

where all the parties are legally represented. It also provides for a mediation notice whereby a party who wishes to attempt mediation may propose terms such as scope of the mediation, governing rules, name of mediator and venue. The form of notice is set out in Appendix C to the practice direction. The other parties are required to respond to the notice in the form set out in Appendix D to the PD.

The text of the practice directions can be downloaded from the judiciary website or that of HKLII, both of which are accessible free of charge.

#### [IA.4.10] Other forms of ADR

Other forms of ADR which may be considered include arbitration, 'med-arb' and 'early neutral evaluation'.

Arbitration usually results from a prior agreement that in the event of a dispute arising it shall be referred to arbitration. It is also possible to agree to 'ad hoc' arbitration of a dispute which has already arisen. Arbitration is much more court-like than mediation. The arbitrator makes a decision on the merits in the same way a judge would after trial. With regard to arbitration generally, see Order 73.

'Med-arb' is a hybrid of mediation and arbitration in which the arbitrator may seek to assist the parties to reach a mediated settlement, and makes an

arbitration award only if that does not succeed. Section 33 of the Arbitration Ordinance (Cap 609) (in force from 1 June 2011) provides that with written consent of the parties an arbitrator may act as mediator.

'Early neutral evaluation' is a process which, like arbitration, but unlike mediation, goes into the merits of a dispute. It is intended to give the parties a non-binding indication of the outcome of the case if it should go to trial. Further information can be found in Law Society circular 11-92, which is available in the members' zone of the Law Society's website.

#### [IA.4.11] Information available to the court to assist it in encouraging use of ADR

The court's duty to encourage use of ADR procedures is facilitated by the provision of information by the parties pursuant to the mediation practice direction (PD 31) (in force from 01.01.2010). It is there provided that a mediation certificate, setting out information about the parties' attempts and attitude to mediation, must be filed together with the case management questionnaire filed under Order 25 rule 1. See the commentary under that rule. The practice direction also provides that a party which wishes to pursue mediation may serve notice setting out its proposals with regard to ADR, to which the opposing party must respond, usually within 14 days. The notice and response are filed in court and thus may be considered pursuant to the duty to encourage use of ADR. With regard to personal injury actions, see also part D of the personal injury list practice direction (PD 18.1) which deals with mediation in such actions.

#### [IA.4.12] Solicitor's duty to encourage use of ADR at early stage

The court's duty under Order 1A rule 4(2)(e) to encourage the use of ADR in any particular action can, obviously, only be exercised after proceedings have been commenced. This does not mean that parties should wait until costs have been incurred in getting an action underway before considering ADR such as mediation.

As expressed in *Egan v Motor Services (Bath) Ltd* [2007] EWCA Civ 1002; [2008] 1 All ER 1156, in appropriate cases solicitors should encourage clients to consider mediation at the earliest possible stage. In that case Ward LJ said (at para 53):

... this is a paradigm case which, if it could not have been settled by the parties themselves, customer and dealer, then it behoved both solicitors to take the firmest grip on the case from the first moment of instruction. That, I appreciate, may not always be easy, but perhaps a copy of this judgment can, at the first meeting, be handed to the client, bristling with righteous indignation, in this case the customer who has paid a small fortune for a motor car which does not meet his satisfaction, and the dealer anxious to preserve the reputation of his prestige product. "This case cries out for mediation", should be the advice given to both the claimant and the defendant. Why? Because it is perfectly obvious what can happen. Feelings are running high, early positions are taken, positions become entrenched, the litigation bandwagon will roll on, experts are inevitably involved, and, before one knows it, there will be two/three day trial and even, heaven help them, an appeal. It is on the cards a wholly disproportionate sum, £100,000, will be to fight over a tiny claim, £6,000. And what benefit can mediation bring? It brings an air of reality to negotiations... Mediation can do more for the parties than negotiation. In this case the sheer commercial folly could have been amply demonstrated to both parties sitting at the same table but hearing it come from somebody who is independent... The commercial possibilities are endless for finding an acceptable solution which would enable the parties to emerge, one with some satisfaction, perhaps a replacement vehicle and the other with its Audi's good name intact and probably enhanced, but perhaps with each of them just a little less wealthy. The cost of such mediation would be paltry by comparison with the costs that would mount from the moment of the issue of the claim. In so many cases, and this is just another example of one, the best time to mediate is before the litigation begins. It is not a sign of weakness to suggest it. It is the hallmark of commonsense. Mediation is a perfectly proper adjunct to litigation. The skills are now well developed. The results are astonishingly good. Try it more often.

In *iRiver HK Ltd v Thakral Corp (HK) Ltd* [2008] 6 HKC 391 (CA) (para 102) Yeung JA, giving the judgment of the Court of Appeal, referred to the above judgment as containing 'useful suggestions as regards how a solicitor could proffer advice on mediation to a client effectively'.

The solicitor's duty with regard to ADR is now a matter of professional conduct. *The Hong Kong Solicitors' Guide to Professional Conduct*, vol 1, principle 10.17, commentary 3 provides that a solicitor should consider and if appropriate advise on ADR procedures. See also para 4 of the mediation practice direction (PD 31) where it is provided that legal representatives should advise clients of the possibility of an adverse costs order where a party unreasonably fails to engage in mediation, and see the commentary under Order 62 rule 5(1)(e) concerning such costs orders.

While the emphasis appears to be on encouraging mediation at an early stage, the fact that proceedings have reached an advanced stage should not be regarded as a barrier. In *Leung Catherine v Tary Ltd* HCPI 805/2007 (Fung J; 12.10.2009) (para 22) the court said 'better late than never, especially when time, expenses and uncertainty of the trial can be avoided'.

#### [IA.4.13] Application to the court for directions on mediation

Where parties are unable to agree between themselves on the manner in which mediation is to proceed, they may apply to the court for directions. Such application is provided for by para 13 of PD 31. The court may give directions to resolve disagreements in the mediation notice and response.

In relation to a body corporate the references in sub-paragraph (a) to the defendant's place of residence shall be construed as references to the defendant's registered or principal office.

(3) Where the defendant acknowledges service by a solicitor who is acting as agent for another solicitor having a place of business within the jurisdiction, the acknowledgment of service must state that the first-named solicitor so acts and must also state the name and address of that other solicitor.

(4) If an acknowledgment of service does not specify the defendant's address for service or the Court is satisfied that any address specified in the acknowledgment for service is not genuine, the Court may on application by the plaintiff set aside the acknowledgment or order the defendant to give an address or, as the case may be, a genuine address for service and may in any case direct that the acknowledgment shall nevertheless have effect for the purpose of Order 10, rule 1(5), and Order 65, rule 9.

#### NOTES

##### [12.3.1] Acknowledgment of service by solicitor

Only a Hong Kong qualified solicitor may acknowledge service of proceedings issued out of the Hong Kong court: see *Li Fook Chu v Chung Shau Ching* [2001] 4 HKC 681 (CA).

##### [12.3.2] Address for service

Order 12 rule 3(2) requires that the defendant give an address within the jurisdiction for service of documents. In *Li Fook Chu v Chung Shau Ching* [2001] 4 HKC 681 the Court of Appeal held that an acknowledgment of service by an English solicitor, giving an address in England for service was defective. Service at that address of pleadings and summonses was set aside.

##### [12.3.3] Service of documents after acknowledgment of service of originating process

After the filing of an acknowledgement of service, documents relating to the proceedings should be served at the address for service stated on the acknowledgement. At this stage service is known as 'ordinary service' and the provisions of Order 65 rule 5 apply. See the commentary under that rule.

##### [12.3.4] Acknowledgement of service of amended writ

It is clear from form No 14 in Appendix A that an acknowledgement of service giving notice of intention to defend relates to 'the proceedings', which should mean the legal action identified by the unique proceedings number. It should follow that the acknowledgement is good for the entire proceedings no matter how they may subsequently be modified by amendment or otherwise, and a fresh acknowledgement of service should not be required when an amended writ is served. This was the position under the pre-1981 procedure whereby a defendant was required to enter an 'appearance' rather than an acknowledgement of service. See *Paxton v Baird* [1893] 1 QB 139 (CA) where Lord Coleridge CJ said (at 141) that it is 'not necessary that there should be a fresh appearance where a writ is amended'. In *Thian Sui Ching*

*v Au Yeung Kwai Chuen & Ors* HCPI 1245/1998 (Suffiad J; 22.10.1999) the court left no room for doubt as to whether a fresh acknowledgement of service would be required by including in an order granting leave to amend the writ, a direction that the previous acknowledgement of service do stand.

##### [12.3.5] Form of acknowledgement of service

Rule 3(1) prescribes 3 different forms of acknowledgement of service, for use in different types of proceedings. Note that Forms 14 and 15 (for acknowledgement of service of a writ and originating summons respectively) were amended as part of the civil justice reforms taking effect in 2009, notably to reflect the admission procedure under the new Order 13A.

#### 4. Procedure on receipt of acknowledgment of service (O. 12 r. 4)

On receiving an acknowledgment of service an officer of the Registry must –

- (a) affix to the acknowledgment an official stamp showing the date on which he received it;
- (b) enter the acknowledgment in the cause book with a note showing, if it be the case, that the defendant has indicated in the acknowledgment an intention to contest the proceedings or to apply for a stay of execution in respect of any judgment obtained against him in the proceedings;
- (c) make a copy of the acknowledgment, having affixed to it an official stamp showing the date on which he received the acknowledgment, and send by post to the plaintiff or, as the case may be, his solicitor at the plaintiff's address for service.

#### NOTES

##### [12.4.1] Tasks for registry on receipt of acknowledgement of service

Order 12 rule 4 prescribes what the court registry is required to do when it receives an acknowledgement of service. This includes sending a copy to the plaintiff or the plaintiff's solicitor by post. It is thus the duty of the court, not the defendant, to bring the acknowledgement of service to the plaintiff's attention.

