following trial and a judgment, even where judgment is in their favour, will have to pay the costs of the action from the end of the 28 days period for acceptance onwards. However, O 22, rr 20(1), 21(1), 23(4), 23(5), 24(3), 24(4) and 24(5) provide with court with a residual discretion as to the appropriate costs order, by reference to the following factors: (a) the terms of the sanctioned offer or payment; (b) the stage in the proceedings at which the offer or payment was made; (c) the information available to the parties at the time; and (d) the conduct of the parties with regard to the giving or refusing to give information for the purposes of enabling the offer or the payment to be evaluated. It is very important that litigation practitioners explain to clients that their sanctioned offers or payments may well not be effective if the receiving party is in reality not in a position to evaluate it properly. O 22 provides a mechanism for, in appropriate cases, the recipient to require more information to be provided about a sanctioned offer or payment. Also, substantial amendments to a pleading after the making of a sanctioned offer or payment may nullify the effect of the offer or payment. As the Final Report put it:

> "308. It would accordingly be a mistake for a Hong Kong party to believe that his sanctioned offer carries the relevant consequences if it was made without properly apprising the other side of the nature of his case. He may not be required by the rules to take on the burdens of pre-action protocols in general, but, if he wishes to avail himself of the benefits of sanctioned offers and payments, he must ensure that he has nevertheless fairly acquainted the other side with all material aspects of his case.
>
> 309. If a case is initially insufficiently pleaded and if it is only by a later amendment that a party's true case is revealed, it is likely that any costs or interest consequences to flow from the other side's rejection of a sanctioned offer would be confined to the post-amendment period, depriving the offer of any prior effect ..."

Mediation

1.60 Effective 1 January 2010, encouragement to mediate is intended to become another new and important part of civil justice in Hong Kong.

Because of the immaturity of the mediation industry in Hong Kong, the introduction of the Court exercising its powers to encourage mediation was delayed beyond the end of 2009. But, even as early as early as the time of publication of the second edition of this Manual, i.e. the second half of 2010, mediations in significant numbers are taking place. These mediations are being conducted by a small but significant number of trained and capable mediators.

1.61 Mediation is dealt with in detail in Chapter 11 of this Manual.

1.62 One of the underlying objectives is to facilitate the settlement of disputes. The Court has a duty as part of its active case management to further that objective by encouraging the parties to use an alternative dispute resolution procedure (commonly known as ADR) if the Court considers that appropriate, as well as facilitating the use of such a procedure. The parties to any proceedings and their legal representatives are also under a duty to assist the Court to further the underlying objectives.

1.63 Practice Direction PD 31 is aimed at assisting the Court to discharge its duty to encourage parties to settle disputes.

1.64 ADR is a process whereby the parties agree to appoint a third party to assist them to settle or resolve their dispute (see also paragraph 3, PD 31). Mediation is a form of ADR where the parties in dispute appoint a neutral third party, the mediator, to assist the parties in arriving at a negotiated settlement. Mediation is conducted confidentially and on a without prejudice basis. Mediation differs from arbitration in that it is an entirely voluntary, non-binding process—whereas an arbitrator's role is to make decisions to resolve disputes, a mediator's role is to facilitate the negotiation of a settlement between the parties.

1.65 While the CJR gives formal recognition to the role of mediation in the administration of justice, the benefits of mediation have in fact already been tested for a number of years through various pilot schemes:

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(a) the Family Pilot Mediation Scheme launched in May 2000 resulted in the establishment of a Mediation Co-ordinator's Office which has since continued to function;
(b) the pilot scheme for mediation of construction disputes launched in September 2006 will become permanent as part of the CJR;
(c) the one-year pilot scheme for mediation in petitions presented under section 168A and petitions for winding upon the just and equitable ground under section 177(1)(f) (essentially shareholders' disputes) was launched in October 2008; and
(d) the pilot scheme for building management cases has been extended for a 6-month period to 30 June 2009.

1.66 PD 31 provides for:

(a) The filing of a Mediation Certificate signed by each party and its solicitors at the same time as the time tabling questionnaire filed under O 25, r 1, which states whether or not a party is willing to attempt mediation, and if not why not. The solicitors are also required to confirm that they have explained to their client the availability of mediation, the respective costs positions of mediation as compared with the costs of the litigation and PD 31.
(b) The service by a party wishing to attempt mediation of a Mediation Notice on the other party as soon as practicable after filing the Mediation Certificate, setting out its proposals as regards mediation.
(c) The service by the Respondent of a Mediation Response within 14 days of receipt of the Mediation Notice (or such other time as the parties may agree or as the Court may direct), indicating whether or not it agrees to use mediation to attempt to resolve all or part of the relevant disputes, and if so, whether or not it agrees to the Applicant's proposals as regards mediation.

1.67 Where the parties are unable to reach agreement on certain proposals in the Mediation Notice and the Mediation Response, either or both

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party may make an application to the Court for directions to resolve the differences between them.

1.68 Notwithstanding the recognition of the role of mediation in the administration of justice, participation in mediation remains entirely voluntary. However, PD 31 makes it clear that unreasonable failure to engage in mediation could potentially entail adverse costs consequences. The pilot schemes on mediation described earlier in this bulletin adopted the same approach.

1.69 What this means is that a successful party could be deprived of some or all of its costs on the grounds that it has unreasonably refused to agree to mediate. The English Court of Appeal explained in *Halsey v Milton Keynes NHS Trust* [2004] 1 WLR 2002 that such an order is an exception to the general rule that costs should follow the event, and the fundamental principle is that such departure is not justified unless it is shown (the burden being on the unsuccessful party) that the successful party acted unreasonably in refusing to agree to ADR.

