

- (b) Subsections (1)(b) and (c) provide that where the day for doing any act or taking any step falls on a public holiday or a day on which either a gale warning or black rainstorm warning is issued, time is extended to the next normal business day. However, this does not apply to acts or steps the time limited for which is six days or less (subsection (1)(d)). For the purpose of section 71, 'black rainstorm warning' is defined as such issued by the Royal Observatory and 'gale warning' is given the meaning assigned by the Judicial Proceedings (Adjournment During Gale Warnings) Ordinance (Cap 62).

The question of when the act, in respect of which the time limitation exists, has been done arose before the Hong Kong Court of Appeal in *Wo Fung Paper Making Factory Ltd v Sappi Kraft (Pty) Ltd* [1988] 2 HKLR 346. In that case, a solicitor's clerk had presented a summons at the registry on the last day of the time limited for making that particular application. The registry queried the summons with the result that it was taken back to the solicitor and not accepted by the registry until the next day. It was later argued that the application had been made within the prescribed time, i.e. when the summons was first presented to the registry. Their Lordships were divided in their opinion on this issue. Fuad VP held that the application had not been made in time because the registry had made a perfectly sensible and proper query about the summons; Hunter JA felt it was unnecessary to decide the point, and Penlington JA held that application had been made to the court in time.

[3.2.2] Legal Aid Ordinance

Section 15 of the Legal Aid Ordinance (Cap 91) and regulations thereunder provide that there shall be a stay of proceedings where notice of an application for legal aid is filed (42 days) or where legal aid is discharged (14 days). The effect of such a legal aid stay is that the time prescribed by these rules for the taking of any step in proceedings ceases to run so long as the stay lasts. This includes the time within which a party may appeal from an adverse decision: see *Brook v Law Society of Hong Kong (No 1)* [1998] 1 HKC 595.

Under the terms of the Legal Aid Ordinance a legal aid stay may be lifted by the court.

In *Lee Shiu Ming v Yeo Hiap Seng (Hong Kong) Ltd* [1994] 1 HKC 18 the Court of Appeal considered the circumstances in which such a stay of proceedings might be lifted.

In *Chan Chun Shing v Chang Chen Chin & Tong Tak Co* HCPI 395/2008 (Fung J, 04.05.2009) the court lifted a legal aid stay to prevent trial dates from being lost, referring to the need to preserve 'milestone' dates. See Order 25 rule 1B as to variation of trial dates.

3. Summer Vacation excluded from time for service, etc., of pleadings (O. 3 r. 3)

Unless the Court otherwise directs, the period of the Summer Vacation shall be excluded in reckoning any period prescribed by these rules or by any order or direction for serving, filing or amending any pleading.

NOTES

[3.3.1] Comparison with English rule

The equivalent English rule was repealed in 1990.

[3.3.2] Time does not run during summer vacation

Order 3 rule 3 provides that the time for serving, filing or amending pleadings does not run during the court's summer vacation, unless the court otherwise directs. The summer vacation is the month of August — see Order 64 rule 1 and the definition of 'vacation' in Order 1 rule 4. The court also has brief vacations at Christmas and Easter and, prior to 1988, the running of time was suspended during those vacations as well.

The suspension of the running of time under this rule applies only with respect to any 'pleading'. Order 1 rule 4 provides that 'pleading' does not include a petition, summons or preliminary act. The ordinary meaning of the word suggests that it applies only to documents which 'plead' a party's case. The Concise Oxford dictionary defines 'pleading' as 'formal statement of cause of action or defence'. Thus a notice of appeal is not a pleading for this purpose: *Chung Fai Engineering Co v Maxwell Engineering Co Ltd* [2001] 3 HKC 24. However, reading the rule together with section 31(1) of the High Court Ordinance, the suspension of time applies more broadly.

Section 31(1) of the High Court Ordinance provides as follows:

Where by any law regulating civil procedure, or by any special order of the High Court, any period not exceeding one month is appointed or allowed for the doing of any act or the taking of any proceeding, no days included in the Summer vacation shall be reckoned in the computation of such time, unless the Court otherwise directs:

Provided that nothing in this section shall be deemed to extend the time for entering appearance to any writ endorsed with a statement of claim.