Rule 4(b) requires that the registry note in the cause book if the defendant has indicated in the acknowledgement an intention to apply for a stay of execution.

This requirement is obsolete. It refers to the previous form of acknowledgement of service in which the defendant could indicate an intention to apply for a stay of execution of judgment when giving notice that it did not intend to defend the proceedings. The purpose was to enable the defendant to apply for terms of payment so as to discourage frivolous defences designed to procure delay and postpone an inevitable judgment. The forms of acknowledgement of service were amended as part of the civil justice reforms which took effect in 2009: see the commentary under rule 3. Rather than allowing the defendant to indicate an intention to apply for a stay of execution they now allow the defendant to indicate an intention to make an admission under the new Order 13A procedure whereby payment terms can be requested and fixed by the court if not agreed.

**[15.13A.2] Costs of non-parties served with notice**

In *Chiu Tak Kwong v Tan Yufang* [2010] 5 HKLRD 718, [2010] HKCU 1307 (original judgment in Chinese); (HCAP 9/2006; Deputy Judge L Chan; 11.06.2010 (judiciary certified English translation)) a probate action by one of the deceased's children against the deceased's second wife was unsuccessful, and costs were ordered in favour of the second wife. Notice of the action had been given to the plaintiff's siblings under Order 15 rule 13A, and although they did not choose to join as defendants, they did actively assist the plaintiff hoping to receive part of the benefit by virtue of rule 13A(4). The court took the view that the siblings should be jointly and severally liable for the costs ordered against the plaintiff and made an order to that effect pursuant to Order 62 rule 6A.

**14. Representation of beneficiaries by trustees, etc. (O. 15 r. 14)**

(1) Any proceedings, including proceedings to enforce a security by foreclosure or otherwise, may be brought by or against trustees, executors or administrators in their capacity as such without joining any of the persons having a beneficial interest in the trust or estate, as the case may be; and any judgment or order given or made in those proceedings shall be binding on those persons unless the Court in the same or other proceedings otherwise orders on the ground that the trustees, executors or administrators, as the case may be, could not or did not in fact represent the interests of those persons in the first-mentioned proceedings.

(2) Paragraph (1) is without prejudice to the power of the Court to order any person having such an interest as aforesaid to be made a party to the proceedings or to make an order under rule 13.

**NOTES****[15.14.1] Cross reference**

See also Order 85 concerning administration and similar actions.

**[15.14.2] Parties in action concerning trust property**

Order 15 rule 14 provides that action can be brought by or against a trustee (or executor or administrator) in relation to trust property without joining the beneficiaries. Any judgment or order in the proceedings will normally be binding on the beneficiaries. Thus in *Nu Life Int'l Ltd v Healthy Living Products Int'l Ltd & Anor* HCA 1157/2006 (Deputy Judge Gill; 12.09.2007) proceedings brought by the beneficiary of an alleged trust were struck out on the ground the matter had already been litigated as against the trustee. In that case (paras 63–65) the court rejected an argument that this rule applies only to express trusts as opposed to trusts arising out of the operation of law such as resulting or constructive trusts.

Rule 14 is permissive: proceedings 'may' be brought by or against the trustee without naming the beneficiary. In most cases there is not a genuine choice and the proper party is the trustee: *Choi Sze Fai v Pretty Full Development Ltd* [1999] 3 HKC 261. However, in certain circumstances it will be appropriate for trustee and beneficiary to be named separately, for example where their interests are adverse or there is a dispute between them.

As for the exceptional circumstances in which a beneficiary may on his own initiative commence proceedings for the benefit of the trust, see the commentary under Order 15 rule 12 concerning 'derivative' actions by beneficiaries.

**[15.14.3] Action may proceed against untraceable trustee**

Section 58 of the Trustee Ordinance (Cap 29) expressly provides that an action may proceed, and judgment may be given, in the absence of a trustee defendant who, despite diligent search, could not be found and served.

**[15.14.4] Action concerning property of a bankrupt**

Under section 58 of the Bankruptcy Ordinance (Cap 6) the property of a bankrupt passes to the trustee in bankruptcy. It follows that actions in relation to a bankrupt's property should be brought by or against the trustee in bankruptcy rather than the bankrupt personally. An exception is personal claims, meaning claims which relate to the bankrupt's body, mind or character without immediate reference to his rights of property: *Chung Kau v HK Housing Authority* [2004] 2 HKLRD 650 (CA) (para 8). In *Cheong Shing Investment Loan & Exchange Co Ltd v Ho Wan Cheung & Anor* CACV 395/2006 (Tang VP, Cheung JA & Lam J; 06.11.2007) an appeal was struck out partly on the ground it was brought by a bankrupt personally, in respect of a property matter. In *Choi Sze Fai* (above) at 262I–263C a bankrupt was permitted to proceed with a claim in his own name where it was alleged that the suit property had not beneficially belonged to him and thus had not passed to the trustee in bankruptcy.

**15. Representation of deceased person interested in proceedings (O. 15 r. 15)**

(1) Where in any proceedings it appears to the Court that a deceased person was interested in the matter in question in the proceedings and that he has no personal representative, the Court may, on the application of any party to the proceedings, proceed in the absence of a person representing the estate of the deceased person or may by order appoint a person to represent that estate for the purposes of the proceedings; and any such order, and any judgment or order subsequently given or made in the proceedings, shall bind the estate of the deceased person to the same extent as it would have been bound had a personal representative of that person been a party to the proceedings.

(2) Before making an order under this rule, the Court may require notice of the application for the order to be given to such (if any) of the persons having an interest in the estate as it thinks fit.

**NOTES****[15.15.1] Order 15 rule 15 – procedure where interested estate lacks representation**

Order 15 rule 15 empowers the court to proceed in the absence of representation of an estate which has an interest in on-going legal proceedings, or to appoint a representative for the estate.

The court is unlikely to proceed without appointing a representative where the estate has any substantial interest in the litigation. This is because unless the estate is represented the court's judgment may not be binding on it, giving rise to the risk

## ORDER 19

## DEFAULT OF PLEADINGS

**1. Default in service of statement of claim (O. 19 r. 1)**

Where the plaintiff is required by these rules to serve a statement of claim on a defendant and he fails to serve it on him, the defendant may, after the expiration of the period fixed by or under these rules for service of the statement of claim, apply to the Court for an order to dismiss the action, and the Court may by order dismiss the action or make such other order on such terms as it thinks just.

## NOTES

**[19.1.1] Power to dismiss for failure to serve statement of claim**

Where proceedings are commenced by generally indorsed writ, the plaintiff will normally be required to serve a statement of claim within 14 days of the defendant giving notice of intention to defend. See Order 18 rule 1. Failure to do so may result in an application under Order 19 rule 1 to dismiss the action. The power to dismiss under this rule is discretionary as a result of the use of the permissive 'may' in the rule's grant of power to the court. In this regard the power differs from that in Order 19 rule 2 to enter judgment in default of defence.

Where the delay is short, and the plaintiff seeks an extension of time (O 3 r 5), the court will normally exercise its discretion in favour of an extension as in *Canadian Oil Works Corp v Sir J Hay* (1878) 38 LT 549 (delay of only 2 days as a result of clerical error). However, each case depends on its own merits: *Higginbottom v Aynsley* (1876) 3 Ch D 288.

An application under this rule is sometimes referred to as an application to dismiss for want of prosecution, especially where there has been long delay, as in *Chan Yiu Cheong Raymond v AG HCPI* 1159/1995 (Suffiad J; 05.10.1998) (para 2). Prejudice must sometimes be shown on an application to dismiss for want of prosecution. See the commentary on want of prosecution under Order 34 rule 2. However, this does not appear to be required on an application under Order 19 rule 1.

**2. Default of defence: claim for liquidated demand (O. 19 r. 2)**

(1) Where the plaintiff's claim against a defendant is for a liquidated demand only, then, if that defendant fails to serve a defence on the plaintiff, the plaintiff may, after the expiration of the period fixed by or under these rules for service of the defence, 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) Order 13, rule 1(2) shall apply for the purpose of this rule as it applies for the purposes of that rule.

## NOTES

**[19.2.1] Judgment in default of defence**

Order 19 rule 2 provides for entry of judgment in default of defence as of right in cases of claims for a liquidated sum. In cases involving claims for unliquidated damages, Order 19 rule 3 applies.

The right to enter judgment in default of defence is of general application but subject to exceptions elsewhere in these rules. See, for example, Orders 83A (money lenders' actions) and 84A (hire-purchase and conditional sale actions) under which leave of court is required to enter judgment in default of defence in the actions to which those Orders apply. See also Order 77 rule 9(1) by which leave is required to enter judgment in default of pleading against the government. Although Order 19 rule 2 makes reference to the claims in the writ, it is not limited to actions commenced by writ. See *Smolar v Prosport Management Ltd & Anor* HCA 7744/2000 (Recorder Tang SC; 17.08.2001) where it was held that the rule applied to an action which had been commenced in the Labour Tribunal and directions for service of pleadings were given under Order 79 following transfer to the Court of First Instance.

Two clear days notice of intention to enter default judgment under rule 2 or rule 3 is required by Order 19 rule 8A.

