proceedings are closely connected by law, fact or otherwise. In *Sincere View Int'l Ltd v Kenco Investments Ltd* HCA 301/2005 (Kwan J; 03.02.2006) it was said:

> In deciding whether to order consolidation of actions the court has an unfettered discretion. The power is to be exercised in a flexible way with regard to the particular circumstances of the situation. The objective of such an order is to save time and costs. There is no hard and fast rule that just because the parties are identical and some common question of fact or law is involved in both actions, it would be expedient and proper to order consolidation.

In addition to saving time and costs, the court will be concerned with avoidance of delay, undue complexity and overloading of issues: *Re The Prudential Enterprises Ltd* HCCW 594/1999 (Chu J; 19.08.2003).

An application for consolidation should be made 'at the earliest convenient moment' in order to avoid waste of expense and effort: *Re Shui On Construction Co Ltd & Schindler Lifts (HK) Ltd* [1986] HKLR 1177, 1185I-J. In *Comtech Engineering & Consultant Co Ltd v Thorn Security (HK) Ltd* HCCT 53/1999 (Ma J; 20.06.2002) the court refused to consolidate two actions which were at different stages, where to do so would result in having to vacate trial dates which had already been fixed for one.

Consolidation results in a single action in which there should be a single set of pleadings. By contrast an order for joint trial leaves the actions and their pleadings distinct. Thus consolidation may be appropriate where two actions can proceed as claim and counterclaim. On the other hand joint trial, or trial one after the other may be preferable where the parties are not identical in the separate actions: *Kader Industrial Co Ltd v Ngai Hing Hong Plastics Materials Ltd* HCA 1534/2003 (Deputy Judge Saunders; 23.02.2004).

See also Order 1B rule 1(2)(g).

[4.9.2] Costs of actions tried at same time

Order 4 rule 9(2) provides that where actions are tried at the same time, but not consolidated, the court may order a party to one of the actions to pay costs of the other action. There was previously some doubt in Hong Kong as to the vires of this provision as it conflicted with section 52A(2) of the High Court Ordinance which prohibited costs orders against non-parties in the absence of specific primary legislation. Thus it was arguable that *Aiden Shipping Co Ltd v Interbulk Ltd* [1986] 1 AC 965, 982 (HL), so far as it dismissed the suggestion that the English equivalent of this rule was ultra vires, was not applicable in Hong Kong. However, section 52A(2) was replaced with effect from 2009 with an express power to order costs against a non-party. Thus there should no longer be any doubt about the validity of the power expressed in this rule. See the commentary on costs against non-parties under Order 62 rule 6A.

[4.9.3] Consolidation of arbitration proceedings

Consolidation of arbitrations is governed by section 6B of the Arbitration Ordinance (Cap 341). That section is based on Order 4 rule 9 and similar, though not identical, factors apply: *Shui On Constructions Ltd v Moon Yik Co & Ors* HCMP 1275/1987 (Deputy Judge Cruden; 31.07.1987); *Linfield Ltd v Brooke Hillier Parker (a firm)* HCA 7693/2000 (Ma J; 19.08.2002).

ORDER 5

MODE OF BEGINNING CIVIL PROCEEDINGS IN THE COURT OF FIRST INSTANCE

1. Mode of beginning civil proceedings (O. 5 r. 1)

Subject to the provisions of any written law and of these rules, civil proceedings in the Court of First Instance may be begun by writ or originating summons.

(25 of 1998 s. 2) (L.N. 152 of 2008)

NOTES

[5.1.1] Court of First Instance or District Court?

Certain types of claim may be pursued in either the Court of First Instance or the District Court. For example, money claims above the Small Claims Tribunal's exclusive jurisdiction and up to the District Court's upward limit of HK$1 million may be brought in either court. However, actions which are within the jurisdiction of the District Court should not be commenced in the CFI without good reason. Section 43 of the District Court Ordinance (Cp 336) provides that in the absence of good reason such as importance or complexity of any issue in the action, the CFI is required to transfer such an action to the District Court. It may do so either on application or of its own motion: section 43(1). See the commentary under Order 25 rule 3.

There were once procedural differences between the two courts which might lead plaintiffs to choose the CFI over the District Court. See, for example, *Diners Club International (HK) Ltd v Wilson Cheung Wing-yim* (1981) 11 HKLJ 247; *Kwangtung Provincial Bank v Tang Chik Leung* [1985] 1 HKC 93. However the District Court rules were amended in 2000 so as to largely bring them into line with the High Court rules.

[5.1.2] Types of originating process

Order 5 rule 1 provides that civil proceedings may be begun by writ or originating summons. The rule previously listed the originating motion and petition as additional modes of commencing proceedings. The Chief Justice's working party on civil justice reform concluded that the previous system was unnecessarily complex (final report, para 151 et seq) and recommended that originating motions and petitions should be abolished save where prescribed for excluded proceedings (recommendation 14). They are preserved by Order 5 rule 5 for proceedings where their use is required or authorised by written law. Thus winding-up and matrimonial proceedings, which are governed by their own rules, continue to be initiated by petitions. However Orders 53 and 54 have been amended so that applications for judicial review and habeas corpus are no longer brought by motion, but by special types of originating summons.

Petitions and motions also continue to exist for some proceedings governed by these rules. Order 102 rule 5 continues to prescribe the petition for certain applications under the Companies Ordinance (Cap 32), and Order 59 rule 3(1) continues to provide that appeals to the Court of Appeal must be brought by a type of motion known as notice of appeal.

ORDER 8

ORIGINATING AND OTHER MOTIONS: GENERAL PROVISIONS

1. Application (O. 8 r. 1)

The provisions of this Order apply to all motions required or authorized under a written law, subject to any provisions relating to any class of motion made by that written law or any other written law. (L.N. 152 of 2008)

NOTES

[8.1.1] Limited use of motions

Order 8 rule 1 applies the provisions of the Order to motions required or authorised under a written law. The rule was amended with effect from 2009 along with the amendment to Order 5 rule 1 making it clear that proceedings under these rules are normally to be commenced by writ or originating summons. Appeals to the Court of Appeal continue to be brought by motion: Order 59 rule 3(1).

See the commentary under Order 5 rule 1.

2. Notice of motion (O. 8 r. 2)

(1) Except where an application by motion may properly be made ex parte, no motion shall be made without previous notice to the parties affected thereby, but the Court, if satisfied that the delay caused by proceeding in the ordinary way would or might entail irreparable or serious mischief, may make an order ex parte on such terms as to costs or otherwise, and subject to such undertaking, if any, as it thinks just; and any party affected by such order may apply to the Court to set it aside.

(2) Unless the Court gives leave to the contrary, there must be at least 2 clear days between the service of notice of a motion and the day named in the notice for hearing the motion.

NOTES

[8.2.1] Ex parte motion

Order 8 rule 2 provides that an application by motion shall not normally be made ex parte. The court has inherent jurisdiction to set aside an order made on a motion without prior notice to affected parties: *Commissioner of Inland Revenue v Registrar of Companies* [1998] 1 HKLRD 875, 877D.

3. Form and issue of notice of motion (O. 8 r. 3)

(1) The notice of an originating motion must be in Form No. 13 in Appendix A and the notice of any other motion in Form No. 38 in that Appendix.

Where leave has been given under rule 2(2) to serve short notice of motion, that fact must be stated in the notice.

(2) The notice of a motion must include a concise statement of the nature of the claim made or the relief or remedy required.

(3) Order 6, rule 5, shall, with the necessary modifications, apply in relation to notice of an originating motion as it applies in relation to a writ.

(4) The notice of an originating motion by which proceedings are begun must be issued out of the Registry.

(6) Issue of the notice of an originating motion takes place upon its being sealed by an officer of the Registry.

4. Service of notice of motion with writ, etc. (O. 8 r. 4)

Notice of a motion to be made in an action may be served by the plaintiff on the defendant with the writ of summons or originating summons or at any time after service of such writ or summons, whether or not the defendant has acknowledged service in the action.

5. Adjournment of hearing (O. 8, r. 5)

The hearing of any motion may be adjourned from time to time on such terms, if any, as the Court thinks fit.

(Enacted 1988)

6. Transitional provision relating to originating and other motions (O. 8 r. 6)

Where, immediately before the commencement of the Amendment Rules 2008, an application, request or appeal by motion or originating motion made under a provision amended by Part 5 of the Amendment Rules 2008 is pending, then the application, request or appeal is to be determined as if that provision had not been so amended.

(L.N. 152 of 2008)

NOTES

[8.6.1] Additional transitional provision for motions pending at time of 2009 reforms

Order 8 rule 6 is a transitional provision for motions and originating motions pending when the civil justice reforms were implemented in 2009. It preserves the pre-existing rules for such motions. This transitional provision is in addition to that in Order 5 rule 7 which applies to proceedings which were commenced by originating motion prior to the implementation of the civil justice reforms in 2009.

Where leave to serve out is refused or set aside for non-disclosure, a renewed application based on a proper affidavit may be possible. See *Pacific Electric Wire & Cable Co Ltd v Texan Management Ltd & Ors* [2007] 4 HKC 372 (CA) where Rogers VP said (at para 16) 'there is certainly no absolute bar' to such an application.