It will be noted that unlike Order 3 rule 3, section 31(1) is not restricted to pleadings. Hence the time for serving notice of appeal is suspended by the latter, though not by the former: *Chung Fai Engineering Co* (above), at 31D-E. Likewise the time for issuing a summons under Order 12 rule 8 (to challenge jurisdiction) is suspended by section 31(1) though not by Order 3 rule 3: *The Artemis CACV 81/1982* (Leonard VP, Cons & Fuad JA; 64.11.1982).

[3.3.3] Power of court to direct time to run during summer vacation

Both Order 3 rule 3 and section 31(1) of the High Court Ordinance leave with the court a discretion to direct that the suspension of time shall not operate in a particular case. Thus when the court gives directions which are likely to span the August vacation, consideration will be given to the question whether time should run during that period.

It is obviously desirable that a direction that time shall run during the August vacation be stated expressly in the court's order. However, such a direction may be implied, as in *Guang Xin Enterprises Ltd (in liq) v Kwan Wong Tang & Fong (a firm)* [2001] 2 HCA 2788/2001 (Chung J; 09.08.2001) where a master's order extending time to a date within the summer vacation was construed as a direction that time shall run.

4. Time expires on Sunday, etc. (O. 3 r. 4)

Where the time prescribed by these rules, or by any judgment, order or direction, for doing any act at an office of the Court expires on a Sunday or other day on which that office is closed, and by reason thereof that act cannot be done on that day, the act shall be in time if done on the next day on which that office is open.

with great caution: see *Spiliada* [1987] AC 460 at p 481.

- (2) There are two safeguards for the foreigner. First the applicant has to bring himself within one of the subparagraphs in Order 11 rule 1. Secondly the applicant has to satisfy Order 11 rule 4(2) and 'make [it] sufficiently to appear to the court that the case is a proper one for service out'. That as Lord Radcliffe pointed out in *Vitkovice* [1951] AC 869 is really the heart of the rule.
- (3) In contract, the question whether a case is a proper one for service out falls to be answered by the tests in *Spiliada* [1987] AC 460. There are two ways, it seems to me, of expressing substantially the same concept. The first is Lord Keith's formulation of 'natural forum' in the *The Abidin Daver* [1984] AC 398 at p 415 where he defines the natural forum as being 'that with which the action has the most real and substantial connection'. The second is what Lord Goff called the basic principle and in his paraphrase of Lord Kinnear's test in *Sim v Robinow* (1892) 19 R 665. It is expressed by Lord Goff in these words at p 476: 'the appropriate forum for the trial of the action is in which the case may be tried more suitably for the interests of all the parties and the ends of justice.' The onus of establishing that falls upon the plaintiff applicant.
- (4) The phrase 'sufficiently to appear' in Order 11 rule 4(2) is a guarded one, and is carefully chosen, I think, to cover the two very different positions of the court, on an application like this, in relation to the law and the facts. As far as the law is concerned, if the facts are clear the court can readily decide that for itself. That conclusion may be decisive, directly or indirectly: see *The Brabo* [1949] AC 326. Equally, and this is one of the court's primary functions under this rule, it can decide whether the facts alleged are sufficient in law to support the cause of the action alleged. But on pure fact, and particularly upon disputed fact, it is in a very different position. It cannot make any finding for the simple reason that it cannot conduct a mini pre-trial in order to decide whether a pre-trial is to take place. It therefore has basically to act upon asserted fact.
- (5) There are two stages to the enquiry. The first is the *ex parte* stage under Order 11. I emphasise that it is *ex parte* on documents. The practice does not envisage oral submissions ever being made except at specific request. Order 11 rule 4(1) specifies what the supporting affidavit has to show. At that stage it seems to me that the court has to come to a provisional view (it being an *ex parte* application) on three matters. The first is whether the applicant shows a *prima facie* case. I read the speeches in *Vitkovice* [1951] AC 869 as accepting that that is the burden of that stage, it may be for the simple reason that when the court has only got one party's version before it, it can do very little more. That is how I read the speeches of Lord Simonds at p 876, Lord Radcliffe at p 884, Lord Tucker at p 891. Secondly it has to consider the sufficiency in law of the facts alleged: for example whether the applicant brings himself within any of the sub-rules and whether the facts alleged are sufficient *prima facie* to establish the cause of action alleged. Thirdly the court has to consider the facts within the limited scope available. This really comes down to considering whether the facts are sufficiently asserted in an apparently credible manner. The manner was put in this way in a case in contract by Lord Buckmaster giving the opinion of the Privy Council in *Hemelryck v William Lyall Shipbuilding* [1921] 1 AC 695 at p 701. He said:

