

[1A.4.19] Order 1A rule 4(2)(f) – helping parties reach settlement

Order 1A rule 4(2)(f) mandates the court, in exercise of its case management powers, to help the parties to settle all or part of their dispute. The Civil Court Practice, our sister publication in the UK, (at para CPR 1.4[8]) says of the equivalent provision in England, CPR 1.4(2)(f), which is identical to the Hong Kong provision:

Encouraging settlement: [rule 4(2)(f)] While the court should encourage parties to settle their differences, it should be careful of putting unfair pressure on a party. Further, when encouraging settlement, the court cannot look at privileged material unless all the parties who have the benefit of the privilege agree – cf *Al-Fayed v Metropolitan Police Commr* [2002] EWCA Civ 780, [2002] All ER (D) 450 (May).

See also Order 1A rule 1(e) by which facilitating settlement of disputes is included in the underlying objectives of these rules.

Also relevant is Order 62 rule 5(1)(e) whereby the court may take into account a refusal to negotiate as conduct relevant to exercise of its discretion in ordering costs. See the commentary under that provision.

[1A.4.20] Order 1A rule 4(2)(g) – timetables and control of case

Order 1A rule 4(2)(g) mandates the court, in exercise of its case management powers, to control progress of a case by fixing timetables or otherwise. Its wording is identical to CPR 1.4(2)(g). The fixing of timetables is dealt with in detail in Order 25.

As a result of this case management duty of the court, late interlocutory applications which may have significant impact on trial, are unlikely to be viewed sympathetically by the court. Late applications 'should be rare occurrences after the CJR': *Liu Chen v Chan Poon Wing & Anor* HCPI 779/2006 (Master Marlene Ng; 07.10.2009) (para 58–9). With regard to late interlocutory applications generally, see the commentary under Order 32 rule 11A.

[1A.4.21] Order 1A rule 4(2)(h) – cost/benefit considerations

Order 1A rule 4(2)(h) provides that the court's active case management duty includes considering whether a particular step in proceedings is justified by the cost. The provision is identical to CPR 1.4(2)(h), of which our sister publication in the UK, The Civil Court Practice says (at para CPR 1.4[9]):

Benefits of taking a particular step [rule 4(2)(h)] – The court can, where appropriate, dismiss summarily an application made before trial simply on the ground that it is likely to increase the costs without producing any real benefit to the conduct of the case: *Norwich Union Linked Life Assurance Ltd v Mercantile Credit Co Ltd* [2003] EWHC 3064 (Ch), [2003] All ER (D) 376 (Dec).

[1A.4.22] Order 1A rule 4(2)(i) – Court should deal with outstanding matters at one stage

Order 1A rule 4(2)(i) stipulates that the court should, as part of case management, deal with as many aspects of a case as it can on the same occasion. Its wording is identical to CPR 1.4(2)(i). See also Order 25 rule 7 by which all relevant matters are to be considered under the case management summons (formerly summons for directions).

[1A.4.23] Order 1A rule 4(2)(j) – Court may deal with cases in absence of parties

Order 1A rule 4(2)(j), like CPR 1.4(2)(j), which is worded identically, allows the court to deal with cases without requiring the parties to attend before it, as part of case management. This provision should be read together with Order 1B rule 2 (court's power to make an order of its own motion) and Order 1B rule 3 (court's power to give directions by way of order *nisi*). Together these provisions enable the court to take a pro-active approach in managing cases by reviewing progress from what appears in the court file, without any input or application from the parties, and to give directions in their absence on a *nisi* basis, enabling them to seek to set aside or vary such directions if they are of the view they are inappropriate.

See also:

- Order 32 rule 11A which expressly empowers masters to deal with interlocutory applications without an oral hearing;
- Order 59 rule 2A(5) which provides for applications for leave to appeal interlocutory decisions to the Court of Appeal to be dealt with on paper; and
- Order 62 rule 21B(1)(a) by which the taxing master may tax a bill of costs without an oral hearing.

[1A.4.24] Order 1A rule 4(2)(k) – use of technology

Order 1A rule 4(2)(k) provides that making use of technology is part of the court's duty of active case management. It is in the same terms as CPR 1.4(2)(k), of which our sister publication in the UK, The Civil Court Practice says (at para CPR 1.4[10]):

The use of technology – [rule 4(2)(k)] – ...The use of IT systems in complex cases is to be encouraged – see the observations in *Morris v Bank of America National Trust & Savings Ass'n* [2000] 1 All ER 954 (CA) (paras 54–60).

Court No 7 on the 5th Floor of the High Court building is equipped with technological equipment including a video-conferencing system and electronic documentation and exhibits handling system (DEHS) allowing documents to be retrieved and displayed electronically during a hearing. See practice direction 29 as to the facilities available and the use of this court. See also the commentary under Order 39 rule 1 as to when it is appropriate to direct that the technology court's video-conferencing facility be used in taking evidence.

[1A.4.25] Order 1A rule 4(2)(l) – directions for quick and efficient trial

Order 1A rule 4(2)(l) includes the giving of directions to ensure quick and efficient trials as part of case management. It is in the same terms as CPR 1.4(2)(l). In this regard, reference should also be made to Order 1B rule 1(2)(j) which gives the court an express power to exclude an issue from consideration, and Order 35 rule 3A which expressly empowers the court to impose time limits including restrictions on the time to be allowed for examination of witnesses and making submissions.

could be persuaded that Order 11 was beyond the power of Hong Kong's colonial legislature (and hence its delegate, the rules committee, which enacted these rules in 1988) it should follow that the Order did not become part of the law of the HKSAR on reunification: *Solicitor v Law Society of HK & Secretary for Justice* (2003) 6 HKCFAR 570.

[11.1.3] Leave requirement

Except as provided in rule 1(2) (see below), a plaintiff who wishes to serve a writ on a defendant outside Hong Kong must first obtain leave of the court under rule 1(1). As to the procedure for such application, see below.

To secure a grant of leave, the plaintiff must demonstrate on his application for leave, that his claim comes within one of the heads listed in rule 1(1). In addition, it must be made 'sufficiently to appear' to the court that the case is a 'proper one' for service out of the jurisdiction (Order 11 rule 4(2)). As stated by Barnes J in *Deak Perera Far East Ltd (in liquidation) v R Leslie Deak et al* [1988] 2 HKLR 95, at 100C:

Under O 11 the Court is faced with two issues: a 'jurisdictional issue' as to whether the applicant's claim falls within any of the 'permissible' categories mentioned in r 1(1), and the 'discretion issue' raised by r 4(2).

The second issue as set out by Barnes J will necessarily include an examination of the merits of the plaintiff's claim.

Furthermore, it must be noted that the terms of Order 11 do not spell out the entirety of the court's jurisdiction to refuse leave (*Johnson v Taylor Brothers & Co Ltd* [1920] AC 144, at 154, per Lord Dunedin). Even where the case falls within the terms of Order 11 rule 1, leave may be refused on the ground of *lis alibi pendens* or *forum non conveniens*, and other factors which may be relevant to a grant or refusal of the order to stay or set aside the leave to serve out (*Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* [1991] 1 AC 187, at 212, per Lord Lowry). These considerations do not affect the existence of jurisdiction, but entitle the court to decline to exercise that jurisdiction. They are considered under rule 4(2) or, more often, will be raised after *ex parte* leave has been granted, and the defendant applies pursuant to Order 12 rule 8 to have that leave set aside.

[11.1.4] The principles on which leave to serve out of the jurisdiction may be granted

The principles which guide the court on an application under Order 11 for leave, or under Order 12 rule 8 to set aside such leave, were set out as follows by Hunter JA in *Wo Fung Paper Making Factory Ltd v Sappi Kraft (Pty) Ltd* [1988] HKC 10, 22-3; [1988] 2 HKLR 346, 356B-357H:

I think it convenient at the outset to attempt to summarise what I see as the main relevant principles governing applications of this nature under Orders 11 and 12. I have drawn them principally, but not exclusively, from three decisions in the House of Lords; *The Brabo* [1949] AC 326; *Vitkovice Horni v Korner* [1951] AC 869, and *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460. They can be summarised in this way:

- (1) This is what has been called an exorbitant jurisdiction. The Court's basic jurisdiction is territorial. It is therefore a strong thing for the Court to go outside its territory

and to compel the foreigner to come here to defend himself. It must therefore be exercised with great caution: see *Spiliada* [1987] AC 460 at p 481.

- (2) There are two safeguards for the foreigner. First the applicant has to bring himself within one of the sub-paragraphs in Order 11 rule 1. Secondly the applicant has to satisfy Order 11 rule 4(2) and 'make [it] sufficiently to appear to the court that the case is a proper one for service out'. That as Lord Radcliffe pointed out in *Vitkovice* [1951] AC 869 is really the heart of the rule.
- (3) In contract, the question whether a case is a proper one for service out falls to be answered by the tests in *Spiliada* [1987] AC 460. There are two ways, it seems to me, of expressing substantially the same concept. The first is Lord Keith's formulation of 'natural forum' in the *The Abidin Daver* [1984] AC 398 at p 415 where he defines the natural forum as being 'that with which the action has the most real and substantial connection'. The second is what Lord Goff called the basic principle and in his paraphrase of Lord Kinnear's test in *Sim v Robinow* (1892) 19 R 665. It is expressed by Lord Goff in these words at p 476: 'the appropriate forum for the trial of the action is in which the case may be tried more suitably for the interests of all the parties and the ends of justice.' The onus of establishing that falls upon the plaintiff applicant.
- (4) The phrase 'sufficiently to appear' in Order 11 rule 4(2) is a guarded one, and is carefully chosen, I think, to cover the two very different positions of the court, on an application like this, in relation to the law and the facts. As far as the law is concerned, if the facts are clear the court can readily decide that for itself. That conclusion may be decisive, directly or indirectly: see *The Brabo* [1949] AC 326. Equally, and this is one of the court's primary functions under this rule, it can decide whether the facts alleged are sufficient in law to support the cause of the action alleged. But on pure fact, and particularly upon disputed fact, it is in a very different position. It cannot make any finding for the simple reason that it cannot conduct a mini pre-trial in order to decide whether a proper trial is to take place. It therefore has basically to act upon asserted fact.
- (5) There are two stages to the enquiry. The first is the *ex parte* stage under Order 11. I emphasise that it is *ex parte* on documents. The practice does not envisage oral submissions ever being made except at specific request. Order 11 rule 4(1) specifies what the supporting affidavit has to show. At that stage it seems to me that the court has to come to a provisional view (it being an *ex parte* application) on three matters. The first is whether the applicant shows a *prima facie* case. I read the speeches in *Vitkovice* [1951] AC 869 as accepting that that is the burden of that stage, it may be for the simple reason that when the court has only got one party's version before it, it can do very little more. That is how I read the speeches of Lord Simonds at p 876, Lord Radcliffe at p 884, Lord Tucker at p 891. Secondly it has to consider the sufficiency in law of the facts alleged: for example whether the applicant brings himself within any of the sub-rules and whether the facts alleged are sufficient *prima facie* to establish the cause of action alleged. Thirdly the court has to consider the facts within the limited scope available. This really comes down to considering whether the facts are sufficiently asserted in an apparently credible manner. The manner was put in this way in a case in contract by Lord Buckmaster giving the opinion of the Privy Council in *Hemelryck v William Lyall Shipbuilding* [1921] 1 AC 698 at p 701. He said:

