

CHAPTER 1

INTRODUCTION TO CIVIL
PROCEDURE IN HONG KONG

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1. Overview of Civil Procedure

(a) Distinction Between Civil and Criminal Procedure

Most of the time, the distinction between civil and criminal procedure is clear. In very simple terms: 1.1

- (1) Criminal procedure governs criminal proceedings the purpose of which is to assess whether a person is guilty of a criminal offence and if so, to impose the appropriate punishment, *e.g.* fine, imprisonment etc., on the guilty person;
- (2) Civil procedure governs civil proceedings, which are mostly for the purpose of assessing whether a person should have civil (*i.e.* non-criminal) liability and if so, to award the appropriate form and amount of relief *e.g.* damages, injunction etc., to another person who has suffered or will suffer a loss.

The matters arising from civil and criminal proceedings are largely distinct, and civil procedural rules and criminal procedural rules are very different. However, there are areas of overlap between them, so that, for example, there are times when criminal matters arise out of or are relevant in a set of civil proceedings, *e.g.*: 1.2

- (1) If a person disobeys a court order made in a civil action, *e.g.* an injunction, under certain circumstances, the Court may commit the party to *prison* as punishment;
- (2) Under s.65(1) of the Evidence Ordinance (Cap.8), a person has a right in *non-criminal* proceedings to refuse to answer any question or produce any document if to do so “would tend to expose that person [or that person’s husband or wife] to proceedings for an [criminal] offence or for the recovery of a penalty”. This “privilege against self-incrimination” is relevant, in particular, in applications for a certain type of injunction called the *Anton Piller* order (see Chapter 9).

(b) Which Courts Have Jurisdiction (*i.e.* Power) Over Civil Matters in Hong Kong?

These are the Court of Final Appeal (CFA), Court of Appeal (CA), Court of First Instance (CFI), District Court (DC), and various tribunals (such as the Labour Tribunal, Lands Tribunal and Small Claims Tribunal). 1.3

“High Court” technically includes both the CA and CFI. 1.4

(c) Where Do You Find Civil Procedure in Hong Kong?

The main sources of civil procedure in Hong Kong are: 1.5

- (1) Statute (in Hong Kong—called an “Ordinance”; in the UK—called an “Act”), *e.g.* High Court Ordinance (Cap.4) (HCO) and District Court Ordinance (Cap.336) (DCO);
- (2) Subsidiary legislation, in particular, Rules of the High Court (Cap.4A, Sub.Leg.) (RHC) (under the HCO) and Rules of the District Court (Cap.336H, Sub.Leg.) (RDC) (under the DCO);

- (3) Practice Directions (PDs) issued by the Chief Justice from time to time;
- (4) Case law; and
- (5) Practice books, *e.g.* *Hong Kong Civil Procedure* (commonly referred to as “The Hong Kong White Book”), published each year.

1.6 How do these sources work together?

- (1) Statutes provide the “big-picture” principles and are the “primary” source;
- (2) Most of the detailed procedural rules and requirements are in the subsidiary legislation, in particular, the RHC (High Court) and RDC (District Court):
 - (a) Most other courts and tribunals have their own sets of procedure, *e.g.* the CFA has the Hong Kong Court of Final Appeal Rules (Cap.484A, Sub.Leg.);
- (3) PDs are generally more administrative in nature and deal with detailed practices (on which the RHC/RDC are silent) required by the Courts, *e.g.* detailed requirements for documents used in applications for injunctions;
- (4) Case law:
 - (a) Shows how the Courts have interpreted and/or applied the relevant principles and procedures in the past;
 - (b) Contains the Court’s comments on its inherent jurisdiction:
 - (i) The Court has inherent powers which are not expressly set out in statute/subsidiary legislation;
 - (ii) These inherent powers are residual powers, which exist independently of the Court’s statutory and common law powers. They enable the Courts to fulfill their judicial roles properly and effectively as courts of law;
 - (iii) Examples—the Court’s powers to control its own procedure and to prevent an abuse of its process;
- (5) Practice books, in particular, *Hong Kong Civil Procedure* (The Hong Kong White Book), collect together the procedural rules and relevant cases and other commentary in a logical way:
 - (a) The White Book is regarded as the practitioners’ “Bible”;
 - (b) The White Book is so authoritative that Courts cite from it.

(d) Rules of the High Court versus Rules of the District Court

- 1.7 Especially after the Civil Justice Reform came into effect on 2 April 2009, the RDC (for use in the DC) are essentially identical in most respects to the RHC (for use in the CA and CFI), *e.g.* most of the Order and Rule numbers are the same in both.

However, there are some important differences between them, including the following:

1.8

- (1) Companies may start and continue civil proceedings in the DC without legal representation. However, in the CFI, under the RHC, the general rule is that a body corporate must use a solicitor (in particular, if it wishes to defend the action);
- (2) Parties have a right to serve two sets of “interrogatories” (which are essentially questions, but put in a prescribed format) before trial in the CFI without the Court’s leave (*i.e.* permission). However, in the DC, the service of interrogatories requires the DC’s leave;
- (3) The RHC provide that the “Summer Vacation” (the month of August each year) is to be excluded in calculating any period for serving, filing or amending any pleading. However, there is no equivalent rule in the RDC. In practice, this means that sometimes there may be more time to perform some tasks in the CFI.