'For the purpose of exercising the discretion which is conferred by the rule to be exercised (that is Order 11) it is sufficient if there appears reasonable

evidence that a contract has been made.'

- (6) The second stage which may or may not be reached, follows a proper application under Order 12 rule 8. Then the court has to consider all the evidence before it, and to determine in the light of that whether the plaintiff shows a good arguable case. That is the test laid down in *Vitkovice* [1951] AC 869 at that stage. But the court's position on fact and law is the same as it was at the *ex parte* stage. It cannot make any findings of fact. It can certainly consider the legal sufficiency of the facts, and whether there are legal holes or obvious failings in the plaintiff's case. It can in the words of Lord Goddard CJ in *Malik v National Bank of Czechoslovakia* 176 LT 136 cited in *Vitkovice* [1951] AC 869 at p 888, 'if it can see by what appears on the affidavits that the case put up is a perfectly groundless one and one in which there is no substance at all, the court can refuse to give leave'. Similarly if the case is demurrable or nearly so. But that is about the limit of the court's power and function on disputed facts under this jurisdiction. It follows that the existence of disputed facts is normally quite irrelevant to the question as to whether or not a good arguable case has to be shown. Putting it in another way, the showing of a good arguable case does not postulate an Order 14 case, and is not negated by the fact that good arguable defences may exist. The relevance of the dispute goes really to little more than the question of the suitability of the forum evidentially and it may be a factor to be brought in there. Otherwise normally speaking factual disputes are quite irrelevant.

Distilling the above comments down to their essence, and reading them together with the approach adopted by the court in other cases such as *Deak & Anor v Deak Perera FE Ltd* (in liq) [1991] 1 HKLR 551, 554C-1 (CA) and *National Union Fire Insurance Co of Pittsburgh v Grand Union Insurance Co Ltd* CACV 105/1992 (*Kempster, Penlington & Litton JJA*; 24.03.1993) (para 10), it might be said that the following three elements are relevant:

- (1) whether there is a *prima facie* or good arguable case on the merits;
- (2) whether the facts come within one of the lettered heads of rule 1(1);
- (3) whether the case is a proper one under rule 4(2) for service out of the jurisdiction, that is the question of *forum conveniens*.

[11.1.5] The merits - standard of proof

A line of cases emanating from *The Brabo* (1949) 82 Lloyd LR 251; [1949] AC 326 and *Vitkovice Harni A Hutni Tezirstvo v Korner* [1951] AC 869 suggests that the plaintiff must show a 'good arguable case on the merits'. For a Hong Kong case, see *Sonata Deceof & Co SA & Ors v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina)* [1981] HKLR 116, especially at 118. In considering whether there is a 'good arguable case' the court does not exercise a discretion but makes a 'judgment of fact': *Continental Mark Ltd v Verkehrs-Club De Schweiz* [2001] 4 HKC 469, 481B (affirmed on appeal: see [2002] 2 HKC 513).

The English cases in this line of authority include *Metall und Rohstoff v Donaldson Lufkin & Jenrette Inc & Anor* [1990] 1 QB 391; *Attock Cement Co v Romanian Bank for Foreign Trade* [1989] 1 Lloyd's Rep 572; [1989] 1 WLR 1147; *Hutton (EF) (London) Ltd & Co v Mofarrij* [1989] 2 Lloyd's Rep 348; [1989] 1 WLR 488; *Société Commerciale de Reassurance v Eras International Ltd* [1992] 1 Lloyd's Rep 570; *Overseas Union Insurance Ltd v Incorporated General Insurance Ltd* [1992] 1 Lloyd's Rep 439; *Banque*

the Court shall order the action to be so tried, and may direct the parties to prepare a statement of the issues in dispute or, if the parties are unable to agree such a statement, may settle the statement itself.