1.70 PD 31 provides guidance on what is not an unreasonable failure to engage in mediation:

(a) where a party has engaged in mediation to the minimum level agreed to by the parties as directed by the Court; or
(b) where a party has a reasonable explanation for not engaging in mediation (for example, where active without prejudice settlement negotiations are progressing, or where the parties are actively engaged in some other form of ADR).

1.71 *Halsey* provides guidance as to some of the factors that should be considered by the Court in deciding whether a refusal to agree to ADR is unreasonable. Such factors are:

(a) the nature of the dispute;
(b) the merits of the case – the fact that a party reasonably believes that he has a strong case is relevant to the question whether he has acted reasonably in refusing ADR;

(c) the extent to which other settlement methods have been attempted;
(d) whether the costs of ADR would be disproportionately high;
(e) whether any delay in setting up and attending the ADR would have been prejudicial; and
(f) whether ADR had a reasonable prospect of success.

1.72 The following comment of Dyson LJ in *Halsey* neatly encapsulates the implication of the judiciary's drive to promote mediation as part of CJR: "All members of the legal profession who conduct litigation should now routinely consider with their clients whether their disputes are suitable for ADR". Failure to participate in mediation can be taken into account in the Court's exercise of its discretion on costs. While PD 31 is not a death knell to traditional adversarial litigation, it certainly is a forewarning that ADR should never be far from the minds of parties to proceedings and their lawyers in attempting to resolve disputes effectively.

Communicating the changes to clients

1.73 It should be obvious that it is absolutely crucial that litigation practitioners find an effective way to communicate to their clients the importance and consequence of the changes to civil justice procedure in Hong Kong.

1.74 The publication of this Manual itself, as a resource for both litigation practitioners and potentially their clients, is hopefully a useful tool. Any client embarking on the expensive course of litigation, might do well to purchase and read a copy of this book.

1.75 Best practice should see litigation practitioners providing a written briefing to a client on the important changes involved, together with the provision of key documentation, including:

1. the standard form case management questionnaire;
2. the Practice Direction dealing with Mediation;
3. a note describing how sanctioned offers and sanctioned payments are intended to operate;

4. a note describing the costs regime, including the new approach to summary assessment of costs;
5. a note dealing with what is required for statements of truth; and
6. a "trial model" as discussed above.

1.76 It should not just be a matter of providing these documents to the clients. The litigation practitioner should then meet the clients to discuss them in detail.

1.77 When counsel is instructed, a similar discussion, although at a more technical level, also should occur between solicitor and counsel, to ensure that the whole of the legal team agrees and understands a common approach.

1.78 Under this new regime, an engagement letter should be sent to the client as a matter of best practice. Engagement letters are discussed in Chapter 3.

Keep up-to-date with developments in procedural law

1.79 Inevitably, despite all the helpful guidance that has been provided, in the new rules and in the Chief Justice's Working Party's Final Report, and in guidance in court decisions given in the first 18 months of operation of the new rules, there is a significant amount of uncertainty about how the rules are going to operate in practice. No doubt the judiciary will be inclined to provide assistance to practitioners by issuing practice notes and rulings giving clarification of issues, and also exemplifying how, in typical scenarios, the rules should operate. It is very important, at least for the next few years, that litigation practitioners follow closely the judicial guidance and clarification and adapt to it.

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further solo expert report subsequent to a joint report, has been regarded as "*sabotaging the entire system of case management*".[68]

Directions on witness of fact evidence

5.48 In exercising its powers of case management, Order 35, rule 3A empowers the Court to order directions which, amongst other things, limit:

(a) the time to be taken in examining, cross-examining or re-examining a witness, and
(b) the number of witnesses that a party may call on a particular issue.

In deciding whether to make such directions the court will have regard to the factors listed in Order 35 rule 3A(2). Although these directions will generally be given at the pre-trial review (discussed at paragraph 5.80), the Court has flexibility to give such directions "at any time" before or during a trial.

Case management directions for Long Cases

5.49 In Long Cases, where an action has been assigned to a trial judge, the trial judge will assume control of the proceedings and make any directions or timetable that he or she deems fit. Any subsequent hearing for the case management summons, case management conference and/or pre-trial review will be heard by the trial judge.[69] Note also that the parties may seek further directions from the trial judge at any time provided two clear days' notice is given to all other parties specifying the directions sought.[70]

[68] See *Thapa Krishna Raj v Wo Hing Construction Co Ltd* (unrep., HCPI 309/2007, [2009] HKEC 485) per Judge Fung at para 14; and see *Lee Wai Man v Chan Che Ming and Anor* (unrep., DCPI 1719/2008, [2009] HKEC 1342).
[69] PD 5.7 para 5(1).
[70] PD 5.7 para 10(2).