2. Pre-Action Considerations

When a new client comes to you with a new piece of litigation, there are some matters which you must consider:

1.9

- (1) *Before even accepting* the instructions, matters to consider include:
 - (a) Competence:
 - (i) In short, do you know and have enough experience of the law and practice in the area of the instruction? If you are “incompetent” but still act on the matter, this may well be professional misconduct. There is also a real risk that you will get things wrong and be sued for negligence;
 - (b) Conflict of interests:
 - (i) For example, a solicitor cannot act for both the plaintiff and the defendant in a legal action;
 - (ii) Beware also of a potential conflict of interests which may mean you have to stop acting later on in the matter—if there is a real risk of this, you should seriously consider not taking on the matter in the first place;
 - (iii) There can also be a “commercial” conflict—*i.e.* no actual conflict of interest in a technical sense, but a conflict in terms of *relationships* with clients, for example, acting for two companies that compete with each other heavily in the same industry;
 - (iv) To consider whether there is any actual or potential conflict of interests, you will need to identify precisely *who is the client* (*e.g.* the person giving you the instructions may only be the real client’s agent), as well as the other possible parties to the action;

- (2) After accepting the instructions, but *before starting any legal action*, there are many matters to consider:
- (a) *This is probably the most important—the objectives of the client—what does the client want to achieve?*
- (i) Depending on the client's objectives, litigation may not be the best way to achieve them;
 - (ii) Confirm instructions with the client, ideally in writing, before starting an action:
 - For example, if the client is a company, you should normally get a board resolution to confirm that the action should be started;
- (b) Alternative ways to resolve the dispute (also known as “alternative dispute resolution” or “ADR”), *e.g.* settlement negotiations, arbitration, mediation, expert determination?
- (i) A settlement on reasonable terms is generally the best result for the client (and cheapest);
 - (ii) Mediation is increasingly recognized as an effective way to help parties come to a settlement:
 - There are different formats for a mediation;
 - In very general terms, the parties appoint a neutral middle-person, the mediator. Through discussions with the parties (usually in meetings but sometimes through telephone conversations or in writing), the mediator tries to understand each party's interests and position and to help the parties come to some common ground:
 - There may be times when the mediator speaks with each party *separately* (with each party in a separate room) to find out that party's positions and desires. This arrangement is commonly used where the parties may have something that they only wish to disclose to the mediator privately, or where the parties may become emotional (and therefore probably less rational) if they are in each other's presence;
 - Once an agreement in principle has been reached, the mediator may help the parties conduct face-to-face negotiation in respect of the detailed terms of the settlement;
 - Note that the mediator does not make any decisions for the parties. It is up to the parties, through discussions with the mediator (and sometimes also face-to-face negotiation with each other), to decide whether to settle and if so, on what terms;

- Mediation is a *confidential* process and evidence of matters discussed during the mediation is generally *not* admissible at the trial in Court (if the mediation fails):¹
 - The confidentiality and inadmissibility of evidence of matters discussed are seen to be necessary to encourage parties to negotiate in earnest—as they need not fear that statements/offers made in the course of the mediation would (if the mediation fails) be used against them in Court later;
- The use of mediation is actively encouraged by the Court in certain areas, *e.g.* family law disputes;²

(iii) Under the Civil Justice Reform, it is expected that the Court will be much more pro-active in encouraging parties to use methods of alternative dispute resolution (in particular, mediation) to settle matters, *e.g.* see the new PD 31 on Mediation (see para.3.6);

- (c) Are the Hong Kong Courts an appropriate forum for deciding this dispute?
- (i) The technical phrase is whether the Hong Kong Courts are the *forum conveniens*. This will be discussed in para.5.29(2);
- (d) In which Court should proceedings be commenced?
- (i) CFI or DC or a specialist tribunal, *e.g.* Labour Tribunal, Lands Tribunal, Small Claims Tribunal?
 - Check the legislation regarding relevant tribunals carefully, as these will set out the types of actions that should go through the tribunal;
 - If the action should go through the CFI or the DC (see Chapter 2), you may still need to choose which “Court List” to start the action in—apart from the “general list”, there are specialist lists for, *e.g.* personal injury actions;
 - A specialist list will usually have its own (sometimes very detailed) procedure, *e.g.* see PD 18.1 in respect of the Personal Injuries List;
 - A party should be careful in choosing the *correct* specialist list (if applicable), as a mistake may lead to the party being penalised in legal costs.³

¹ *S v T (Mediation: Privilege)* [2011] 1 HKLRD 534.

² PD 15.10.

³ *Rondabosh International Ltd v China Ping An Insurance (Hong Kong) Co Ltd* (unrep., HCA 581/2009, [2009] HKEC 2103).

- (e) If money is in dispute, does the intended defendant have enough assets to make it worth suing?
- (f) Does the client, as the intended plaintiff, have the (financial) ability to carry through a legal action lasting a long time (some actions take a few years)?
- (i) Is the client eligible for Legal Aid? In summary:
- Legal Aid is available to a *natural* person (*i.e.* an *individual* and *not*, *e.g.* a company) in Hong Kong;
 - There are two schemes—the Ordinary Legal Aid Scheme and the Supplementary Legal Aid Scheme, with different coverage and eligibility criteria;
 - For matters within (and outside) the Ordinary Legal Aid Scheme, see Schedule 2 of the Legal Aid Ordinance (Cap.91) (LAO). Under this scheme, legal aid is generally available for actions in the DC, CFI, CA and CFA and some other matters. Matters outside this scheme include certain types of defamation actions, partnership disputes, and actions in the Labour Tribunal and Small Claims Tribunal;
 - For matters within (and outside) the Supplementary Legal Aid Scheme, see Schedule 3 of the LAO;
 - The Director of Legal Aid has recently confirmed that legal aid also covers mediation in civil proceedings;⁴
 - Applications are made directly to the Legal Aid Department;
 - The applicant must pass both:
 - A merits test (strength of claim)—in general, the applicant must show that he/she “has reasonable grounds for taking, defending, opposing or continuing [the action in question] or being a party thereto”;⁵ and
 - A means test (applicant’s financial resources)—the relevant financial limits are reviewed and revised periodically;⁶
 - Depending on the applicant’s means, an offer of legal aid may be conditional upon the applicant paying a contribution (*i.e.* a sum of money up front);⁷

⁴ See Law Society Circular 09-521 (PA), 6 July 2009.