**3. Default of defence: claim for unliquidated damages (O. 19 r. 3)**

Where the plaintiff's claim against a defendant is for unliquidated damages only, then, if that defendant fails to serve a defence on the plaintiff, the plaintiff may, after the expiration of the period fixed by or under these rules for service of the defence, enter interlocutory judgment against that defendant for damages to be assessed and costs, and proceed with the action against the other defendants, if any. (See App. A, Form 40)

## NOTES

**[19.3.1] Judgment in default of defence – unliquidated claim**

Whereas Order 19 rule 2 provides for judgment in default of defence to a liquidated claim, rule 3 provides for such judgment in respect of claims for an unliquidated amount of damages. Unliquidated claims are those the amount of which is not precisely ascertainable in advance, and require assessment by the court. See the discussion of this topic under Order 6 rule 2(1)(b). The distinction is perhaps best illustrated by example. Claims for special damages such as reimbursement for medical bills are liquidated, whereas claims for monetary compensation for a non-monetary loss such as pain and suffering are unliquidated.

Because unliquidated claims require assessment by the court, judgment in default under rule 3 is a judgment on liability only, with the quantum to be assessed. Assessment of damages will normally be conducted before a master in open court pursuant to Order 37 rule 1.

**4. Default of defence: claim in detinue (O. 19 r. 4)**

(1) Where the plaintiff's claim against a defendant relates to the detention of goods only, then, if that defendant fails to serve a defence on the plaintiff, the plaintiff may, after the expiration of the period fixed by or under these rules for the service of the defence and subject to Order 42, rule 1A –

*Appeal to Court of Appeal* – the power to order security for costs of an appeal to the Court of Appeal is found in Order 59 rule 10(5). See also the commentary under that rule.

### [23.1.9] Jurisdiction to order security for costs

Order 23 rule 1(1) sets out 4 sets of circumstances in which the court may order security for costs. Each of them contemplates an order for security against a ‘plaintiff’. However, by rule 1(3) ‘plaintiff’ in this context extends to any party who is in the position of a plaintiff, for example, a counterclaiming defendant.

The 4 sets of circumstances are:

- (a) Plaintiff ordinarily resident out of Hong Kong;
- (b) Nominal plaintiff;
- (c) Plaintiff failing to give correct address in originating process; and
- (d) Change of address with view to evade consequences of litigation.

The 4 sets of circumstances set out above are dealt with one by one below. Following that we turn to companies, in respect of which there exists an additional power under the Companies Ordinance to order security.

#### [23.1.10] Rule 1(1)(a) – non-resident plaintiff

Order 23 rule 1(1)(a) empowers the court to make an order for security for costs against a plaintiff on the ground of ordinary residence out of the jurisdiction. The purpose is to facilitate enforcement in the event of an order for costs against the non-resident plaintiff: *Walt Disney Co v Disney Property Agency* HCA 7289/1992 (Godfrey J; 15.03.1993) quoting with approval from *The Alpha* [1991] 2 Lloyd’s Rep 52, 54. It is considered *prima facie* unjust that a non-resident plaintiff, ‘more or less immune’ from enforcement of an adverse costs order, should be allowed to proceed in Hong Kong without putting up security for costs: *Tagliani v Lee Wai Ting Elvis* [2006] 2 HKC 194, 197E–F, citing *Elec Vision Inc v Achiever Industries Ltd* [2003] 1 HKLRD 60. The possibility of enforcement of an adverse costs order in the jurisdiction where the non-resident plaintiff lives is a relevant factor: *Tagliani* (above, 200B–C); *Jollymex NV v Jollybaby Int’l Ltd* [2007] 4 HKC 66; but not of itself decisive: *Thune v London Properties Ltd* [1990] 1 WLR 562 (CA). See the discussion below on ease of enforcement abroad.

In most cases it will be clear where the plaintiff is resident, as the form of writ of summons requires that the plaintiff’s address be stated. Where on an application for security for costs there is a dispute as to the plaintiff’s place of ordinary residence, the burden of proof rests with the defendant applying for security. See *Mahajan v HCL Technologies (HK) Ltd & Ors* [2010] HKCU 1971 (HCA 1510/2004; Deputy Judge L Chan; 15.09.2010).

Ordinary residence is a concept which has been considered in many cases and in different contexts. Essentially a person is ordinarily resident in the place where he habitually goes about his daily life apart from temporary or occasional absences: *R v Barnet LBC exp Shah* [1983] 2 AC 309 (HL). See also the note by Pyott at (1982) 12 HKLJ 216 and the cases cited therein. Ordinary residence is a matter of fact, and differs from a legal right of residence. Thus the holder of a Hong Kong identity card is not *ipso facto* ordinarily resident here: *Chian Ker Chi Paul v Super Zone Investment Ltd* [1994] 2 HKC 679, 681G. However, a person illegally present in the jurisdiction

will not be considered ordinarily resident: *Sun Jie v Registration of Persons Tribunal CACV 320/2004* (Rogers VP, Le Pichon JA & Sakhrani J; 13.12.2005).

If a person is ordinarily resident in Hong Kong and in another jurisdiction at the same time, does rule 1(1)(a) apply? The answer appears to be that the rule does apply, meaning there is power to order the person to give security for costs; however, the fact of ordinary residence in the jurisdiction will be highly relevant to the court’s exercise of discretion. See the judgment of the Singapore Court of Appeal in *Tjong Very Sumito v Chan Sing En & Ors* [2011] 4 SLR 580, [2011] SGCA 40 (Common LII) where the question was considered in detail and reference was made to English and Australian cases.

A non-resident plaintiff may resist an order for security for costs by showing fixed assets in Hong Kong. See *Tsang Yee Mui v Personal Representatives of Mak Chik Wing* HCA 2606/2006 (Chu J; 21.07.2008) where it was said (at para 31):

... the fact that the plaintiff is known to have fixed assets in the jurisdiction is highly relevant. This is because the rationale or objective underlying Order 23 rule 1(1)(a) is to alleviate the difficulty that may be faced by a successful defendant in seeking to recover costs against a foreign plaintiff. If it is known that there are assets within the jurisdiction available for costs, then the concern that the rule sets out to address will be met.

In *Tsang* (above) the court went on to hold (at para 32) that a plaintiff who resists an application for security for costs on the basis of assets within the jurisdiction ‘is obliged to make good that proposition’ and ‘should adduce supporting information to substantiate his assertion’ and that the value of the assets is relevant. Cash deposits in bank accounts in Hong Kong are unlikely to assist a non-resident plaintiff in resisting an order for security for costs: see *Hoogland v Lin & Anor* HCA 657/2007 (Chung J; 29.05.2008) where, refusing an appeal against an order for security for costs, it was said (at para 25):

Hong Kong is a major financial centre. Financial movements can take place swiftly. Cash deposits in bank accounts can be disposed of literally within minutes. They cannot ordinarily be regarded as assets of a fixed and permanent nature.

#### [23.1.11] Human rights considerations and ease of enforcement abroad

Security for costs will not automatically be ordered against a non-resident with no significant assets in the jurisdiction. The court may consider whether the non-resident has assets in another jurisdiction where a Hong Kong costs order may be enforced without undue difficulty. The basis of taking this factor into account is said in some authorities to be human rights considerations (non-discrimination on basis of national origin). In others the courts have simply referred to lack of need to order security in such circumstances.

In *Nasser v United Bank of Kuwait* [2002] 1 All ER 401, [2002] 1 WLR 1868 (CA) it was held that it would be discriminatory if the mere fact of residence abroad could justify an order for security for costs. Reference was made to the right under the European Convention on Human Rights to access to the court without discrimination on the basis of ‘national ... origin’. It was held that that there could be no inflexible assumption that a person from abroad should provide security. The court should consider the difficulty in enforcing a costs order in the place of residence. It inferred that enforcement of an English costs order in the United States carried with it a significantly greater burden by way of costs and delay as compared to enforcement in England, and upheld an order for security against an American-resident litigant.

(2) Not less than 4 clear days before the day fixed under rule 2 for the hearing of an originating summons which is in Form No. 10 in Appendix A, the plaintiff must serve the summons on every defendant or, if any defendant has already been served with the summons, must serve on that defendant notice of the day fixed for the hearing.

(3) Where notice in Form No. 12 in Appendix A is served in accordance with paragraph (1), such notice shall specify what orders or directions the party serving the notice intends to seek at the hearing; and any party served with such notice who wishes to seek different orders or directions must, not less than 7 days before the hearing, serve on every other party a notice specifying the other orders and directions he intends to seek.

(L.N. 404 of 1991)

(4) If the hearing of an originating summons which is in Form No. 8 or 10 in Appendix A is adjourned and any party to the proceedings desires to apply at the resumed hearing for any order or direction not previously asked for, he must, not less than 7 days before the resumed hearing of the summons, serve on every other party a notice specifying those orders and directions.

(L.N. 404 of 1991)

(5) Where a party is required by any provision of this rule or rule 5(2) to serve a notice or a copy of a notice on "every other party" he must—

- (a) where he is the plaintiff, serve it on every defendant who has acknowledged service of the originating summons; and
- (b) where he is a defendant, serve it on the plaintiff and on every other defendant affected thereby.

(L.N. 404 of 1991)

## NOTES

**[28.3.1] Wording of Order 28 rule 3**

Some printings of these rules refer to 'orders of directions' rather than 'orders or directions', in Order 28 rule 3(3). An examination of LN 404 of 1991 by which rule 3(3) was enacted indicates that 'orders or directions' (as above) is correct.

**3A. Originating summons to be heard in open court (O. 28. r. 3A)**

An originating summons must be heard in open court unless the Court otherwise directs.

(L.N. 152 of 2008)

## NOTES

**[28.3A.1] Originating summonses normally heard in open court**

Order 28 rule 3A stipulates that originating summonses are to be heard in open court unless the court otherwise directs. The rule was inserted to implement recommendation 15 in the final report of the Chief Justice's working party on civil justice reform. The rule does not represent a change in the previous practice, but simply states in legislative form the practice established by cases dating back to the 1980s.