For the purpose of exercising the discretion which is conferred by the rules to be exercised (that is Order 11) it is sufficient if there appears reasonable evidence that a contract has been made.
- (6) The second stage which may or may not be reached, follows a proper application under Order 12 rule 8. Then the court has to consider all the evidence before it, and to determine in the light of that whether the plaintiff shows a good arguable case. That is the test laid down in *Vitkovice* [1951] AC 869 at that stage. But the court's position on fact and law is the same as it was at the *ex parte* stage. It cannot make any findings of fact. It can certainly consider the legal sufficiency of the facts, and

ORDER 13

FAILURE TO GIVE NOTICE OF INTENTION TO DEFEND

1. Claim for liquidated demand (O. 13 r. 1)

(1) Where a writ is indorsed with a claim against a defendant for a liquidated demand only, then, if that defendant fails to give notice of intention to defend, the plaintiff may, after the prescribed time, enter final judgment against that defendant for a sum not exceeding that claimed by the writ in respect of the demand and for costs, and proceed with the action against the other defendants, if any. (See App. A, Form 39)

(2) A claim shall not be prevented from being treated for the purposes of this rule as a claim for a liquidated demand by reason only that part of the claim is for interest under section 48 of the Ordinance at a rate which is not higher than that payable on judgment debts at the date of the writ.

NOTES

[13.1.1] Types of claim where default judgment may be entered

Judgment in default of notice of intention to defend may be taken as of right, but subject to being set aside (see rule 9), in respect of claims for most, but not all, types of relief. The types of claim which come within the scope of the Order are the following:

- (1) Rules 1 and 2 – claims for liquidated and unliquidated sums of money respectively. As to the distinction between those two types of claims for money, see *GL Baker Ltd v Barclays Bank Ltd* [1956] 1 WLR 1409; [1956] 3 All ER 519 and *Lagos v Grundwald* [1910] 1 KB 41, both of which were cited with approval in *Indian Overseas Bank Ltd v Asi Tai & Co* [1965] HKLR 128.
- (2) Rule 3 – claims in detinue.
- (3) Rule 4 – claims for possession of land.
- (4) Rule 5 – mixed claims, being claims for more than one of the above types of relief.

In each case, the plaintiff's entitlement to enter judgment in default of notice of intention to defend arises 'after the prescribed time', as to which, see rule 6A and the commentary thereunder.

Note that leave is required to enter judgment in default of notice of intention to defend in certain types of case. See, for example, Order 83A in respect of money lenders' actions and Order 84A dealing with actions to enforce hire-purchase and conditional sale agreements. See also Order 77 rule 9(1) by which leave is required to enter judgment in default of notice of intention to defend against the government.

Other claims, in respect of which there is no provision for default judgment, are dealt with by Order 13 rule 6. See the commentary under that rule.

[13.1.2] Effect of default judgment

A default judgment is binding on the parties and takes effect like any other judgment. Such a judgment is capable of giving rise to estoppel *per rem judicatam* even though there has been no adjudication on the merits. See *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] AC 993, 1010 (PC). However, such estoppel will arise only in respect of what must necessarily be taken to have been decided: *New Brunswick Railway Co v British and French Trust Corp Ltd* [1939] AC 1.

In *Lam Chi Fat v Liberty International Insurance* [2003] 2 HKC 260, 2651 the Court of Appeal, citing *Cribb v Freyberger* [1919] WN 22 held that on failing to give notice of intention to defend, a defendant had admitted all of the allegations in the statement of claim.

[13.1.3] Enforcement of default judgment abroad

Because a default judgment is not a judgment on the merits, enforcement in international cases is 'notoriously difficult': *Habib Bank Ltd v Central Bank of Sudan* [2007] 1 WLR 470; [2006] EWHC 1767 (Comm) (para 8). Although the common law permits enforcement of such judgments (see the commentary under Order 71 rule 2), different legal systems may take a different view. Thus in *Berliner Bank AG v Karageorgis & Anor* [1996] 1 Lloyd's Rep 426, and again in *Habib* (above) the English court permitted the plaintiffs to proceed to trial rather than enter default judgment, in order that they could obtain judgment on the merits which would more likely be enforceable abroad.

[13.1.4] Effect of default judgment against one defendant

Where relief is sought against more than one defendant, default judgment entered against one of them may, but does not necessarily, render the claim against the other nugatory. In *Bonus Garment Co (a firm) v Karl Rieker GMBH & Anor* [1997] 2 HKC 460 the Privy Council considered *Morel Bros & Co Ltd v Earl of Westmoreland* [1904] AC 11 where it was held that where a plaintiff has pleaded in the alternative against more than one defendant the taking of default judgment against one of them precluded it from proceeding against the others. The board was of the opinion that the claim against the remaining defendant was not alternative to that against the party against whom judgment in default had been entered and reversed the decision of the Court of Appeal setting aside leave to serve out of the jurisdiction. See also *Rukhmin Balgobin v South West Regional Health Authority* [2012] UKPC 11 (BAILII).

Different considerations may apply in the case where it is alleged that defendants are jointly liable. See sections 5 and 7 of the Civil Liability (Contribution) Ordinance (Cap 377).

With regard to assessment of damages where default judgment is entered against one defendant, see Order 37 rule 3.

[13.1.5] Costs

As to the quantum of costs which may be claimed by a plaintiff in favour of whom judgment is entered under this rule, see Order 62, Second Schedule, Part I.

of a business to be liable for the debts of the transferor unless proper notice has been given. See also *DDK Trading & Development Co Ltd v Multi Best Manufacturers Ltd* [1986] HKLR 155.

Effect of judgment against one defendant – Where judgment is obtained against a defendant who is jointly liable with another, the plaintiff may proceed against the other for the balance of the amount claimed. Section 5 of the Civil Liability (Contribution) Ordinance (Cap 377) removes the bar which existed at common law and section 7 provides likewise where there is a settlement agreement (but subject to the terms of the agreement). See *Chien Ngan Sang v Lai Kam Hing & Anor* [2002] 2 HKC 448, 454I–455A, and see *Asia Television Ltd v Mak Chi Kin* [2006] 4 HKC 347 (CA) where the development of the law is outlined.

Rule 4(1) – other cases – Where there is no question of joint or several liability of defendants Order 15 rule 4(1) applies and defendants may only be joined where there are common questions of law or fact or the relief sought arises out of the same, or a series of transactions, or with leave of the court.

[15.4.5] Representation of joined parties

Where there is more than one plaintiff in an action they must be represented by the same solicitors: see *Lewis v Daily Telegraph Ltd* [1964] 2 QB 601; [1964] 1 All ER 705 (per Pearson LJ at 620 QB) and see *Attorney General v Canadian Pacific Ltd* (1981) 30 BCLR 230. The same rule may apply to counsel, save in exceptional circumstances: *Black King Shipping Corp v Massie* [1984] The Times, 9 July. Defendants are entitled to separate representation, but there may be costs implications if there is no conflict of interest such that separate representation is not strictly necessary. See *Milillo v Konnecke* [2009] NSWCA 109 where one of the two successful defendants was denied costs.

[15.4.6] Companies

It is essential that bodies corporate be properly named when they are joined in legal proceedings. A body corporate exists only by virtue of the legal instrument by which it is created. In the case of a Hong Kong company formed under the Companies Ordinance (Cap 622) (or one of its predecessor Ordinances), this will be the Certificate of Incorporation, which states precisely what the company's name is. In the case of limited companies this will be the certificate of incorporation under the Companies Ordinance (Cap 32), which states precisely what its name is. In other cases the founding legal instrument may be a statute (as is the case with many religious and charitable organisations) or executive charter (for example, Standard Chartered Bank, though not the Hong Kong branch thereof which is now operated by a limited company – see Cap 1174).

In *WA Somerville & Co Ltd v Golden Carriage Restaurant (a firm)* [1966] HKLR 273 judgment was obtained against a company which had wrongly been named in the writ as a firm. The judgment was set aside, but leave to amend and reserve was granted.

In *Re Nos 55 and 57 Holmes Road, Kentish Town* [1959] Ch 298; [1958] 2 All ER 711 it was held that it was not a mere misnomer to name the wrong company in legal proceedings.

A company must duly authorise proceedings brought in its name. This normally means a directors' resolution is required. However, proceedings started without authority are not a nullity and the defect may be cured by ratification: *Danish Mercantile Co Ltd v Beaumont* [1951] 1 Ch 680; *Swire Timber Products Ltd v So Kwok Kuen* CACV 55/1982 (Cons & Zimmern JJA, Hooper J; 17.06.1982).