[11.4.3] Discretion - must be a 'proper' case for service out

Order 11 rule 4(2) provides that the court shall not grant leave unless the case is a 'proper' one for service out of the jurisdiction. The effect is to leave the court with a discretion to refuse an application even though the case comes within one of the heads of rule 1(1). This is the basis on which the court may refuse leave on grounds such as lis alibi pendens and *forum non conveniens*: *Deak Perera (FE) Ltd v Deak* [1988] 2 HKLR 95, 98. For discussion of these grounds, see the commentary under Order 12 rule 8. At the initial *ex parte* stage the burden on the plaintiff is to demonstrate that Hong Kong is 'clearly and distinctly' the appropriate forum for trial of the action: *Hargreaves v Taian Insurance Co Ltd* [2006] 3 HKLRD 70 (para 50). This is the opposite of the situation where a stay is sought of proceedings started in Hong Kong as of right, on grounds such as forum non conveniens: *Dynasty Line Ltd (provisional liquidators appointed) v Sukamto Sia & Anor* [2009] 4 HKC 184 (CA) (para 56, 75).

The requirement of Order 11 rule 4(2) that the court be satisfied the case is a proper one for a grant of leave to serve out of the jurisdiction also involves consideration of the merits of the claim. This topic is discussed in the commentary under Order 11 rule 1.

[11.4.4] Procedure on application for leave to serve out

An application under Order 11 for leave to serve a writ out of the jurisdiction should be made *ex parte* by affidavit in accordance with the procedure discussed in the commentary under Order 32 rule 1. The application will normally be dealt with by a master, without a hearing. The application may be made before the writ is issued, seeking leave to issue a writ for service out of the jurisdiction. Alternatively, if a writ has already been issued naming a defendant out of the jurisdiction, it will have been marked 'not for service out of the jurisdiction', and the application will be for issue of a concurrent writ under Order 6 rule 6 and leave to serve *ex juris*.

[11.4.5] Setting aside leave to serve out

A party who is the subject of an *ex parte* order granting leave to serve out of the jurisdiction may apply to discharge that order. Such an application is specifically provided for in Order 12 rule 8(1)(c). Leave may be set aside on the ground the requirements discussed above are not met. Those were succinctly set out in *Hargreaves v Taian Insurance Co Ltd* [2006] 3 HKLRD 70 (para 24) as a burden on the plaintiff to show:

(i) that there is a good arguable case that the facts fall within one of the relevant heads of Order 11 rule 1(1);
(ii) that in terms of the dispute itself there is a serious issue to be tried; and
(iii) that the case is one which falls within the rubric of Order 11 rule 4(2), namely that 'No such leave shall be granted unless it shall be made sufficiently to appear to the Court that the case is a proper one for service out of the jurisdiction'.

In addition, non-disclosure at the *ex parte* stage may be a ground for setting aside leave to serve out of the jurisdiction: see the discussion of the full disclosure requirement above. In *Friis & Anor v Colburn* [2009] EWHC 903 (Ch) (01.05.2009) the English

court took cost into account in setting aside leave to serve out of the jurisdiction. The court noted that more than £500,000 in costs had already been incurred, that there were already proceedings underway in two other jurisdictions and concluded (at para 54) that the plaintiffs were 'running up costs oppressively'. In Hong Kong, the court's discretion under Order 11 rule 4, coupled with the underlying objective of reasonable proportion and procedural economy (Order 1A rule 1(c)) should make a similar result possible in a suitable case.

5. Service of writ out of jurisdiction: general (O. 11 r. 5)

(1) Subject to the following provisions of this rule, Order 10, rule 1(l), (4) and (5) and (6) and Order 65, rule 4, shall apply in relation to the service of a writ notwithstanding that the writ is to be served out of the jurisdiction, save that the accompanying form of acknowledgment of service shall be modified in such manner as may be appropriate.

(2) Nothing in this rule, rule 5A or in any order or direction of the Court made by virtue of it shall authorize or require the doing of anything in a country or place in which service is to be effected which is contrary to the law of that country or place. (L.N. 39 of 1999)

(3) A writ which is to be served out of the jurisdiction—

(a) need not be served personally on the person required to be served so long as it is served on him in accordance with the law of the country or place in which service is effected; and

(b) need not be served by the plaintiff or his agent if it is served by a method provided for by rule 5A, rule 6 or rule 7. (L.N. 39 of 1999)

(5) An official certificate stating that a writ as regards which rule 5A or rule 6 has been complied with, has been served on a person personally, or in accordance with the law of the country or place in which service was effected, on a specified date, being a certificate—

(a) by a British consular authority in that country or place, or

(b) by the government or judicial authorities of that country or place, or

(c) by any other authority designated in respect of that country or place under the Hague Convention,

shall be evidence of the facts so stated. (L.N. 39 of 1999)

(6) An official certificate by the Chief Secretary for Administration stating that a writ has been duly served on a specified date in accordance with a request made under rule 7 shall be evidence of that fact. (L.N. 362 of 1997)

(7) A document purporting to be such a certificate as is mentioned in paragraph (5) or (6) shall, until the contrary is proved, be deemed to be such a certificate.

(8) In this rule and rule 6 "the Hague Convention" means the Convention on the service abroad of judicial or extra judicial documents in civil or commercial matters signed at The Hague on 15 November 1965.

NOTES

in principle the plaintiff should be free to proceed with court action to recover the debt. See *Louis Dreyfus Trading Ltd v Bonarich Int'l (Group) Ltd* [1997] 3 HKC 597 and *Leung Kwok Tim v Builders Federal (HK) Ltd* [2001] 3 HKC 527.

Even in the absence of any suggestion of an arbitration agreement the court may stay proceedings pending the outcome of a related arbitration involving other parties: *Linfield Ltd v Taoho Design Architects Ltd* [2002] 2 HKC 204, 208H–I per Ma J, refusing a stay on the facts.

[12.8.12] Procedure on application

Order 12 rule 8(3) provides that a jurisdictional application under the rule must be made by summons. It must be emphasised that the sub-rule specifically requires that the summons must state the grounds of the application. It is probably sufficient simply to refer to one or more of the heads set out in rule 8(1) and (2A) without elaboration, so long as the applicant's position is made clear.

The application must be supported by an affidavit verifying the facts relied upon, and the affidavit must be served with the summons: rule 8(4). In *Texan Management Ltd & Ors v Pacific Electric Wire & Cable Co Ltd* [2009] UKPC 46 (paras 87) the Privy Council, construing a similar provision in the rules applicable in the British Virgin Islands, held that a failure to serve the evidence with the application was 'a minor procedural defect', and that the judge at first instance had properly exercised discretion to excuse it. Such a discretion may be found in Hong Kong's Order 2 rule 1.

[12.8.13] Time for making application

Order 12 rule 8(1) provides that an application under the rule must be made within the time for service of a defence (as to which see Order 18 rule 2). Prior to amendment in 1988 the rule stipulated 14 days from the giving of notice of intention to defend.

Where the time for service of the defence is extended, the time for applying under rule 8 is likewise extended. See *Texan Management Ltd & Ors v Pacific Electric Wire & Cable Co Ltd* [2009] UKPC 46 (paras 82-85), where the Privy Council preferred *Lawson v Midland Travellers Ltd* [1993] 1 WLR 735 (CA) over other authorities.

The time limit does not apply to applications for a stay made under the inherent jurisdiction of the court, and it is appropriate to rely on inherent jurisdiction where the circumstances said to justify a stay arise only after that time has expired. See *Texan Management Ltd* (above) (paras 73, 77), a decision of the Privy Council construing similar provisions in the rules applicable in the British Virgin Islands.

[12.8.14] Extension of time for making application

The time within which an application must be made under Order 12 rule 8 may be extended under Order 3 rule 5 even after it has expired. See, for example, *The Tian Sheng No 8* [2000] 3 HKC 285 (CFA), in particular the judgment of Bokhary PJ at 299F *et seq*. Earlier authorities such as *Wo Fung Paper Making Fty Ltd v Sappi Kraft (Pty) Ltd* [1988] 2 HKLR 346 (CA), based on the former rule 8(2) (which purported to exclude such extension power) should no longer be followed.

On an application for extension of time the court will expect a satisfactory explanation for the delay: *Yeung Fu Lin & Anor v Wong Kam Hung & Anor* [1997] 3 HKC 809, 811D-F. Where the grounds for a stay emerge only after the time to make an application has expired, there is 'no reason to suppose that the court should be reluctant to extend time

to allow the application to be made': *Chan Chin Cheung v Chan Fatt Cheung & Ors* [2010] 1 SLR 1192 (CA) (para 24), quoting Dicey & Morris.

[12.8.15] Abandonment of jurisdictional point by taking a step in the proceedings

Notwithstanding the scheme laid down in Order 12 rules 7 and 8 a party may be taken to waive a jurisdictional point by taking a step in the proceedings. The party will be taken to have waived the jurisdictional point if the step it takes demonstrates an election to abandon the right to contest the court's jurisdiction: *Deak Perera Far East Ltd (in liq) v R Leslie Deak* [1988] 2 HKLR 95, 101I–J citing *Eagle Star Insurance Co v Yuval Insurance Co* [1978] 1 Lloyd's Rep 357 and *Ives and Barker v Willans* [1894] 2 Ch 478. The principle and its operation are illustrated by the following points set out in *Hwoo Huang Linda v Fu Being San & Ors* HCA 4888/2001 (Deputy Judge Reyes SC; 10.04.2002):

(1) A party may be treated as having submitted to the jurisdiction if he files a pleading setting out his case on the substantive merits of an action.

(2) A party may be treated as having submitted to the jurisdiction if he invokes the court's jurisdiction to obtain an interlocutory or final order requiring the opposite party to perform some act (for example, disclose documents, provide further and better particulars, or answer interrogatories).

(3) A party does not submit to the jurisdiction if he merely acts to preserve the *status quo* pending the mounting and resolution of an application to challenge forum.

(4) A party does not submit to jurisdiction if he merely takes defensive action in interlocutory injunction proceedings brought by the other side.

(5) A party may be able to preserve an option to challenge forum, despite having engaged in conduct which might be regarded as submission to the jurisdiction if before or at the time of such conduct he makes it clear that his action is without prejudice to the bringing of a challenge to forum.