Until the late 1980s, originating summonses were often heard in chambers in Hong Kong. At the time all chambers hearings were closed to the public. That

practice was condemned by the court as 'improper' in *Wong Shui Yun Bernadette v Lau Wai Pui* [1987] 3 HKC 513, and as 'wrong' in *Pak Lan Ching v Crown Great Co Ltd* [1988] HKC 784, 786C. In *Yau Fook Hong Co Ltd v CIR* [1989] 2 HKC 514, 516B–D it was said:

... an action commenced by originating summons is an action just like any other, although commenced by a different originating process ... unless there are some special reasons, the substantive hearing has to be in open court.

Vendor and purchaser summonses under section 12 of the Conveyancing and Property Ordinance (Cap 219) should be heard in open court: *Cheung Kai Wei Sandra v Fuk Ka Pak & Anor (No 2)* [1990] 2 HKC 401, 407B–D.

**[28.3A.2] Exceptional circumstances where originating summonses may be heard in chambers**

Exceptional circumstances in which it may be appropriate for the court to direct that an originating summons be heard in chambers, or 'special reasons' as they were described in the above passage from *Yau Fook Hong* were said, in that case, to include the following:

... security of the state or the protection of the interests of infants or disabled persons, or the protection of trade secrets. Generally speaking, apart from such cases, actions commenced by originating summons, like, as I say, any other action, ought to be heard in open court: *Scott v Scott* [1913] AC 417.

In addition to the special reasons mentioned in the above passage for hearing an originating summons in chambers, such a hearing may be appropriate where the case raises matters of 'private concern ... such as the execution of trusts or the administration of estates', as opposed to hostile litigation like a construction summons: *Pak Lan Ching* (above, at 785D–E). See also *Yu Hong Ping v Yuen HCMP 1104/2009* (Lam J; 24.08.2009) where an uncontested application under s 33(3) of the Probate and Administration Ordinance (Cap 10) for removal of an executor was adjourned to chambers to be dealt with by a master. In making that direction under this rule, the court said there was no reason the application could not be dealt with on the papers (as to which see Order 32 rule 11A).

In *Mayluck Investment Ltd v Lee Yih Ping & Ors* [1996] 3 HKC 245 the court heard an originating summons seeking relief under the Partition Ordinance (Cap 352) in chambers, but only because the parties appeared by solicitors and it was thus not practicable to proceed in open court. At the time all chambers hearings in Hong Kong were closed to the public. Judgment was delivered in open court.

**[28.3A.3] Originating summonses heard before a master in chambers**

Before Order 28 rule 3A came into force the practice was for certain types of originating summonses to be set down for hearing before a master in chambers. At the time rule 3A came into force practice direction 14.2 was amended to state expressly that the following applications by originating summons should in the first instance be returnable before a master in chambers (open to the public):

- (1) application for summary determination of interpleader under Order 17 rule 5;
- (2) application for default judgment under Order 83A (money lenders' actions);

although this conclusion does some violence to the language of the rules, it was justified in order to make sense of the rules as a whole.

Both rule 11 and rule 12 contain provisions whereby the court must be satisfied either that the plaintiff has already established liability or would be able to do so if the action proceeded to trial. The test is whether the plaintiff will, not 'will be likely to', obtain judgment: *Shenzhen Envirotech Electronics Co Ltd v Cellplus (HK) Ltd* [2005] 4 HKLRD 217 (para 19). This test is a 'high' one: *Guo Jing Jing v Art Master Investment Ltd & Ors* HCA 1008/2009 (Au J; 11.12.2009) (para 88), and will normally involve an examination of the merits, as in *Lin Chiu Lung v ILE Co Ltd* HCPI 1056/2002 (Master B Kwan; 08.12.2005). The interim payment procedure remains inappropriate in cases where there is serious dispute, whether of fact or law, notwithstanding the civil justice reforms implemented in 2009: *UMG Recordings Inc & Ors v Profit Chart Dev't Ltd & Ors* [2013] HKCU 395 (CACV 262/2012; Cheung CJHC, Lam JA & L Chan J; 19.02.2013) (para 7).

### [29.12.2] Limitation on power in personal injury cases

The court's power to order an interim payment in personal injury cases is limited by Order 29 rule 11(2) so as to protect impecunious defendants. An order will only be made against a defendant whose liability will be met by insurance, is a public authority or has sufficient resources of its own. So far as insurance is concerned, this rule previously allowed an interim payment order only against a defendant who was himself an insured. By amendment in 2002 this was expanded so as to allow an order to be made against any defendant whose liability will be met under an insurance policy (whether he is the insured himself or not) or under the uninsured motorists' scheme run by the Motor Insurers' Bureau.

### [29.12.3] Factors to be taken into account in exercise of discretion

The court's power to order an interim payment under Order 29 rules 11 and 12 is clearly discretionary.

There are many cases touching upon the manner in which the court should exercise its discretion. The cases have canvassed the questions whether any particular need must be demonstrated by the applicant, the extent to which delay in the proceedings is relevant and the question whether any distinction should be drawn between personal injury cases and other cases. Suffiad J conducted a review of the relevant cases in *Sun Jianqiang v Chan Tai Kau & Anor* [2001] 2 HKC 702 and held as follows (at 708I–709G):

Viewing all these cases, and the somewhat confused state of the law, the time has come when there should be a standard practice adopted in respect of applications for interim payment irrespective whether the case is a personal injury case or not. This is the effect of the decision by the Court of Appeal in *Stringman v McArdle* [1994] 1 WLR 1653 (CA). Of particular note are the following passages of the judgment of Stuart-Smith LJ in *Stringman v McArdle* at 1657 where he said:

'Once the threshold conditions in RSC Ord 29 r 11(1), sub-paragraphs (a), (b) or (c) are satisfied, what the court has to do, if it thinks fit, is to make an interim payment of such amount as it thinks just not exceeding a reasonable proportion of the damages which in the opinion of the court are likely to be recovered by the plaintiff after taking into account contributory negligence and any set-off or counterclaim. It should be noted that the plaintiff does not have to demonstrate any particular need over and

above the general need that a plaintiff has to be paid his or her damages as soon as reasonably may be done. It will generally be appropriate and just to make an order where there will be some delay until the final disposal of the case. Therefore what the court is concerned with in fixing the quantum is that it does not exceed a reasonable proportion of the damages which in the opinion of the court are likely to be recovered ...'

Suffiad J continued in the *Sun Jianqiang* case by saying he was in full agreement with the above words of Stuart-Smith LJ and that those words should henceforth be taken to apply equally to personal injury cases as to other cases (at 709E).

On the question whether the applicant is required to show any particular hardship or need for an interim payment, Suffiad J held that these factors could be taken into account by the court but 'not in a restrictive way in the exercise of the court's discretion' (at 709F–G). In this respect Suffiad J was of the view that the following cases should no longer be followed: *Yeung Sek Sung v Cheung For Ming* [1991] 1 HKLR 1; *Paul Y Construction Co Ltd v AG* [1992] 2 HKLR 120; and *Pham Van Ngo v AG* HCA 4895/1990 (Jones J; 12.06.1992).

Where an interim payment is sought to cater for a need which may be at issue in the proceedings, the court may be disinclined to make the order. See *Poon Catherine (by her next friend) v Hospital Authority* [2011] 6 HKC 114 where it was considered inappropriate to include in an interim payment funds for private residential care. The need for such care had not yet been established, and it might ultimately be found that less expensive care in a public hospital would be sufficient.

### [29.12.4] Quantum of interim payment

When the court decides that it is appropriate to order an interim payment the question of the quantum of that payment is also a matter of discretion. Under both rule 11 and rule 12 the court shall fix the quantum at the amount it thinks just, after taking into account any claim to set-off, cross-claim or counterclaim. Under rule 11, but not rule 12, the court must also take into account contributory negligence, and should fix the quantum at an amount not exceeding a reasonable proportion of the damages likely to be recovered.

In personal injury cases no distinction is to be made between the various heads of damages which may be awarded: see *Sun Jianqiang v Chan Tai Kau* [2001] 2 HKC 702, 710H where Suffiad J rejected a submission that in fixing the quantum of an interim payment he should not have regard to damages for pain and suffering and future loss.

In exercising its discretion as to quantum the court will also take into account the fact that liability and/or quantum remain in issue so that at the end of the day the plaintiff may be required to re-pay all or part of the interim award (see Order 29 rule 17). Thus the question of solvency will be relevant, though the court will not be concerned with the manner in which the plaintiff proposes to spend the interim award (unless he is a party under disability): see *Stringman v McArdle* [1994] 1 WLR 1653 (CA), approved by Suffiad J in *Sun Jianqiang v Chan Tai Kau & Anor* [2001] 2 HKC 702.

In *BIS Consultants Ltd v Dao Heng Bank Ltd* [1989] 1 HKLR 446 the quantum of an interim payment was fixed with reference to the amount of funds held by the defendant mortgagee surplus to its claim.

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 evidence-gathering, according to *Tito* what the judge sees on such a view does go into evidence. Nevertheless the distinction continues to be made: see, for example, *R (Broxbourne BC) v North & East Hertfordshire Magistrates' Court* [2009] EWHC 695 (Admin) (para 59 *et seq.*).

For court-ordered inspection by assessors or witnesses, see also Order 29 rule 2 and Order 75 rule 28.

#### 9. Death of party before giving of judgment (O. 35 r. 9)

Where a party to any action dies after the verdict or finding of the issues of fact and before judgment is given, judgment may be given notwithstanding the

death, but the foregoing provision shall not be taken as affecting the power of the judge to make an order under Order 15, rule 7(2), before giving judgment.

#### 10. Certificate of judicial clerk (O. 35 r. 10)

At the conclusion of the trial of any action, the judicial clerk or other officer in attendance at the trial shall make a certificate in which he shall certify—

- (a) the time actually occupied by the trial,
- (b) any order made by the judge under Order 38, rule 5 or 6,
- (c) every finding of fact by the jury, where the trial was with a jury,
- (d) the judgment given by the judge, and
- (e) any order made by the judge as to costs.

