

## ORDER 1A

## OBJECTIVES

## 1. Underlying objectives (O. 1A r. 1)

The underlying objectives of these rules are –

- (a) to increase the cost-effectiveness of any practice and procedure to be followed in relation to proceedings before the Court;
- (b) to ensure that a case is dealt with as expeditiously as is reasonably practicable;
- (c) to promote a sense of reasonable proportion and procedural economy in the conduct of proceedings;
- (d) to ensure fairness between the parties;
- (e) to facilitate settlement of disputes; and
- (f) to ensure that the resources of the Court are distributed fairly.

(L.N. 152 of 2008)

## NOTES

## [1A.1.1] Introduction of the 'underlying' objectives

Order 1A rule 1 sets out the 'underlying' objectives of the Rules of the High Court. It took effect in 2009 when the recommendations of the Chief Justice's working party on civil justice reform were implemented.

## [1A.1.2] Origin and scope of the underlying objectives in Order 1A

The underlying objectives set out in Order 1A rule 1 are a modified version of the 'overriding' objective set out in CPR 1.1 in England. In Hong Kong the working party's final report (paras 95–100) recommended the word 'underlying' instead of 'overriding'. This was done in light of experience in England where, in the words of the final report (para 97(d)), 'over-reliance on the overriding objective has sometimes led to absurd results'. The final report continues (at para 98):

The trap into which the misguided are likely to be led would involve regarding the overriding objective as providing all the answers and, because of its 'overriding' character, as permitting specific procedural provisions to be ignored or given insufficient weight. This would be a fundamental error since such rules will in many cases have been refined over the years to deal fairly with the specific procedural issues to hand.

As a consequence, the final report recommended (at para 100) against the new rule having an 'overriding' character, 'to avoid encouraging over-elaborate and misguided reliance placed on it'. Instead, the final report recommended that:

It should be made clear that such a rule merely makes explicit what are implicit objectives which 'underlie' specific rules of the RHC, supporting the internal logic of such rules. Such specific rules should accordingly continue to demand intelligent application informed, but not overridden, by the underlying principles.

The English rule lays down the single objective of 'enabling the court to deal with cases justly'. That phrase does not appear in the Hong Kong rule, but Order 1A rule

2(2) is arguably to a similar effect. The English rule then elaborates the single objective with a list of factors included in 'dealing with a case justly'. Hong Kong's rule lists 'objectives' in the plural, which are similar to the factors by which the English single objective is elaborated. Despite the differences in wording, the overall thrust of the two is similar.

## [1A.1.3] The individual objectives

The wording and arrangement of the underlying objectives set out in rule 1 are different from the overriding objectives in CPR 1.1. Although the overall thrust appears to be broadly similar, the Hong Kong rules are couched in more moderate terms.

We now turn to look at Hong Kong's underlying objectives one by one.

## [1A.1.4] Objective (a) – cost-effectiveness

Order 1A rule 1(a) states the objective of increasing the 'cost-effectiveness' of any practice and procedure to be followed in the court. This must mean that the court, when exercising its powers with regard to procedural matters, should bear in mind cost implications. It is obviously desirable that the just resolution of civil disputes should be obtainable as cheaply as possible.

This objective closely resembles CPR 1.1(2)(b), which is simply 'saving expense'. The Civil Court Practice, our sister publication in the UK, has the following commentary on that provision of the CPR (at para CPR 1.1[4]):

**Saving expense** In *Little v George Little Sebire & Co* [1999] The Times, 17 November, it was held that the power to award indemnity costs and enhanced interest under the former CPR 36.21 (now CPR 36.14(3)) (where a reasonable offer had been rejected) [in Hong Kong see O 22 r 23 & 24] should be exercised so as to concentrate the minds of the parties on offers to settle and thereby to save expense. Active case management, including the power to dispose of claims or issues summarily is to be implemented with a view to saving expense: see *Swain v Hillman* [2001] 1 All ER 91 (CA) [and see Order 1A rule 4 in Hong Kong]. However, the provisions of CPR 1 cannot be invoked so as to require a claimant to include claims he does not wish to raise, or to increase the quantum of his claim: *Khaiban v Beard* [2002] EWCA Civ 358; [2003] 3 All ER 362. It is incumbent on practitioners appearing in any court to take all steps they can in accordance with CPR 1.1 and CPR 1.3 [in Hong Kong Order 1A rules 1 & 3] to reduce the costs of proceedings and such steps include the use of video conferencing: *Pastouna v Black* [2005] EWCA Civ 1389, [2005] NLJR 1847.