Failure to Comply with Case Management Directions

5.50 Under the Civil Justice Reform, the Court will be much less tolerant of non-compliance with its orders. Parties and their legal representatives are expected to be proactive and inform the Court if there is any anticipated non-compliance of Court ordered case management directions or timetable before the Court deadline, or alternatively to inform the Court promptly of any actual non-compliance immediately upon the expiry of the deadline, and where appropriate, seek remedial directions (such as extensions of time). *Inter-partes* Court directions (such as the filing or exchange of witness statements, for restoring the case for directions hearing, or for making joint written application on or before a specified deadline) bind both parties, and consequently this burden rests not only on the defaulting party but also the other party(ies) involved".[71]

5.51 A party who fails to keep to the timetable fixed by the Court is in real jeopardy of orders imposing severe sanctions upon him including:

- costs sanctions;
- the payment by a defaulting party of a sum of money into Court as security for the other party's claim or its costs;[72]
- self-executing "unless orders" which take effect automatically upon non-compliance without the need for a further application, unless the defaulting party applies to the Court for relief;[73]
- wasted costs order being made against legal representatives.[74]

The Case Management Conference

5.52 It should not be thought that every case will go straight to a case management conference. The Final Report indicated that in many, if

[71] See *Ip Sau Lin v Hospital Authority* (unrep., DCEC 584/2007, [2009] HKEC 572) per Judge Ng at paras 11–12.
[72] See O 1B, r 1(3) and (4), and O 2, r 3.
[73] O 2, r 4 and 5.
[74] O 62, r 8.

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not most cases, a case management conference would not be needed.[75] Instead, it is envisaged that the Court will be able to give comprehensive directions without a case management conference on the basis of the Timetabling Questionnaire and with input from the parties.

5.53 A court may order a case management conference where the case is heavy and procedural complications are likely to arise, for instance, where strongly contested interlocutory applications or interlocutory appeals are intended or pending (as disclosed in the Timetabling Questionnaire) making it difficult to fix a realistic trial date or trial period at the case management summons stage. The Court might, in such cases, fix a case management conference for a time when it is envisaged that most of the outstanding pending interlocutory disputes would have been dealt with, giving directions only up to that stage. The case management conference would then be used to clear any still outstanding interlocutory questions and to fix a timetable for the further progress of the case, including dates for the pre-trial review or trial or trial period.[76]

5.54 Case management conferences are an integral part of the system of active case management by the Courts. They are a critical stage in the proceedings and in most cases, virtually the only milestone event before trial. Case management conferences are not simply a second opportunity for parties to seek for directions which they could have sought after filing the Timetabling Questionnaire.[77] Parties are expected to have complied with the timetable laid down by the Court by the time of the case management conference and variations to the timetable will not generally be allowed. If an extension of time is granted, this will most likely be on an "unless order" basis with self-executing sanctions.[78] (As to variations of "milestone" and "non-milestone" dates, refer to paragraphs 5.84 to 5.89).

[75] Final Report, para 386.
[76] Final report, para 385 and see O 25, r 1A(2) and (3).
[77] PD 5.2 para 28.
[78] PD 5.2 para 29.

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5.55 Case management conferences are generally held by a master at the initial stage of a case, although the master may refer the case to a judge in the usual way under Order 32, rule 12. A master's decision in this respect is final and cannot generally be appealed.[79]

The Listing Questionnaire

5.56 At least seven days before the case management conference, each party must file and serve the new Listing Questionnaire.[80] Listing Questionnaires are used to check that earlier orders and directions have been complied with, and to provide up-to-date information to assist the Court with deciding further directions at the case management conference.

5.57 Although the Practice Direction does not specify a sanction for failing to file and serve a Listing Questionnaire, it is likely the Court will simply proceed on the information provided by the other parties. Consequently, all parties should file a completed questionnaire if they wish the Court to take into account their requirements when giving further directions at the conference. A failure to prepare and complete the Listing Questionnaire properly may attract costs sanctions against the party's solicitors.[81] Note, however, that parties are *not* required to file or serve a Listing Questionnaire (unless otherwise directed) for the initial case management conference for Long Cases (as to which see paragraphs 5.70 to 5.75).[82]

Summary of information required

5.58 In addition to answering fully the questions in the form, the parties should submit a one-page summary of the brief factual background to the case and the issues to be tried.[83]

[79] PD 5.2 para 27.
[80] PD 5.2 para 24. The Listing Questionnaire is attached at Appendix C of PD 5.2.
[81] See for example *Lo Shu Lam v Kin Ming Construction Co Ltd* (unrep., HCA 191/2008, [2009] HKEC 1675).
[82] PD 5.7 para 5(3).
[83] See A18 of the Listing Questionnaire.

5.59 As with the Timetabling Questionnaire, if a trial date is sought, a certificate should be filed and served with the Listing Questionnaire giving various time estimates for the trial (preferably prepared by trial counsel). The certificate should provide estimates (without taking into account the time estimates of the other parties) of:

(a) their own opening submission;
(b) evidence-in-chief of each of their own witnesses;
(c) cross-examination of each of the other side's witnesses; and
(d) their own closing submission.[84]

Lastly, a set of directions which the parties invite the court to make should be attached to the form. Preferably these should be agreed between the parties.[85]

5.60 The Listing Questionnaire must be verified by a declaration of belief that the answers stated in the form are true and accurate. It must be signed by the party on whose behalf the questionnaire is filed, or that party's legal representative.

Interlocutory applications

5.61 The parties are expected to indicate accurately and fully the extent of further interlocutory applications or appeals to be made. The later in time and the closer to a trial date an application is made, the less likely it is that the Court will entertain it.[86]

Case management bundles

5.62 At least three clear days before the case management conference, the plaintiff must file at Court a bundle containing copies of:

[84] PD 5.2 para 25.
[85] See A20 of the Listing Questionnaire.
[86] PD 5.2 paras 30–31; and see *Liu Chen v Chan Poon Wing* (unrep., HCPI 779/2006, [2009] HKEC 1650) for a discussion on the Court's balancing exercise in considering whether to allow a late application for amendment of pleadings, further discovery or further witness evidence.

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(a) the pleadings;
(b) the witness statements;
(c) the expert reports; and
(d) a draft index.