[15.4.7] Action by struck off company

Legal proceedings commenced by a company which has been struck off or deregistered may retrospectively be validated upon restoration of the company to the register. See Part 15, Division 4 (section 760 *et seq*) of Cap 622, and see *El Wince Ltd v Wu Wen Sheng* [2001] 4 HKC 107, 113G–115D where a writ issued by a company which was at the time struck off (for failure to file an annual return) was found to be valid because of the subsequent restoration of the company.

[15.4.8] Action against wound-up company

The court has power to make a 'Lazarus' order granting leave to commence proceedings against a company which has been wound up: see section 290(1) of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) and see *Wong Pui Sau & Anor v Cheung Kwong Min* [2000] 2 HKC 810 where such an order was made.

Lazarus orders can be useful where, although the defendant has been wound up, a judgment would be satisfied by an insurer or by a compensation fund such as TAVAS.

[15.4.9] Right of foreign corporation to commence proceedings

Under the Foreign Corporations Ordinance (Cap 437) a body corporate incorporated in a territory which is not recognised as a state may nevertheless commence proceedings in Hong Kong: see *Taiwan Via Versand Ltd v Commodore Electronics Ltd* [1993] 2 HKC 650. Note, however, that an order of a court in such a jurisdiction may not be recognised in Hong Kong: see *Ting Lei Miao v Chen Li Hung & Anor* [1997] 2 HKC 779.

[15.4.10] Action by receiver

Receivers have no title to sue in their own name on a cause of action accruing to the party for whose benefit they have been appointed. Only in limited circumstances where they have an independent cause of action may they sue. See *Liu Yiu Keung Stephen v Keen Lloyd Resources Ltd (in liq)* [2007] 1 HKC 605.

[15.4.11] Enemy aliens

An enemy alien may not invoke the jurisdiction of the court, nor can he continue proceedings commenced prior to the outbreak of war. He may, however, be sued and may defend the proceedings brought against him. See *Porter v Freudenberg* [1915] 1 KB 857. The question whether any foreign jurisdiction is an 'enemy' for this purpose is a matter for the sovereign and a certificate issued by the competent authority will be conclusive: see *Rv Bottrill ex p Kuechenmeister* [1946] 1 All ER 635.

A counterclaim does not relate back to the date of issue of the writ. This is because a counterclaim has the characteristics of a separate action – see the commentary under Order 15 rule 2. It follows that an ‘amendment’ to a defence so as to plead a counterclaim in respect of a cause of action arising after the issue of the writ is unobjectionable. See *Hong Kong Jie Hing Trading Co Ltd v Pacific Commercial Co Ltd* HCA 2167/2005 (Deputy Judge Gill; 18.10.2006).

The relation back rule does not apply to recovery of damages under a continuing cause of action. Order 37 rule 6 provides for recovery of such damages occurring after the issue of the writ, down to the date of assessment. Nor does it apply to evidence of matters arising after the issue of the writ, which may be relied upon to prove the facts alleged: *PearlDelta Group Ltd v Huge Winners Int'l Ltd & Ors* HCA 595/2008 (Saunders J; 11.02.2009).

[20.5.11] Amendment of defence so as to withdraw admission

On an application for leave to amend a defence so as to withdraw an admission it is appropriate for the court to consider the circumstances in which withdrawal of an admission will be permitted. See *White v Greensand Homes Ltd* [2007] EWCA Civ 643 (28.06.2007) (para 33); *Chow Sing Yuet Elton t/a Elton SY Chow & Associates (a firm) v Carry Express Investment Ltd* HCCT 18/2007 (Saunders J; 04.11.2009) (para 16); and *Cheung Wan Hung v Fai Wong Construction (Asia) Ltd* DCPI 136/2009 (Judge ST Poon; 12.03.2010) (para 10). For discussion of the withdrawal of admissions, see the commentary under Order 13A rule 2(3) and Order 27 rule 1.

An application for leave to amend so as to withdraw an admission will be carefully weighed, especially after expiration of the limitation period: see *Li Fat Mui v Able Engineering Co Ltd & Ors* [1998] 1 HKC 469. There the defendant sought to amend so as to withdraw an admission that it was the employer of the plaintiff in a personal injuries action. Leave was refused on the ground that prejudice would be caused to the plaintiff in that the limitation period had expired and it would no longer be possible for the plaintiff to commence proceedings against the person which the applicant maintained was the true employer.

[20.5.12] Effect of amendment

Once a pleading has been amended, what stood before is no longer material and cannot be relied upon: *Warner v Sampson* [1959] 1 QB 297 (CA). In that case it was held that a landlord could not invoke a denial of the lease in the unamended defence as constituting a forfeiture thereof.

[20.5.13] Wholesale amendments

Where a party seeks to completely redraft a pleading, the court may permit it to ‘put a line right through’ the whole of it and set out an entirely new pleading: *Chow Wing Yuet Elton v Carry Express Investment Ltd* HCCT 18/2007 (Saunders J; 04.11.2009) (para 15). There the court said (para 16) that in doing so ‘great care’ must be taken to ensure that admissions made in the original pleading are maintained unless leave to withdraw them is granted under Order 13A rule 2(3).

In *FEB Finance Ltd & Anor v Tse Yim* CACV 92/1989 (Cons VP, Clough & Penlington JJA; 15.02.1990) the court struck out a statement of claim with leave to file a new one where it was of the view that a completely new pleading was

appropriate where amendments which would substantially change the nature of the case were sought.

See also rule 10(1) which provides for the preparation of a fresh document where amendments are numerous or lengthy, and requires that in the case of a writ or originating summons, the originating process be re-issued.

[20.5.14] Amendment in other official language

It has been held that a party may in amending a document, cross it out entirely and replace it with a document in the other official language: *Hebei Enterprises Ltd v Livasiri & Co* HCA 20094/1998 (Yuen J; 26.11.1999). Where this is done to a writ or originating summons the procedure under rule 10(1) for reissuance should be followed.

[20.5.15] Amendment during August vacation

The previous Order 20 rule 6 imposed restrictions on the making of amendments during the court’s summer vacation, that is the month of August. It was repealed in England in 1982 and omitted from the Hong Kong rules when they were repealed and re-enacted in 1988. Order 3 rule 3 continues to provide that the month of August will not be included in the reckoning of time for amendment of pleadings (unless the court otherwise directs): see the commentary under that rule.

[20.5.16] Numbering

There is no rule 6 in Order 20. It was repealed in 1988. See the commentary above.

7. Amendment of other originating process (O. 20 r. 7)

Rule 5 shall have effect in relation to an originating summons, a petition and an originating notice or motion as it has effect in relation to a writ.

8. Amendment of pleading and certain other documents (O. 20 r. 8)

(L.N. 152 of 2008)

(1) For the purpose of determining the real question in controversy between the parties to any proceedings, or of correcting any defect or error in any proceedings, the Court may at any stage of the proceedings and either of its own motion or on the application of any party to the proceedings order a pleading or any other document in the proceedings to be amended on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct. (L.N. 152 of 2008)

(1A) The Court shall not under paragraph (1) order a pleading to be amended unless it is of the opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs. (L.N. 152 of 2008)

(2) This rule shall not have effect in relation to a judgment or order. (L.N. 152 of 2008)

NOTES

[20.8.1] Power to order amendment

Order 20 rule 8 empowers the court to order parties to amend their documents in the proceedings. The rule was broadened with effect from 2 April 2009, so as to apply to

counterclaims for such relief, with necessary modifications. See also the commentary below on the privilege against self-incrimination.

[24.2.12] Automatic discovery not available against the government

Order 24 rules 1 and 2 do not apply in civil proceedings to which the government is a party: Order 77 rule 12(1). This reflects the common law position under which discovery could not be ordered against the government: *Cowie v AG* [1948] HKLR 42. Discovery may now be ordered against the government under the Crown Proceedings Ordinance (Cap 300) s 24(1)(a). See the commentary under Order 77 rule 12.

[24.2.13] Actions for infringement of a patent

Order 24 rules 1 and 2 do not apply to actions for infringement of patent rights: Order 103 rule 26(3).

[24.2.14] Collision cases

Order 24 Rule 2(2) provides that the automatic discovery of documents procedure does not apply in cases arising from collision or apprehended collision of vehicles, unless the court otherwise orders. An automatic direction by which the parties are so ordered in personal injury cases (which will be the bulk of collision cases) is provided for by Order 25 rule 8. Practice direction 18.1 (concerning the personal injuries list) is also relevant in this regard – see the commentary under Order 72 rule 2.

[24.2.15] Defamation actions

There are limitations on the discovery process in defamation actions. See the commentary under Order 82 rule 3.

[24.2.16] Third party proceedings

There is no automatic discovery of documents in third party proceedings: see the qualifying paragraph at the end of Order 24 rule 2(1). In such cases, if there is to be discovery, an appropriate direction should be sought under Order 16 rule 4.

[24.2.17] Order limiting scope of discovery

Order 24 rule 2(5) & (6) empower the court to make an order limiting the scope of discovery of documents, or dispensing with it altogether, if necessary in the circumstances of the particular case for disposing of the case fairly or for saving costs. In *Deacons v White & Case* HCA 2433/2002 (Deputy Judge Poon; 13.03.2003) (paras 19–31) the court used this power to excuse a party from making discovery of documents in relation to irrelevant allegations in the opposing party's pleading. In addition see the express power to limit the scope of discovery in Order 24 rule 15A.

See also rule 1(2) under which the parties may by agreement dispense with or limit discovery.

[24.2.18] Affidavit of documents

Any party may require another party to make an affidavit verifying its list of documents at any time before the case management summons is taken out: Order 24 rule 2(7). See also rule 3(2) which empowers the court (without restriction as to the stage of proceedings) to order a party to verify its list of documents by affidavit. And see rule 5(3) as to the form of affidavit of documents.

The purpose of an affidavit of documents is to add the sanction of perjury so as to ensure full disclosure.

Failure to make an affidavit of documents when required to do may result in an adverse order under Order 24 rule 16.

[24.2.19] Privilege

The common law recognises a number of heads of privilege which may be claimed by a party to legal proceedings so as to justify refusal to allow the opposing party to inspect a relevant document. Privilege is not automatic but must be asserted. A claim to privilege is made by listing the relevant document in part 2 of schedule I of the party's list of documents. Privilege may be lost or waived if not asserted or if voluntary disclosure is made – see below.