#### 11. List of exhibits (O. 35 r. 11)

(1) The judicial clerk or other officer in attendance at the trial shall take charge of every document or object put in as an exhibit during the trial of any action and shall mark or label every exhibit with a letter or letters indicating the party by whom the exhibit is put in or the witness by whom it is proved, and with a number, so that all the exhibits put in by a party, or proved by a witness, are numbered in one consecutive series. In this paragraph a witness by whom an exhibit is proved includes a witness in the course of whose evidence the exhibit is put in.

(2) The judicial clerk or other officer in attendance at the trial shall cause a list to be made of all the exhibits in the action, and any party may, on payment of the prescribed fee, have an office copy of that list.

(3) The list of exhibits when completed shall form part of the record of the action. (L.N. 103 of 1994)

(4) For the purpose of this rule a bundle of documents may be treated and counted as one exhibit.

#### 12. Exhibits retained by Registrar pending appeal (O. 35 r. 12)

(HK)(1) Unless the Court otherwise directs, the Registrar shall retain in his custody all exhibits duly marked and labelled until—

- (a) the expiration of the time limited by these rules for appealing to the Court of Appeal, or such extended period therefor as may be allowed; and thereafter
- (b) in the event of an appeal to the Court of Appeal, the final disposal of such appeal; and thereafter
- (c) the expiration of the time limited by Order in Council for applying to the Court of Appeal for leave to appeal to the Court of Final Appeal, or such extended period therefor as may be allowed; and thereafter
- (d) in the event of the Court of Appeal or the Court of Final Appeal giving leave to appeal to the Court of Final Appeal, the non-fulfilment of any condition for such leave to appeal or the final disposal of such appeal.

(2) Unless the Court otherwise directs, upon the expiration of the time limited for retention of exhibits fixed under paragraph (1) it shall be the duty of

**37C. Expert witness's declaration of duty to Court (O. 38 r. 37C)**

- (1) An expert report disclosed under these rules is not admissible in evidence unless the report contains a declaration by the expert witness that –
- he has read the code of conduct set out in Appendix D and agrees to be bound by it;
  - he understands his duty to the Court; and
  - he has complied with and will continue to comply with that duty.
- (2) Oral expert evidence is not admissible unless the expert witness has declared, whether orally or in writing or otherwise, that –
- he has read the code of conduct set out in Appendix D and agrees to be bound by it;
  - he understands his duty to the Court; and
  - he has complied with and will continue to comply with that duty.
- (3) Paragraph (1) does not apply to a report that was disclosed under rule 37 before the commencement of this rule.

(L.N. 152 of 2008)

**NOTES****[38.37C.1] Origin and scope of Order 38 rule 37C – expert evidence inadmissible without declaration**

Order 38 rule 37C provides that expert evidence is not admissible unless the expert witness declares that he has read the code of conduct in appendix D, understands his duty to the court (as to which see Order 38 rule 35A) and that he has and will comply with that duty. The requirement for a declaration derives from England's CPR 35.10(2), and the sanction whereby the evidence is inadmissible in case of non-compliance derives from the New South Wales rules. The rule implements recommendation 103 of the Chief Justice's working party on civil justice reform, which called for such a hybrid provision in Hong Kong.

In *Ip Kam Chung v Kwo Siu Kit & Anor* DCEC 797/2009 (Deputy Judge Clement Lee; 20.09.2010) (para 14) the court made an unless order by which expert reports would be expunged from the court file unless the statement of truth and declaration of compliance with the code of conduct were filed within 14 days.

It has been suggested that, technically, the declaration requirement in rule 37C does not apply to expert evidence in an affidavit, such as in proceedings by way of originating summons. This was said to be the result of the exception in rule 36(2). See *Chen Ha Ping Hepburn & Anor v Loong San Investment Co Ltd* [2014] 2 HKLRD 1116 (HCMP 1380/2013; Anthony Chan J; 30.04.2014) (para 10-14). However, as noted by the court in that case, it is desirable for all expert reports in legal proceedings to contain the declaration (para 14). See also *Regal Shining Ltd v SJ* HCMP 2781/2012 (Anthony Chan J; 21.10.2014) (para 30).

**[38.37C.2] Reports exchanged before implementation of CJR in 2009**

Order 38 rule 37C(3) is a transitional provision, whereby expert reports disclosed under rule 37 before the implementation of the civil justice reforms in 2009 are not subject to the provisions of the rule requiring a declaration and restricting admissibility in case of non-compliance.

**[38.37C.3] Breach of expert's duty**

See the commentary under Order 38 rule 35A.

**38. Meeting of experts (O. 38 r. 38)**

In any cause or matter the Court may, if it thinks fit, direct that there be a meeting "without prejudice" of such experts within such periods before or after the disclosure of their reports as the Court may specify, for the purpose of identifying those parts of their evidence which are in issue. Where such a meeting takes place the experts may prepare a joint statement indicating those parts of their evidence on which they are, and those on which they are not, in agreement.

**NOTES****[38.38.1] Power to order meeting of experts**

Order 38 rule 38 empowers the court to direct that there be a 'without prejudice' meeting between experts for the purpose of identifying the parts of their disclosed reports which are in issue. The rule is in the same terms as the rule of the same number in the former English Rules of the Supreme Court. The equivalent provision in England is now CPR 35.12.

As to the circumstances in which the court will exercise its discretion to order such a meeting, the following observations of Tuckey LJ in *Hubbard & Ors v Lambeth Southwark & Lewisham Health Authority & Ors* [2001] EWCA Civ 1455 (07.09.2001), [2002] Lloyd's Rep Med 8 are instructive:

- The rule is obviously salutary. Experience of the working of this rule and its RSC predecessor show that in almost every case experts are able to narrow the issues to be determined at trial even in very complex cases. The time and cost benefit which flows from this is obvious. There are of course cases where an experts' meeting would serve no purpose, in which case no order should be made. But, even if both parties object to a meeting, the Court is not prevented from making an order and should do so if it thinks that something will come of it. I see nothing wrong with a general approach that an order for such discussions to take place will usually be made where there has been an exchange of expert reports.
- The mere objection of one party will not be sufficient. Some very good reason for not having a meeting would have to be shown.

In *Hubbard* (para 19) it was held that the plaintiff's fear that at such a meeting their experts would be overawed by the reputation of a distinguished medical specialist against whom some of their allegations were made and would 'sell them down the river' was not a good reason not to order a meeting. Tape recording of the meeting was agreed to cater for this concern.

In *Chu Yee Wah v Director of Environmental Protection* [2011] 3 HKC 227 (para 13–15) the court refused to order a meeting of experts on grounds of lateness, unlikelihood of achieving meaningful agreement, and proportionality.

In *Leung Wai Kee v Tan Yuet Sheung* DCCJ 5716/2007; [2009] HKCU 693, where the opposing parties had filed expert reports, the court made an order under this rule directing the experts to prepare a joint statement indicating the parts of their evidence on which they were in agreement, and those on which they were not. The result was 10 'bullet points' of the experts' respective conclusions, which the court considered to be readily apparent from the expert reports filed earlier. The court was

Year	Effective Date	%	Rate of Interest
	01-Jul		8.245
	01-Oct		9.234
2006	01-Jan		10.088
	01-Apr		10.711
	01-Jul		10.921
	01-Oct		11
2007	01-Jan		10.934
	01-Apr		10.75
2008	01-Jan		10.420
	01-Apr		9.398
	01-Jul		8.353
	01-Oct		8.250
2009	01-Jan		8.192
	01-Apr		8

As of mid-2013 there had been no change to the 8% interest rate fixed in April 2009.

#### [42.1.6] Interest on costs

An award of costs in a judgment is part of the judgment and interest is payable under section 49 of the High Court Ordinance: see *Caltex Oil Hong Kong v Director of Buildings and Lands* [1994] HKDCLR 31. The prevalent view is that interest on an award of costs runs from the date of the order for costs rather than the subsequent date on which the amount of costs payable may be quantified by taxation or agreement. See the commentary under Order 62 rule 3.

#### [42.1.7] Interest on money repaid on appeal

The court has a common law or inherent power to order the payment of interest on money which is ordered to be repaid on appeal: *Man Ping Nam v Man Fong Hang* (CFA) (above, para 14), referring to *Rodger & Ors v The Comptoir d'Escompte de Paris & Anor (No 2)* (1871) 3 LR PC 465; [1842–1910] HKC 68 (PC from Hong Kong) and *Central Electricity Board of Mauritius v Bata Shoe Co (Mauritius) Ltd* [1983] 1 AC 105. The opposite conclusion was reached in *Hang Sing Construction Co Ltd v Young's Engineering Co Ltd* [1985] 2 HKC 17 (CA), which would appear to be *per incuriam*.

See also the interesting case of *Hongkong Electric Co Ltd v Commissioner of Rating and Valuation (No 2)* [2012] 3 HKC 212 (CFA) where money had to be repaid more than once as a case worked its way up from first instance to final appeal.

#### [42.1.8] Interest where both claim and counterclaim successful

Where both claim and counterclaim succeed, the court may give separate judgments or may set off one against the other and give a single net judgment. See Order 15 rule 2 and the commentary thereunder. In *Union Base Ltd v Tsang Shek Tong* [1998] 3 HKC 349, 352D–F (CA), where a single net judgment was given in favour of the

plaintiff after setting off the amount of the successful counterclaim, it was held that in principle the plaintiff was entitled to interest on the net amount.

#### 1A. Judgment in favour of reversioner for detention of goods (O. 42 r. 1A)

(1) Where a claim relating to the detention of goods is made by a partial owner whose right of action is not founded on a possessory title, any judgment or order given or made in respect of the claim shall be for the payment of damages only.