As to when evidence may be taken by video-link in Hong Kong, see the commentary under Order 39 rule 1.

In *Ip Tsz Lam Ada v Pearl Wisdom Ltd* HCA 2482/2007 (Sakhrani J; 30.04.2009); [2009] HKCU 678, the court referred to this objective, and objective (c) (reasonable proportion and procedural economy) on a summary assessment of the costs of an amendment application. It found the claim for more \$600,000 was 'both unreasonable and disproportionate', and allowed less than \$100,000.

## [1A.1.5] Objective (b) – expeditiousness

Order 1A rule 1(b) states the objective 'to ensure that a case is dealt with as expeditiously as is reasonably practicable'. This must mean that the court should, in exercising its powers, strive to avoid unnecessary delay in the resolution of civil disputes.

This objective closely resembles CPR 1.1(2)(d), which is 'ensuring that [a case]

is dealt with expeditiously and fairly'. The following commentary on the English objective is taken from our sister publication in the UK, The Civil Court Practice (para CPR 1.1 [6]):

**Expedition and fairness** Applications for permission [in Hong Kong the term 'leave' is retained instead of 'permission' used in the CPR] to amend often raise particular difficulties. In *Cobbold v Greenwich LBC* (09.08.1999, unreported) [accessible on the BAILII website as [1999] EWCA Civ 2074] Peter Gibson LJ said that an amendment should generally be allowed to 'permit the real dispute between the parties to be adjudicated', provided that 'the public interest in the effective administration of justice is not significantly harmed'. However, it may well normally be right to refuse permission to amend when the application is made during trial and would result in the adjournment of the trial and a re-hearing, even where the party seeking the amendment is prepared to bear all the costs thrown away: see *Worldwide Corp Ltd v GPT Ltd* [1998] All ER (D) 667 (CA). When granting permission [leave] to amend, it may be right to impose conditions which would reduce or limit the cost or delay implications of the amendment: see *Southern & Eastern District Finance plc v Turner* [2003] EWCA Civ 1574, [2003] All ER (D) 112 (Nov), at para 34.

Although the above commentary focuses on the court's power to grant leave to amend, it is clear that the expeditiousness objective should apply broadly. Its essence is the resolution of disputes without avoidable delay. Thus in *Interasia Bag Manufacturers Ltd v Commissioner of Inland Revenue* [2009] 5 HKLRD 818 the court took this objective into account in striking out an appeal for want of prosecution.

The expeditiousness objective is furthered by the court's power to fix case management timetables which are generally expected to be complied with. See Order 25 rule 1B and the commentary thereunder.

**[1A.1.6] Objective (c) – reasonable proportion and procedural economy** Objective (c) seeks to 'promote a sense of reasonable proportion and procedural economy in the conduct of proceedings'. It is a modified version of CPR 1.1 (2)(c) which mandates the English court to deal with cases in ways which are proportionate to (i) the amount of money involved, (ii) the importance of the case, (iii) the complexity of the issues, and (iv) the financial position of each party. The specificity of the English provision was deliberately avoided in Hong Kong. The Chief Justice's working party recommended (para 106 of its final report) that the Hong Kong provision 'should try to avoid spawning minute analysis and argument', and 'should instead be a reminder that commonsense notions of reasonableness and a sense of proportion should inform the exercise of a judicial discretion in the procedural context'.