(3) Where the Court makes an order under paragraph (2), it shall, and where it dismisses an application for such an order, it may, give such directions as to the further conduct of the action as may be appropriate, and Order 25, rules 2 to 7 shall, with the omission of so much of rule 7(1) as requires parties to serve a notice specifying the orders and directions which they desire and with any other necessary modifications, apply as if the application under this rule were a case management summons. (L.N. 152 of 2008)

(4) This rule applies to every action begun by writ other than one which includes—

- (a) a claim by the plaintiff for libel, slander, malicious prosecution or false imprisonment; or (L.N. 363 of 1990)
- (b) a claim by the plaintiff based on an allegation of fraud.

22. Saving for defence under Merchant Shipping Acts etc. (O. 18 r. 22)

Nothing in Order 75, rules 37 to 40, shall be taken as limiting the right of any shipowner or other person to rely by way of defence on any provision of the Merchant Shipping Acts 1894 to 1979 in their application to Hong Kong or the Merchant Shipping (Local Vessels) Ordinance (Cap 548), the Merchant Shipping (Seafarers) Ordinance (Cap. 478) or the Merchant Shipping (Safety) Ordinance (Cap. 369), which limits the amount of his liability in connection with a ship or other property. (L.N. 356 of 1988; 44 of 1995 s. 143; 24 of 2005 s. 55)

NOTES

[18.22.1] Wording of Order 18 rule 22

Order 18 rule 22 continues to refer to United Kingdom legislation which ceased to apply in Hong Kong on the resumption of Chinese sovereignty. See the commentary under Order 75 rule 1. Note that this rule was amended with effect from 02.01.2007 when the Merchant Shipping (Local Vessels) Ordinance (Cap 548) was brought into force (LN 282/2006).

As a transitional measure some United Kingdom legislation may continue to apply in Hong Kong if adopted by the legislature: see section 2A(2)(e) of Cap 1, and with regard to shipping legislation see the commentary under Order 75 rule 1.

23. Transitional provision relating to rule 93 of Amendment Rules 2008 (Order 18 r. 23)

Where a statement of claim has been served on a defendant before the commencement of the Amendment Rules 2008, then rule 93 of the Amendment Rules 2008 does not apply to the defence to the claim and if a counterclaim has been served on the plaintiff, to the defence to the counterclaim, and rule 13 as in force immediately before the commencement continues to apply as if rule 93 of the Amendment Rules had not been made. (L.N. 152 of 2008)

NOTES

[18.23.1] Defence not affected by 2009 amendments if claim served prior to commencement

The practical effect of Order 18 rule 23 is that the provisions of rule 13, by which a bare denial or non-admission is no longer permitted, do not apply to a defence to an action in which a statement of claim had already been served when that rule was amended as part of the civil justice reforms with effect from 2009. In such cases a bare denial will still be possible. The same is true with respect to a defence to counterclaim in such an action.

24. Transitional provision relating to rules 96 and 97 of Amendment Rules 2008 (O. 18, r. 24)

Where a statement of claim has been served on a defendant before the commencement of the Amendment Rules 2008, then rules 96 and 97 of the Amendment Rules 2008 do not apply —

- (a) in relation to the service of the defence and the reply to that defence; and
- (b) if a counterclaim has been served on the plaintiff, in relation to the service of the defence to the counterclaim,

and rules 2 and 3 as in force immediately before the commencement continue to apply as if rules 96 and 97 of the Amendment Rules 2008 had not been made. (L.N. 152 of 2008)

NOTES

[18.24.1] Times for service not affected by 2009 amendments if claim served prior to commencement

The practical effect of rule 24 is that the provisions of rules 2 and 3 enlarging the time for service of a defence, reply or defence to counterclaim do not apply to an action in which a statement of claim had already been served when the amendments to those rules came into force as part of the civil justice reforms in 2009. The previous period of 14 days will apply instead of the enlarged time of 28 days.