The bundle should, where possible, be used at any subsequent case management conference and/or pre-trial reviews with a highlighted index showing the updated parts.[87]

Attendance at the case management conference

5.63 If a case management conference is to be attended by a legal representative, someone familiar with the case must attend the case management conference. The person attending will have to be the fee earner concerned, or someone who is fully familiar with the file, the issues and the proposed evidence. They must be able to field the questions that are likely to arise at the hearing, and have the authority to agree and/or make representations on the matters reasonably to be expected to arise. Notwithstanding this general rule, if however the hearing is before a judge, it should be attended by trial counsel, unless otherwise directed.[88]

5.64 Note that for cases in the Personal Injuries List, the Court has clarified that the above requirement for trial counsel to attend case management hearings before a judge, unless otherwise directed, does not apply.[89] Instead, either the solicitor with prime responsibility of handling the case, or where an issue or argument warrants counsel's appearance, trial counsel, should attend.

5.65 Where the inadequacy of the person attending or his or her instructions leads to an adjournment of the hearing, the Court is likely to make an

[87] PD 5.2 para 26.
[88] PD 5.2 paras 44–46.
[89] See *Lau Koon Loi v Wing Wai Sing* (unrep., HCPI 445/2007, [2009] HKEC 1123); and see PD 18.1.

- In other cases, the offending allegations in the respondent's pleading will simply be struck out and the action will proceed to trial in the ordinary way.

7.121 The losing party will ordinarily be ordered to pay the costs of the application. If the result of the application is that the action is dismissed or judgment is entered, the unsuccessful party will usually be required to pay the other party's costs of the entire action.

Summary disposal of a case on a point of law (Order 14A)

7.122 O 14A allows the Court to determine in a summary way any question of law or construction of any document.

Where a case involves a question of law or construction of a document which is too complicated to be dealt with under the summary judgment[67] or strike out[68] procedures, it may nevertheless be possible to have that question determined under the O 14A procedure. Upon making a determination under O 14A, the Court has the power to make any order it thinks fit, including to enter judgment or to dismiss the action.

Grounds

7.123 The Court may determine a question or law or construction of a document under O 14A where it appears to the Court that:

- such question is suitable for determination without a full trial or the action; and
- such determination will finally determine the entire cause or matter or any claim or issue therein.

In *Shell Hong Kong Ltd v Yeung Man Kiu Yip Co Ltd & Another*,[69] the Court of Final Appeal noted that use of the O 14A procedure is inappropriate where issues of fact are interwoven with the legal issues to be determined. If it is necessary for the Court to hear evidence to

[67] O 14.
[68] O 18, r 19.
[69] (2003) 6 HKCFAR 222.

resolve a factual dispute in order to determine the question of law or construction of a document, it is not normally suitable to invoke O 14A.

7.124 Although the Court has the power to enter judgment or to dismiss the action under O 14A, it is not necessary that resolution of the question will determine the entire proceedings. The court may still act under O 14A where to do so would resolve "any claim or issue" in the proceedings. However, the Court will decline to make a determination under O 14A where the question is a trivial one, as this could result in unnecessary expense and delay.[70]

7.125 The Court may only exercise its powers under O 14A if the parties have either had an opportunity to be heard on the question to be determined, or have consented to an order or judgment being made on such determination.[71]

Procedure

7.126 The O 14A procedure is quite flexible in that it can be invoked by the Court on its own initiative or on the application of either party.[72] Where an application is made by one of the parties, this may be done by summons or orally in the course of any interlocutory application.[73]

7.127 The most common situation in which O 14A is invoked is as an alternative to an application for summary judgment under O 14 or an application to strike out under O 18, r 19. It is not uncommon for such applications to raise complicated issues of law. Where this is the case, the applicant should consider including an alternative application under O 14A in the summons. In the event that the Court considers that the legal issue is too difficult for determination under O 14 or O 18, r 19, the applicant can then ask the Court to exercise its jurisdiction under O 14A.

[70] *Shell Hong Kong Ltd* (n 68 above).
[71] O 14A, r 1(3).
[72] O 14A, r 1(1).
[73] O 14A, r 2.

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7.128 It is important to bear in mind the following points when preparing an application under O 14A and the affidavit evidence in support:

- The question of law or construction should be stated in clear, careful and precise terms so that there should be no difficulty or ambiguity about what the question is that has to be determined.[74]
- The applicant's affidavit in support of the summons should depose to all of the material facts relating to the questions of law or construction to be determined.
- Unlike O 14, there is no provision under O 14A allowing for the admissibility of hearsay evidence. Therefore, where an application is made under O 14A, it is important that both parties make sure that their affidavit evidence is confined to matters within the personal knowledge of the deponents.

Delay and default

7.129 The Court has an inherent jurisdiction to dismiss an action for want of prosecution if there has been default in complying with the rules or excessive delay in the prosecution of the action. There are two distinct circumstances in which the Court may dismiss an action for want of prosecution:

- Where either the plaintiff or the defendant has been guilty of intentional and contumelious default; and
- Where there has been inordinate and inexcusable delay in the prosecution of the action by the plaintiff.

Intentional and contumelious default

7.130 Intentional and contumelious default arises where a party fails to comply with a peremptory order of the Court. In practice, a peremptory

[74] *Dragages et Travaux Publics (Hong Kong) Ltd v American Home Assurance Co* (unrep., CACV 295/1999, [1999] HKEC 800).

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order is made in the form of an "unless" order.[75] This is an order that a party take a certain step in the proceedings (for instance, serving the list of documents) within a certain time, failing which a sanction will be imposed. Although it is open to the Court to specify some lesser sanction, the most serious sanction available is that the action be dismissed (if the defaulting party is the plaintiff) or that the defence be struck out and judgment entered (if the defaulting party is the defendant).