(6) The court should adopt a common sense approach. It must not be overly subtle or astute to find that a party has submitted to the jurisdiction. Otherwise, the question of submission could easily become a technicality trap for the unwary. The real question is whether a party's conduct is so inconsistent with maintaining an option to challenge forum that the party should be assumed to have waived such option. In the case of any doubt, the party proposing to challenge forum should probably be given the benefit of that doubt.

The same considerations apply where a defendant seeks a stay of proceedings in favour of arbitration or litigation in another jurisdiction even though Order 12 rule 8 does not apply: see *Hwoo Huang Linda* (above, para 23).

Additional guidance on submission to jurisdiction can be obtained from the following cases:

- *Lee Fai v Chan Kui* [1997] 3 HKC 228 (CA) where the defendant was taken to have submitted to the jurisdiction by applying to set aside a default judgment and appearing at an assessment of damages, albeit under protest, without making an application under Order 12 rule 8.
- In *ABN Ambro Bank NV v Fortgang* HCA 537/2007 (Sakhrani J; 11.01.2008) the defendant was taken to have submitted to the jurisdiction by, after issuing a

directions as to the period within which the notice is to be issued.

(2) There must be served with every third party notice a copy of the writ or originating summons by which the action was begun and of the pleadings (if any) served in the action and a form of acknowledgment of service in Form No. 14 in Appendix A with such modifications as may be appropriate.

(3) The appropriate office for acknowledging service of a third party notice is the Registry.

(4) Subject to the foregoing provisions of this rule, the following provisions of these rules, namely, Order 6, rule 7(3) and (5), Order 10, Order 11, Order 12 and Order 75, rule 4, shall apply in relation to a third party notice and to the proceedings begun thereby as if—

(a) the third party notice were a writ and the proceedings begun thereby an action; and

(b) the defendant issuing the third party notice were a plaintiff and the person against whom it is issued a defendant in that action:

Provided that in the application of Order 11, rule 1(1)(c) leave may be granted to serve a third party notice outside the jurisdiction on any necessary or proper party to the proceedings brought against the defendant.

NOTES

[16.3.1] Issue of third party notice

When leave is granted to issue a third party notice the court may give directions as to the period within which the notice is to be issued: rule 3(1). Whether or not leave was required for the issue of the third party notice, it must be in form 20 or 21 in appendix A of these rules: rule 1(1). A third party notice is issued on the date it is sealed by the court, and issues as to whether a limitation period has been complied with must be judged with reference to that date. See *Parshad v Chit Hing Construction Eng'g* [2011] 1 HKLRD 217 (para 93-120).

[16.3.2] Third party notice must be sealed

A third party notice is issued by the court. Being effectively the originating process against the third party, requiring him to acknowledge service and give notice of intention to defend or face default judgment under rule 5, a third party notice should be sealed with the seal of the court just like a writ or originating summons. Order 6 rule 7(3), which provides that a writ is issued upon being sealed, applies to a third party notice by virtue of Order 16 rule 3(4). In *Keen Lloyd Ltd v Sam Lee Lightering & Transport Co Ltd* [1995] 2 HKC 350, 351B it was said that by virtue of those provisions there is 'no doubt at all' that third party notices 'must be sealed'. In *Parshad* (see case above, para 103 et seq) a third party notice which had not been sealed was treated as ineffective and the court held that the procedural defect could not be cured under Order 2 rule 1.

[16.3.3] Service of third party notice

A third party notice must be served on the third party in the same manner as a writ or originating summons: Order 16 r 3(4) expressly provides that various other provisions of these rules relating to service shall apply.

Rule 3(2) provides that together with the third party notice there must be served a copy of the originating process by which the main action was commenced, together with any pleadings, and a form of acknowledgement of service. The third party must acknowledge service in the same way as must a defendant, and failure to do so may result in default judgment under rule 5.

4. Third party directions (O. 16 r. 4)

(1) If the third party gives notice of intention to defend, the defendant who issued the third party notice must, by summons to be served on all the other parties to the action, apply to the Court for directions.

(2) If no summons is served on the third party under paragraph (1), the third party may, not earlier than 7 days after giving notice of intention to defend, by summons to be served on all the other parties to the action, apply to the Court for directions or for an order to set aside the third party notice.

(3) On an application for directions under this rule the Court may—

(a) if the liability of the third party to the defendant who issued the third party notice is established on the hearing, order such judgment as the nature of the case may require to be entered against the third party in favour of the defendant; or

(b) order any claim, question or issue stated in the third party notice to be tried in such manner as the Court may direct; or

(c) dismiss the application and terminate the proceedings on the third party notice;

and may do so either before or after any judgment in the action has been signed by the plaintiff against the defendant.

(4) On an application for directions under this rule the Court may give the third party leave to defend the action, either alone or jointly with any defendant, upon such terms as may be just, or to appear at the trial and to take such part therein as may be just, and generally may make such orders and give such directions as appear to the Court proper for having the rights and liabilities of the parties most conveniently determined and enforced and as to the extent to which the third party is to be bound by any judgment or decision in the action.

(5) Any order made or direction given under this rule may be varied or rescinded by the Court at any time.

NOTES

[16.4.1] Directions for trial of third party dispute

A defendant who issues a third party notice is required to apply to the court for directions: Order 16 rule 4(1). The summons for directions should be served within 7 days of the third party giving notice of intention to defend; otherwise the third party can apply under rule 4(2) to have the third party notice set aside.

Third party directions will normally provide for service of a statement of claim by the defendant on the third party, with consequential directions for service of a defence, for discovery and so forth. Useful references include the form of summons

which the party on whom it is served does not intend to admit must be specifically traversed by him in his defence or defence to counterclaim, as the case may be; and a general denial of such allegations, or a general statement of non-admission of them, is not a sufficient traverse of them. (L.N. 403 of 1992)

(4) (Repealed L.N. 403 of 1992)

(5) Where an allegation made in a statement of claim or counterclaim is traversed by a denial, the party who denies the allegation shall in his defence or defence to counterclaim –

(a) state his reasons for doing so; and

(b) if he intends to put forward a different version of events from that given by the claimant, state his own version.

(L.N. 152 of 2008)

(6) A party who –

(a) fails to deal with an allegation; but

(b) has set out in his defence or defence to counterclaim the nature of his case in relation to the issue to which that allegation is relevant,

is to be taken to require that allegation to be proved.

(L.N. 152 of 2008)

NOTES

[18.13.1] Rule 13(5) – bare denial no longer permitted

By Order 18 rule 13(5) a defendant is no longer entitled to plead bare denials of the plaintiff's allegations. The Chief Justice's working party recommended this change, saying (at para 207 of its final report) 'A defence consisting of bare denials and non-admissions does nothing to advance the proper functions of pleadings'. Now a defendant must state his reasons for a denial, and state his own version of events if he intends to put one forward at trial. Such elaboration is not expressly required in the case of a non-admission, though that appears to have been within the working party's contemplation. This is possibly explained by the fact that non-admission is only appropriate where a party is unable to admit or deny for lack of knowledge, so the reason is implied. For example, if a plaintiff has pleaded that he is a teacher, and the defendant responds with a non-admission, it means that the defendant does not know the plaintiff's occupation. Similarly, it should not be necessary to elaborate a non-admission with a different version of events because non-admission necessarily implies the defendant does not have a different version of events to put forward.

Order 18 rule 13(5) derives from CPR 16.5(2). The Civil Court Practice, our sister publication in the UK, says of the English provision (at CPR 16.5[1]):

> **Contents of defence** The defendant may not meet the claimant's particulars of claim with a bare denial; he must state which allegations he admits, which he denies (with his reasons for so doing) and which allegations he is unable either to admit or to deny but nevertheless requires the claimant to prove. If he wishes to put forward a different version of events from that given by the claimant then he must state that version. See the CPR Pt 16 Practice Direction, paras 10-13 [which describes generally what is required in a defence, and may serve as a useful guide in Hong Kong].

> Where, for example, in a claim for damages for personal injuries the defendant's case is that the claim is fabricated he does not need to put forward a substantive case of fraud in order to succeed; it is sufficient to set out fully the facts from which the defendant would be inviting the judge to draw the inference that the claimant had not in fact suffered the injuries which he asserted; if the defendant's medical examiner has examined the claimant and has concluded on the basis of thorough interview and clinical examination that there are substantive reasons for disbelieving the claimant's account then those reasons ought to be positively asserted in the defence: *Kearsley v Klarfeld* [2005] EWCA Civ 1510 paras 45 and 48, [2005] All ER (D) 98 (Dec).

In *Kearsley*, referred to in the above passage, the English Court of Appeal was of the view that a defence pleading that the plaintiff was 'fabricating his symptoms and that no injuries were truly sustained' was sufficient, and that it was not necessary in the defence to plead a substantive case of fraud. What seems to be clear is that supporting a denial with a reason such as 'because it is not true' is unlikely to be sufficient; that something more specific must be stated, such as 'because no such accident happened', or 'because there was no such agreement'.

[18.13.2] Rule 13(6) – defendant may require allegation to be proved

Order 18 rule 13(6) provides that a party is taken to require an allegation against it to be proved where although the allegation is not specifically dealt with, the nature of that party's case in relation to the issue is set out in its defence or defence to counterclaim. Its adoption was recommended by the Chief Justice's working party in order to prevent defences from becoming overly lengthy as a result of the introduction of rule 13(5) whereby a bare denial is no longer permitted. In para 209 of their final report, the working party said:

> There is, however a danger that such a rule [Order 18 rule 13(5)], aimed at countering insufficient pleading, may result in the opposite defect of prolixity or inordinate detail. It should accordingly be made clear that in pleading a defence substantively, the defendant should not deal obsessively with each and every allegation in the statement of claim but that he should aim to strike the balance mentioned above.