Ming v Koon Wing Yee & Ors HCA 1479/2009 (Poon J; 25.09.2009) the court directed that the Department of Justice be informed of the application in order that its view could be made known.

[29.1.84] Restriction on use of information disclosed pursuant to Mareva injunction

As with the case with regard to information obtained by normal means of discovery (see the commentary under Order 24 rule 14A), there is an implied undertaking to the court on grant of a *Mareva* injunction that information obtained will not be used for a collateral purpose. Breach is a contempt of court. See the judgment of the Singapore Court of Appeal in *Pertamina Energy Trading Ltd v Karaha Bodas Co LLC & Ors* [2007] SGCA 10 (01.03.2007), referring to several UK authorities, in particular *Prudential Assurance Co Ltd v Fountain Page Ltd* [1991] 1 WLR 756, 764-5.

[29.1.85] Solicitor's duty in relation to discovery under Mareva injunction

A solicitor has important duties to the court in respect of disclosure by the client under a *Mareva* injunction. In *Yau Chiu Wah v Gold Chief Investment Ltd & Anor* (No 2) [2003] 3 HKC 91, Ma JA considered these duties at 102G-1. The learned judge said:

A solicitor's duty in relation to discovery is to ensure that his client properly complies with his obligations . . . The duty is not limited merely to preventing the client from filing an affidavit which, to his knowledge, is false. The solicitor must actually explain to his client the extent of his obligations in relation to discovery and take reasonable steps to ensure that this obligation is fulfilled.

In this regard Ma JA cited *Myers v Elman* [1940] AC 282, 304 and *Roberts v Machine Tool Co Ltd v EP Barrus (Concessionaires) Ltd* [1968] 1 WLR 621, 624.

[29.1.86] Dispute as to ownership

Where there is a question as to the ownership of assets, such as where they appear on their face to belong to a third party, the court will not include them within the scope of a *Mareva* injunction without evidence that in truth they belong to the defendant. In such cases the court may direct the issue of ownership to be tried as a separate issue. See *Lee Boon Chean v Alfred Kao & Ors* HCA 8146/1984 (Hunt J; 22.05.1985) and *Standard Chartered Securities Ltd v Lai Arthur & Ors* [1993] 1 HKC 375, 390D-I, both applying *SCF Finance Co Ltd v Masri* [1985] 1 WLR 676.

[29.1.87] The evolution of the 'worldwide' Mareva injunction

As mentioned above, the court may grant a *Mareva* injunction against assets located as well as outside Hong Kong. Such an injunction is often referred to as a 'worldwide' *Mareva*.

The decisions in which the worldwide *Mareva* injunction evolved show that the court should not arrogate to itself an extraterritorial power to interfere in matters which on grounds of comity should be left to the courts of other jurisdictions. That concern remains relevant and finds expression in aspects of the form of worldwide *Mareva* injunction set out in practice direction 11.2 (see below). Hence a brief consideration of the development of the worldwide *Mareva* may be instructive.

In *Ka Wah Int'l Merchant Finance Ltd v Asean Resources Ltd* HCA 385/1987

(Sears J; 05.03.1987) the court recognised a power to grant a worldwide *Mareva* injunction against a person within Hong Kong in restricted circumstances. Referring to the decision in *Ashtiani v Kashi* [1986] 3 WLR 647 (CA) the Hong Kong court held that the power to grant a *Mareva* covering assets in other jurisdictions should be restricted to cases where:

- (1) the assets have been deliberately removed from Hong Kong to frustrate control by the court;
- (2) assets have been disguised as 'foreign' when in reality they are 'national';
- (3) the document of title to extraterritorial assets is in Hong Kong;
- (4) the extraterritorial assets are held by a Hong Kong company and can be specifically identified.