Of the various heads of privilege it is legal professional privilege which is most often asserted in civil proceedings.

[24.2.20] Legal professional privilege

Legal professional privilege (sometimes called 'solicitor client privilege') protects communications the dominant purpose of which is to seek legal advice or which are made in contemplation of litigation. It protects communications with lawyers only, not those with other professionals providing legal advice such as accountants: *Prudential plc & Anor v Special Commissioner of Income Tax & Anor* [2013] UKSC 1 (BAILII). An outline of the history of the development of this privilege at common law, and its interaction with modern statute and human rights law can be found in the judgment of Lord Phillips in *Re McE & Ors* [2009] UKHL 15 (para 3 *et seq*). See also the interesting exposition of cases from around the common law world in the Singapore Court of Appeal's decision in *Skandinaviska Enskilda Banken AB v Asia Pacific Breweries (Singapore) Pte Ltd & Ors* [2007] SGCA 9; [2007] 2 SLR 367 (paras 23–26). The common law principle was stated in the often-cited English case of *Anderson v Bank of British Columbia* (1876) 2 Ch D 644 which has been applied in Hong Kong all along. See for example *The Chun Loong v G Martini* (1919) 14 HKLR 29.

A concise up-to-date statement of the common law rule can be found in *Lui Yiu Nga v Hospital Authority* [2002] 4 HKC 204, 207D–H, per Suffiad J, quoting Phipson on Evidence (15th ed). The learned judge said as follows:

The statement of the law which I rely upon can be found in *Phipson on Evidence* (15th ed). There, the author of *Phipson* categorizes privilege into two categories: Legal Advice privilege and Litigation privilege. Under the first category, at para 20-04, *Phipson* states:

'Confidential communication between a lawyer and client which come into existence for the purpose of giving or getting legal advice are privileged at all times. The privilege may be asserted by successors in title. It covers direct communications and communications through agents. It covers all documents generated for the purpose of giving or getting legal advice, not merely letters to and from solicitors and instructions to and opinions from counsel, but also all working papers and drafts. The privilege exists whether or not litigation is contemplated or pending.'

As for Litigation privilege, *Phipson* says this at para 20-05:

'The second category of legal professional privilege is wider than the first but arises only when litigation is in prospect or pending. From that moment on, any communications between the client and his solicitor or agent or between one of

application in the action must be made under the summons by 2 clear days' notice to the other party stating the grounds of the application.

(L.N. 152 of 2008)

NOTES

[25.7.1] Matters to be dealt with under case management summons

Order 25 rule 7(1) places a duty on all parties to apply on 7 days notice for all interlocutory orders and directions required at the determination of the case management summons. Subsequent interlocutory applications may be made on two clear days' notice: rule 7(3). The rule is the same as that which applied under the former summons for directions procedure, adapted only to reflect the change to case management summons.

The questionnaire or case management summons in an action will comprehensively raise matters which it is necessary for the court to consider in giving directions for pre-trial conduct of an action and fixing a timetable. With regard to the former summons for directions procedure, it was said, in *Li Fook Chu v Chung Shau Ching* [2001] 4 HKC 681, 688F (CA):

When a summons for directions is heard, that must never be treated as a formality. It is the master's duty to consider all matters which will lead to a speedy and effective hearing of the trial of the action.

Those comments should apply *a fortiori* to the case management summons procedure, given the questionnaire, which is designed to allow the court to give directions tailor-made to the individual case. See the commentary under Order 25 rule 1 concerning the questionnaire.

[25.7.2] Long cases

In regard to cases which are likely to require lengthy trials, practice direction 5.7 requires additional matters to be considered at the case management stage. The parties are required to alert the listing judge by letter if they are in agreement that the trial is likely to last 15 days or longer, or apply by summons if they are not in agreement on this point.

As amended when the civil justice reforms came into force, the practice direction provides that long cases are assigned to a trial judge at an early stage, who will take charge of case management of the action and preside at any subsequent hearing of the case management summons or pre-trial review. The text of the practice direction can be viewed on the judiciary's website www.judiciary.gov.hk or that of the Hong Kong Legal Information Institute www.hklii.org, both of which are accessible by the general public free-of-charge. The Chief Justice's working party on civil justice reform regarded it as providing for what is essentially a docket system, whereby cases are assigned to a particular judge's list, and supported its continuation (final report, recommendation 63).

[25.7.3] Reconsideration of case management decisions

A master's order *nisi* on a case management summons may be varied on application to the master. See Order 25 rule 1A(4) and the commentary thereunder. A case management order absolute may be appealed to a single judge of the Court of First

Instance under Order 58 at which the court is entitled to exercise discretion afresh. In the case of appeals from a judge to the Court of Appeal, the court is generally reluctant to interfere with discretionary and leave to appeal is unlikely to be granted. See the commentary under Order 59 rule 2B.

It is open to a trial-designated judge to reconsider and vary case management decisions made earlier on by a judge of the same court. See *Asia-Pac Infrastructure Dev't Ltd v Ing & Ors* HCA 16778/1999 (Stone J; 03.12.2010) (para 33–5) (where jurisdiction to do so was found in PD 5.2, para 39, and in Order 1B rule 1(2)(f)). The practice direction contemplates variation of earlier case management decisions only when there has been a change of circumstances, but in *Asia-Pac* the court was of the view that it should in principle always be open to the trial-designated judge to do so.

8. Automatic directions in personal injury actions (O. 25 r. 8)

(1) When the pleadings in any action to which this rule applies are deemed to be closed the following directions shall take effect automatically –

- (a) there shall be discovery of documents within 14 days in accordance with Order 24, rule 2, and inspection within 7 days thereafter, save that where liability is admitted, or where the action arises out of a road accident, discovery shall be limited to disclosure by the plaintiff of any documents relating to special damages;
- (b) (Repealed L.N. 152 of 2008)
- (c) (Repealed L.N. 152 of 2008)
- (d) photographs, a sketch plan and the contents of any police accident report shall be receivable in evidence at the trial and shall be agreed if possible;
- (HK)(dd) the record of any proceedings in any court or tribunal shall be receivable in evidence upon production of a copy thereof certified as a true copy by the clerk or other appropriate officer of the court or tribunal;
- (f)–(g) (Repealed L.N. 99 of 1993)
- (2) (Repealed L.N. 152 of 2008)
- (3) Nothing in paragraph (1) shall prevent any party to an action to which this rule applies from applying to the Court for such further or different directions or orders as may, in the circumstances, be appropriate or prevent the making of an order for the transfer of the proceedings to the District Court. (L.N. 152 of 2008)

(4) For the purpose of this rule –

“a road accident” means an accident on land due to a collision or apprehended collision involving a vehicle; and

“documents relating to special damages” include –

- (a) documents relating to any industrial injury, industrial disablement or sickness benefit rights, and
 - (b) where the claim is made under the Fatal Accidents Ordinance (Cap. 22), documents relating to any claim for dependency on the deceased.
- (5) This rule applies to any action for personal injuries except –
- (a) any Admiralty action; and

surreptitiously induced the defendants to breach his patent rights with a view to obtaining cash payments in settlement of his claims.

- (4) *Other relief more appropriate* – In *Overholt v Overholt* [1999] 2 HKLRD 445 (para 80) an *Anton Piller* order was set aside partly on the ground that it was unnecessary, as a preservation order under Order 29 rule 2 would have sufficed. *Ng Chun Fai Stephen v Tamco Electrical & Electronics (HK) Ltd* [1993] 1 HKC 160 suggests (at 174B–C) that an *Anton Piller* order should not be granted ‘unless there is real reason to believe that without such an order the respondent would disobey an injunction for the preservation of the evidence the destruction of which would defeat the ends of justice’.

[29.3.30] Costs

The principles applicable to interlocutory injunctions will normally be followed in regard to the costs of an *Anton Piller* order. See the discussion in *Centaline Property Agency Ltd v Hong Kong Property Service (IC&I) Ltd* DCCJ 4937/2005 (Deputy Judge K W Wong; 12.12.2005).

4. Sale of perishable property, etc. (O. 29 r. 4)

(1) The Court may, on the application of any party to a cause or matter, make an order for the sale by such person, in such manner and on such terms (if any) as may be specified in the order of any property (other than land) which is the subject-matter of the cause or matter or as to which any question arises therein and which is of a perishable nature or likely to deteriorate if kept or which for any other good reason it is desirable to sell forthwith.

In this paragraph “land” includes any interest in, or right over, land.

(2) Rule 2(5) and (6) shall apply in relation to an application for an order under this rule as they apply in relation to an application for an order under that rule.

NOTES

[29.4.1] Power to order sale of perishable property

Order 29 rule 4 empowers the court to order the sale of property which is perishable or likely to deteriorate, or where there is other good reason.

The purpose of this power is to allow the court ‘to prevent injustice which would arise if the goods, which are liable to deteriorate or perish, are allowed to do so, with the consequence that they will become of no value while the dispute between the parties is pending’: *Taxfield Shipping Ltd v Asiana Marine Inc & Ors* HCCT 15/2006 (Deputy Judge L Chan; 07.03.2006).

The power to order sale is discretionary. It extends to property (other than interests in land) which is the subject of the action or as to which any question arises. The power extends to enable the court to order sale of a ship which has been arrested as security for an Admiralty claim, even where the validity of the arrest is questioned. See *The Athenian Zoe (No 2)* [1985] 1 HKC 367.

5. Order for early trial (O. 29 r. 5)

Where on the hearing of an application, made before the trial of a cause or matter, for an injunction or the appointment of a receiver or an order under rule 2, 3 or 4 it appears to the Court that the matter in dispute can be better dealt with by an early trial than by considering the whole merits thereof for the purposes of the application, the Court may make an order accordingly and may also make such order as respects the period before trial as the justice of the case requires.

Where the Court makes an order for early trial it shall by the order determine the mode of the trial.