7.131 The new O 32, r 11B has introduced specific guidance as to when an "unless order" should be made. It provides that, where there has been default in complying with a case management direction and the non-defaulting party makes an application to secure compliance, the Court should, in the absence of special circumstances, make an order which specifies the consequences of non-compliance. In other words, where a party fails to comply with a case management direction, the non-defaulting party will ordinarily be entitled to an "unless" order to secure compliance.

7.132 Where a party fails to comply with an "unless" order, the consequences specified in the order are "self-executing" (ie they take effect automatically). It is therefore unnecessary for the non-defaulting party to apply by summons for them to be enforced.[76] Where the specified sanction is for judgment to be entered or for the defence to be struck out, the innocent party should simply draw up the relevant default judgment or order and have it approved by the court.

7.133 The Court nevertheless retains a discretion to grant relief from sanctions imposed under an "unless" order and it is open to the defaulting party to apply by summons supported by affidavit for such relief.[77] The matters to be considered by the court in exercising that discretion are set out in O 2, r 5. In general, this discretion is exercised sparingly and the Court will only grant relief if the applicant can show that the

[75] See Practice Direction 16.5.
[76] O 2, r 4.
[77] O 2, r 5.

failure to comply was not intentional and that it was due to extraneous circumstances.[78]

Inordinate and inexcusable delay

7.134 Even where there has been no intentional and contumelious default by the plaintiff, the defendant may nevertheless apply for the action to be dismissed where:

- There has been inordinate and inexcusable delay by the plaintiff in prosecution of the action; and
- The delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action, or is likely to cause serious prejudice to the defendant.

7.135 It is difficult to define inordinate delay precisely, although this has been described as "materially longer than the time usually regarded by the profession and Courts as an acceptable period".[79] Cases in Hong Kong have held that a delay of two years is inordinate.[80] Inordinate delay may be excusable if the plaintiff has suffered illness or if the parties have been engaged in settlement negotiations. However, delays caused by the plaintiff's lawyers or by their impecuniosity are generally not excusable.

7.136 The defendant must also establish a substantial risk to fair trial or serious prejudice. This requires the defendant to show prejudice over and above the obvious prejudice caused to a litigant by a long delay. The most usual factors are the effect of the lapse of time on the memory of witnesses, or the death or disappearance of witnesses in the course of the delay.[81]

7.137 Where the requirements of delay and resulting prejudice are established, the Court still retains a discretion as to whether or not to dismiss the

[78] See *PT Bank Pembanguanan Indonesia (Persero) v Tan Eddy Tansil* [1997] HKLRD 57.
[79] *Birkett v James* [1978] AC 297.
[80] See *Hong Kong Civil Procedure* (Sweet & Maxwell Asia, 2009), para 25/L/5.
[81] See *Hong Kong Civil Procedure* (Sweet & Maxwell Asia, 2009), para 25/L/7.

action. Common circumstances which weigh against dismissing the action include:

- The limitation period has not yet expired. This is generally considered a conclusive reason not to dismiss the action as the plaintiff has the right simply to issue a fresh writ.[82]
- The existence of other defendants who have not applied to strike out the claim.
- The defendant has contributed or agreed to the delay.
- Notwithstanding the delay by the plaintiff, the defendant's conduct had induced the plaintiff to incur further cost in pursuing the action.

Under the new case management regime, the Courts are now under a duty actively to manage cases.[83] This includes a duty to fix at an early stage a case management timetable, including dates for a pre-trial review and for the trial itself.[84] In this environment, it may well be more difficult for plaintiffs to let their claims go stale. If this is the case, circumstances requiring the defendant to argue that the plaintiff has been guilty of "inordinate and inexcusable delay" will be less likely to arise.

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Dismissal for want of prosecution — the applicable principles post-CJR

7.138 Following the introduction of the CPR in England (on which reforms the Hong Kong CJR is closely based), the English courts adapted their approach to dismissal for want of prosecution. The English Court of Appeal adopted the approach that the CPR provisions should govern the decision whether or not to dismiss.[85] Although the court no longer needs to consider prejudice in the Birkett v James sense, it remains

[82] *Birkett v James* (n 78 above).
[83] O 1A, r 4.
[84] O 25, r 1A.
[85] *Nasser v the United Bank of Kuwait* [2001] EWCA Civ 1454.

WHAT HAS BEEN REPEALED OR REPLACED

Personal liability of solicitor for costs (O 62, r 8)

10.04 Order 62, rule 8, which empowered the Court to grant costs orders against solicitors personally, has been replaced by a new procedure empowering the Court to grant what are known as wasted costs orders. To this end, six separate rules, namely Order 62, rules 8, 8A, 8B, 8C, 8D and 8E have been introduced. There is a new Practice Direction - 14.5 regarding application for wasted costs orders.

Gross sum assessment (O 62, r 9)

10.05 The application of Order 62, rule 9 which provides for fractional or gross sum assessment of costs is now restricted to non-interlocutory applications. Further, what was formerly referred to as gross sum assessment of costs in Order 62, rule 9(4)(b) has been replaced by a new procedure known as summary assessment of costs. A new Order 62, rule 9A has been introduced to provide for summary assessment of costs of interlocutory applications. The new Order 62, rules 9B and 9C are ancillary rules relating to summary assessment of costs.