⁵ Legal Aid Ordinance s.10(3).

⁶ Updated figures may be found in the LAO/related subsidiary legislation or at the Legal Aid Department’s website.

⁷ Again, details may be found in the LAO/related subsidiary legislation or at the Legal Aid Department’s website.

- In respect of legal costs in actions involving a legally aided person, see the LAO, in particular, ss.16C and 19. Broadly speaking:
 - Where the legally aided person *starts* an action/claim and loses, and is ordered to pay legal costs to the winning (non-legally aided) party, the Director of Legal Aid will pay those costs;
 - On the other hand, where the legally aided person *defends* an action and loses, and is ordered to pay costs to the winning (non-legally aided) party, the Director of Legal Aid will only pay costs to the winning party *if* (and to the extent) the legally aided party had paid a contribution to the Director of Legal Aid *and* the contribution exceeds the legal costs spent by the Director on behalf of the legally aided party;
 - Where appropriate, the Court may of course also order a non-legally aided party to pay the legally aided party’s costs, *e.g.* where the legally aided party is the winner of the action;
 - Director of Legal Aid’s “First Charge”—in general terms, under the Ordinary Legal Aid Scheme, if the legally aided party wins in the action and is paid legal costs by the other party, these recovered costs (and if necessary, the contribution) will be taken by the Director of Legal Aid to repay legal costs spent on the legally aided party’s behalf. However, if there is still a shortfall after this, the legally aided person will have to repay the Director of Legal Aid out of the money or property recovered or preserved:
 - In this regard, where the property recovered is real property, the Director of Legal Aid’s First Charge may be registered against the property in the Land Registry;
 - In a sense, legal aid is a little like a loan by the Director of Legal Aid to the legally aided party—to the extent that the party will have to repay the Director if he/she wins in the action and recovers or preserves money or property;
- (g) Fact gathering—as much as possible, but in particular:
- (i) Background documents;
 - (ii) Background facts;
- (h) Apart from Hong Kong law, is there any other law that is relevant and/or applicable to the dispute?
- (i) If so, you may need to help the client get advice on foreign law;
- (i) What claims does the client have?
- (i) In other words, what causes of action does the client have against the intended defendant, *e.g.* breach of contract, negligence etc.?

CHAPTER 7

PARTIES AND JOINDER

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1. Joinder of Causes of Action and Joinder of Parties

(a) General

“Joinder of parties” means adding *parties* to an existing action. “Joinder of causes of action” means adding *claims* to an existing action. 7.1

The main Court rule governing joinder is RHC and RDC O.15. 7.2

The general purposes of joinder include: 7.3

- (1) To avoid multiplicity of proceedings; and
- (2) To make sure that, as far as possible, all matters in dispute between the parties are completely and finally decided at the same time.

(b) Joinder of Causes of Action

The plaintiff may in the *same action* claim against the *same defendant* in respect of more than one causes of action in certain situations.¹ These are where: 7.4

- (1) The plaintiff is claiming *and* the defendant is alleged to be liable in the *same capacity* in respect of *all the causes of action*;² or
 - (a) For example, if the plaintiff has a claim in negligence and a claim in contract against the same defendant, and the claim in contract is against the defendant in his/her *personal* capacity but the claim in negligence is against the defendant in his/her capacity as a *trustee*, this would be *outside* RHC and RDC O.15 r.1(1)(a);
- (2) The plaintiff is claiming or the defendant is alleged to be liable in respect of some of the causes of action in the capacity of executor or administrator of an estate, and in the personal capacity in respect of the other causes of action which are in relation to the *same estate*;³ or
- (3) If the plaintiff’s situation is not within RHC and RDC O.15 r.1(1)(a) or (b) above, the plaintiff has applied for and got the Court’s leave to add the new cause(s) of action:⁴
 - (a) The application is by an *ex parte* application, using an affidavit/affirmation (stating the grounds of the application). The application must be made *before* the issue of the writ or originating summons.⁵

Where the plaintiff claims on two or more causes of action in the same action, the Court may order separate trials (or make other orders) if the joinder of the causes 7.5

¹ RHC and RDC O.15 r.1.

² RHC and RDC O.15 r.1(1)(a).

³ RHC and RDC O.15 r.1(1)(b).

⁴ RHC and RDC O.15 r.1(1)(c).

⁵ RHC and RDC O.15 r.1(2).

of action “may embarrass or delay the trial or is otherwise inconvenient”,⁶ e.g. if the different claims need completely different evidence.