6. Recovery of personal property subject to lien, etc. (O. 29 r. 6)

Where the plaintiff, or the defendant by way of counterclaim, claims the recovery of specific property (other than land) and the party from whom recovery is sought does not dispute the title of the party making the claim but claims to be entitled to retain the property by virtue of a lien or otherwise as security for any sum of money, the Court, at any time after the claim to be so entitled appears from the pleadings (if any) or by affidavit or otherwise to its satisfaction, may order that the party seeking to recover the property be at liberty to pay into court, to abide the event of the action, the amount of money in respect of which the security is claimed and such further sum (if any) for interest and costs as the Court may direct and that, upon such payment being made, the property claimed be given up to the party claiming it.

NOTES

[29.6.1] Scope of Order 29 rule 6

Order 29 rule 6 empowers the court to order the release of property (other than land) being held under a lien or as security, in return for payment of the amount in dispute into court. Although the rule mentions only payment by the party claiming return of the property, in *Dynamic Creations Dd v Mint Gem & Jewelry Manufacturing Co Ltd* HCA 378/2006 (Chu J; 12.04.2006) the court granted relief under the rule on payment in by a parent company.

7. Directions (O. 29 r. 7)

(1) Where an application is made under any of the foregoing provisions of this Order, the Court may give directions as to the further proceedings in the cause or matter.

(2) If, in an action begun by writ, not being any such action as is mentioned in sub-paragraphs (a) to (c) and (e) to (h) of Order 25, rule 1 (2), the Court thinks fit to give directions under this rule before the case management summons, rules 2 to 7 of that Order shall, with the omission of so much of rule 7(1) as requires parties to serve a notice specifying the orders and directions which they desire and with any other necessary modifications, apply as if the application were a case management summons.

(L.N. 152 of 2008)

because the other party can, in financial terms, be compensated in costs;

- (b) as with any other application for leave to amend consideration must be given to anxieties and legitimate expectations of the other party, the efficient conduct of litigation, and the inconvenience caused to other litigants.
- (4) Quite apart from, and over and above, those principles, because it is inherently contrary to the public interest and unfair on the other side that an unsuccessful party should be able to raise new points or call fresh evidence after a full and final judgment has been given against him, it would generally require an exceptional case before the court was prepared to accede to an application where the applicant could not satisfy the three requirements in *Ladd v Marshall*.
- (5) Almost inevitably, each case will have particular features which the court will think it right to take into account when deciding how to dispose of the application before it.
- (6) The court should be astute to discourage applications which involve parties seeking to put in late evidence, but cases where new evidence is found after judgment is given and before the order is drawn up will be comparatively rare.

The above passage was quoted in *Secretary of State for Trade & Industry v Paulin* [2005] 2 BCLC 667; [2005] EWHC 888 (Ch) (13.05.2005), where it was accepted (at para 50) that on an application to admit fresh evidence after a hearing but before judgment, the principle is 'no more restrictive than would be applied by the Court of Appeal', that is, in civil matters, the test in *Ladd v Marshall* (as to which see the commentary under Order 59 rule 10). In *Keen Lloyd Energy Ltd v Bank of China (HK) Ltd* CACV 34/2008 (Rogers VP & Le Pichon JA; 06.01.2009) (para 9) leave to appeal to the Court of Final Appeal was sought on the issue whether this English approach should be preferred over the Australian approach in *Nweiser* (above). Leave was refused on the ground the issue was not really engaged in the particular case. In *Chinachem Charitable Foundation Ltd v Chan Chun Chuen & Anor* HCAP 2/2007 (Lam J; 10.07.2009) it was said, referring to the same judge's earlier decision in *L v L* HCMC 1/2003 (Lam J; 20.04.2005), that *Charlesworth* concerned an application to re-open after judgment and that some considerations identified in it would not apply to an application to re-open before handing down of a judgment.

See also the closely related topic of the court's power to reconsider and vary its judgments and orders before they are sealed, discussed in the commentary under Order 20 rule 11.

8. Inspection by judge or jury (O. 35 r. 8)

(1) The judge by whom any cause or matter is tried may inspect any place or thing with respect to which any question arises in the cause or matter.

(2) Where a cause or matter is tried with a jury and the judge inspects any place or thing under paragraph (1), he may authorize the jury to inspect it also.

NOTES

[35.8.1] Site visits by the court

Order 35 rule 8 expressly empowers the court to inspect any place or thing which is relevant to proceedings before it. The original purpose of such an inspection or 'view' was explained by the High Court of Australia in *Evans v The Queen* (2007) 235 CLR 521; [2007] HCA 59 (para 190):

At common law a 'view' was an out of court examination of land, or of chattels too large to be taken into court and tendered as exhibits. The purpose was to assist the trier of fact, by enabling an examination of the dimensions, appearance and relative positions of the features of the things viewed, 'to understand and weigh the oral evidence'. A 'view' was distinguished from an out of court demonstration or reproduction of a past event which had been described by witnesses in court.

It has been held that a site inspection under Order 35 rule 8 goes beyond assisting in understanding the evidence, but is part of the taking of evidence itself. In *Tito v Waddell* [1975] 1 WLR 1303, 1308A Megarry J said:

What a judge perceives on a view is itself evidence, in the same way as what he sees and hears in the courtroom.

Thus an application by a party under this rule is an application to tender evidence and the proper approach for the court to take in exercising its discretion whether to accede to such an application 'is to consider not whether a sufficient case for holding a view has been made out, but whether there are sufficient grounds for rejecting the application': *Tito* (above, at 1308D-E).

It has been held that it is permissible for a judge to undertake a simple viewing in a public place on his or her own: *Salsbury v Woodland* [1969] EWCA Civ 1; [1969] 3 All ER 863, referring to *Goold v Evans & Co* [1951] 2 TLR 1189 (CA). *Goold* was also referred to in *The Queen v Leung Chun-pui* [1987] HKLR 50 (CA) where a judge had visited the scene of the crime without reference to counsel. Kempster JA said (53D-E):

... the judge went to a public place in order to use his eyes to see in three dimensions and true colour something which had previously been represented to him in two sketch plans. Applying the rationale of the English civil authorities we find nothing improper in the course which he took ...

Nevertheless, it is 'undesirable' and 'dangerous' for a judge to have a view unaccompanied and unannounced. 'Circumstances change: surroundings change: it is very dangerous to suppose that things are as they were ...': *Salsbury* (above), per Harman LJ at 876C-D All ER.

The situation has been held to be different where there is to be a demonstration during the view (such as a demonstration as to how an accident occurred). See *Tameshwar v The Queen* [1957] AC 476, 484 (PC) where Lord Denning said:

... in civil cases ... a view, coupled with a demonstration, is part of the evidence. So much so that if it takes place in the absence of one party without his consent, the trial is bad...

The distinction between a judge's solo site visit for a simple view (permissible) and view with demonstration (not permissible) is difficult to reconcile with *Tito* (above). Whereas the distinction seems to be based on the ground that a simple view is not

NOTES

[43.3.1] Liberty to apply

See the commentary under Order 44 rule 3 as to 'liberty to apply' in respect of directions under a judgment or order.

4. Account to be made, verified, etc. (O. 43 r. 4)

(1) Where an account has been ordered to be taken, the accounting party must make out his account and, unless the Court otherwise directs, verify it by an affidavit to which the account must be exhibited.

(2) The items on each side of the account must be numbered consecutively.

(3) Unless the order for the taking of the account otherwise directs, the accounting party must lodge the account with the Court and must at the same time notify the other parties that he has done so and of the filing of any affidavit verifying the account and of any supporting affidavit.

5. Notice to be given of alleged omissions, etc. in account (O. 43 r. 5)

Any party who seeks to charge an accounting party with an amount beyond that which he has by his account admitted to have received or who alleges that any item in his account is erroneous in respect of amount or in any other respect must give him notice thereof stating, so far as he is able, the amount sought to be charged with brief particulars thereof or, as the case may be, the grounds for alleging that the item is erroneous.

NOTES

[43.5.1] Rules 4 & 5 – procedure for taking an account

Rules 4 and 5 set out the obligations of the respective parties to refine the issues in preparation for the taking of an account. Under rule 4 the 'accounting party', that is the party who has a duty to account, sets out the account item by item in numbered sequence. This will show, for example, the payments received by the accounting party, expenses incurred and payments out to the receiving party. The rule requires that the account be verified by affidavit.

In response any party objecting to an item in the account is obliged to give notice with particulars. This is done in a document which is sometimes called a 'Notice of Objections' – see, for example, *Wong Kam Wing v Cheng Pui Lun & Anor* DCCJ 3878/2002 (Judge Muttrie; 09.06.2004). Unlike the account, there is no requirement in the rules that the objections be verified by affidavit. However, it would be appropriate to file affidavit evidence in support of an objection if such evidence is required to substantiate it.

The time and manner for taking the above steps may be fixed by directions given under Order 43 rule 3.

See generally Atkin's Court Forms (2002 issue, vol 1, p 5 *et seq*) and Chitty & Jacob's Queen's Bench Forms (1986, ch 98), both of which are cited with approval in *Lam Yim Kam Johnson v Lam Yim Hing David* HCA 642/2001 (Recorder Ronny Wong SC; 03.09.2002) and *Wong Kam Wing* (above). As to the degree of detail required, see *Hollingsworth v Juson* HCA 249/2006 (Chu J; 16.10.2006).

[43.5.2] Hearing

The taking of an account 'is a process of inquiry' whereby the court (master or judge) will vet the accounts produced by the accounting party and the oral and written evidence produced by both parties 'with a view to arriving at an outstanding figure due from one party to another': *Kids World Ltd v XL Machine Ltd & Ors* HCA 125/2002 (Reyes J; 18.09.2003).

[43.5.3] Appeal against order made on taking an account

An appeal against a master's order made on taking an account lies to a single judge in chambers pursuant to Order 44 rule 12. See the commentary under that rule, referring to *Chow Fu Hsien v K Vision Int'l Investment (HK) Ltd* [2010] HKCU 1585 (HCA 2884/2004; Recorder Yu SC; 20.07.2010).

6. Allowances (O. 43 r. 6)

In taking any account directed by any judgment or order all just allowances shall be made without any direction to that effect.