The balance referred to in the above passage is the balance between 'excessive sparsity and excessive detail' in pleadings, referred to at para 195 of the final report.

Order 18 rule 13(6) derives from CPR 16.5(3). The Civil Court Practice, our sister publication in the UK, says of the English equivalent of this rule (at CPR 16.5[2]):

> **'fails to deal with an allegation'** If a defendant fails to deal with an allegation specifically but has nevertheless set out in the defence the nature of his case on that issue, he will be taken to have required that issue to be proved (CPR 16.5(3)) [in Hong Kong Order 18 rule13(6)]. If, on the other hand, the defendant fails to deal with an allegation at all, then he will be taken to admit that allegation (CPR 16.5(5)) [in Hong Kong Order 18 rule 13(1)]. In either event it is open to the claimant to request further information under CPR Pt 18 [in Hong Kong, an application for particulars under Order 18 rule 12(3)]. If the defence does not make the nature of the defendant's case sufficiently clear in the sense that the claimant does not really know what is admitted or denied or what he is required to prove, then the defence or any offending part of it may be struck out as an abuse of the process or because it will obstruct the just disposal of the proceedings: CPR 3.4 [in Hong Kong Order 1B rule 1(2)(j) and Order 18 rule 19(1)]. The court may take such a step of its own initiative or upon application: CPR 3.3 [in Hong Kong Order 1B rule 2 and Order 18 rule 19(1)].

See also the discussion of *Kearsley v Klarfeld* in the preceding paragraph.

relied upon included *Neilson v Laugharne* [1981] QB 736 and *Hehir v Commissioner of Metropolitan Police* [1982] 2 All ER 335. Hunter J's very strong statements must be read first subject to the qualification that disclosure may, nevertheless, be ordered when to do so is necessary for the proper presentation of a defence to a criminal charge (*R v Brown and Daley* (1987) 87 Cr App R 52).

(4) As to the public interest in keeping secret the identity of police informers see *Lau Biu v AG & Anor* HCA 392/1981 (Mr Commissioner Gittins QC; 15.07.1981) and *R v Lam Kwok-hung* CACC 477/1988 (Yang CJ, Silke VP & Power JA; 23.03.1989).

(5) In *PV v Director of Immigration* [2004] 3 HKC 637, 647H–I, judicial review proceedings concerning the detention and removal of a person, the judge, having reviewed the documents in respect of which public interest immunity was claimed, upheld the claim on the ground that 'disclosure would not only reveal the identity of sources whose anonymity was fundamental to the order and safety of Hong Kong but would constitute a gross breach of solemn confidential arrangements necessary to the good governance of this Territory'

[24.2.39] Appointment of 'special advocate' in cases where public interest immunity upheld

Circumstances may arise where the government wishes to rely on privileged material in support of its case, but at the same time keep it confidential from the opposing litigant and the public for public interest reasons such as national security. In *PV v Director of Immigration* [2004] 3 HKC 637, 648-50, applying *R v H & Ors* [2004] 2 WLR 335 (HL) the court allowed this to be done by appointing a 'special advocate' to represent the opposing litigant in respect of the privileged material. The special advocate was appointed on terms which restricted the usual right to communicate with the client, and required that submissions on the privileged material be made at an *in camera* hearing in the absence of the client. The special advocate's role was limited to the privileged material with the balance of the case being conducted in the usual way by the litigant's own legal team. The special advocate procedure will only be adopted in exceptional cases such as where liberty is at stake, or a person faces deportation to a place where there is a risk of persecution: *Chu Woan Chyi & Ors v Director of Immigration* HCAL 32/2003 (Hartmann J; 08.05.2006). In that case the court declined to adopt the special advocate procedure and decided to consider the confidential documents itself.

The special advocate procedure is Canadian in origin: *Chahal v UK* (1996) 23 EHRR 413. It has been adopted in the UK in the Special Immigration Appeals Commission Act 1997. Although the procedure deprives a person of the right to know the whole of the case against him, it is a justifiable infringement of that right where there are compelling national security considerations: see *Charkhaoui v Canada* [2007] 1 SCR 350 where it was suggested that the procedure would not infringe constitutionally entrenched rights. See, however, the trenchant condemnation of the special advocate procedure in *Epoch Group Ltd v Director of Immigration* HCMP 2475/2010 (Rogers VP; 05.01.2011) where (para 7, *obiter*) the procedure was described as 'abhorrent', 'a denial of the fundamental principles of the common law and natural justice' and 'the tool of the oppressor'.

In *V v Director of Immigration* HCAL 60/2005 (Chu J; 17.10.2005) an application by the government to use the special advocate procedure was dismissed on the ground

the evidence the government wished to rely on without disclosure to the opposing party was irrelevant. It is now recognised that the special advocate procedure is not limited to national security situations: *Murungaru v Secretary of State* [2008] EWCA Civ 1015 (12.09.2008) (para 18).

For a succinct statement of the principles to be borne in mind when considering appointment of a special advocate, see *Secretary of State for the Home Department v AHK & Ors* [2009] EWCA Civ 287 (para 37).

The special advocate or 'closed material' procedure was developed in the context of cases involving issues of public law, and appears to be limited to such cases. In *Al Rawi & Ors v Security Service & Ors* [2010] EWCA Civ 482 (04.05.2010) it was held the procedure may not, in the absence of statutory power or (arguably) agreement of the parties, be adopted in an ordinary civil claim such as a claim for damages for tort or breach of statutory duty.

[24.2.40] Privilege as between spouses

Section 7 of the Evidence Ordinance (Cap 8) provides that spouses cannot be compelled to disclose communications between them during the course of their marriage. The section was amended by Ordinance 25/1969 to restrict its application to criminal proceedings.

Other provisions in the Evidence Ordinance extend the privilege against self-incrimination to incrimination of one's spouse. See sections 65 and 65A thereof.

[24.2.41] Legal aid

Information obtained from applicants for legal aid, apart from that relating to the applicant's financial means, is privileged from disclosure (Legal Aid Ordinance (Cap 91), section 24).

[24.2.42] 'Without prejudice' communications

Communications between parties with a view to settle their dispute, such as 'without prejudice' letters, are normally inadmissible without consent of both sides. This rule is based on the public policy of encouraging litigants to settle their disputes: *Rush & Tompkins Ltd v GLC & Ors* [1989] AC 1280, 1299 (HL). It enables parties to have candid negotiations with a view to settlement knowing that if agreement is not reached, whatever has been said cannot be used against them at trial. The privilege may attach to both oral and written communications.

The law concerning without prejudice communications was set out concisely in *Standard Chartered Bank (HK) Ltd v Ma Lit Kin Cary* HCA 62/2006 (Reyes J; 22.01.2007) in the following terms:

(1) For a claim of 'without prejudice' privilege to succeed, the party claiming it must show that the communication was made:-

  (a) in a *bona fide* attempt to settle a dispute between the parties; and

  (b) with the intention that, if negotiations failed, the communication could not be disclosed without the consent of the party making the communication.

(2) In establishing that there was a *bona fide* attempt to settle a dispute, the party seeking to assert privilege must show that, at the time of his communication:-

  (a) a dispute existed between the parties in respect of which legal proceedings had commenced or were contemplated; and,

> This evidence may take a number of different forms. It may consist of direct evidence that the defendant has previously acted in a way which shows that its probity is not to be relied upon. Or the plaintiff may show what type of company the defendant is (where it is incorporated, what are its corporate structure and assets, and so on) so as to raise an inference that the company is not to be relied upon. Or, again, the plaintiff may be able to found his case on the fact that inquiries about the characteristics of the defendant have led to a blank wall. Precisely what form the evidence may take will depend upon the particular circumstances of the case.

See also *Chow Chor-leung v Rafaella Sportswear Inc* [1990] 1 HKLR 449, 451, quoting extensively from *Third Chandris Shipping Corp v Unimarine SA* [1979] 1 QB 645.

It has been suggested that in Hong Kong it may be easier for the court to infer a risk that assets may be removed from the jurisdiction: see *Intercontinental Housing Development Ltd v Queck* HCCL 1/1986 (Mortimer J; 15.01.1986) (reversed on appeal on other grounds – see [1986] HKLR 1153) where it was said:

> In Hong Kong with the cosmopolitan nature of its community, the international nature of its financial institutions, its international connections, its ease of travel and the ease with which liquid assets can be moved both in and out of the jurisdiction are matters which necessarily have to be considered. In Hong Kong it may be easier to infer from the evidence that there is a risk that assets may be removed from the jurisdiction than in places lacking some of these facilities which in every other respect are admirable.

The fact that the defendant is a foreign company is probably not enough on its own to infer a risk of dissipation: *Anglo-Eastern* (above, at 89G-H). However it is clearly a relevant factor. In *Honsaico Trading Ltd v Hong Yiah Seng Co Ltd* [1990] 1 HKLR 235 (affirmed on appeal – CACV 171/1989) the court took into account the fact the defendant was a foreign company from a jurisdiction with no provision for reciprocal enforcement of Hong Kong judgments. The appellate court noted it could take 6-9 years to enforce a Hong Kong judgment there.

Dubious behaviour will be taken into account and may be a sufficient basis to infer a real risk: *Honsaico* (above) where (at 240H HKLR) it was said:

> . . . the defendant has exhibited an unacceptably low standard of commercial morality in its dealings with the plaintiff; and this drives me to conclude that there is a danger that if the defendant thought it was in its best interests to do so, it would not shrink from attempting to defeat the interests of the plaintiff under any judgment . . .

