Y Construction Co Ltd v AG* [1992] 2 HKLR 120. There (at 122) Kaplan J described the rationale of the rule in the following terms:

> The rationale behind this rule would seem to be based upon the fact that the [Secretary for Justice] can be sued in one capacity, but may seek to set-off or counterclaim in another. For instance, A could sue the [SJ] in respect of medical negligence. This would, effectively, be an action against the Department of Medical and Health. The [SJ] could seek to set-off against any sums found to be due to A in the medical negligence action a

sum said to be owed by A to another government department, for instance the Building Ordinance Office, in respect of the cost of work carried out by that office for which A is liable under that Ordinance. It is to keep an eye on situations such as this, that the leave of the court is required.

The court went on to hold that in exercising its discretion, it was necessary to look at all the circumstances.

7. Summary judgment (O. 77 r. 7)

(1) No application shall be made against the Crown –

(a) under Order 14, rule 1, or Order 86, rule 1, in any proceedings against the Crown;

(b) under Order 14, rule 5, in any proceedings by the Crown; or

(c) under Order 14A, rule 1, in any proceedings by or against the Crown.

(L.N. 165 of 1992)

(2) Where an application is made by the Crown under Order 14, rule 1, Order 14, rule 5, or Order 86, rule 1, the affidavit required in support of the application must be made by –

(a) the solicitor acting for the Crown, or

(b) an officer duly authorized by the solicitor so acting or by the department concerned;

and the affidavit shall be sufficient if it states that in the deponent's belief the applicant is entitled to the relief claimed and there is no defence to the claim or part of a claim to which the application relates or no defence except as to the amount of any damages claimed.

NOTES

[77.7.1] Numbering

There is no rule 8 in Order 77. The equivalent in the former English RSC dealt with revenue claims by the government. In Hong Kong such claims are normally dealt with in the District Court, regardless of amount: Inland Revenue Ordinance (Cap 112), s 75(2).

9. Judgment in default (O. 77 r. 9)

(1) Except with the leave of the Court, no judgment in default of notice of intention to defend or of pleading shall be entered against the Crown in civil proceedings against the Crown or in third party proceedings against the Crown.

(2) Except with the leave of the Court, Order 16, rule 5(l)(a), shall not apply in the case of third party proceedings against the Crown.

(3) An application for leave under this rule may be made by summons and the summons must be served not less than 7 days before the return day.

(L.N. 152 of 2008)

NOTES

[77.9.1] Default judgment

By virtue of Order 77 rule 9(1) leave is required to enter default judgment against the government. However, there is no such requirement where the government is plaintiff. Thus government should be able to enter default judgment in an action against a citizen just as if it were a private party. That is the situation in Malaysia, where it is recognised that the government may enter summary judgment against a citizen for outstanding tax. See *Government of the Federation of Malaysia v Haji Ghani Gilong* [1993] 1 MLJ 349.

10. Third party notices (O. 77 r. 10)

(1) Notwithstanding anything in Order 16, a third party notice (including a notice issuable by virtue of Order 16, rule 9) for service on the Crown shall not be issued without the leave of the Court, and the application for the grant of such leave must be made by summons, and the summons must be served on the plaintiff and the Crown.

(2) Leave to issue such a notice for service on the Crown shall not be granted unless the Court is satisfied that the Crown is in possession of all such information as it reasonably requires as to the circumstances in which it is alleged that the liability of the Crown has arisen and as to the departments and officers of the Crown concerned.

11. Interpleader: application for order against Crown (O. 77 r. 11)

No order shall be made against the Crown under Order 17, rule 5(3), except upon an application by summons served not less than 7 days before the return day.

12. Discovery and interrogatories (O. 77 r. 12)

(1) Order 24, rules 1 and 2, shall not apply in civil proceedings to which the Crown is a party.

(2) In any civil proceedings to which the Crown is a party any order of the Court made under the power conferred by section 24(1) of the Crown Proceedings Ordinance (Cap. 300), shall be construed as not requiring the disclosure of the existence of any document the existence of which it would, in the opinion of the Chief Secretary for Administration, be injurious to the public interest to disclose.

(L.N. 362 of 1997)

(3) Where in any such proceedings an order of the Court directs that a list of documents made in answer to an order for discovery against the Crown shall be verified by affidavit, the affidavit shall be made by such officer of the Crown as the Court may direct.

(4) Where in any such proceedings an order is made under the said section 24 for interrogatories to be answered by the Crown, the Court shall direct by what officer of the Crown the interrogatories are to be answered.

(5) (Repealed L.N. 404 of 1991)