NOTES

[43.6.1] Meaning of 'just allowances'

The meaning of the term 'just allowances' in Order 43 rule 6 was explained by Barnett J in *Tang Wing Hong Alan (personal representative of the estate of Tang Man Sit, deceased) v Capacious Investment Ltd* [1993] 2 HKC 416. The learned judge stated (at 421D–E):

Just allowances, as I have said, are essential expenses and disbursements which it is just to be allowed to the accounting party. The important word, in relation to this case, is 'just'. The cases to which I have been referred, all involved mortgagees acting lawfully and justifiably. In contrast, the defendant, ie the deceased, behaved unlawfully, in breach of trust. That, in my judgment, distinguishes this case. I do not consider it just that a party who is called to account for secret profits arising out of a breach of trust should be entitled to any allowances without explicit order of the court.

7. Delay in prosecution of accounts, etc. (O. 43 r. 7)

(1) If it appears to the Court that there is undue delay in the prosecution of any accounts or inquiries, or in any other proceedings under any judgment or order, the Court may require the party having the conduct of the proceedings or any other party to explain the delay and may then make such order for staying the proceedings or for expediting them or for the conduct thereof and for costs as the circumstances require.

(2) The Court may direct any party or the Official Solicitor to take over the conduct of the proceedings in question and to carry out any directions made by an order under this rule and may make such order as it thinks fit as to the payment of the Official Solicitor's costs.

(L.N. 375 of 1991)

8. Distribution of fund before all persons entitled are ascertained (O. 43 r. 8)

Where some of the persons entitled to share in a fund are ascertained, and difficulty or delay has occurred or is likely to occur in ascertaining the other persons so entitled, the Court may order or allow immediate payment of their

reason for this rule is explained in *R v IRC ex p Preston* [1985] AC 835, 852 (quoted with approval in *Chow Shun Chiu v HKSAR* [2002] 1 HKC 30):

a remedy by way of judicial review is not to be made available where an alternative remedy exists ... Judicial review is a collateral challenge: it is not an appeal. Where Parliament has provided by statute appeal procedures ... it will only be very rarely that the courts will allow the collateral process of judicial review to be used to attack an appealable decision.

In *Stock Exchange of Hong Kong Ltd v New World Development Co Ltd & Ors* [2006] 2 HKC 533 the Court of Final Appeal overturned decisions below which allowed a judicial review to proceed in advance of an internal disciplinary enquiry. The CFA held that the judicial review was premature.

Where an administrative appeal lies to the Chief Executive, section 64(3) of the Interpretation and General Clauses Ordinance (Cap 1) provides that judicial review may instead, or in addition, be sought. See *PCCW Media Ltd v Broadcasting Authority & Anor* HCAL 97/2005 (Reyes J; 01.12.2005), citing *Bahadur v Director of Immigration* [2001] 3 HKLRD 225, 233F–H.

In the Malaysian case of *QRS Brands Bhd v Suruhanjaya Sekuriti & Anor* [2006] 3 MLJ 164 (CA) it was held that the availability of an alternative remedy is only relevant to the merits of the substantive application and should not be dealt with at the leave stage.

[53.1.9] Residual jurisdiction to allow judicial review where applicant could have appealed

However, the court retains a jurisdiction to grant relief by way of judicial review, in exceptional circumstances, even though the applicant could have appealed. See *Au Wing Lun, William v The Solicitors Disciplinary Tribunal & The Law Society of Hong Kong* (CACV 4154/2001). There, the majority of the Court of Appeal (Rogers VP and Le Pichon JA), with Yuen JA dissenting on this point, granted relief by way of judicial review although the applicant could have availed himself of an appeal. Le Pichon JA held that there were ‘exceptional circumstances’ to grant judicial review in the particular case, citing *R v Inland Revenue Commissioners ex p Preston* [1985] AC 835 and *Leech v Deputy Governor of Parkhurst Prison* [1988] 1 AC 533. Rogers VP said that the decision subject to review was ‘not only so clearly wrong but so manifestly unjust that it cannot be allowed to stand’.

In *Chow Kwong Fai Edward v Inland Revenue Board of Review* [2004] 2 HKLRD 963, [2004] 3 HKC 216 (HCAL 47/2004; Hartmann J; 10.06.2004) (paras 16, 18) the court considered that judicial review was more appropriate than the case stated procedure under the Inland Revenue Ordinance (Cap 112). The taxpayer’s grievance boiled down to irrationality and procedural impropriety, which were better investigated on judicial review. Nevertheless the court allowed the application by case stated to go ahead.

[53.1.10] Judicial review of criminal proceedings

It is not appropriate to apply for judicial review of criminal proceedings where an adequate remedy such as an appeal lies within the criminal process: *Jetex HVAC Equipments Ltd v Commissioner for Labour* [1994] 3 HKC 42, 47; *Secretary for Justice v Lee Wai Man* [1999] 1 HKLRD 572; *Chow Shun Chiu v HKSAR* [2001] 1 HKC 30. Nor is it appropriate to interrupt criminal proceedings by seeking review on

points of law which arise in the course of the proceedings: *Mo Yuk Ping v Secretary for Justice* [2005] 3 HKC 476, 483C–E (CA); *Ma Zhujiang v Secretary for Justice* HCAL 129/2005 (Chu J; 31.10.2005). This is so even where the review arises from a jurisdictional point: *Tse So So v Secretary for Justice* HCAL 160/2005 (Lam J; 19.12.2005). The exercise of prosecutorial discretion on questions such as whether to proceed with a public prosecution will not normally be reviewable, though there is inherent power to prevent abuse of process: *Keung Siu Wah v AG* [1990] 2 HKLR 238 (CA); *Matalulu v DPP* [2003] 2 HKC 457 (FijiSC); *Kwan Sun Chu Pearl v Department of Justice* [2005] 3 HKC 441 (CFI) (appeal to the Court of Appeal dismissed – [2006] 3 HKC 207); *RV v Director of Immigration & Anor* HCAL 2/2008 (Hartmann J; 10.03.2008).

However, there are circumstances in which judicial review is appropriate in the criminal context. For example:

- *Natrass v AG* [1996] 1 HKC 480 – the defendant in a criminal case successfully applied for judicial review of the trial judge’s decision to recuse himself.
- *Re Cheng Kai Nam Gary* [2002] 1 HKC 41 – the court heard a pre-trial application for judicial review of the District Court’s refusal to list a criminal case before a Chinese-speaking judge. Leave to apply was refused on the merits.
- *Secretary for Justice v Cheung Chung Chit* [2003] 4 HKC 49 – judicial review of a judge’s order of a permanent stay of criminal proceedings was considered appropriate because there was no statutory right of appeal. See also *Secretary for Justice v Shum Chiu* HCAL 101/2005 (Hartmann J; 22.12.2005).
- *Dairy Farm Co Ltd v Director of Food & Environmental Hygiene* HCAL 59/2004 (Chu J; 18.08.2004); [2005] 3 HKC 1 (CA) – judicial review of a magistrate’s refusal to order a permanent stay was heard on an expedited basis during an adjournment of the trial.
- *Yeung Chun Pong & Ors v Secretary for Justice* [2005] 3 HKC 447 – judicial review of a magistrate’s decision that there was no jurisdiction to consider an *autrefois* plea at the committal stage.
- *Inglis v Loh Lai Kuen Eda* [2005] 3 HKC 115 – judicial review of a magistrate’s refusal to allow counsel to enter a plea of guilty on behalf of the defendant.

Such circumstances will be comparatively rare. In *Ng Pak Min v HKSAR* HCAL 70/1999 (Stock J; 27.07.1999) it was said that judicial review is an ‘avenue of last resort’, and that only in ‘the most exceptional circumstances’ would a court stop criminal proceedings *in limine*. In *Yeung Chun Pong v SJ (No 2)* [2006] 3 HKC 31, 34F–G the Court of Appeal reminded practitioners of the ‘strong presumption against entertaining judicial review applications that interrupt criminal proceedings’. See also *Yeung Chun Pong v SJ (No 4)* [2008] 2 HKC 46 (CA) (para 62 *et seq*).

The burden on the applicant in seeking leave to apply for judicial review may be heavier when the impugned decision arises in the criminal process. In *Re Wong Tung Kin* [1989] 1 HKLR 93 Sears J held that the court should interfere in the criminal process only where the impugned decision is ‘outrageous’. However, in *Lee Wai Man* (above) the court doubted that Sears J had intended to suggest that a heavier burden applies.

been given, before the court from whose order or decision the appeal is brought unless the order or decision is reversed by that judgment.

(3) An application for the release of a person under paragraph (2) pending an appeal to the Court of Appeal must be made by motion, and the notice of the motion must, at least 24 hours before the day named therein for the hearing, be served on the Registrar and on all parties to the proceedings who are directly affected by the appeal.

(Enacted 1988)

CASES WHERE LEAVE TO APPEAL IS NOT REQUIRED FOR INTERLOCUTORY APPEALS

21. Judgments and orders to which section 14AA(1) of the Ordinance not apply (O. 59, r. 21)

(1) Judgments and orders to which section 14AA(1) of the Ordinance (leave to appeal required for interlocutory appeals) does not apply and accordingly an appeal lies as of right from them are the following –

- (a) a judgment or order determining in a summary way the substantive rights of a party to an action;
- (b) an order made under section 52A(4) of the Ordinance;
- (c) an order prohibiting a debtor from leaving Hong Kong under Order 44A, rule 3(1);
- (d) an order for the imprisonment of a judgment debtor under Order 49B;
- (e) an order of committal for contempt of court under Order 52, rule 1;
- (f) an order granting any relief made at the hearing of an application for judicial review;
- (g) an order under Order 53, rule 3 refusing to grant leave to apply for judicial review;
- (h) an order granting an application for a writ of habeas corpus ad subjiciendum;
- (i) an order under Order 73 (other than an order against which leave to appeal is required under the Arbitration Ordinance (17 of 2010));
- (j) a judgment given inter partes under Order 83A, rule 4, or Order 84A, rule 3 or in a mortgage action within the meaning of Order 88, rule 1;
- (k) an order under Order 121; and
- (l) a decree nisi of divorce or nullity of marriage.