10.06 In Re Hawkins Development Limited, [2010] 1 HKLRD 535, it was held that notwithstanding the repeal of the old Order 62 rule 9A, the court has inherent jurisdiction to make an order for interim payment of costs in proceedings that are not interlocutory applications. The Court took the view that there is a procedural lacuna in that the power to make provisional summary assessment under rule 9A applies only to interlocutory applications, and there is no power under rules 21 to 21C to make an interim payment of costs which in the opinion of the Court approximates the costs that would be allowed on taxation at the provisional taxation or at a taxation hearing. Interim payment of costs (O 62, r 9A).

The former Order 62, rule 9A relating to interim payment of costs has been repealed. The new Order 62, rule 9D(2) empowers the Court to order costs to be taxed at an earlier stage.

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See Re Hawkins Development Limited [2010] 1 HKLRD 535 for the Court's inherent jurisdiction to make an order for interim payment of costs in proceedings that are not interlocutory applications and hence not covered by the new Order 62, rule 9A.

Costs consequences arising from payment into Court 62 3(8), 62 10(2) (3) (4)

10.07 There is a new procedure which has replaced the former system of payments into Court under Order 22. Consequently, Order 62, rule 3(8) and Order 62, rule 10(2), (3) and (4) which provide for the costs consequences arising from an acceptance of a payment into Court have been removed.

Mode of beginning proceedings for taxation (O 62, r 21)

10.08 The former Order 62, rule 21 which laid down the procedure for the commencement of taxation proceedings and the provisional taxation of costs has been repealed and replaced by a new set of procedures under the new Order 62, rules 21, 21A, 21B, 21C and 21D.

Delay in filing of bill of costs (O 62, r 22)

10.09 The former Order 62, rule 22, which imposed sanctions on delay in the filing of bill of costs for taxation or the service of the notice of appointment of to tax, has been repealed. In its place, a new procedure under the new Order 62, rule 22 has been introduced which deals with delay in the commencement of proceedings for taxation under the new procedure and delay in proceeding with taxation generally.

Deposit of papers and vouchers (O 62, r 23)

10.10 The former Order 62, rule 23, which required parties to deposit papers and vouchers before the date appointed for taxation, has been repealed. The new Order 62, rule 13A enables the taxing Master to give taxation directions including a direction for the filing of papers and vouchers.

By paragraph 28 of Practice Direction 14.3, a taxation bundle relating to the items objected to should be lodged with the Court not less than 2 clear days before the date fixed for provisional taxation by a taxing Master or taxation with a hearing.

Notice of taxation (O 62, r 24)

10.11 The former Order 62, rule 24 which dealt with the situation where a party fails to attend an appointment to tax has been repealed as a consequence of the introduction of a new set of taxation procedures of which the new Order 62, rule 24(2) and (3) deal with absence of party at a taxation hearing.

Provisions as to bill of costs (O 62, r 25)

10.12 The former Order 62, rule 25 governing the contents of a bill of costs has been repealed. Under the new procedures, a taxing Master is empowered under the new Order 62, rule 13A to give directions, *inter alia*, as to the form and contents of a bill of costs.

Annexed to Practice Direction 14.3 as Appendix B is the format of a bill of costs which shall be followed. A deviation from the format requires directions of the taxing Master.

What has been Introduced

New definitions

10.13 Added to the interpretation provisions in Order 62, rule 1 are the following new terms:

a) "legal representative", which covers both counsels and solicitors conducting litigation on behalf of a party. This is relevant in the context of wasted costs orders. Under the new rules, the Court may make a wasted costs order against a legal representative. In other words, the Court is empowered to make Counsel instructed by a party personally liable for costs.

b) "party entitled to be heard on taxation" which includes, apart from the parties to the litigation, a person who has a financial interest in the outcome of the taxation. A person will qualify as having a financial interest in the outcome of the taxation if they have given written notice to the party entitled to payment of costs and the Registrar or if the Court has given a direction for service on them of a notice of commencement of taxation and the bill of costs pursuant to Order 62, rule 21(3).

10.14 "Completion date" is extensively defined in the new Order 62, rule 22(9) which is the reference point from which a limitation period for the commencement of taxation proceedings introduced in the new Order 62, rule 22(7) will start to run.

10.15 By virtue of the new Order 62, rule 28A(6), a company which is acting without a legal representative will qualify as a litigant in person for the purposes of Order 62, rule 28 which provides for the taxation of the costs of a litigant in person/

Entitlement to costs (O 62, r 3)

10.16 It is one of the recommendations of the Working Party on Civil Justice Reform that while the principle that costs should normally "follow the event" should continue to apply to costs of the action as a whole, in relation to interlocutory applications, that principle should be an option (which would often in practice be adopted) but should not be the prescribed "usual order".

10.17 Order 62, rule 3 has been amended to adopt such recommendation. In the new Order 62, rule 3(2), the principle that costs follow the event would not be applicable to interlocutory proceedings.

10.18 The new Order 62, rule 2(A) gives the Court in deciding costs of interlocutory proceedings a discretion either to order the costs to follow the event or make such order as it sees fit.

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Special matters to be taken into account in exercising discretion (O 62, r 5)

10.19 The Working Party on Civil Justice Reform recommends that costs orders aimed at unreasonable interlocutory conduct after commencement of proceedings should be given at least equal prominence in practice, with the Court being directed to have regard to the underlying objectives.

10.20 Order 62, rule 5 has been amended to give effect to the recommendation. The new Order 62, rule 5(1)(aa) provides that the Court shall take into account the underlying objectives set out in Order 1A, rule 1.

10.21 Conduct of all parties is specified in Order 62, rule 5(1)(e) as another new matter which the Court shall take into account in exercising its discretion as to costs.