- 7.6 The rules regarding the joinder of causes of action also applies to a defendant making a counterclaim. In such a case, the counterclaiming defendant is regarded, in respect of the counterclaim, to be in the position of a plaintiff (and the plaintiff receiving the counterclaim in the position of a defendant).⁷

(c) Joinder of Parties

(i) General

- 7.7 Persons may be joined in the same action as plaintiffs or defendants in one of the following situations:⁸

- (1) If “separate actions were brought by or against each of them, ... some common question of law or fact would arise in all the actions **and all rights to relief claimed in the action ... are in respect of or arise out of the same transaction or series of transactions**”: (Emphasis added.)
 - (a) In *Behrens Ng Mo Chee v Credit World Ltd* (unrep., CACV 33/2000, [2000] HKLRD (Yrbk) 101), the CA approved what Deputy Judge To had stated in his first instance judgment: “[t]he issue before me is whether there is a common question of fact or law bearing sufficient importance in proportion to the rest of the action to render it desirable that there should be a joinder of the plaintiffs. In my opinion, a common question of fact does not mean a common finding of fact so that in respect of all the plaintiffs, the finding of fact is identical. So long as the question of fact to be determined is common among the plaintiffs, the fact that the eventual outcome may be resolved differently among the plaintiffs does not mean that the question of fact is not a common one”; (Emphasis added.)
- (2) With the Court’s leave:
 - (a) In deciding whether to grant leave, the Court will consider, among other things, the principles set out in this section and the following sections. However, if the conditions in sub-para.(1) above are not met, the Court will generally be unlikely to grant leave.

- 7.8 Where two or more plaintiffs/defendants are party to the same action, the Court may order separate trials (or make other orders) if the joinder of the parties “may embarrass or delay the trial or is otherwise inconvenient”.⁹

- 7.9 Parties *cannot* be joined after the action has been finally resolved:

⁶ RHC and RDC O.15 r.5(1).
⁷ RHC and RDC O.15 r.2(2).
⁸ RHC and RDC O.15 r.4(1).
⁹ RHC and RDC O.15 r.5(1).

- (1) For example, see, *United States Garment Factory Ltd v Sea-Land Service Inc* [1995] 1 HKLR 323 (Barnett J)—“... judgment has been obtained and satisfied, that there has been no appeal, and that the time for lodging an appeal had expired ... the action between the owners and carriers has been finally resolved and is no longer in existence. I agree with Mr Coleman that there are no proceedings to which this application can relate. The action is dead. It is not capable of resurrection. It is trite that there must be an end to litigation. It is not right that parties, between whom all issues have been resolved, should be vexed by a third party who seeks to reopen their action. However inconvenient it may be, I am satisfied that such a third party must seek such remedies or relief as may be available to him by another means ...”

(ii) Plaintiffs—Special Cases

Subject to any statutory provisions and unless the Court gives leave to the contrary, where the plaintiff in any action “claims any relief to which any other person is entitled jointly with him”, (Emphasis added.) such other person(s) *must all* be party to that action.¹⁰

7.10

- (1) A common example is joint owners of land suing someone for trespass over their land;
- (2) If any such person does not consent to being joined as a plaintiff, the person must be made a defendant (unless the Court orders otherwise):
 - (a) In these situations, the traditional difference between plaintiffs (as someone who “starts the fight”) and defendants (as someone defending themselves) is blurred;
- (3) RHC and RDC O.15 r.4(2) does not apply to probate (*i.e.* wills) actions.

Co-plaintiffs must generally use the same solicitors and counsel:¹¹

7.11

- (1) “*Prima facie*, co-plaintiffs, whether in one original action or in an action consisting of consolidated actions, must be jointly represented by solicitor and counsel. In a proper case, an order may be made authorising severance in point of representation; but this must be, I think, rare and should only be done to avoid injustice.”;¹²
- (2) Separate legal representation of co-plaintiffs needs the Court’s leave;¹³
- (3) One possible situation where separate legal representation may be justified is where there is a conflict of interests between the co-plaintiffs (*e.g.* if they have claims against each other).

¹⁰ RHC and RDC O.15 r.4(2).

¹¹ “It is trite law that co-plaintiffs must be represented by the same solicitors and counsel: see *Supreme Court Practice 1999*, Volume 1, MN62/B/127; *Lewis v Daily Telegraph Ltd (No 2)* [1964] 2 QB 601”; *Sindicato Pesquero Del Peru SA v Eurco Elf Co Ltd* (unrep., HCCL 99/1998) (Stone J).

¹² *Lewis v Daily Telegraph Ltd (No 2)* (Russell LJ).

¹³ *Lewis v Daily Telegraph Ltd (No 2)*.

(iii) Defendants—Special Cases

7.12 Where relief is claimed in an action against a defendant who is liable *jointly* (i.e. together) with some other person *and also severally* (i.e. separately) liable, there is no need to join that other person as a defendant:¹⁴

- (1) Being jointly and severally liable means that *each* of the defendant and the other person is liable for the *whole* of the relief (e.g. damages) claimed by the plaintiff. Therefore there may be no need to join the other person to the action;
- (2) An example of joint and several liability being provided for is a loan agreement with more than one borrower—it is common to make the co-borrowers jointly and severally liable for the debt.

7.13 Where persons are *jointly, but not severally, liable* under a contract and relief is claimed against *some but not all* of those persons, the Court may, on the application of any defendant already party to the action, stay (i.e. suspend) the action until the other liable persons are joined as defendants:¹⁵

- (1) Some older forms of guarantees provide for joint (but not several) liability of the guarantors.