(2) Without affecting the generality of paragraph (1)(a), the following are judgments and orders determining in a summary way the substantive rights of a party –

- (a) a summary judgment under Order 14 or Order 86;
- (b) an order striking out an action or other proceedings or a pleading or any part of a pleading under Order 18, rule 19 or under the inherent jurisdiction of the Court;

- (c) a judgment or order determining any question of law or the construction of any document under Order 14A, rule 1(1);
 - (d) a judgment or order made under Order 14A, rule 1(2) dismissing any cause or matter upon determination of a question of law or construction of any document;
 - (e) a judgment on any question or issue tried pursuant to an order under Order 33, rule 3;
 - (f) an order dismissing or striking out an action or other proceedings for want of prosecution;
 - (g) a judgment obtained pursuant to an “unless” order;
 - (h) an order refusing to set aside a judgment in default;
 - (i) an order refusing to allow an amendment of a pleading to introduce a new claim or defence or any other new issue; and
 - (j) a judgment or order on admissions under Order 27, rule 3.
- (3) A direction as to whether a judgment or order is one that is referred to in paragraph (1)(a) may be sought from the judge who made or will make the judgment or order.
- (4) A reference to an order specified in paragraph (1)(b), (c), (d), (e), (f), (h), (i), (k) and (l) includes an order refusing, varying or discharging the order.

(L.N. 152 of 2008)

NOTES

[59.21.1] Scope of Order 59 rule 21 – leave not required for certain interlocutory appeals

Order 59 rule 21 lists those interlocutory appeals to the Court of Appeal for which leave to appeal is not required. Under section 14AA(1) of the High Court Ordinance leave is generally required for such appeals, but section 14AA(2) goes on to stipulate that the rules of court may prescribe judgments and orders to which that requirement will not apply. Pursuant to the latter provision, rule 21 exempts many interlocutory judgments and orders from the leave requirement. Generally it is judgments and orders of a final character, or affecting the liberty of the person, which are exempted.

Note also that the leave requirement does not apply to any interlocutory judgment or order of the CFI made before section 14AA came into operation in 2009: see HCO section 14AA(5).

[59.21.2] Rule 21(1)(a) – summary determination of substantive rights

Order 59 rule 21(1)(a) provides that summary determinations of the substantive rights of a party are not subject to the leave requirement for interlocutory appeals. Rule 21(2) sets out a non-exhaustive list of judgments and orders which are considered to be summary determinations of substantive rights. The list includes summary judgment, striking out of pleadings, refusal to set aside default judgment and judgment on admissions.

Rule 21(2) sets out a non-exhaustive list of judgments and orders which are considered to be summary determinations of substantive rights. The list includes summary judgment, striking out of pleadings, refusal to set aside default judgment and judgment on admissions. Not on the list are orders against vexatious litigants (see

The court may exercise its management powers under CPR 3.1 [Order 1B rule 1 in Hong Kong] to debar the paying party from taking part in the detailed assessment [taxation] unless that party complies with an order for an interim payment: *Days Healthcare UK Ltd v Pihsiang Machinery Manufacturing Co Ltd* [2006] EWHC 1444 (QB), [2006] 4 All ER 233.

For example, where at the trial, the successful party is proved to have forged a material document the trial judge should consider making an order under paragraph (2) [rule 32C(1)(b) in Hong Kong] for the disallowance of costs claimed or for the payment of costs incurred by the other side: *Ultraframe (UK) Ltd v Fielding (No 2)* [2007] The Times, 8 Jan (CA).

Save insofar as rule 32C expressly applies in relation to and at the stage of assessment or taxation of costs, it does not seem to add much to Order 62 rule 5(1)(e) (by which the court takes into account the conduct of parties in exercising its discretion as to costs), rule 7(1) (which empowers the court to impose sanctions for improper or unnecessary conduct and rule 8 (which provides for wasted costs orders).

REVIEW

33. Application to taxing master for review (O. 62 r. 33)

(1) Any party to any taxation proceedings who is dissatisfied with the allowance or disallowance in whole or in part of any item by a taxing master, or with the amount allowed by a taxing master in respect of any item –

- (a) may apply to the taxing master to review his decision in respect of that item; and
- (b) may not apply to a judge for an order to review the decision until after its review by the taxing master.

(L.N. 152 of 2008)

(2) An application under this rule for review of a taxing master's decision may be made at any time within 14 days after the conclusion of the taxation in which that decision was made or such shorter period as may be fixed by the taxing master:

Provided that no application under this rule for review of a decision in respect of any item may be made after the signing of the taxing master's final certificate dealing with that item.

(L.N. 152 of 2008)

(3) Every applicant for review under this rule must at the time of making his application deliver to the taxing master objections in writing specifying by a list the items or parts of items the allowance or disallowance of which or the amount allowed in respect of which, is objected to and stating concisely the nature and grounds of the objection in each case, and must deliver a copy of the objections to each other party (if any) who attended on the taxation of those items or to whom the taxing master directs that a copy of the objections shall be delivered.

(3A) If an applicant fails to comply with paragraph (3), the taxing master may dismiss the application. (L.N. 152 of 2008)

(4) Any party to whom a copy of the objections is delivered under this rule may, within 14 days after delivery of the copy to him or such shorter period as may be fixed by the taxing master, deliver to the taxing master answers in writing to the objections stating concisely the grounds on which he will oppose the objections, and shall at the same time deliver a copy of the answers to the party applying for review and to each other party (if any) to whom a copy of the objections has been delivered or to whom the taxing master directs that a copy of the answers shall be delivered.

(5) An application under this rule for review of the taxing master's decision in respect of any item shall not prejudice the power of the taxing master under rule 17 to issue an interim certificate in respect of items his decision as to which is not objected to.

NOTES

[62.33.1] Cross-reference

See also the Legal Aid Regulations (Cap 91), regs 10, 11 & 12, for review of costs allowed the lawyers assigned for a legally aided person.

ORDER 72

(HK) PARTICULAR PROCEEDINGS

SPECIAL PROVISIONS AS TO PARTICULAR PROCEEDINGS

1. Application and interpretation (O. 72 r. 1)

(1) This Order applies to particular proceedings, and the other provisions of these rules apply to those actions subject to the provisions of this Order.

(2) In this Order “particular proceedings” means a type of proceedings for which provision has been made by the Chief Justice for separate listing.

2. The Various Lists (O. 72 r. 2)

(1) There may be lists, in which actions and other proceedings may be entered in accordance with the provisions of this Order, and a judge shall be in charge of each list.

(L.N. 307 of 1998)

(2) In this Order references to the judge shall be construed as references to the judge for the time being in charge of a particular list.

(3) The judge shall have control of the proceedings in his particular list and, subject to the provisions of this Order and to any directions of the judge, the powers of a judge in chambers (including those exercisable by the Registrar) shall, in relation to any proceedings in such an action (including any appeal from any judgment, order or decision of the Registrar, given or made prior to the transfer of the action or proceedings to the relevant list) be exercisable by the judge.

(4) Paragraph (3) shall not be construed as preventing the powers of the judge being exercised by some other judge.

NOTES

[72.2.1] Origin and scope of Order 72

Order 72 makes provision for the establishment of lists of particular types of proceedings, often referred to as specialist lists. The consequence of an action being listed on one of the specialist lists is that it will usually be tried before a particular judge, or one of a group of judges, who are assigned to deal with the particular type of case. The Hong Kong system of specialist lists is rather different from what prevails in England and Wales. There, unlike Hong Kong, there are formal divisions within the court, such as the Chancery Division and the Queen’s Bench Division.

A number of specialist lists have been established in Hong Kong pursuant to Order 72. This is normally done by practice directions which govern the procedures to be followed. The various lists are discussed one by one below.

[72.2.2] The commercial list

There has long been a commercial list in Hong Kong. It is now the subject of practice direction SL1.1, which took effect on 1 November 2009. The practice direction says (para 2) that the function of the list ‘is to facilitate the disposal of actions involving commercial matters’.

The commercial list practice direction contains specific provisions in relation to case management summonses. The intention appears to be to displace the provisions of Order 25 and the case management practice direction (PD 5.2) which would otherwise apply. A special form of information sheet, set out in appendix A to the practice direction, is required to be lodged with the clerk to the judge no later than 7 days before the hearing of the 1st case management summons. Standard directions to be made at the 11th case management conference in most commercial list cases are set out in paragraph 11 of the practice direction. Appendix B is the commercial list checklist for pre-trial review, to be lodged no later than 28 days in advance.

Also relevant are practice direction SL1, which specifies commercial list applications which are to be dealt with by a master, and part (3A) of practice direction 11.1, which deals with urgent applications to the commercial list judge. The updated text of these practice directions can be downloaded from the judiciary’s website or that of the Hong Kong Legal Information Institute.

The choice of whether to place an action on the commercial list appears to be left to the plaintiff at the time the writ is issued. In *Idmiston Ltd v Asian Master Enterprises Ltd & Anor* CACV 1/1989 (Cons VP, Clough JA & O’Connor J; 17.03.1989) Cons VP said (at para 6), referring to Order 72 rule 4, that ‘a plaintiff may enter his action in the Commercial List by simply noting the writ or the originating summons in the top left hand corner’. The current practice is to insert an action number beginning with ‘HCCL’ rather than the ‘HCA’ used for ordinary High Court actions. An action which is not commenced on the commercial list may at a later stage be transferred to it under Order 72 rule 5.

In *Idmiston* (above) the court went on to give guidance as to the types of cases which are appropriate for the commercial list, but by 2013 that guidance was considered outdated. In its place the court adopted a ‘wide open’ approach, saying that it would exercise its discretion ‘liberally’: see *Wingames Investments Ltd & Anor v Mascot Land Ltd & Ors* [2013] 3 HKC 444, HCA 907/2011 (Bharwaney J; 20.03.2013) (paras 20–21). There the court held that there is no exhaustive list, and that appropriate cases include actions arising out of trade and commerce making any claim relating to:

- (a) a business document or contract;
- (b) the export or import of goods;
- (c) carriage of goods by land, sea, air or pipeline;
- (d) construction of ships;
- (e) contracts relating to aircraft;
- (f) insurance and reinsurance;
- (g) banking and financial services;
- (h) purchase and sale of commodities;
- (i) operation of markets and exchanges;
- (j) business agency; and
- (k) any other matter, question of fact or law, particularly suitable for decision by a judge of the Commercial Court.