Honsaico was followed in this regard in *Standard Chartered Securities Ltd v Lai Arthur & Ors* [1993] 1 HKC 375, 394A, and again in *Top One Int'l (China) Property Group Co Ltd & Anor v Top One Property Group Ltd & Ors* HCA 1244/2009 (Poon J; 16.10.2009) (para 63). See also *Nienaber v Bravery Co Ltd* HCA 2942/1989 (Liu J; 05.09.1989) (para 11) where 'steps and measures taken in haste by the defendant in closing down without the slightest warning' were held to be 'indicative' of a risk of dissipation of assets.

Conversely, evidence 'which might tend to support a claim by the defendants that they honestly believed they were entitled to do what they had done would reduce the likelihood of fraud and, consequently, tend to destroy the basis for an inference that there was a real risk of disposal of property...': *Scales & Anor v Wong William & Anor* [1983] 2 HKC 119, 204H-I (CA).

(c) Just or convenient

The court must be satisfied that it is 'just or convenient' to grant the injunction. This requirement is found in s 21L(1) of the High Court Ordinance and applies to all injunctions. The requirement is misstated as 'just *and* convenient' in *Advance Finance* (above) and *Liu Hong Fai* (above).

In *Macy's Candies Ltd v Chan Man Hong* [1996] 2 HKC 602 a *Mareva* injunction was discharged on this ground. The court said (at 613F-G) that the injunction was neither just nor convenient *inter alia* because it would deprive the defendant of the opportunity to earn a living and the plaintiff already had substantial security for its claim.

(d) Defendant has assets

The applicant must satisfy the court that the defendant has assets. Those assets may be in or outside of Hong Kong. See the discussion elsewhere in this commentary on extraterritorial or 'worldwide' *Mareva* injunctions.

The court will not grant a *Mareva* injunction to cover assets in which the defendant has no equity or beneficial interest. In *Wong King Lun v Hong Kiao Go* DCCJ 67/2005 (Judge CB Chan; 17.08.2005) a *Mareva* injunction was set aside on the ground the defendant's only known asset was landed property in negative equity so that the injunction would serve no purpose. In *Prekookeanska Plovidba v LNT Lines SrL* [1988] 3 All ER 897 it was held that a *Mareva* should not be granted against funds in a solicitor's client account where the solicitor had a lien over the funds for unpaid costs.

Where the defendant is plainly insolvent, the appropriate remedy is winding-up rather than a *Mareva* injunction: *Wu Choi Yau v Beelee Industries Ltd* HCA 5811/1990 (Godfrey J; 28.01.1991).

[29.1.66] Time at which injunction takes effect

A *Mareva* injunction, like all judgments and orders of the court, takes effect from the moment it is pronounced: see Order 42 rule 3 and the commentary thereunder. In practice, however, *Mareva* injunctions are granted *ex parte* in private, which means no one can be expected to comply until notice of the order is given or it is served. The means of enforcement is contempt proceedings, but a person can hardly be guilty of contempt of an order of which he is ignorant.

[29.1.67] *Mareva* injunction in dispute subject to arbitration

Section 2GC(1)(c) of the Arbitration Ordinance (Cap 341) empowers the court to grant interim injunctions in relation to arbitration proceedings. Such an injunction may be of the *Mareva* type and *Mareva* principles will apply: *Hsin Chong Construction (Asia) Ltd v Henable Ltd* [2005] 3 HKC 27. In *Interbulk (HK) Ltd v Safe Rich Industries Ltd* [1992] 2 HKLR 185 the court was of the view (under the previous legislation) that such an injunction may not be granted in Hong Kong in relation to an arbitration to be conducted in another jurisdiction.

[29.1.68] *Mareva* injunctions affecting banks

Injunctions which interfere with the usual obligations of a bank to repay depositors and to honour instruments such as guarantees and letters of credit will not be granted lightly. Commercial confidence in the banking system will be taken into account. See *Prime Deal (HK) Enterprises Ltd v HSBC* [2006] 3 HKC 74 (para 14) and the authorities cited therein, and see *Polly Peck Int'l plc v Nadir* [1992] 4 All ER 769;

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[38.36.1] Nature of expert evidence

Expert evidence is opinion evidence by a person with expertise on a relevant issue. It differs from evidence of fact in that it is not necessarily based on personal observation of events. See *Koninklijke Philips Electronics NV v Wealth Full Technology Ltd* [2002] 3 HKC 87 where Deputy Judge R Tong SC stated (at 91E–F): 'Opinion evidence, by definition, means any inference from observed facts' (citing Cross & Tapper *'Evidence'* (9th ed) 511). See also *Re Jinro (HK) International Ltd* [2002] 4 HKC 90, 97F–G, per Kwan J.

The fact that a person giving evidence has expertise in the subject matter does not necessarily mean the evidence is of expert character. As Deputy Judge R Tong SC stated in the *Philips Electronics* case (above, at 91F–G):

> The mere fact that factual evidence is given by someone with expertise in a particular discipline does not transform that evidence into expert or opinion evidence although sometimes the line between factual and opinion evidence may not be immediately apparent. For example, an explanation as to how a computer works may be purely descriptive and factual although it may require some expert training on the part of the person giving that explanation. On the other hand, evidence as to the quality of the work of a computer may be a matter of expert opinion.

In the *Philips Electronics* case Deputy Judge R Tong SC held that evidence by an engineer as to how a compact disc works was not expert evidence.

Explaining words or terms of science or art is 'within the function of experts': *Wong Hoi Fung v AIA Co (Bermuda) Ltd* [2002] 4 HKC 225 (para 14). There the court granted leave to adduce expert evidence concerning 'terms and usage in life insurance policies'.

[38.36.2] Medical evidence – distinction between 'treatment' and expert evidence

In cases where medical evidence is adduced, the distinction between factual and expert evidence comes into sharp focus. Both are often required in cases involving claims for personal injuries, medical negligence and employees compensation. They should be dealt with separately, as emphasised in *Wong Cheuk v Falcon Insurance Co (HK) Ltd* DCEC 688/2008 (Judge Marlene Ng; 20.05.2009), where it was said (paras 45-46):

> 45. A treating doctor renders his medical report an/or testify in court as a professional witness on observed facts (eg what the patient told him, what symptoms were reported, what investigation/examination was undertaken, what medical advice/ treatment was given, etc) rather than offer expert medical opinion (*eg* opinion on the causation, aetiology, diagnosis and/or prognosis etc of the injuries). Thus, information from the treating doctor is normally non-controversial, and his medical reports/records are usually admitted without calling him to testify in court.
>
> 46. On the other hand, an expert doctor is qualified by his experience and expertise in a medical specialty, and usually has no prior therapeutic involvement with the injured party. He is expected to give impartial opinion on particular medical issue(s) to assist the court on the basis of assumptions of fact provided to him in

> written or other form and/or his own examination of the injured party. His opinion/report is for the benefit of the court and independent of such party. Permission of the court is generally required for adducing such expert opinion in evidence at trial.

The learned judge continued (at paras 49-50) by saying that practitioners who instruct medical doctors 'should take special care to make clear the purpose for which the reports are required', so as not to avoid 'mixing of fact and opinion', which 'can lead to confusion'. In *Ho Lai San Teresa v Orea Dental Centre Ltd & Anor* DCPI 2530/2009 (Master Lo; 04.06.2010) the court refused to permit a party to instruct an expert for a joint medical report where that expert had previously treated the party and would be a witness of fact at trial.

[38.36.3] Cross reference

See also Order 38 rule 4 under which the court may limit the number of expert witnesses to be called at trial, and see Order 40 as to court-appointed experts.

[38.36.4] Admissibility of expert and other opinion evidence

Expert evidence is admissible by virtue of section 58(1) of the Evidence Ordinance (Cap 8), subject to any rules. Section 58(2) provides for the admission of other opinion evidence, not of an expert character.

Issues as to the admissibility of expert evidence may arise when leave is sought (as to which see below) or later, once the expert reports have been served and considered. A comprehensive review of the issues which may arise on a challenge to the admissibility of expert evidence is set out in *Barings plc v Cooper & Lybrand & Ors* [2001] EWHC (Ch) 17 (09.02.2001). In that case, after reviewing authorities from the UK and other jurisdictions, the English court said (at para 45):

> In my judgment the authorities which I have cited above establish the following propositions: expert evidence is admissible under section 3 of the Civil Evidence Act 1972 [Evidence Ordinance s 58(1) in Hong Kong] in any case where the Court accepts that there exists a recognised expertise governed by recognised standards and rules of conduct capable of influencing the Court's decision on any of the issues which it has to decide and the witness to be called satisfies the Court that he has a sufficient familiarity with and knowledge of the expertise in question to render his opinion potentially of value in resolving any of those issues. Evidence meeting this test can still be excluded by the Court if the Court takes the view that calling it will not be helpful to the Court in resolving any issues in the case justly. Such evidence will not be helpful where the issue to be decided is one of law or is otherwise one on which the Court is able to come to a fully informed decision without hearing such evidence.

The above passage has been relied upon in at least two decisions in Hong Kong: *Lee Annabell v Lee Wing Kim* HCA 9522/1997 (Chu J; 06.12.2001) and *Re Ocean Time Dev't Ltd* HCCW 334/2004 (Barma J; 16.01.2008). It was also referred to in the final report of the Chief Justice's working party on civil justice reform (2004) (para 596-7) where the effect of the legislation was succinctly summarised as follows:

> (a) the subject matter of the opinion must fall within an area in which expert evidence may properly be given;
>
> (b) the witness must be qualified as an expert to give the evidence of the type in

Court shall make an order setting aside the sale for irregularity.