(iv) Misjoinder/Non-joinder of Parties

7.14 “Misjoinder/non-joinder of parties” means parties have not been joined correctly to the action. However, these kinds of mistakes are not fatal to the action.¹⁶

7.15 The Court may, on its own initiative or on application to it (including by a person wanting to add himself/herself/itself as a party, known as an “intervener”); and “on such terms as it thinks just”:¹⁷

- (1) Order an improper or unnecessary party to an action to stop being a party;
- (2) Add a new party to the action where the new party is a:
 - (a) Person who ought or needs to be a party to ensure that “all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon”:
 - (i) “It seems to me that when two parties are in dispute in an action at law, and the determination of that dispute will directly affect a third person in his legal rights or in his pocket, in that he will be bound to foot the bill, then the court in its discretion may allow him to be added as a party on such terms as it thinks fit. By so doing, the court achieves the object of the rule ...”,¹⁸

¹⁴ RHC and RDC O.15 r.4(3).

¹⁵ RHC and RDC O.15 r.4(3).

¹⁶ RHC and RDC O.15 r.6(1).

¹⁷ RHC and RDC O.15 r.6(2).

¹⁸ *Gurtner v Circuit* [1968] 2 QB 587 (Lord Denning MR), cited in *Man Whi Chung v Man Ping Nan* [2003] 1 HKC 549.

(ii) The proposed new party must have some interest in the subject matter of the action beyond a mere commercial interest in its outcome, e.g. an equitable interest in the subject matter of the action;¹⁹

(b) Person between whom and a party to the action there is a question or issue “arising out of or relating to or connected with any relief or remedy claimed” in that action, which would be “just and convenient” to determine among that person and the other parties to the action:

- (i) “... the rule requires *some interest in the would-be intervener which is in some way directly related to the subject matter of the action. A mere commercial interest in its outcome, divorced from the subject matter of the action is not enough* ... no case has gone so far as to allow intervention by someone who is only a creditor, or alleged creditor, with no more than a creditor’s commercial interest in the outcome of the action ...”.²⁰ (Emphasis added.)

As mentioned above, an example of an interest beyond a “mere commercial interest in [the action’s] outcome” is an equitable interest in the subject matter of the action.

As mentioned above, the order to add new parties may be made on the Court’s own initiative or on an application to it:

- (1) If a person applies for himself/herself/itself to be added as a party (i.e. the intervener), the applicant must (except with the Court’s leave) file an affidavit/affirmation showing:²¹
 - (a) The applicant’s “interest in the matters in dispute” in the action; or
 - (b) The “question or issue to be determined as between him and any party to the cause or matter”.

“[N]o person shall be added as a plaintiff without his consent signified in writing or in such other manner as may be authorized”:²²

- (1) For example, if the existing plaintiff applies to join another person as a co-plaintiff, but that person does not consent to this, the Court may still add the person as a party, but only as a defendant.

(v) Adding/Substituting a Party after the Limitation Period

For a discussion on the rules for adding or substituting a party after the expiry of the relevant limitation period, see para.6.87.

¹⁹ *Man Whi Chung v Man Ping Nan*.

²⁰ *Sanders Lead Co Inc v Entores Metal Brokers Ltd* [1984] 1 WLR 452 (Kerr LJ), cited in *Man Whi Chung v Man Ping Nan*.

²¹ RHC and RDC O.15 r.6(3).

²² RHC and RDC O.15 r.6(4).

7.16

7.17

7.18

2. "Third Party" Claims

(a) General

- 7.19 Broadly speaking, where the defendant has a claim against someone else (e.g. in the situation described in para.7.20(1)(a)), the defendant may make use of the "third party" procedure in RHC and RDC O.16.
- 7.20 Under RHC and RDC O.16 r.1(1), the defendant (who has given notice of intention to defend) can make a claim against a person who is *not yet a party to the action*, for:
- (1) A contribution or an indemnity;
 - (a) For example, in a car crash, the plaintiff passenger sues the driver for negligence. The defendant driver believes that the car manufacturer was also responsible for the crash and should share in any liability the defendant driver may have towards the plaintiff passenger. The defendant driver may therefore claim a contribution or an indemnity from the car manufacturer as a third party;
 - (b) In essence, an "indemnity" is a *full* reimbursement (of the relevant damages and/or loss). A "contribution" is a *partial* reimbursement;
 - (2) Any relief or remedy relating to the original subject matter of the action, which is substantially the same as the relief or remedy claimed by the plaintiff; or
 - (3) Any question or issue relating to the original subject matter of the action to be decided by the Court not just between the plaintiff and the defendant but also between one or both of them and that person.
- 7.21 The defendant will issue a "third party notice", "containing a statement of the nature of the claim made against [the third party] and as the case may be, either of the nature and grounds of the claim made by him or of the question or issue required to be determined".²³
- 7.22 In a writ action, the defendant should issue the third party notice *before* serving the defence on the plaintiff (otherwise the defendant would need the Court's leave to issue the third party notice).²⁴
- 7.23 Upon service of the third party notice, the third party becomes a party to the action "with the same rights in respect of his defence against any claim made against him in the notice and otherwise as if he had been duly sued in the ordinary way by the defendant by whom the notice is issued".²⁵
- (1) If the third party intends to defend against the defendant's claim, it must file an appropriate AOS form at Court and then participate in the action in accordance

²³ RHC and RDC O.16 r.1(1).

²⁴ RHC and RDC O.16 r.1(2).