In *Cheung Lily v Standard Chartered Bank HK Trustee Ltd* [1988] 1 HKLR 613 (CA) *Ashtiani* was again referred to and the court limited a *Mareva* injunction to assets in Hong Kong saying (at 618F-G) that such an injunction 'should not purport to inhibit dealings with assets outside the jurisdiction'.

In 1989 the position changed radically with a quartet of decisions of the English Court of Appeal:

- (1) In *Babanaft Int'l Co SA v Bassame* [1989] 1 All ER 433 (CA) it was held that although the court should not claim an exorbitant extraterritorial jurisdiction of an *in rem* nature, a *Mareva* injunction could cover assets elsewhere if qualified by a proviso making it clear that the injunction was directed to the defendant *in personam* and did not affect the rights of third parties or seek to control their activities.
- (2) *Republic of Haiti v Duvalier* [1989] 1 All ER 456 (CA) – the proviso to a worldwide *Mareva* should protect third parties outside the jurisdiction only to the extent that the order is not enforced by the courts of the place where the assets are located.
- (3) In *Derby & Co Ltd v Weldon* [1989] 1 All ER 469 (CA) the court held it had jurisdiction to grant a worldwide *Mareva* in exceptional circumstances such as where the assets within the jurisdiction were wholly inadequate in view of the sum involved in the action, and there was a high risk of dissipation of the extra-territorial assets. Such a *Mareva* should, held the court, by undertaking or proviso protect the position of third parties.
- (4) In *Derby & Co Ltd v Weldon (Nos 3 & 4)* [1990] Ch 65 (reported at [1989] 1 All ER 1002 as *Derby & Co Ltd v Weldon (No 2)*) it was held that a worldwide *Mareva* could be granted even where the defendant had no assets within the jurisdiction. A sufficient sanction existed against the defendant in the event of disobedience in that the court could bar the defendant's right to defend. The court should protect the position of third parties outside the jurisdiction by including a proviso that, insofar as the order purported to have extraterritorial effect, no person should be affected by it or concerned with its terms until it was declared enforceable or recognised or enforced by the court of the extraterritorial jurisdiction. Even then, it should only affect such third persons to the extent they are:
 - (a) persons to whom the order is addressed or an officer or agent of such persons, or
 - (b) persons who are subject to the jurisdiction of the court and (i) have

- deceased person has been directed, such party as the Court may direct must—
- (a) examine the claims of persons claiming to be creditors of the estate,
 - (b) determine, so far as he is able, to which of such claims the estate is liable, and
 - (c) at least seven clear days before the time appointed for adjudicating on claims, make an affidavit stating his findings and his reasons for them and listing all the other debts of the deceased which are or may still be due.
- (2) Where an inquiry for next of kin or other unascertained claimants has been directed, such party as the Court may direct must—
- (a) examine the claims,
 - (b) determine, so far as he is able, which of them are valid, and
 - (c) at least seven clear days before the time appointed for adjudicating on claims, make an affidavit stating his findings and his reasons for them.
- (3) If the personal representative or trustee concerned are not the parties directed by the Court to examine claims, they must join with the party directed to examine them in making the affidavit required by this rule.

7. Adjudication on claims (O. 44 r. 7)
- For the purpose of adjudicating on claims the Court may—
- (a) direct any claim to be investigated in such manner as it thinks fit,
 - (b) require any claimant to attend and prove his claim or furnish further particulars or evidence of it, or
 - (c) allow any claim after or without proof thereof.

NOTES

[44.7.1] **Costs of creditor**
A creditor which succeeds in proving its debt against an estate or trust under Order 44 rules 4-8 will normally be entitled to its costs. See Order 62 rule 3(9).

8. **Notice of adjudication (O. 44 r. 8)**
The Court shall give directions that there be served on every creditor whose claim or any part thereof has been allowed or disallowed, and who did not attend when the claim was disposed of, a notice informing him of that fact.
9. **Interest on debts (O. 44 r. 9)**
- (1) Where an account of the debts of a deceased person is directed by any judgment, then, unless the deceased's estate is insolvent or the Court otherwise orders, interest shall be allowed—
 - (a) on any such debt as carries interest, at the rate it carries, and
 - (b) on any other debt, from the date of the judgment at the rate payable on judgment debts at that date.