In this paragraph “partial owner” means one of two or more persons having interest in the goods, unless he has the written authority of every other such person to sue on the latter’s behalf.

#### 2. Judgment, etc. requiring act to be done: time for doing it (O. 42 r. 2)

(1) Subject to paragraph (2), a judgment or order which requires a person to do an act must specify the time after service of the judgment or order, or some other time, within which the act is to be done.

(2) Where the act which any person is required by any judgment or order to do is to pay money to some other person, give possession of any land or deliver any goods, a time within which the act is to be done need not be specified in the judgment or order by virtue of paragraph (1), but the foregoing provision shall not affect the power of the Court to specify such a time and to adjudge or order accordingly.

#### NOTES

##### [42.2.1] Time for complying with order requiring act to be done

Order 42 rule 2 provides that certain types of judgments and orders requiring a person to do an act (for example, a mandatory injunction) must specify the time within which the act is to be done. Failure to comply with this requirement may result in the judgment being set aside: *Chou Yi Feng v Chou Yi Chen & Ors* HCA 4393/2001 (Chung J; 23.11.2002).

The time for doing the required act is normally stipulated as a specified time after service of the judgment or order. However, the rule also permits ‘some other time’ to be stipulated. Thus the order will not be bad for stipulating a time for compliance counting from the date of the order rather than the date of service: *Lee Hung Yam v Lee Sou Fai* HCA 4390/1983 (Deputy Judge Nazareth QC; 23.05.1985); [1985] HKLY 788. Further, it is permissible to state that the act must be done ‘forthwith’, in which case the act must be done as soon as it can reasonably be done: *Chou Yi Feng* (above).

##### [42.2.2] Peremptory and ‘unless’ orders

A peremptory order is an order requiring that the party take a specified step within a stipulated time. The order may or may not include a sanction for disobedience. If it does, it is an ‘unless’ order. See Practice Direction 16.5, paras 2–3, and see *Schenker International (HK) Ltd v Natural Dairy (NZ) Holdings Ltd* [2014] 1 HKC 507, [2014] 1 HKLRD 274 (HCA 1755/2011; Deputy Judge Le Pichon; 22.11.2013).

- d. All shares and stocks certificates held in the company's name.
  - e. The deeds or Land Registry entries in respect of all property in the company's name or owned beneficially by the company.
  - f. Registration details of all vehicles owned by or in the company's name.
  - g. All documents showing outgoing and liabilities, including copies of any other judgments of a court entered against the company's name.
  - h. All Company Books, Registers [and documents].
3. Costs reserved

**Further Direction:**

The Judgment Creditor shall provide a shorthand writer to take a verbatim note of evidence at the examination and the notes of evidence shall be filed in court within [ ] days of the completion of the examination or any adjournment thereof.

**Warning**

The director of the Judgment Debtor Company is warned of the requirement to make a full disclosure when complying with clause 2 herein, and if it is not done there may be another adjournment and the director of the Judgment Debtor Company may be liable for the costs incurred.

The director of the Judgment Debtor Company is further warned that he must attend the examination whenever required and if he fails to attend the examination without good cause being shown, he is liable to face Contempt of Court Proceedings.

**[48.1.4] Examination in open court**

By practice direction 13.2 examination of a judgment debtor under this Order and under Order 49B is conducted in open court before a master. Solicitors have the right of audience.

**[48.1.5] Scope of examination under Order 48 rule 1**

The scope of an examination under Order 48 rule 1 is set down in sub-rule (1), that is to determine whether (a) there are any debts owing to the judgment debtor, and (b) what other property or means the judgment debtor may have of satisfying the judgment.

In *Bloomsbury International Ltd v Nouvelle Foods (HK) Ltd* [2005] 1 HKC 337 the court considered in detail the scope of examination permitted by rule 1(1)(b). It was held that the word 'property' should not be read narrowly. It includes choses in action such as claims for unliquidated damages or restitution of property. As a result the judgment creditor may ask questions about the judgment debtor's rights against third parties, including accounts receivable, with a view to the appointment of a liquidator or receiver by way of equitable execution. The decision in *Hua Chiao Commercial Bank Ltd v Alpha Plus International Development Ltd* [2001] 2 HKC 54 (where it was held that the examination is limited to assets which are 'instantly' or 'currently' available) was effectively over-ruled in this regard.

There is a line 'beyond which a creditor examining under Order 48 may not tread'. In deciding what can or cannot be examined the court 'must not be overly solicitous' in favour of the debtor, who has committed a wrong in failing to pay, and 'should refrain from drawing too refined distinctions'. The judgment creditor is not entitled to ask about negotiations or to ask questions with a view to seeking its own remedy against third parties. 'Order 48 is a process of discovery about the debtor's means and property rights against third parties...not a means of obtaining

discovery for use in personal actions by the creditor or anyone else against third parties': *Bloomsbury International* (above) citing *Watkins v Ross* (1893) 68 LT 423 and *McCormack v National Australia Bank Ltd* (1992) 106 ALR 647.

**[48.1.6] Order for further disclosure**

The court has power to order further disclosure of documents during the course of an examination under Order 48 or Order 49B: *Lafarge SA v Continental Cement Corp* [2007] 1 HKC 34.

**[48.1.7] Dispute in the course of examination**

Order 48 rule 1(3) provides that the master before whom the examination takes place may refer to a judge any difficulty or dispute with regard to the examinee's obligation to answer questions. This provision is 'permissive', it 'does not require that every dispute on the scope of the examination be referred to the judge'. It would be 'impractical and disruptive, not to say inefficient in terms of time and cost, if every dispute in the course of examination had to go to a judge'. The master 'has a wide discretion whether to allow a question' and jurisdiction to 'resolve the issues of scope raised by the parties'. See *Bloomsbury International Ltd v Nouvelle Foods (HK) Ltd* [2005] 1 HKC 337.

**[48.1.8] Imprisonment**

Where, upon an examination conducted under Order 48 rule 1, the court is satisfied that the judgment debtor is able to satisfy the judgment, has disposed of assets with a view to avoiding satisfaction of the judgment, either wholly or in part, or has wilfully failed to make full disclosure, the court may, in its discretion, order that the judgment debtor be imprisoned for a period not exceeding three months (Order 49B rule 1B(1)). In each case, the liability to imprisonment is that of the 'judgment debtor' and not of the person examined (where the identity of such person differs from that of the judgment debtor). Consequently, where the judgment debtor is a body corporate, there can be no imprisonment (under Order 49B rule 1B(1)) in respect of an 'officer' of that body corporate who is examined under Order 48 rule 1. The point was acknowledged in *Hua Chiao Commercial Bank Ltd v Alpha Plus International Development Ltd* [2001] 2 HKC 54. In refusing the judgment creditor's application to order the imprisonment of the company judgment debtor's director (on the basis that the judgment debtor company was able to satisfy the judgment debt) Master Kwan stated (at 61B-E):

... it is conceptually difficult to apply the provisions of O 49B r 1B to commit directors of corporate entities. A distinction has to be drawn between the judgment debtor company and [the examined director]. Since the case of *Salomon v A Salomon Ltd* [1897] AC 22 the common law has recognized that the legal identity of an incorporated company is distinct from its members and directing mind.

However, it is submitted that the provisions of Order 49B rule 1B in no way restrict or curtail a court's common law power to commit, for 'contempt', any person – be it an officer of a corporate judgment debtor, upon his examination under Order 48 rule 1, or otherwise – for wilful refusal to comply with a court order.

- *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.

#### [53.1.11] Constitutional and administrative law list

Applications for judicial review must be brought on the court’s Constitutional and Administrative Law List, which also applies to applications for habeas corpus, election petitions, appeals from the Obscene Articles Tribunal and other cases involving the Basic Law or Bill of Rights if transferred to the list by a judge. The list was established by practice direction 26.1, the text of which may be viewed free-of-charge on the judiciary website [www.judiciary.gov.hk](http://www.judiciary.gov.hk) or that of the Hong Kong Legal Information Institute [www.hklii.org](http://www.hklii.org).

#### [53.1.12] Judicial review practice direction

Practice direction SL3 sets out various matters of procedure to be followed on applications which come within the Constitutional and Administrative Law List. Part 1 of the practice direction deals with applications for judicial review. The practice direction dates from 1998 and has since been amended, most recently when the civil justice reforms came into force in 2009. The up-to-date text of the practice direction may be downloaded from the judiciary website [www.judiciary.gov.hk](http://www.judiciary.gov.hk) or that of the Hong Kong Legal Information Institute [www.hklii.org](http://www.hklii.org) both of which are accessible to the general public free-of-charge.

#### 2. Joinder of claims for relief (O. 53 r. 2)

On an application for judicial review any relief mentioned in rule 1(1) or (2) may be claimed as an alternative or in addition to any other relief so mentioned if it arises out of or relates to or is connected with the same matter.