The court went on to say that a decision whether to include telecommunications cases would be deferred until the issue arose and submissions had been heard.

if made on the next following day on which the offices are opened. A security bill (ie a bill of sale made or given by way of security for the payment of money) shall be void in respect of the chattels comprised therein unless attested and registered as required by the section. Any other bill of sale would be deemed fraudulent and void as against any of the persons stipulated in the section and to the extent stated therein (see subsection (b) of section 7 of the Ordinance). Section 9 of the Ordinance sets out the mode of registering the bills of sale.

[95.1.3] Renewal of registration

Section 10 of the Ordinance states that the registration of a bill of sale must be renewed once at least every five years, and in the event that a period of five years elapses from the registration or the renewed registration of a bill of sale without a renewal or further renewal, as the case may be, the registration shall become void. The renewal of a registration is effected by filing with the Registrar an affidavit stating the details specified in the section. The form of such affidavit is set out in Form 1 of the Schedule to the Ordinance.

[95.1.4] Correction of errors in registration

The court, on being satisfied that an omission or misstatement of the name, residence or occupation of any person was accidental or due to inadvertence, may order such omission or misstatement to be rectified by the insertion in the register of the true name, residence, or occupation – see section 20 of the Ordinance and this rule. Section 20 of the Ordinance refers to such an order being made by ‘a judge’; however, rule 1(1) stipulates that application should be made by affidavit *ex parte* to a master. In *Crew v Cummings* (1888) 21 QBD 420, the party registering the bill of sale omitted to include a description of the residence and occupation of one of the attesting witnesses to the bill in the affidavit accompanying the bill, as required under section 10 of the UK Bills of Sale Act 1878 (equivalent to section 9 of the Ordinance). An application under section 14 of the 1878 Act (equivalent to section 20 of the Ordinance) to rectify this omission was not permitted on the basis that the said section only permitted a rectification of the register, and the description of the residence and occupation of the attesting witness did not form part of the register (see section 19 of the Ordinance for the details which do form part of the register).

[95.1.5] Extension of time for registration

Under section 20 of the Ordinance and this rule, the court, on being satisfied that the omission to register a bill of sale or an affidavit of renewal thereof within the time prescribed by the Ordinance was accidental or due to inadvertence, may extend the time for such registration, on such terms and conditions, if any, as to security, notice by advertisement or otherwise, or to any other matter, as he thinks fit to direct. However, *Crew v Cummings* (1888) 21 QBD 420, held that an extension of time to register a bill of sale could not be granted so as to defeat a title already *bona fide* vested in an execution creditor. Similarly, in *Re Parsons, Ex parte Furber* [1893] 2 QB 122, the Court of Appeal held that the time for registration of a bill of sale could not be extended to defeat vested rights of a trustee in bankruptcy. In *Re Spiral Globe Ltd* [1902] 1 Ch 396, Swinfen Eady J was prepared to extend time for registration of a charge under section 15 of the UK Companies Act 1900 (which was

in *pari materia* with section 14 of the UK Bills of Sale Act 1878) provided that the order for extension included the words: ‘This order to be without prejudice to the rights of parties acquired prior to the time when such [debentures] shall be actually registered.’ It would therefore appear that the discretion of a judge in extending time for registration cannot be exercised to defeat rights of persons which have actually accrued in the meantime and which would be prejudicially affected if registration were allowed without saving and protecting those rights. However, it would appear from the case of *Re Kris Cruises Ltd* [1949] Ch 138 that this protection is only for the benefit of secured creditors whose rights have accrued in respect of the assets of the debtor and does not extend to protect unsecured creditors of the grantor where no bankruptcy has intervened.

Note that section 20 of the Ordinance refers to an order for extension of time being made by ‘a judge’; however, rule 1(1) stipulates that application should be made by affidavit *ex parte* to a master.

[95.1.6] Comparison with English rule

Prior to 26 April 1999, Order 95, rules 1, 2, 3, 4 and 6 of the English Rules of the Supreme Court were in *pari materia* with the corresponding rules of Order 95 of the Hong Kong Rules of the High Court. However, the English Civil Procedure Rules 1998 (‘CPR’) which came into force on 26 April 1999 have resulted in Order 95 of the English Rules being re-enacted in Schedule 1 of the CPR. In the process, all of the rules in the said Order 95 have undergone amendment. Save and except for rule 2, all the amendments are minor.

2. Entry of satisfaction (O. 95 r. 2)

(1) Every application under section 21 of the Bills of Sale Ordinance (Cap. 20) to a master for an order that a memorandum of satisfaction be written on a registered copy of a bill of sale must –

- (a) if a consent to the satisfaction signed by the person entitled to the benefit of the bill of sale can be obtained, be made *ex parte*;
 - (b) in all other cases, be made by originating summons.
- (2) An *ex parte* application under paragraph (1)(a) must be supported by –
- (a) particulars of the consent referred to in that paragraph; and
 - (b) an affidavit by a witness who attested the consent verifying the signature on it.

(3) An originating summons under paragraph (1)(b) must be served on the person entitled to the benefit of the bill of sale and must be supported by evidence that the debt (if any) for which the bill of sale was made has been satisfied or discharged.

(4) An originating summons under paragraph (1)(b) shall be in Form No. 10 in Appendix A.

NOTES

[95.2.1] Application under section 21

Section 21 of the Ordinance provides that the Registrar may order a memorandum of satisfaction to be written upon any registered copy of a bill of sale, on the prescribed evidence being given that the debt, if any, for which such bill of sale was made

NOTES

[115.3.1] Procedure – ex parte application by originating summons

Order 115 rule 3 provides that an application for a restraint order or a charging order under the primary legislation (Cap 405) shall be made by the Secretary for Justice *ex parte*. Previously the rule required that the application be made by originating motion, but it was amended as part of the civil justice reforms which, for the most part, did away with originating motions. The rule now provides that the application 'may be made by originating summons'. Technically it may be possible to apply by writ (Order 5 rule 4) but it is difficult to imagine circumstances where that would be appropriate.

As to the contents of the originating process, in *Re C* [1990] 1 HKLR 127, 128J–K it was said that the terms of the order sought should be set out in the body of the document, or in a schedule or incorporated by reference to an annexed draft order.

The *ex parte* application will be heard in chambers: rule 2.

4. Restraint order and charging order (O. 115 r. 4)

(1) A restraint order may be made subject to conditions and exceptions, including but not limited to conditions relating to the indemnifying of third parties against expenses incurred in complying with the order, and exceptions relating to reasonable living expenses and reasonable legal expenses of the defendant, but the Secretary for Justice shall not be required to give an undertaking to abide by any order as to damages sustained by the defendant as a result of the restraint order. (89 of 1995 s. 30)

(2) Unless the Court otherwise directs, a restraint order made *ex parte* shall have effect until a day which shall be fixed for the hearing *inter partes* of the application and a charging order shall be an order to show cause, imposing the charge until such day.

(3) Where a restraint order is made the Secretary for Justice shall serve copies of the order and of the affidavit in support on the defendant and on all other named persons restrained by the order and shall notify all other persons or bodies affected by the order of its terms.

(4) Where a charging order is made the Secretary for Justice shall, unless the Court otherwise directs, serve copies of the order and of the affidavit in support on the defendant and, where the property to which the order relates is held by another person, on that person and shall serve a copy of the order on such of the persons or bodies specified in Order 50, rule 2(1)(b) to (d) as shall be appropriate.

NOTES

[115.4.1] Duration of *ex parte* restraint order

Rule 4(2) provides that unless the court otherwise orders, an *ex parte* restraint order will normally only have effect until the return day for an *inter partes* hearing. In *Re C* (above) the court was invited to make an *ex parte* restraining order effective 'until

further order'. The court declined to do so and instead the judge ascertained that the court would be available for an *inter partes* hearing on the following day and expressly made the order effective only to that date and time.

[115.4.2] Third parties have no right to be heard

Third parties who may claim an interest in the property which is the subject of a confiscation order application have no right to be heard on the application. Their interests are catered for at a later stage when application is made for an order appointing a receiver to realise the property when they have, by section 12(8) of Cap 405, a right to be heard. See *Secretary for Justice v Lee Chau Ping & Anor* [1999] 2 HKC 103, 116G–I, and see the commentary under Order 115 rule 7.

5. Discharge or variation of order (O. 115 r. 5)

(1) Any person or body on whom a restraint order or a charging order is served or who is notified of such an order may apply by summons to discharge or vary the order.

(2) The summons and any affidavit in support shall be served on the Secretary for Justice and, where he is not the applicant, on the defendant, not less than 2 clear days before the date fixed for the hearing of the summons.

(L.N. 296 of 1996)

(3) Upon the Court being notified that proceedings for the offences have been concluded or that the amount payment of which is secured by a charging order has been paid into court, any restraint order or charging order, as the case may be, shall be discharged.

NOTES

[115.5.1] Right to apply for discharge or variation of order

Order 115 rule 5 provides that any person served with a restraining or charging order may apply for discharge or variation thereof. In *Re C* (above) the court insisted that an *ex parte* restraining order contain an express provision giving the person against whom it was made liberty to apply to discharge the order.

6. Further application by Secretary for Justice (O. 115 r. 6)

(1) Where a restraint order or a charging order has been made the Secretary for Justice may apply (and, if so, by summons) or, where the case is one of urgency, *ex parte* – (L.N. 296 of 1996)

(a) to discharge or vary such order; or

(b) for a restraint order or a charging order in respect of other realisable property; or

(c) for the appointment of a receiver.

(2) An application under paragraph (1) shall be supported by an affidavit which, where the application is for a restraint order or a charging order, shall to the best of the deponent's ability give full particulars of the realisable property in respect of which the order is sought and specify the person or persons holding such property.