- (2) A creditor who has established his debt in proceedings under the judgment and whose debt does not carry interest shall be entitled to interest on his debt in accordance with paragraph (1)(b) out of any assets which may remain after satisfying the costs of the cause or matter, the debts which have been established and the interest on such of those debts as by law carry interest.
- (3) For the purposes of this rule "debt" includes funeral, testamentary or administration expenses and, in relation to expenses incurred after the judgment, for the reference in paragraph (1)(b) to the date of the judgment there shall be substituted a reference to the date when the expenses became payable.

10. Interest on legacies (O. 44 r. 10)

Where an account of legacies is directed by any judgment, then, subject to any directions contained in the will or codicil in question and to any order made by the Court, interest shall be allowed on each legacy at the rate of 8 per cent per annum beginning at the expiration of one year after the testator's death.

11. Master's order (O. 44 r. 11)

(1) Subject to Order 37, rule 2, the result of proceedings before a master under a judgment shall be stated in the form of an order. (L.N. 363 of 2000)

(2) Subject to any direction of the master under paragraph (3) or otherwise an order under this rule shall have effect as a final order disposing of the cause or matter in which it is made.

(3) An order under this rule shall contain such directions as the master thinks fit as to the further consideration, either in court or in chambers, of the cause or matter in which it is made.

(4) Every order made under this rule shall have immediate binding effect on the parties to the cause or matter in which it is made and copies of the order shall be served on such of the parties as the master may direct.

12. Appeal against master's order (O. 44 r. 12)

(1) Subject to paragraph (2), Order 58, rule 1 shall apply to an order made under rule 11 as it applies to any judgment, order or decision of a master, save that the hearing shall be in open court unless the Court directs otherwise. (L.N. 129 of 2000)

(1A) The following provisions shall have effect in the application of Order 58, rule 1 to an order made under rule 11—

- (a) the notice referred to in Order 58, rule 1(2) shall state the grounds of the appeal;
- (b) no fresh evidence (other than evidence as to matters which occurred after the date of the master's order) shall be admitted except on special grounds;
- (c) the judge hearing the appeal shall have the same power to draw inferences of fact as has the Court of Appeal under Order 59, rule 10(3). (L.N. 129 of 2000)

In *Lobster Group Ltd v Heidelberg Graphic Equipment Ltd* [2008] EWHC (TCC) [2008] 2 All ER 1173 the English court distinguished between pre-action and post-action mediation and observed (para 17) that the costs of the latter were more likely to be recoverable as being incidental to the proceedings. With regard to the former it was said (para 12) that 'the greater the distance in time between the incurring of the costs and the commencement of proceedings, the greater will be the likelihood that the losing party will have good grounds to dispute its liability to reimburse such costs'.

The specimen forms of mediation notice and response in the appendices to Pt 31 contemplate the parties agreeing in advance whether the cost of mediation could be recoverable as costs of the proceedings if the mediation fails.

[62.28.6] Apportionment between jointly liable defendants

Where costs are ordered against more than one defendant, who are jointly and severally liable for the same, the court may nevertheless assess costs wholly attributable to steps taken in respect of one defendant against that defendant only. See *Sutton v Dixon* (1889) 22 QBD 529 (CA) where it was held that where a defendant had served a separate defence, it alone was liable for the plaintiff's costs incurred in relation thereto.

[62.28.7] Time when costs order becomes a debt

An order that a litigant pay costs does not give rise to a debt until the amount payable has been ascertained by taxation or agreement: *Australian Telephone Distributors Pty Ltd (in liq) v Golden Always Ltd & Anor* [1996] 2 HKLR 325. In that case, it had been held at first instance that there is no obligation to pay until an allocation has been served (see *Re Golden Always Ltd & Anor* [1996] 3 HKC 252) but the Court of Appeal held that once the amount of costs has been certified it immediately becomes due and payable.