²⁵ RHC and RDC O.16 r.1(3).

with the Court rules and the Court's directions, including filing and serving a third party defence, giving third party discovery (if ordered), etc.;

- (2) As a matter of procedure, third party proceedings are regarded as *separate* proceedings (between the defendant that issued the third party notice and the third party), *independent of* the main action between the plaintiff and the defendant:
 - (a) However, the third party's liability to the defendant may *depend on* the defendant's liability to the plaintiff, e.g. where the defendant is claiming against the third party for an *indemnity* in respect of whatever amount the Court may order the defendant to pay to the plaintiff.

A third party can in turn join *other* persons to the action under the above rules. The person joined by a third party in this way is called a "fourth party". The fourth party can join a "fifth party"; and so on.²⁶ 7.24

As should be clear from the above, the purposes of third party proceedings include to prevent multiple actions about the same or very similar subject matters going on in parallel (which may give rise to inconsistent results) and to save costs by bringing all interested parties before the Court at the same time. 7.25

Where the defendant has a claim against someone else who is *already a party to the same action*, e.g. a co-defendant, the defendant can make a third party claim against this co-defendant under RHC and RDC O.16 r.8 (which is very similar to O.16 r.1). The procedure there is slightly different. 7.26

(b) Distinction Between Third Party Procedure Under O.16 and Counterclaim Procedure Under O.15

Contrast the above third party situation with the situation where the defendant: 7.27

- (1) *Counterclaims against the plaintiff*; and
- (2) In respect of another person (whether or not already a party to the action), either:
 - (a) Alleges that this person is liable to the defendant together with the plaintiff in respect of the subject matter of the counterclaim; or
 - (b) Claims against this person any relief relating to or connected with the original subject matter of the action.

For example, using the car crash example in para.7.20(1)(a), in addition to wanting to share liability with the car manufacturer, the defendant driver *also has a counterclaim against the plaintiff passenger*. 7.28

The defendant may join this other person (the car manufacturer in our example) as a party to the *counterclaim*.²⁷ In this situation, the defendant's claim against this other 7.29

²⁶ RHC and RDC O.16 r.9.

²⁷ RHC and RDC O.15 r.3.

appellant had already got leave to appeal to the CFA and started the appeal proceeding) wishing not just to *defend* the CA judgment appealed against, but to contend that the CA judgment was wrong and to *seek a more favourable judgment* from the CFA? In *Thanakharn Kasikorn Thai Chamkat (Mahachon) v Akai Holdings Ltd (No 1)* (2010) 13 HKCFAR 283, Bokhary PJ held as follows:

- (1) A respondent who only wishes to *defend* a CA judgment, even if on further or other grounds, does *not* need leave to rely on these grounds;
- (2) However, a respondent who goes further and wishes to obtain a *more favourable judgment* from the CFA must do so by way of a cross-appeal. The Court's leave is required for such a cross-appeal (and can be applied for from the CFA directly, without having to go to the CA first). Further, just as in the situation of an intending appellant applying for leave to appeal to the CFA, the grant of leave may be subject to conditions under s.25 of the Hong Kong Court of Final Appeal Ordinance.

ENFORCEMENT OF JUDGMENTS

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1. Strategy Regarding Enforcement of Judgments

(a) General

What is the purpose of “enforcing” a Court judgment or order?

14.1

- (1) This process is also sometimes broadly referred to as “execution” of the judgment or order;
- (2) If a judgment or order orders the payment of money and the judgment debtor fails to pay, the enforcement is to get money or other assets to satisfy the judgment or order;
- (3) If a judgment or order orders something else, *e.g.* an injunction, and the party against whom it is made does not obey it, the purpose of enforcement is to ensure the party in question complies with it.

Assuming the client wants money from an intended defendant, the issue of whether the intended defendant may have enough assets to satisfy a judgment to be given later is *not* something that only needs to be considered after a judgment has been obtained. This is an issue that *must* be considered at the *beginning* of the matter, preferably before the client incurs any substantial costs or starts legal action:

14.2

- (1) Why is this? In very simple terms, there is no point in suing a party for money if it does not have any;
- (2) The above is of course a smaller (or even irrelevant) consideration if the client is not looking for money, but instead, *e.g.* an injunction or other non-monetary relief;
- (3) Ultimately, it is a matter of the lawyer discussing with the client at the start of a matter about what the client’s aims are and then assessing whether those aims can be achieved through litigation:
 - (a) The above assessment will also highlight the need to apply for some of the interlocutory orders discussed earlier, *e.g.* security for costs and injunctions;

- (b) Bearing in mind the Underlying Objectives, the lawyer should also discuss with and advise the client about the appropriate forms of alternative dispute resolution, in particular, mediation.

(b) Information Regarding a Defendant’s Assets

Assuming the client’s claim is for money, for the purposes of considering whether an intended defendant is worth suing and how to enforce a judgment against a defendant, the following information is necessary:

14.3

- (1) *What assets* does the defendant have and how much are they worth?
 - (a) A defendant’s assets will generally include, *e.g.* a house or flat, a car, shares of public and/or private companies, cash at the bank etc.;
 - (b) The *type* of asset will affect the *enforcement method* that should be used;

- (2) Assuming the defendant does have assets, *where are they located?*
- (a) If the assets are not in Hong Kong, the client will have to consider enforcing the judgment in the foreign jurisdiction where the assets are located:
- (i) This may or may not be feasible, depending on local laws;
 - (ii) The client will need help from foreign lawyers, which will mean spending more legal costs.