(3) Whenever a sale of immovable property is set aside for irregularity the purchaser shall be entitled to receive back any money deposited or paid by him on account of such sale, with or without interest, to be paid by such parties and in such manner as it may appear to the Court proper to direct.

(4) (a) After a sale of immovable property has become absolute in manner aforesaid the Court shall grant a certificate to the person who has been declared the purchaser at such sale to the effect that he has purchased the right, title and interest of the judgment debtor in the property sold.

(b) Such certificate shall be liable to the same stamp duty as an assignment of the same property and, when duly stamped as aforesaid, shall be taken and deemed to be a valid transfer of such right, title and interest and may be registered in the Land Registry under the Land Registration Ordinance (Cap. 128). (8 of 1993 s. 30)

(5) (a) Where the property sold consists of immovable property in the occupancy of the judgment debtor, or of some person on his behalf, or of some person claiming under a title created by the judgment debtor subsequently to the attachment of the property, the Court shall, on the application of the purchaser, order delivery of the property to be made by putting the party to whom the property has been sold, or any person whom he may appoint to receive delivery on his behalf, in possession thereof and, if necessary, by removing any person who may refuse to vacate the same.

(b) Where the property sold consists of immovable property in the occupancy of any other person entitled to occupy the same the Court shall, on the application of the purchaser, order delivery thereof to be made by affixing a copy of the certificate of sale in some conspicuous place on the property or at the court house.

(6) (a) If the purchaser of any immovable property sold in execution of a judgment is, notwithstanding the order of the Court, resisted or obstructed in obtaining possession of the property, the provisions of this Order relating to resistance or obstruction to the execution of the judgment for immovable property shall be applicable in the case of such resistance or obstruction.

(b) If it appears that the resistance or obstruction to the delivery of possession was occasioned by any person other than the judgment debtor claiming a right to the possession of the property sold as proprietor, mortgagee, lessee, or under any other title, or if in the delivery of possession to the purchaser any such person claiming as aforesaid is dispossessed, the Court, on the complaint of the purchaser or of such person claiming as aforesaid, if made within one month from the date of such resistance or obstruction or of such dispossession, as the case may be, shall inquire into the matter of the complaint and make such order as may be proper in the circumstances of the case.

(c) The person against whom any such order is made shall be at

liberty to bring an action to establish his right at any time within three months from the date of the order.

(HK)8. Special rules as to the sale of movable property (O. 47 r. 8)

(1) (a) Where the property sold consists of movable property in the possession of the judgment debtor, or to the immediate possession of which the judgment debtor is entitled, and of which actual seizure has been made, the property shall be delivered to the purchaser.

(b) Where the property sold consists of movable property to which the judgment debtor is entitled subject to a lien or right of any person to the immediate possession thereof, the delivery to the purchaser shall as far as practicable be made by the bailiff giving notice to the person in possession prohibiting him from delivering possession of the property to any person except the purchaser.

(2) Where the property sold consists of debts, not being negotiable instruments, or of shares in any public company or corporation, the Court shall, on the application of the purchaser, make an order prohibiting the judgment debtor from receiving the debts and his debtor from making payment thereof to any person except the purchaser, or prohibiting the person in whose name the shares are standing from making any transfer of the shares to any person except the purchaser, or receiving payment of any dividends thereon, and the manager, secretary or other proper officer of the company or corporation from permitting any such transfer or making any such payment to any person except the purchaser.

(3) Where the property sold consists of a negotiable instrument of which actual seizure has been made the same shall be delivered to the purchaser.

(4) (a) If the execution of a transfer by any person in whose name any share in a public company or corporation is standing, or the indorsement by any person of any negotiable instrument, or the execution by any person of any deed or other instrument relating to immovable property or any interest therein, is lawfully required to give effect to any sale in execution of a judgment, the Registrar, with the sanction of the Court, may—

(i) execute such transfer; or
(ii) endorse such negotiable instrument; or
(iii) execute such deed or other instrument.

(b) The execution of such transfer, the endorsement of such negotiable instrument and the execution of such deed or other instrument by the Registrar shall have the same effect as the execution and the endorsement by the person whose execution or endorsement is so required as aforesaid.

(c) Until the execution of such transfer or the endorsement of such negotiable instrument the Court may, by order, appoint some person to receive any dividend or interest due in respect of any such share or negotiable instrument.
(Enacted 1988)

paragraph (b) applies) or section 14(3)(e) or (f) of the Ordinance, 7 days after the date on which leave to appeal is granted;

(b) in the case of an appeal from a judgment, order or decision given or made in the matter of the winding up of a company, or in the matter of any bankruptcy, 28 days from the date of the judgment, order or decision; and

(c) in any other case, 28 days from the date of the judgment, order or decision concerned.

(L.N. 152 of 2008)

(2) In the case where an appeal may lie from a judgment of the Court of First Instance under Division 3 of Part II of the Hong Kong Court of Final Appeal Ordinance (Cap 484), the following period of time shall be disregarded in determining the period referred to in paragraph (1) —

(a) where an application has been made under section 27C of that Ordinance, the period from the date on which the judgment is given to the date on which the application is determined; or

(b) where an application has been made under section 27D of that Ordinance, the period from the date on which the judgment is given to the date on which the application is determined.

(11 of 2002 s. 7)

(3) (Repealed, L.N. 152 of 2008)

(4) In relation to an appeal from the District Court, a notice of appeal must be served under rule 3(5) within —

(a) in the case where leave to appeal to the Court of Appeal is required under section 63(1) or (1B) of the District Court Ordinance (Cap. 336), 7 days after the date on which leave to appeal is granted; and

(b) in the case of an appeal from an order specified in section 63(3) of the District Court Ordinance (Cap. 336) or an order for imprisonment given or made under Order 49B of the Rules of the District Court (Cap. 336 sub. leg. H), 28 days after the date on which the order is made.

(L.N. 152 of 2008)

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[59.4.1] Time within which notice of appeal must be served

A notice of appeal must be served within the time prescribed by Order 59 rule 4. Rule 4(1) is the general provision. It was replaced as part of the civil justice reforms taking effect in 2009. The new provision is significantly different from its predecessor in the following respects:

(a) Time now begins to run immediately that leave to appeal is granted or, where leave is not required, from the date of the judgment, order or decision to be appealed. Previously time did not run until the order to be appealed had been drawn up and entered. This topic is discussed further below.

(b) The time for service of a notice of appeal against an interlocutory order has been adjusted, reflecting the introduction of the general requirement for leave to appeal such orders (as to which see rules 2A, 2B and 21).

A notice of appeal must be served on all parties to the proceedings giving rise to the appeal, who are directly affected by the appeal: rule 3(5). It appears that all must be served within the time prescribed by rule 4. The times may be summarised briefly as follows:

(a) *Interlocutory appeals* – 7 days from the grant of leave to appeal, if leave is required by section 14AA of the High Court Ordinance (rule 4(1)(a)); 28 days from date of the decision if by virtue of Order 59 rule 21 leave to appeal is not required (rule 4(1)(c)).

(b) *Winding-up and bankruptcy matters* – 28 days from the date of the decision in all cases, whether interlocutory or final and whether leave is required or not (rule 4(1)(b)).

(c) *Appeals against final decisions* – 28 days from the date of the decision (rule 4(1)(c)).

(d) *Appeals from District Court* – 7 days from the grant of leave to appeal (rule 4(4)(a)); 28 days if the decision comes within section 63(3) of the District Court Ordinance, which prescribes certain orders which may be appealed without leave, or if it is an order for imprisonment of a judgment debtor under Order 49B RDC (rule 4(4)(b)).

The time periods prescribed by Order 59 rule 4 do not apply where there is express provision elsewhere applying to a specific type of appeal: *Mita Kobyo Kabushiki Kaisha v Mitac Inc* [1993] 1 HKC 207. Although that case concerned the now-repealed Trade Marks Ordinance (Cap 43) (which has been replaced by Cap 559), the stated principle should still apply.

[59.4.2] Comparison with English rules

In England appeals to the Court of Appeal are governed by part 52 of the CPR. The English provisions regarding appeals are significantly different from their Hong Kong counterparts. For one thing, leave to appeal is required in most cases, whereas Hong Kong does not require leave to appeal from final orders of the Court of First Instance, nor from many interlocutory orders (as set out in Order 59 rule 21). For another, the time for appealing is generally 21 days from the date of the decision, as compared to 7 or 28 days in Hong Kong, depending on the type of decision.

[59.4. 3] When time begins to run

As noted above, the time within which notice of appeal must be served begins to run immediately that leave to appeal is granted or, where leave is not required, from the date of the judgment, order or decision to be appealed. Prior to implementation of the civil justice reforms in 2009, time did not run until the order to be appealed had been 'sealed or otherwise perfected'. This is a significant change. Previously parties could postpone the time for service of notice of appeal simply by delaying the process of drawing up of the order and submitting it for approval and to be sealed. This change does not appear to have been specifically recommended by the Chief Justice's working party on civil justice reform. However the Registrar has previously complained about

[62.33.4] Form of application for review of taxation

Order 62 rule 33 does not specify the form of application for review of taxation. Practitioners commonly use a form headed 'Notice of Application for Review of Taxation'. In *AG v Commodore Electronics Ltd* [1994] 1 HKC 660, Master Gould suggested (at 661E-G) that application should be made by summons or at least the procedures which apply to a summons should be followed.

[62.33.5] Contents of application for review of taxation

Order 62 rule 33(3) provides that a party applying for review of taxation must prepare a written list of the items in respect of which objection is raised and state concisely the nature and grounds of the objection. A review of taxation is not just another opportunity for the taxing master to consider the items in more detail and the party applying for review must present fresh evidence or argument: *Glendon Rowell v Pacific International Insurance Co Ltd* HCCT 2/2000 (Master HC Wong; 29.08.2001). In that decision, Master Wong referred to *Smart International Industrial Ltd v Twinkle Step Investment Ltd* HCA 9883/1997 and CACV 201/1998 (Master B Kwan; 15.08.2000) where an application for review which merely repeated the objections filed on the original taxation was struck out.