#### 3. Grant of leave to apply for judicial review (O. 53 r. 3)

- (1) No application for judicial review shall be made unless the leave of the Court has been obtained in accordance with this rule.
- (2) An application for leave must be made *ex parte* by filing in the Registry –
  - (a) a notice in Form No. 86 in Appendix A containing a statement of –
    - (i) the name and description of the applicant;
    - (ii) the name and description of the respondent;
    - (iii) the relief sought and the grounds on which it is sought;
    - (iv) the name and description of all interested parties (if any) known to the applicant;
    - (v) the name and address of the applicant’s solicitors (if any); and
    - (vi) if no solicitor acts for the applicant, the applicant’s address for service. (L.N. 152 of 2008)
  - (b) an affidavit verifying the facts relied on.
- (3) The judge may determine the application for leave without a hearing, unless a hearing is requested in the notice of application, and need not sit in open court; and in any case the Registrar shall serve a copy of the judge’s order on the applicant. (L.N. 152 of 2008)
- (4) Where an application for leave is refused by a judge or is granted on terms, the applicant may appeal against the judge’s order to the Court of Appeal within 14 days after such order. (L.N. 152 of 2008)
- (6) Without prejudice to its powers conferred by Order 20, rule 8, the Court hearing an application for leave may allow the applicant’s statement to be amended, whether by specifying different or additional grounds or relief or otherwise, on such terms, if any, as the Court thinks fit.
- (7) The Court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates.
- (8) Where leave is sought to apply for an order of certiorari to remove for the purpose of its being quashed any judgment, order, conviction or other proceeding which is subject to appeal and a time is limited for the bringing of the appeal, the Court may adjourn the application for leave until the appeal is determined or the time for appealing has expired.
- (9) If the Court grants leave it may impose such terms as to costs and as to giving security as it thinks fit.
- (10) Where leave to apply for judicial review is granted, then –
  - (a) if the relief sought is an order of prohibition or certiorari and the Court so directs, the grant shall operate as a stay of the proceedings to which the application relates until the determination of the application or until the Court otherwise orders;
  - (b) if any other relief is sought, the Court may at any time grant in the proceedings such interim relief as could be granted in an action begun by writ.

every such notice must specify the grounds of the appeal and the precise form of the order which the appellant proposes to ask the Court of Appeal to make.

(3) Except with the leave of the Court of Appeal or a single judge, the appellant shall not be entitled on the hearing of an appeal to rely on any grounds of appeal, or to apply for any relief, not specified in the notice of appeal.

(L.N. 404 of 1991)

(5) A notice of appeal must be served on all parties to the proceedings in the court below who are directly affected by the appeal; and, subject to rule 8, it shall not be necessary to serve the notice on parties not so affected.

(6) No notice of appeal shall be given by a respondent in a case to which rule 6(1) relates.

## NOTES

### [59.3.1] Rule 3(1) – appeal by way of rehearing

Order 59 rule 3(1) provides that an appeal shall be by way of ‘rehearing’. This means that the Court of Appeal will consider the evidence and submissions. In this respect the procedure in Hong Kong is the same as that which applied in England before the introduction of CPR 52.11. Under that provision, in England an appeal is now usually a ‘review’ rather than a rehearing, and the Court of Appeal may only interfere with the decision below in relatively limited circumstances. Hong Kong decided against adopting the current English position (Chief Justice’s working party on civil justice reform, final report, recommendation 121).

So far as the evidence is concerned the Court of Appeal does not rehear the witnesses, rather in the case of an appeal on a question of fact it considers the evidence in writing. See *Hongkong and Shanghai Banking Corp v Chan Yiu-wah & Anor* [1988] 1 HKLR 457 (CA) at 475B–C per Fuad JA, citing with approval the following passage from the speech of Viscount Sankey in *Powell v Streatam Maror Nursing Home* [1935] AC 243:

It is perfectly true that an appeal is by way of rehearing, but it must not be forgotten that the Court of Appeal does not rehear the witnesses. It only reads the evidence and rehears the counsel.

In *Tang Kwok Ming v Daxprofit Scaffolding Ltd* [1999] 1 HKC 657 (CA) Godfrey JA reiterated the law in the following words, at 663D–F:

The approach of an appellate court to appeals on fact is well-established. An appeal to this court is by way of re-hearing. Accordingly, it is the duty of this court to re-consider all the materials before the judge, to make up its own mind, not disregarding the judgment below but carefully weighing and considering it, not shrinking from overruling it, if on full consideration it comes to the conclusion that the trial judge’s finding was wrong. But that does not mean that this court will re-try the case. The re-hearing is a rehearing on the papers.

As a consequence of the fact that an appeal is a rehearing, the Court of Appeal does not confine itself to the question whether the court below came to the correct decision on the basis of the material it had before it. The Court of Appeal has power to admit further evidence (Order 59 rule 10(2)) even of facts occurring after the decision under appeal. An appellate court will also give effect to intervening changes of the law: *Quilter v Mapleson* (1882) 9 QBD 672; *Lau Kong Yung (an infant) v Director of*

*Immigration* [1999] 4 HKC 731 (CFA). An intervening development of the common law material to the particular case will be applied by the appellate court on the basis of the declaratory theory whereby decisions of the court are said to declare the common law as it has always been. Legislative amendments are not normally retrospective, but if so they will, if material, be applied by the appellate court.

### [59.3.2] Notice of appeal

An appeal to the Court of Appeal is brought by serving and filing a notice of appeal in accordance with the subsequent rules of this Order. The notice of appeal is a form of notice of motion: rule 3(1).

Rule 3(2) provides that a notice of appeal may be against the whole or part of the judgment or order below.

Rule 3(2) goes on to require that the notice specify (1) the grounds of the appeal, and (2) the precise form of order which the appellant proposes to ask the Court of Appeal to make. The first of those requirements was the subject of judicial comment in *Leung Kin Hung v Cheng Mui* [1982] HKLR 383, 384; [1982] HKCU 40 (CA). There grounds stating merely that the trial judge ‘erred in law’ in holding as he did were deprecated for failing to give ‘any indication as to how it is suggested that the judge did err or what the questions of law would be for consideration’.

Separate notices of appeal are not required to appeal against separate orders or judgments made at separate hearings in the proceedings below: *Lehman & Co Management Ltd v Efficient Ltd & Anor* CACV 272/2011 (Kwan, Chu & Barma JJA; 13.03.2013); [2013] HKCU 576. In that case it was held (para 2–3) that commentary to the contrary in another work should not be followed. In *Re Wing Fai Construction Co Ltd* CACV 244/2004 (Yeung JA; 06.10.2005) the appellant was granted leave to amend its notice of appeal so as to add a challenge to a subsequent costs order, rather than bringing a separate appeal.

The parties to an appeal should be described in the notice of appeal in the same way as they were described below, eg plaintiff and defendant, without adding descriptions such as appellant and respondent: PD 4.1, para 16.

### [59.3.3] Failure to obtain leave to appeal where required

Failure to obtain leave to appeal, where required, deprives the Court of Appeal of jurisdiction with the result that the appeal cannot be entertained: *A Solicitor v Law Society of Hong Kong* [1995] 1 HKC 834. Even service of a notice of appeal is not valid unless leave to appeal has been granted: *Kwan Chui Kwok Ying & Anor v Tao Wai Chun & Ors* CACV 296/2006 (Cheung & Yeung JJA, Chung J; 09.05.2008) (para 7). See also the Australian case of *Permanent Custodians Ltd v Palmer* [2009] VSCA 80 (24.04.2009) where it was said that a purported appeal was ‘incompetent’ for failure to obtain leave to appeal, notwithstanding advice from the registry staff which the appellant had allegedly received.

If it is not possible to obtain leave within the time prescribed for service of the notice of appeal, the court should be sympathetic to an application for an extension of time, as in *Re Wing Fung Construction (HK) Ltd* [2006] 1 HKC 72.

It has been held in England that the irregularity of failure to obtain leave to appeal may be waived by the opposing party applying for security for costs of the appeal: *Knighthood Assurance Consultants Ltd v Meacher* (1976) 120 SJ 117 (CA).

the jurisdiction may be invoked for breach of duty in conduct of a case, it should be confined to matters such as:

[f]ailures to appear, conduct which leads to an otherwise avoidable step or prolongation of a hearing by gross repetition or extreme slowness in the presentation of evidence or argument.

In *Harley Lord Hope* went on to say (at 704C–D) that issues about duties owed to the client and the conduct of the case outside the courtroom are ‘unlikely’ to be appropriate to be determined under the summary jurisdiction. Instead, in such cases, a complaint to a professional body, or a separate action, should be considered. In *Lam Rogerio Sou Fung v Ku Ling Yu John t/a John Ku & Co* HCMP 1916/2007 (Deputy Judge Carlson; 03.08.2011) the court allowed an appeal against a master’s decision on a wasted costs application on the ground that the dispute was not appropriate for summary disposal. The hearing before the master had taken two days. The judge observed that the applicant, who was claiming wasted costs against his own former solicitor, could bring an action against his solicitor and/or counsel in negligence (para 33).

### [62.8A.3] Procedure in making application for wasted costs order

Observations as to the procedure which should be followed on an application for a wasted costs order were made by the Chief Justice in *Ma So So Josephine v Chin Yuk Lun Francis & Anor* [2004] 3 HKLRD 294 (CFA). That predates the amendments allowing the court to make a costs order against counsel. Nevertheless, it is likely to be relevant to the new power which came into effect in 2009. See para 3 of practice direction 14.5, which was amended with effect from the same date so to state.

The following procedural points made in *Ma So So* are noteworthy:

- The application should usually be dealt with at the conclusion of the proceedings. This is to avoid any risk of disruption of the proceedings and intimidation (para 19) [now see rule 8A(4) and, as to avoiding intimidation, see rule 8C].
- The application should usually be heard by the judge who dealt with the proceedings (para 19) [now see rule 8A(5)].
- The solicitor [or counsel] should be informed of the conduct complained of, how such conduct caused costs to be incurred or wasted and all other circumstances relied on (para 21) [now see rule 8B(3)].
- Elaborate pleadings should be avoided; likewise the formal process of discovery (para 21) [now see rule 8(5)].

Practice direction 14.5, which took effect on 2 April 2009 along with the new rules 8–8E, contains additional guidance as to the procedure to be followed in making a wasted costs application. The following points are of note:

- Para 14 – although the application may be made orally at a hearing, it should normally be made by *inter partes* summons in the proceedings in which wasted costs are alleged to have been incurred.
- Para 15 – by rule 8A(3) the summons must be served on the legal representative against whom the order is sought and any person represented by that legal representative, as well as any other person as may be directed by the court.