10.22 Order 62, rule 5(2) expressly gives examples of such conduct which are included for the purpose of rule 5(1)(e) such as whether it is reasonable to and the manner in which parties pursue or defend, any exaggeration of claim and the conduct before or during the proceedings. Other new matters are whether a party has succeeded on part of the case and any admissible offer to settle.

See Manova International Limited v Giga Technology Company Limited & Another, (unrep., HCA733/2009, [2010] HKEC 300), where the Court considered the conduct of the receiving party pursuant to Order 62 rule 5(2) in taxing costs.

In Chinachem Charitable Foundation Ltd v Chan Chun Chuen (unrep., HCAP 8/2007, [2010] HKEC 400), it was held that despite the reference to the conduct of the parties in the new Order 62 rule 5(1) and the reasonableness to raise, pursue or contest a particular allegation or issue under rule 5(2)(a), insofar as a losing party is seeking costs on a particular issue, by reason of Order 62 rule 7(1), such party still has to show that the issue was raised improperly or unnecessarily after the Civil Justice Reform.

Costs order in favour of or against non-parties (O 62, r 6A)

10.23 Under the new section 52A of the High Court Ordinance, the Court is empowered to, *inter alia*, order costs against a non-party and section 52B enables costs only proceedings to be commenced and by section 52B(3)(c), the Court may make costs order against a person who is not a party to the costs only proceedings.

10.24 The new Order 62, rule 6A provides that if the Court is considering making a costs order in favour of or against a non-party, that person must be joined as a party and given reasonable opportunity to attend a hearing.

Costs arising from misconduct or neglect (O 62, r 7)

10.25 A new Order 62, rule 7(2)(aa) has been introduced which provides that the underlying objectives set out in Order 1A, rule 1 shall be one of the matters that the Court shall have regard to for the purpose of Order 62, rule 7 in deciding whether to make a costs order arising from misconduct or neglect of a party.

Wasted costs order (O 62, r 8, 8A, 8B, 8C, 8D and 8E) *(cf Practice Direction 14.5)*

10.26 The Working Party recommended that rules along the lines of paragraphs 53.4 to 53.6 of the Civil Procedure Rules Practice Directions on Costs in the UK, modified to exclude reference to liability based on negligence, should be issued where wasted costs are incurred as a result of any improper unreasonable act or omission on the part of the solicitor or any employee of such solicitor.

10.27 The new section 52A(4) to (7) of the High Court Ordinance empowers the Court to make wasted costs order as recommended by the Working Party.

10.28 The new Order 62, rules 8, 8A, 8B, 8C, 8D and 8E provide the guidance for the exercise of the costs discretion and discouraging disproportionate satellite litigation in relation to wasted costs order.

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for Bullard to bear their own costs. One of the major factors which influenced the Court of Appeal's judgment was the Bullard's refusal to mediate. The Court of Appeal applied the factors from the *Halsey's case* and concluded according to the following reasons:

- *Nature of the dispute* – small building dispute like this case is an excellent kind of dispute which lends itself well with mediation;
- *Merits of the case* – Bullard acted unreasonably by believing that their case was so "watertight" that they could ignore any attempt to settle and rely on exaggerated counterclaims. Refusing mediation on the basis that the matters were too complex was a "non-sense";
- *Whether the costs of ADR were disproportionately high* – LJ Ward compared the costs of ADR to a "drop in the ocean" as compared with the money being spent on litigation; and
- *Whether ADR has a reasonable prospect of success* – Burchell modestly presented his claim, readily admitted many of the defects, and honestly admitted where he was wrong. All these factors are beneficial for a successful mediation.

11.40 The Court of Appeal would normally have imposed cost sanctions on Bullard. However, in this case, because the offer to mediate was rejected by a building surveyor (i.e. without legal advice), Bullard was not subject to a costs sanction.

11.41 In the case of *Earl of Malmesbury v Strutt & Parker*,[39] heavily disputed claims were brought by the Earl against Strutt & Parker for alleged negligence in advice about rents for land leased as airport car parking at the Bournemouth Airport. Amount for lost rental were quantified at a figure exceeding £100 million. Mediation took place after the judgment on liability and the preparation of evidence for the trial on damages. At the mediation, the defendant offered £1 million inclusive of interest with each side to bear their own costs. The claimants

[39] [2008] EWHC 424 (QB).

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counter-offered £9 million plus 80 per cent of the claimants' costs. The counteroffer was rejected and the mediation was terminated. The Court concluded that the claimants' position at the mediation was "plainly unrealistic and unreasonable". If the claimants made an offer which better reflected their true position, then mediation might have succeeded. A party who agrees to mediation but then causes the mediation to fail by his reason of unreasonable position in the mediation is, in essence, in the same position as a party who unreasonably refuses to mediate.

Mediation in UK

11.42 Mediation was introduced to the courts in the United Kingdom by the Civil Procedure Rules ("CPR"). CPR 1.4(1)[40] obliges the court to further the overriding objective by actively managing cases. CPR 1.4(2)(e)[41] defines "active case management" as including "encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure". The Glossary[42] to the CPR defines "alternative dispute resolution" as the "collective description of methods of resolving disputes otherwise than through the normal trial process".

11.43 There is no equivalent practice direction in the UK in respect of Hong Kong Practice Direction 31. However, in the UK Practice Direction – Pre-action Conduct, mediation is listed as an example of ADR. The pre-action practice direction states that although ADR is not compulsory, the parties should consider whether some form of ADR procedure might enable them to settle the matter without starting proceedings. This practice direction also requires the parties to provide evidence to the Court that they have considered some forms of ADR.[43]

[40] http://www.justice.gov.uk/civil/procrules_fin/contents/parts/part01.htm.
[41] http://www.justice.gov.uk/civil/procrules_fin/contents/parts/part01.htm.
[42] http://www.justice.gov.uk/civil/procrules_fin/contents/backmatter/glossary.htm.
[43] UK Practice Direction - Pre-action Conduct, para 4.4(3).