14.4 Sources of information about a defendant's assets:

- (1) The client's own information, *e.g.*:
- (a) Past dealings, in particular, details of previous payments by and to the defendant;
 - (b) Documents from the defendant, *e.g.* cheques and invoices;
- (2) Public records, *e.g.*:
- (a) The Land Registry—this holds information on the ownership of real properties, *i.e.* land, houses, flats etc. The public can search its records (using the address of the property in question) for a fee:
 - (i) Some search companies also have the ability to search for properties against a particular named person or company;
 - (b) The Companies Registry—this holds information on companies registered under the New Companies Ordinance (Cap.622) (and previous Companies Ordinances), including ownership of shares and addresses of corporate offices (which may be clues for further enquiries, *e.g.* at the Land Registry);
- (3) Inquiry agents:
- (a) These are private investigators who can be instructed for a fee to find out information on the defendant, including its assets. However, in a place like Hong Kong where there are strict confidentiality requirements on banks and other financial institutions, it is often difficult for private investigators to find out detailed financial information;
- (4) Oral examination of the judgment debtor under RHC and amended RDC O.48 or O.49B:
- (a) RHC and amended RDC O.48:
 - (i) Where a *money* judgment has been given by the Court, on the judgment creditor's application, the Court may order the judgment debtor (or if the judgment debtor is a *body corporate*, an *officer* of the body) to attend at Court to be examined orally. The judgment debtor can also be ordered to produce relevant books and documents regarding its assets, including debts owing to it;¹

¹ RHC and RDC O.48 r.1(1).

- (ii) RHC and RDC O.48 also applies to *other* (non-monetary) kinds of judgments and orders;²

(iii) Procedure:

- The application is to be made *ex parte*:
 - Remember the duty of full and frank disclosure;
- The order for oral examination (with a penal notice) must be served *personally* on the judgment debtor (or if judgment debtor is a body corporate, on the officer to be examined);³
- The examination will take place before a master in open Court;⁴
- The master conducting the oral examination will keep a written record of the evidence given at the examination;

(iv) After the examination, if the Court thinks that the judgment debtor:

- Is able to satisfy the whole or a part of the judgment; or
- Has disposed of assets to avoid satisfying the whole or a part of the judgment; or
- Has willfully failed to give full disclosure under O.48 or to answer any question,

the Court may imprison the judgment debtor for not more than three months;⁵

(b) RHC and amended RDC O.49B:

- (i) Where a *money* judgment against an *individual* judgment debtor is not fully paid up, on the application by the judgment creditor, the Court may order the judgment debtor to attend at Court to be examined orally, regarding his/her assets and liabilities etc.⁶

(ii) Procedure:

- The application is to be made *ex parte*;
 - Remember the duty of full and frank disclosure;
- To make sure the judgment debtor attends the oral examination:
 - The Court may order the judgment debtor to attend at Court for examination and to bring specified documents or records.⁷ Such an order must be served on the judgment debtor

² RHC and RDC O.48 r.2.

³ RHC and RDC O.48 r.1(2).

⁴ Amended PD 14.2.

⁵ RHC and RDC O.49B r.1B(1).

⁶ RHC and RDC O.49B rr.1(1), 1A(1), 1A(2).

⁷ RHC and RDC O.49B r.1(1)(a).

- personally*. If the judgment debtor does *not* attend, the Court may order that he/she be arrested and brought to the Court;⁸
- Where the Court believes that “there is reasonable cause, from all the circumstances of the case, including the conduct of the judgment debtor” that he/she may disobey a Court order to attend the examination, the Court may order for the judgment debtor to be *arrested* and brought to the Court;⁹
 - The Court may also make an order prohibiting the judgment debtor from leaving Hong Kong (this is known as a “Prohibition Order”);¹⁰
 - For details on the appropriate practice once a warrant for the arrest of the judgment debtor has been issued under RHC and RDC O.49B, see PD 12.1;
 - If an examination hearing is adjourned (*i.e.* postponed), the Court will order the judgment debtor to attend the adjourned hearing and may prohibit him/her from leaving Hong Kong or imprison him/her until the adjourned hearing;¹¹
 - The examination will take place before a master in open Court;¹²
 - At the examination:
 - Questions can be asked by the Court or the judgment creditor;¹³
 - The Court will record the evidence given at the examination;¹⁴
 - The judgment debtor must give full disclosure of “all his assets, liabilities, income and expenditure and of the disposal of any assets or income and shall, subject to the directions of the Court, answer all questions put to him”;¹⁵
- (iii) After the examination, if the Court thinks that the judgment debtor:
- Is able to satisfy the whole or a part of the judgment; or
 - Has disposed of assets to avoid satisfying the whole or a part of the judgment; or
 - Has willfully failed to give full disclosure under r.1A(2) or to answer any question,

⁸ RHC and RDC O.49B r.1(3).

⁹ RHC and RDC O.49B r.1(1)(b).

¹⁰ RHC and RDC O.49B r.1(2).

¹¹ RHC and RDC O.49B r.1A(3).

¹² Amended PD 14.2.

¹³ RHC and RDC O.49B r.1A(1).

¹⁴ RHC and new RDC O.49B r.1AA.

¹⁵ RHC and RDC O.49B r.1A(2).

the Court may imprison the judgment debtor for not more than three months.¹⁶ For a discussion of the Court’s considerations in deciding whether to imprison the judgment debtor in these circumstances, see *Timekeeping Systems Inc v Oberlander* (unrep., HCA 612/2007, [2009] HKEC 1285);

- (c) Differences between the RHC and RDC O.48 and O.49B procedures include:
- (i) RHC and RDC O.49B are only available against *individual* judgment debtors. RHC and RDC O.48 can be used against individuals and bodies corporate;
 - (ii) RHC and RDC O.49B is only available in respect of unsatisfied *money* judgments, whereas under RHC and RDC O.48 the Court has the power to conduct an examination in respect of other kinds of judgments as well;
 - (iii) The Court has much wider powers under RHC and RDC O.49B to secure the attendance of the judgment debtor at the examination hearing, including arrest, imprisonment and prohibition from leaving Hong Kong.