[62.33.6] Procedure

Order 62 rule 33(3) provides that the party applying for review of taxation must deliver its written objections with the application and serve other relevant parties. In the past failure to deliver objections in a timely fashion was sometimes treated leniently. In *Lam Fong & Anor v Mak Ming* HCPI 395/1997 (Master Kwan; 30.09.1999) such failure was said to be a procedural irregularity which could be remedied by an adjournment with costs in case of any prejudice being caused. And in *A Solicitor v Law Society of HK* [2007] 4 HKC 165 it was held that failure to deliver objections with the application was not fatal. Since then, the new rule 33(3A) has come into force as part of the civil justice reforms. It expressly provides that failure to comply with the procedural requirements of rule 33(3) may result in the application for review being dismissed.

The party served with objections to the taxation has 14 days from delivery thereof to provide written answers thereto: rule 33(4).

[62.33.7] Who may apply for review of taxation?

Obviously the party to the proceedings who has been ordered to pay costs may apply for review of taxation of those costs. In addition, a legal representative who is not a party to the proceedings, but the subject of a 'wasted costs' order under Order 62 rule 8 has standing to apply for a review: *Yeung Shu Lam Wilson v Chan Sui Tung & Anor* [2005] 1 HKC 309, 317I (CA).

[62.33.8] Review of taxation in criminal cases

In *HKSAR v Cheung Siu Ki* [1997] 3 HKC 344, it was held that where a deputy registrar of the High Court had taxed costs under an order of the district court in a criminal case there was no power in the deputy registrar or a judge to review the taxation. This situation is now ameliorated by section 21 of the Costs in Criminal Cases Ordinance (Cap 492) which expressly provides for review of taxation and by

rule 8 of the Costs in Criminal Cases Rules which provides that Order 62 rules 33 and 34 will apply on such a review.

34. Review by taxing master (O. 62 r. 34)

(HK)(1) A review under rule 33 shall be carried out by the taxing master to whom the taxation was originally assigned.

(2) On reviewing any decision in respect of any item, a taxing master may receive further evidence and may exercise all the powers which he might exercise on an original taxation in respect of that item, including the power to award costs of and incidental to the proceedings before him; and any costs awarded by him to any party may be taxed by him and may be added to or deducted from any other sum payable to or by that party in respect of costs.

(3) On a hearing of a review under rule 33 a party to whom a copy of objections was delivered under paragraph (4) of that rule shall be entitled to be heard in respect of any item to which the objections relate notwithstanding that he did not deliver written answers to the objections under that paragraph.

(4) A taxing master who has reviewed a decision in respect of any item shall issue his certificate accordingly and, if requested to do so by any party to the proceedings before him, shall state in his certificate or otherwise in writing by reference to the objections to that decision the reasons for his decision on the review, and any special facts or circumstances relevant to it. A request under this paragraph must be made within 14 days after the review or such shorter period as may be fixed by the taxing master.

NOTES

[62.34.1] Review before same taxing master

Order 62 rule 34(1) provides that a review of taxation shall be carried out by the taxing master who dealt with the taxation of costs giving rise to the review. In *Fenn Kar Bak Lily v Goh Kim Lay & Anor* HCA 9177/1992 (Keith J; 08.12.1998), it was held that the rationale for this rule 'is that the taxing master who carried out the original taxation will know why a particular item had or had not been allowed'.

In the *Fenn Kar Bak Lilly* case, the taxing master had retired and was not available to conduct the review. Noting that the original taxation had proceeded by default and that the master had allowed the whole of the receiving party's bill as drawn without considering the items one by one, Keith J held that under the inherent jurisdiction of the court he could order that the review be conducted by another master.

[62.34.2] Fresh evidence on application for review

Order 62 rule 34(2) expressly provides that a taxing master may receive fresh evidence on an application for review. It has been held that the taxing master's discretion to admit fresh evidence on review 'is in no way fettered' by considerations such as those which apply in the Court of Appeal: *Kung Wong Sau-hin v C P Lin & Co* [1988] 2 HKLR 209, 212B-C. In that case, the Court of Appeal held that parts of an affidavit should have been admitted on an application for review of taxation notwithstanding the fact the evidence was available at the time of the original taxation but had not been used.

NOTES

[75.32.1] Repeal of rule 32(3)

By virtue of the Evidence (Amendment) Ordinance 1999 (No 2 of 1999), rule 32(3) of this Order was repealed for civil proceedings commenced on or after 1 June 1999. The sub-rule continues to apply to proceedings commenced prior to that date. See the commentary under Order 38 rule 22.

33. Proceedings for apportionment of salvage (O. 75 r. 33)

(1) Proceedings for the apportionment of salvage the aggregate amount of which has already been ascertained shall be begun by originating motion.

(3) On the hearing of the motion the judge may exercise any of the jurisdiction conferred by section 556 of the Merchant Shipping Act 1894 (1984 c. 60 U.K.).

NOTES

[75.33.1] Apportionment of salvage

Order 75 rule 33 provides that proceedings for apportionment of salvage shall be commenced by originating motion. For a discussion of the principles applied by the Admiralty court in apportioning amongst different salvors see Kennedy & Rose, The Law of Salvage (6th ed, 2002) ch 17.

See the commentary under Order 75 rule 1 as to interpretation of the reference in this rule to the UK Merchant Shipping Act 1894 after the resumption of Chinese sovereignty over Hong Kong.

34. Notice of motion in actions in rem (O. 75 r. 34)

(1) The affidavits, if any, in support of a motion in an action in rem must be filed in the Registry before the notice of motion is issued, unless the Court gives leave to the contrary.

(2) A notice of motion, except a motion for judgment in default, must be served on all caveators together with copies of the affidavits, if any, in support of the motion 2 clear days at least before the hearing, unless the Court gives leave to the contrary.

35. Agreement between solicitors may be made order of court (O. 75 r. 35)

(1) Any agreement in writing between the solicitors of the parties to a cause or matter, dated and signed by those solicitors, may, if the Registrar thinks it reasonable and such as the judge would under the circumstances allow, be filed in the Registry, and the agreement shall thereupon become an order of court and have the same effect as if such order had been made by the judge in person.

NOTES

[75.35.1] Order 75 rule 35 – order by agreement

Order 75 rule 35 provides for consent orders in the Admiralty jurisdiction. The parties need only file their agreement in the registry and, if approved by the registrar (as

reasonable, and such as the judge would under the circumstances allow) it is deemed to be an order of the court. The consent summons and consent order procedures (see the commentary under Order 42 rule 5A) need not be followed.

[75.35.2] Omission of Order 75 rule 36

There is no rule 36 in Order 75 of the Hong Kong rules. The rule of the equivalent number in the former English RSC dealt with Admiralty proceedings commenced by originating summons.

37. Limitation action: parties (O. 75 r. 37)

(1) In a limitation action the person seeking relief shall be the plaintiff and shall be named in the writ by his name and not described merely as the owner of, or as bearing some other relation to, a particular ship or other property.

(2) The plaintiff must make one of the persons with claims against him in respect of the casualty to which the action relates defendant to the action and may make any or all of the others defendants also.

(3) At least one of the defendants to the action must be named in the writ by his name but the other defendants may be described generally and not named by their names.

(4) The writ must be served on one or more of the defendants who are named by their names therein and need not be served on any other defendant.

(5) In this rule and rules 38, 39 and 40 "name" includes a firm name or the name under which a person carries on his business, and where any person with a claim against the plaintiff in respect of the casualty to which the action relates has described himself for the purposes of his claim merely as the owner of, or as bearing some other relation to, a ship or other property, he may be so described as defendant in the writ and, if so described, shall be deemed for the purposes of the rules aforesaid to have been named in the writ by his name.

NOTES

[75.37.1] Limitation actions

A 'limitation action', as defined in rule 1, means an action by shipowners or other persons under the Merchant Shipping Acts 1894 to 1984 for the limitation of the amount of their liability in connection with a ship or other property. The reference to United Kingdom legislation should now be read in light of the Hong Kong Reunification Ordinance (Cap 1026). See the commentary under Order 75 rule 1.

Limitation actions are within the Admiralty jurisdiction of the High Court (section 12A(1)(b) and (3)(c) of the High Court Ordinance). Order 75 rule 37 sets out the requirements for joining and naming the parties to a limitation action.

A limitation fund must be constituted in accordance with the provisions of the Merchant Shipping (Limitation of Shipowners Liability) Ordinance (Cap 434) (brought into operation on 1 October 1993 (LN 381 of 1993)). Section 12 of that Ordinance brings into force in Hong Kong the Convention on Limitation of Liability for Maritime Claims 1976. The text of the convention is set out in the Second Schedule of the Ordinance.

a plaintiff and a next friend there were substituted references to a defendant and to a guardian ad litem respectively. (81 of 1997 s 59)

NOTES

[80.12.1] Comparison with English rules

Order 80 rule 12(3) differs from its counterpart in the former English rules of the Supreme Court by the addition of the following italicised words:

> … directions as to how the money is to be applied or dealt with and as to any payment to be made either directly or out of the amount paid into court *and whether before or after the money is transferred to or paid into a District Court*, to the plaintiff …'.

These words are added in view of the fact that the High Court has power to control money recovered by a person under a disability and may order that it be transferred or paid into the district court.