For instance, one party may plan to lay criminal complaints against another or has no intention to mediate whatsoever. Sometimes, this underlying refusal to mediate may even be cloaked by the unavailability of an appropriate mediator, or the absence of significant parties in mediation.

11.64 One option is to seek help from a third party organisation which offers services of explaining the process of mediation to an adversary. For instance, a party to an Employees Compensation Claim may make a mediation request through the New Insurance Mediation Pilot Scheme. The Scheme Administrator will approach the other party to explain the process and find out their difficulties and concerns in participating in mediation. The third party neutral's assistance may ease out the burden of the proposing party and may also bring in alternative perspective regarding the usefulness of the process.

Inappropriate to mediate now?

11.65 The time for mediation may change with the development of the circumstances of the dispute. For various reasons, the parties may not wish to mediate at an early stage, such as lack of information about the other's case, strong emotions of the parties against each other which make direct dialogue impossible. Some parties may even be overly confident with the merits and conclude that they should have their day in court. It is natural to come to such views at different stages of a legal action. But the golden rule is to keep options open and the decision on mediation should be revisited at different stages of the proceedings. It is not uncommon that unforeseen circumstances may take place, such as witnesses become unavailable, a client wishing to drop the action last minute or funds becoming limited for the court proceedings. When these changes ensue, it will be worthwhile for the lawyer to reconsider mediation with the client.

Choice of mediator

11.66 The choice of mediator is the first and perhaps foremost issue that the parties need to resolve after they agree to mediate. There are different

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criteria for choosing the mediator appropriate for a dispute and the lawyers may consider the following before proposing or responding to a choice of mediator:

(a) The determining factors

An advocate, who has a good understanding of the subject matter in dispute, the mix of participating members in the mediation and the client's requirement as to the calibre of mediators, is usually in the best position to decide the identity of the mediator. The advocate should diagnose the conflict further and see which of the following elements are the primary cause:

- substance
- process
- people

There is often debate as to whether the mediator needs to have expertise relevant to the subject matter in dispute. In fact, the knowledge in the subject matter in dispute is only one of the aspects that the lawyer needs to take into account. A mediator with strong substance knowledge is required when the conflict is caused by different or imbalanced information between the parties. On the other hand, a mediator with strong process skills will be preferred when the disputing parties have misunderstandings and disagreement due to their different perspectives, or become entrenched in positions. A mediator with strong process skills will enable the parties to air their grievances and frustrations and communicate directly under control. He can also maintain an effective communication framework amongst the parties, handle the disruption and challenges and ensure smooth progress.

However, where the parties will likely have strong emotions and feelings against each other, a mediator with powerful people skills, such as effective listening skills, strong

communication skills will assist the parties in venting their feelings and emotions before moving on to develop solutions. No single dispute will involve merely one of the elements above. Hence, the lawyer needs to balance the above factors very carefully, analyse the nature of issues in determining the kind of mediator who is most suited to the client's needs and the dispute.

(b) Handling recommendations made by the opposing party

Under the mechanism of Practice Direction 31, an advocate needs to respond to the choice of mediator proposed by the opponent party. Unless the responding lawyer knows the proposed mediator personally, it is natural that such proposal will be treated with great scepticism and caution. In responding to an opponent's proposal, the advocate should also use the above criteria for evaluation. Further, the neutrality and independence of the mediator, prior connections or associations between the mediator and the proposing party should also be explored. Here are some actions that a responding lawyer may take:

- Request a detailed CV from the proposed mediator which sets out, specifically, his mediation experience;
- Examine the background and expertise of the mediator;
- Confer with the proposed mediator to obtain a general feeling as to his style and attributes;
- Request a declaration of conflict of interest from the mediator, including ascertaining from him whether he has a close working relationship with the opposing party, such as the number of occasions which the mediator was previously appointed by the party in the past two years. Such information will give the responding lawyer objective data for assessing the neutrality and independence of the mediator.

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Venue and other administrative arrangements

11.67 Since CJR has been implemented, it has been said that there are insufficient venues for mediation meetings. Where a corporation is one of the parties, it has often been proposed that the mediation be held in its office or in the office of the party's lawyer. On some occasions, the lack of a suitable venue caused delay in arranging the mediation meetings.

The guiding principle in deciding the venue is neutrality. This is often a matter of perception but it does have an important impact on the participants. Conducting mediation in one of the parties' office may lead to disruption – the party or the lawyer might be distracted by work or phone calls thus affecting the momentum of the meeting. In most cases, generic conference centres with facilities like white board, computer and photocopying facilities will make adequate venues. The mediator should be able to assist in retaining proper number of rooms in accordance with the parties and people attending the mediation.

The mediation agreement

11.68 Mediation is a voluntary process and the mediation agreement is the document evidencing the legal basis of mediation. All the participating parties should be party to the agreement and the parameters of the dispute should also be sufficiently identified.

Here are the major provisions of a mediation agreement:

(a) The appointment of mediator and his role;
(b) Authority of parties' representatives;
(c) The Mediation Rules applicable;
(d) Confidentiality and privilege;
(e) Indemnity to the mediator;
(f) Termination of mediation;
(g) Venue and other arrangement of mediation; and
(h) Costs of mediation.