- Paras 16, 17, 18 – particulars specifying the conduct complained of, and what wasted costs were caused must be given in the application.
- Para 19 – the application should be supported by an affidavit verifying the particulars of the complaint and identifying the evidence or other material relied upon.

The full text of the practice direction can be viewed on the judiciary’s website [www.judiciary.gov.hk](http://www.judiciary.gov.hk), or that of the Hong Kong Legal Information Institute [www.hklii.org](http://www.hklii.org), both of which are accessible by the general public free-of-charge.

### [62.8A.4] Timing of application for wasted costs order

According to paras 4 and 5 of practice direction 14.5 (as amended with effect from 2009, along with the coming into force of the new legislation and rules on wasted costs orders), the court may make a wasted costs order against a legal representative ‘at any time’; however an application by a party, under rule 8A(2), should usually not be made or dealt with until after the relevant proceedings have concluded: rule 8A(4). The reason is to avoid disruption of proceedings and the risk of intimidation. This reflects what was said in para 19 of the CFA’s judgment in *Ma So So Josephine* (above).

### [62.8A.5] Delay in applying for wasted costs order

Delay in applying for a wasted costs order is a factor relevant to the exercise of the court’s discretion at the first stage whether to allow the application to proceed. See *Kwok Chin Wing v Kao, Lee & Yip* HCCW 743/2002 (Kwan J; 18.07.2007), in particular at paras 20–21. In that case the court dismissed an application for a wasted costs order partly on the ground of delay of about 19 months after the conclusion of the proceedings from which it arose. It was said that a late application could place the opposite party in difficulty, as evidence might no longer be available.

As to the stages in which the court will consider making a wasted costs order, see rule 8B.

### 8B. Stages of considering whether to make a wasted costs order (O. 62 r. 8B)

(1) The Court shall consider whether to make a wasted costs order in 2 stages –

- (a) in the first stage, the Court must be satisfied that –
  - (i) it has before it evidence or other material which, if unanswered, would be likely to lead to a wasted costs order being made; and
  - (ii) the wasted costs proceedings are justified notwithstanding the likely costs involved; and
- (b) in the second stage (even if the Court is satisfied under subparagraph (a)), the Court shall consider, after giving the legal representative an opportunity to give reasons why the Court should not make a wasted costs order, whether it is appropriate to make the order in accordance with rule 8.

(2) On an application for a wasted costs order, the Court may proceed to the second stage described in paragraph (1)(b) without first adjourning the hearing if it is satisfied that the legal representative has already had a reasonable

## 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.

## [62.33.2] Review of taxation of costs

Order 62 rules 33, 34 and 35 provide a procedure for review of taxation of costs. Any party dissatisfied with a taxing master's decision on any item in a bill of costs may apply to the master for a review of taxation under rule 33. The review will be conducted before the same taxing master in accordance with rule 34. Thereafter, there may be a further review before a judge under rule 35.

The review procedures should be exhausted before bringing an appeal against the decision of the taxing master: *CFK v LLL* [2003] 3 HKC 190 (CA).

Where a party is dissatisfied with some aspect of a taxation other than a decision to allow or disallow any item in the bill being taxed, for example where a party is dissatisfied with a decision by the taxing master on procedure, an appeal would be appropriate since such a challenge does not come within the review procedure. See *Re Macro (Ipswich) Ltd* [1996] 1 WLR 145 and *R v Taxing Officer ex p Bee-Line Roadways Int'l Ltd* *The Times* (11.02.1982), both cited in *CFK v LLL* [2003] 3 HKC 190, 194D–E (CA).

## [62.33.3] Time for applying for review of taxation

An application to a taxing master for review of a decision on taxation of costs should be made within 14 days after conclusion of the taxation: Order 62 rule 33(2). Extension of time is possible under Order 62 rule 16. Order 62 rule 33(2) provides that in any event an application for review must be made before the signing of the taxing master's certificate dealing finally with any objected item but the certificate may be set aside under rule 16(1)(b) so as to extend time. See *A Solicitor v Law Society of HK* [2007] 4 HKC 165. However, if the paying party has had the opportunity to argue his objections in the taxation hearing, he has to establish a strong reason' before an extension would be granted after issuance of the allocator: *Li Han Ji v Registrar HK Institute of CPAs* [2013] HKCU 2331 (CACV 265/2009; Deputy Judge Lok; 07.10.2013) (para 18).

## [62.33.4] Form of application for review of taxation

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

## [62.33.5] Contents of application for review of taxation

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

limits this Admiralty jurisdiction *in personam*, in certain factual scenarios, to cases where there is a specified connection with Hong Kong. Order 75 rule 3(2) provides that an Admiralty action *in personam* shall be commenced by writ in the same form as that used for general civil actions (form No. 1 in Appendix A).

#### [75.3.11] Acknowledgement of service of writ in rem

Order 75 rule 3(5) prescribes a special form of acknowledgement of service for an action *in rem* or limitation action (form No. 2B in Appendix B).

#### [75.3.12] Only registered owner may acknowledge service of writ in rem

For the purposes of a writ *in rem* against the owner of a ship, 'owner' is taken to mean the registered owner save in the most unusual circumstances. It follows that only the registered owner may properly acknowledge service. See *The Tian Xiang 2 Hao* HCAJ 322/2001 (Reyes J; 08.10.2003) where an acknowledgement of service filed on behalf of a party claiming to be beneficial owner was set aside. Citing *The Able Lieutenant* [2002] 6 MLJ 433 it was held that the proper course for the party claiming beneficial ownership was to apply under Order 75 rule 17 for leave to intervene in the action.

#### [75.3.13] Acknowledgement of unserved writ in rem

Order 75 rule 3(6) permits a defendant to acknowledge issue of a writ which has not yet been served. This enables the defendant to make a 'pre-emptive strike': *The Tuyuti* [1984] 2 Lloyd's Rep 51, 53 (CA). In that case the defendant shipowners acknowledged issue of the writ so as to enable them to make an application for a stay of proceedings. Although the stay was granted the associated warrant of arrest was allowed to stand.

In *The Pacific Bear* [1979] HKLR 125 the court considered whether a defendant could abuse this rule to avoid arrest in a case where a writ is issued in respect of more than one ship. Cons J said, at 129:

Furthermore by judicious choice of ships a defendant might be able to emasculate the new found remedy of the plaintiffs [ie arrest of sister ships]. Only one ship may be arrested. The defendant would enter appearance for that one of his ships least likely to call within the jurisdiction, and the others could then continue to call with impunity. To my mind that cannot be right. The Act gives the choice to the plaintiff. It must be the fact of arrest, or similar action, and not the fact of service, which demonstrates the exercise of that choice.

#### [75.3.14] Duration and renewal of writ in rem

See the commentary under Order 75 rule 8.

#### [75.3.15] Amendment of Admiralty writ

An Admiralty writ may be amended like a writ commencing an ordinary action. As noted in the commentary under Order 20 rule 5, special considerations arise where it is sought to amend so as to introduce a new cause of action which has become statute barred. In *The Almerinda* [2002] 1 HKC 75 the Court of Final Appeal refused leave to appeal against a decision allowing amendment of an Admiralty writ after expiration of the 12-month period prescribed by art III rule 6 of the Hague-Visby Rules. The CFA, at 79H-I agreed with the view of the Court of Appeal that the rule 'did not

operate so as to impose a time-bar against subsequent amendments to add further grounds of liability, whether in the shape of new causes of action' or otherwise.

#### 4. Service of writ out of jurisdiction (O. 75 r. 4)

(1) Subject to the following provisions of this rule, service out of the jurisdiction of a writ containing any claim for damage, loss of life or personal injury arising out of a collision between ships or the carrying out of or omission to carry out a manoeuvre in the case of one or more of two or more ships or non-compliance on the part of one or more of two or more ships with the collision regulations, every limitation action and every action to enforce a claim under section 6 or 25 of the Merchant Shipping (Liability and Compensation for Oil Pollution) Ordinance (Cap. 414) or section 5 of the Bunker Oil Pollution (Liability and Compensation) Ordinance (Cap. 605) is permissible with the leave of the Court if, but only if – (L.N. 363 of 1990, 14 of 2009 s 36)

- (a) the defendant has his habitual residence or a place of business in Hong Kong; or
- (b) the cause of action arose within the territorial waters of Hong Kong; or
- (c) an action arising out of the same incident or series of incidents is proceeding in the Court or has been heard and determined in the Court; or
- (d) the defendant has submitted or agreed to submit to the jurisdiction of the Court.

(2) Order 11, rule 4(1), (2) and (4), shall apply in relation to an application for the grant of leave under this rule as it applies in relation to an application for the grant of leave under rule 1 of that Order.

(L.N. 152 of 2008)

(3) Paragraph (1) shall not apply to an action in rem.

(4) The proviso to rule 7(1) of Order 6 and Order 11, rule 1(2), shall not apply to a writ by which any Admiralty action is begun.

#### NOTES

##### [75.4.1] Service outside Hong Kong of Admiralty writ in personam

Order 75 rule 4 empowers the court to grant leave to serve an Admiralty writ *in personam* out of Hong Kong in certain factual scenarios. This fills the gap created by Order 11 rule 1(4) (by which the general power under Order 11 rule 1 to grant leave to serve *ex juris* does not apply in more or less the same factual scenarios).

Broadly speaking the factual scenarios catered for by rule 4 are:

- Claims arising out of a collision between ships, failure to carry out a manoeuvre or non-compliance with collision regulations;
- Limitation actions (defined in rule 1);
- Claims under the Merchant Shipping (Liability and Compensation for Oil Pollution) Ordinance (Cap 414).