[80.12.2] Application of rule 12

Although Order 80 rules 10 and 11 apply only to claims for money, rule 12 applies to claims for declaratory relief which will result in money being recovered: *Kwai Fun Luk Vanessa v Kwai Kun Choi* HCA 4261/2003 (Deputy Judge Muttrie; 05.01.2006).

[80.12.3] Power to direct how money is to be applied or dealt with

Order 80 rule 12(3) gives the court power to direct how money in court held for the benefit of a person under disability is to be applied or dealt with. In *Re C* HCMP 15/2002 (Lam J; 14.03.2007) (para 12–13) it was observed that the rule suggests that the power is confined to payments for the benefit or maintenance of the person under disability, and legal costs. The court observed that by contrast, section 10A of the Mental Health Ordinance (Cap 136) gives the court a wider power which includes payments for the benefit of family members and other persons or purposes for which the party under disability might be expected to provide.

[80.12.4] Interim payments

Interim payments to a party under disability under Order 29 part II should be made known to the court (despite Order 29 rule 15) and should not be held in an account which bears no interest. See the guidance note dated 5 May 2003 from the judge then in charge of the personal injury list, included with practice direction 18.1 on the judiciary's website. See also the commentary under Order 72 rule 2. In such cases it is appropriate to apply under Order 80 rule 12 for directions as to how the money should be dealt with.

[80.12.5] Transfer to District Court

Note Order 62 rule 30(6) which provides for a copy of a taxing master's certificate of costs to be sent to the Registrar of the District Court where there has been a transfer under this rule. See also rule 13, below.

13. Provisions supplementary to rule 12 (O. 80 r. 13)

(HK)(3) Where money is ordered to be transferred to or paid into a District Court, the Registrar shall send a sealed copy of the judgment or order to the Registrar of the District Court.

NOTES

[80.13.1] Numbering sequence

Note that there is no rule 14 in Order 80.

15. Proceedings under Fatal Accidents Ordinance: apportionment by Court (O. 80 r. 15)

(1) Where a single sum of money is paid into court under Order 22, in satisfaction of a cause of action under the Fatal Accidents Ordinance (Cap 22) and a cause of action under Part IV or IVA of the Law Amendment and Reform (Consolidation) Ordinance (Cap 23), and that sum is accepted, the money shall be apportioned between the different causes of action by the Court either when giving directions for dealing with it under rule 12 (if that rule applies) or when authorizing its payment out of court. (L.N. 152 of 2008)

(2) Where, in an action in which a claim under the Fatal Accidents Ordinance (Cap 22) is made by or on behalf of more than one person, a sum in respect of damages is adjudged or ordered or agreed to be paid in satisfaction of the claim, or a sum of money paid into court under Order 22, is accepted in satisfaction of the cause of action under the said Ordinance, then, unless the sum has been apportioned between the persons entitled thereto by a jury, it shall be apportioned between those persons by the Court. (L.N. 152 of 2008)

The reference in this paragraph to a sum of money paid into court shall be construed as including a reference to part of a sum so paid, being the part apportioned by the Court under paragraph (1) to the cause of action under the said Ordinances.

NOTES

[80.15.1] Comparison with English rule

Order 80 rule 15 is adapted from the rule of the same number in the previous English RSC. That was replaced by rule 37.4 of the Civil Procedure Rules which came into force in England in 1999.

[80.15.2] Apportionment of money accepted in settlement of claims on death

Order 80 rule 15 provides for the division between surviving dependants and beneficiaries of money accepted in settlement of their claims arising from the death of a deceased.

Such apportionment will be necessary in fatal accident claims where proceedings are brought on behalf of more than one surviving dependant and are settled by acceptance of a sanctioned payment of a single sum of money. This is because the Fatal Accidents Ordinance (Cap 22) provides, in section 5(3), that only one action may be brought for the benefit of all surviving dependants, and in section 6(6) that money paid into court in satisfaction of a cause of action under the Ordinance may be in one sum without specifying any person's share. Furthermore, under LARCO (Cap 23) causes of action belonging to the deceased may survive for the benefit of his or her estate, which may devolve to a person or group of persons not exactly the same as the dependants entitled to the FAO (Cap 22) relief. Order 22 rule 14(4) expressly

10. Service of documents (O. 106 r. 10)

(1) Any document required to be served on the Society in proceedings under this Order shall be served by sending it by prepaid post to the secretary of the Society.

(2) Subject to paragraph (1), any document not required to be served personally which is to be served on a defendant to proceedings under this Order shall, unless the Court otherwise directs, be deemed to be properly served by sending it by prepaid post to the defendant at his last known address.

11. Constitution of the Court of Appeal to hear appeals (O. 106 r. 11)

Every appeal shall be heard by the Court of Appeal consisting, unless the Chief Justice otherwise directs, of not less than 3 judges.

NOTES

[106.11.1] Composition of Court of Appeal on appeal from Solicitors Disciplinary Tribunal

Order 106 rule 11, in providing that an appeal to the Court of Appeal from the Solicitors Disciplinary Tribunal shall normally be heard by not less than 3 judges, does not reflect section 34B(4) of the High Court Ordinance (which provides that the Court of Appeal may sit with only 2 judges where the parties consent). In principle the Ordinance should prevail: see section 28(1)(b) of Cap 1.

[106.11.2] Appeal by solicitor to the Court of Appeal

Section 13(1) of the Legal Practitioners Ordinance (Cap 159) provides that a solicitor aggrieved by any order made by the Solicitors Disciplinary Tribunal may appeal to the Court of Appeal. Unlike appeals by the Law Society, there is no general leave requirement. However, where the appeal relates solely to costs, section 14(3)(e) of the High Court Ordinance (Cap 4) applies and the solicitor appellant must obtain leave from the tribunal or from the Court of Appeal: see *A Solicitor v Law Society of Hong Kong* [1995] 1 HKC 834 (CA).

Section 13(1) goes on to provide that the provisions of Order 59 shall apply on the hearing of such an appeal. However, to the extent that Order 106 differs from Order 59 the former shall prevail: *Re a Solicitor* [1988] 2 HKLR 137 (CA), per Barker JA at 144H. Notwithstanding Order 59 rule 4 the time for giving notice of appeal is 21 days (as compared to 28 days for other appeals). The Law Society should be named as respondent to an appeal by a solicitor under section 13(1). It is not appropriate to name the tribunal as respondent – *Solicitor (301/02) v Law Society of HK* [2006] 2 HKC 40, 47I (CA) where the Court of Appeal ordered that the tribunal be struck out as a respondent.

In *Au Wing Lun, William v The Solicitors Disciplinary Tribunal & The Law Society of Hong Kong* (CACV 4154/2001) the solicitor had sought judicial review of the Tribunal rather than availing himself of the statutory appeal process. Yuen JA found against the solicitor on this ground. However, the majority of the Court of Appeal was prepared to allow the appeal on exceptional grounds. Rogers VP said that the decision of the Tribunal on costs was 'not only so clearly wrong but so manifestly unjust that it cannot be allowed to stand'. Le Pichon JA said that there were 'exceptional circumstances'.

[106.11.3] Further appeal to Court of Final Appeal

It is now clear that a solicitor who is not satisfied by a decision of the Court of Appeal on appeal from the Solicitors Disciplinary Tribunal may seek leave to appeal to the Court of Final Appeal.

Section 13(1) of the Legal Practitioners previously stated that an appeal by a solicitor to the Court of Appeal 'shall be final', purportedly ousting the possibility of a further appeal. In *Solicitor v The Law Society of Hong Kong & Secretary for Justice* (2003) 6 HKCFAR 570 (FACV 7/2003) it was held that this finality provision was void on the ground of repugnancy to UK legislation during the colonial era and hence did not become part of the law of Hong Kong on 1 July 1997. The finality provision was repealed by Ordinance No 10 of 2005.

[106.11.4] Appeal by Law Society to Court of Appeal

Previously there was no express right on the part of the Law Society to appeal an order of the Solicitors Disciplinary Tribunal. In 2000 section 13(2A) was added to the Legal Practitioners Ordinance (Cap 159), providing that the Council of the Law Society may, with leave of the Court of Appeal, appeal an order of the Solicitors Disciplinary Tribunal. In *Law Society of Hong Kong v A Solicitor* [2002] 1 HKC 585 (CA) it was argued that this provision does not extend so as to permit an appeal against an *ex parte* order of the tribunal summarily dismissing a complaint against a solicitor. The Court of Appeal set aside leave on the ground that the single judge who had granted it had been misled, leaving open the jurisdictional question.

In the subsequent case of *Law Society of Hong Kong v A Solicitor* [2002] 2 HKC 115 the jurisdiction issue was revisited and it was held that the Court of Appeal does have the power to entertain an appeal against summary dismissal by the Solicitors Disciplinary Tribunal. The court distinguished *Re Stromberg and the Law Society of Saskatchewan* (1996) 132 DLR (4th) 470 (QB) (Sask) and allowed the appeal.

12. Title, service, etc. of notice of motion (O. 106 r. 12)

(1) The notice of the originating motion by which an appeal is brought must be entitled in the matter of a solicitor, or, as the case may be, a solicitor's clerk, without naming him, and in the matter of the Ordinance.

(2) Unless the Court otherwise orders, the persons to be served with such notice are every party to the proceedings before the disciplinary tribunal and the Society. (L.N. 275 of 1998)

(3) The notice must be served within 21 days from the day on which the order appealed against is pronounced. (L.N. 275 of 1998)

(4) (Repealed L.N. 275 of 1998)

13. Society to produce certain documents (O. 106 r. 13)

(1) Within 7 days after being served with notice of the originating motion by which an appeal is brought the Society must lodge in the Registry 3 copies of each of the following documents—

(a) the order appealed against, prefaced by the statement of the disciplinary tribunal's findings required by section 12 of the Ordinance,