[62.28.8] The bases of taxation

This rule sets out the bases on which costs may be taxed as between the parties to proceedings or where costs are to be paid out of a fund. The basis on which costs are to be taxed determines which items of work performed by a party's solicitor and which disbursements incurred must be paid for by the party against whom the costs award is made, and, subject to the schedules to this rule, influence the amount recoverable in respect of any such item.

Note that there is now a considerable divergence between the English and Hong Kong rules on the question of the bases of taxation. In England all of the old bases were replaced in April 1986 with just two new bases, being the 'standard basis' and the 'indemnity basis'. The Hong Kong Court of Appeal expressed support, *obiter*, for a similar amendment of Hong Kong's rules in *Lakhan v Wu Wing Tai & Anor* [1987] 3 HKC 54, but no such amendment was incorporated into the 1988 Hong Kong rules. The result is that English decisions on the bases of taxation since April 1986 must be read with caution in Hong Kong, and the leading decision in *EMI Records Ltd v Ian Cameron Wallace Ltd* [1983] 1 Ch 59 remains highly persuasive in Hong Kong though it is now largely irrelevant in England.

[62.28.9] The party and party basis

Rule 28(2) stipulates that costs to which this rule applies shall normally be taxed on the party and party basis. In *EMI Records Ltd v Ian Cameron Wallace Ltd* [1983] 1 Ch 59, at 63G, Megarry V-C described the 'necessary or proper' test set down in this sub-rule as the 'essence' of party and party costs and went on to describe this as the strictest of the normal bases of taxation. In *C Art Ltd v Ability Manufacturing Ltd* [1990] 1 HKC 407, 409G-H it was held that recovery on the party and party scale includes:

action taken by a prudent solicitor, protecting the rights of his client, and instructing a specialist counsel to settle the statement of claim in proceedings where it is intended that he will be briefed to appear at trial, and stand by those pleadings, except in the most simple and straightforward proceedings . . .

The court went on to hold that party and party costs will not necessarily extend to a conference with counsel.

In *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1982] HKLR 387, it was held that the cost of travelling time, air fares and hotel accommodation of a London silk were not 'necessary or proper' in the circumstances of the case and thus could not be recovered on a party and party taxation because capable local counsel would have done the job for the brief fee only, thus saving the other expenses.

The party and party basis is a minimal basis, and will normally leave the successful party substantially out of pocket. In *Commissioner of Inland Revenue v Aspiration Fund Investment Ltd* HCIA 10/1989 (Kaplan J; 14.12.1990) it was observed that the party and party basis would leave a party 'between 40% and 30% out of pocket'. The level of recovery under the party and party scale has been criticised as inadequate (see Hunsworth, in *Law Lectures for Practitioners 1991* (Hong Kong: Hong Kong Law Journal Ltd, 1991)).

[62.28.10] The common fund basis

Rule 28(3) empowers the court to award costs as between opposing litigants on the 'common fund basis', and sub-rule (4) lays down what costs shall be allowed on this 'more generous basis'. In *EMI Records Ltd v Ian Cameron Wallace Ltd* [1983] 1 Ch 59, at 63G-64B, Megarry V-C referred to *Giles v Randall* [1915] 1 KB 290, at 295, and said that a common fund taxation is, in practice,

little more than a party and party taxation conducted 'on a more generous scale' . . . It is sometimes said that on average a common fund taxation produces a figure 5 to 10 per cent higher than a party and party taxation; and that may be so.

It has been held that the 'more generous' basis applicable on a common fund taxation relates to 'approach' and not quantum of individual items claimed: see *Ngan Wun Hing v Lok Sin Tong Benevolent Society, Kowloon & Ors* [2000] 2 HKC 404, per Master Poon. The result in the case before Master Poon was that no enhancement of the quantum of counsel's fees was allowed. The master did not follow *Gibbs v Gibbs* [1952] P 332, preferring *Lyon v Lyon* [1952] 2 All ER 831, and cited with approval in the commentary on the latter decision in the Lord Chancellor's *Notes for Guidance on the Taxation of Civil Costs* (July 1984).

When common fund costs appropriate – for the court to order taxation on the more generous common fund scale, instead of the usual party and party scale, 'there should be some special or unusual feature in the case to justify the court in exercising