2. Methods of Enforcement of Money Judgments

(a) General

As mentioned above, there are different methods of enforcing a *money* judgment depending on the *type of asset* to be enforced against. Some of the more common methods of enforcement are set out in the following sections:

14.5

- (1) A judgment debtor can, if it so wishes, enforce against different assets at the same time. However, depending on the amount unpaid under the judgment, it may be enough just to enforce against a single high value asset, *e.g.* a flat. It may not be cost-effective to enforce against many different assets, given the legal costs involved in the enforcement procedures;
- (2) There are special rules regarding enforcement of judgments against a partnership or individual partners—see RHC and RDC O.81.

There are other ways to enforce *non-money* judgments and orders, *e.g.* see RHC and RDC O.45. For example, there are the following procedures:

14.6

- (1) The writ of possession to enforce a judgment for possession of land;
- (2) The writ of delivery to enforce a judgment for delivery up of goods;
- (3) Committal (to prison) and the writ of sequestration to punish a contempt of Court, *e.g.* when a party disobeys an injunction.

¹⁶ RHC and RDC O.49B r.1B(1).

(b) Goods and Chattels—Writ of *Fieri Facias***(i) General**

14.7

Where a judgment debtor has *movable* assets such as goods and chattels, these can be seized by the Court under a writ of *fiери facias* (this is often shortened to “writ of *fi fa*”) and then sold (usually by public auction):

- (1) The full list of property which may be seized is at s.21D(1) of the HCO and s.68B(1) of the DCO;
- (2) The property in question must belong to the judgment debtor:
 - (a) If a piece of property is *jointly* owned by the judgment debtor and someone else, the property can still be seized and sold. However, only the part of the sale proceeds in respect of the judgment debtor’s interest can be used to pay off the judgment;
- (3) Certain goods *cannot* be seized, *e.g.* tools of trade, “necessary wearing apparel and bedding ... to a value, inclusive of tools and apparel and bedding, not exceeding \$10000 in the whole”;¹⁷
- (4) After the property has been sold, the expenses of the execution (including, *e.g.* the costs of the auction sale) will be deducted from the sale proceeds first. The balance will then be paid to the judgment creditor to satisfy the judgment. If there is any surplus after that, the surplus is returned to the judgment debtor.

(ii) Procedure

14.8

General rule: The judgment creditor may issue a writ of *fi fa* without the Court’s leave:

- (1) However, under RHC and RDC O.46 rr.2(1), 2(2) and 3, there are some situations in which the Court’s leave is needed. These include:
 - (a) Where six years or more have passed since the date of the judgment or order to be enforced;
 - (b) Where the parties entitled or liable to execution under the judgment or order have changed;
 - (c) Where the judgment or order is subject to conditions and it is alleged that those conditions have been fulfilled;
- (2) If the Court’s leave is needed, the application must be made *ex parte* (unless the Court requires a summons to be issued) by affidavit/affirmation. This must, among other matters:
 - (a) Identify the judgment or order in question and state the amount of the judgment or order and the amount outstanding at the date of the application;

¹⁷ HCO s.21D(1) and DCO s.68B(1).

- (b) Where six years or more have passed since the date of the judgment or order to be enforced, state the reasons for delay;
- (c) Where the parties entitled or liable to execution under the judgment or order have changed, state the change since the date of the judgment or order;
- (d) State any other information to satisfy the Court that:
 - (i) The applicant is entitled to proceed to execution; and
 - (ii) The person against whom execution is sought is liable.¹⁸

To issue a writ of *fi fa*, the judgment creditor has to:

14.9

- (1) Lodge various documents in the Court, *e.g.* the judgment or order in question (or an office copy), a *praecipe* (*i.e.* a request) for the writ of *fi fa* to be issued etc.—see RHC and RDC O.46 r.6;
- (2) Pay a filing fee and a deposit (to cover the bailiff’s traveling expenses and costs of the security guard (see below)).

The writ of *fi fa* is issued when it is sealed by the Court.

14.10

A writ of *fi fa* is initially valid for 12 months (but the Court may extend this).¹⁹

14.11

The writ of *fi fa* is directed to the Court bailiff, who carries out the act of “seizing” the judgment debtor’s goods:

14.12

- (1) “Seizure” does *not* need physical contact—the bailiff only needs to enter into the premises where the goods are kept and express an intention of seizure;
- (2) To help the bailiff do the seizure as efficiently as possible, the judgment creditor should give as much information as possible to the bailiff about the goods to be seized;
- (3) The bailiff will not physically take the seized goods away. Instead, the bailiff will draw up a list of the seized goods:
 - (a) The bailiff will give a copy of this list to the security guard posted at the premises to guard the seized goods in the meantime;
- (4) The judgment debtor has five working days to pay the judgment debt plus the estimated costs of the execution. If the judgment debtor does not pay these, the seized items will normally be sold by public auction;
- (5) Ownership of the goods remains vested in the judgment debtor until their sale.

For the detailed provisions regarding the sale, see RHC and RDC O.47.

14.13

¹⁸ RHC and RDC O.46 r.4(1), 4(2).

¹⁹ RHC and RDC O.46 r.8.