The Chief Justice's working party said (final report, para 103, referring to the UK publication *Civil Procedure 2003*) that proportionality requires:

- (a) litigation costs to bear a reasonably proportionate relationship with the amount at stake in the dispute;
- (b) procedures to be appropriately matched to the case, that is, ensuring that elaborate procedures (which may be appropriate for big and complex cases) are not used unnecessarily in ordinary cases;
- (c) applications for drastic forms of relief, such as *Anton Piller* orders or orders for committal for contempt, to be avoided where such relief would be disproportionate in the circumstances;
- (d) procedural sanctions and orders to be issued in a manner proportionate to

the requirements of procedural and substantive justice, for instance, not striking out the entire claim when a lesser sanction would suffice, and not ordering extensive particulars or further discovery where the benefits are likely to be slight and would not justify the expense and effort involved;

- (e) cases to be instituted in the correct tribunal, avoiding the High Court where the simpler procedures of a lower court or tribunal would suffice; and
- (f) procedural orders to be made which are proportionate to the financial position of each party ...

As to what the concept entails, in *Szeto v Dwyer* [2010] NLCA 36 (CanLII), the Newfoundland Court of Appeal said (para 54) that proportionality 'means dealing with a proceeding in ways such that the time and the types of processes involved as well as the expense and convenience of the parties are proportionate to factors such as: the nature of the issues engaged; the amount of money involved; the time reasonably necessary to resolve the issue; the complexity of the issues and the overall cost of the litigation that can be reasonably expected.'

The Chief Justice's working party noted (at para 105) that some elements of the proportionality concept were already found in the rules prior to the civil justice reforms. Specific mention is made of the requirement in relation to discovery (Order 24 rule 8) and interrogatories (Order 26 rule 1) that an order not be made unless necessary for disposing fairly of the case, or for saving costs; and the stipulation in Order 38 rule 2A(1) that the court's power to order exchange of witness statements shall be exercised for the purpose of fair and expeditious disposal of the case, and saving costs, having regard to all the circumstances. Order 1A rule 1(c) now makes it clear that proportionality underlies the rules as a whole.

Proportionality will be of particular relevance when the court exercises a discretion. Our sister publication in the UK, The Civil Court Practice gives the following examples (at para CPR 1.1[5]):

- Amendment: *McPhilemy v Times Newspapers Ltd* [1999] 3 All ER 775
- Assessment of costs: *Lownds v Home Office* [2002] EWCA Civ 365
- Leave to appeal: *Pigłowska v Pigłowska* [1999] 3 All ER 632, 644–5 (HL)

Examples from Hong Kong include:

- *Ma Hoi Ki v Li Chi Chuen & Anor* [2009] 2 HKC 488 (para 18): proportionality would militate against allowing counsel's fee for advising on settlement in straightforward low quantum proceedings.
- *Ip Tsz Lam Ada v Pearl Wisdom Ltd* HCA 2482/2007 (Sakhrani J; 30.04.2009); [2009] HKCU 678: a claim for more than \$600,000 for an amendment application was said to be 'both unreasonable and disproportionate', and was reduced to less than \$100,000.

Examples from other jurisdictions include:

- *London Enterprises Ltd v Smith* [2010] BCSC 1666 (CanLII): an application for pre-trial disclosure of the identity of the 11,000 'Names' who were personally liable under a Lloyd's insurance syndicate was refused as disproportionate, considering the time, effort, complexity and possible cost.

**[1A.1.7] Objective (d) – fairness between the parties**

The objective in Hong Kong is to ensure ‘fairness’ between the parties, whereas in England’s CPR 1.1(2)(a) the court is enjoined to ensure that the parties are on an ‘equal footing’. The Chief Justice’s working party on civil justice reform recommended the objective of ‘greater equality between parties’ (final report, para 99) but the wording was changed to ‘fairness’ when Order 1A was made by the rules committee. In England the ‘fairness’ objective is coupled with that of ‘expeditiousness’, as to which see above. ‘Fairness’ appears to be broader than ‘equality’, though clearly equality is a part of fairness.

The Civil Court Practice, our sister publication in the UK, says of the English ‘equal footing’ provision (at para CPR 1.1[3]):

**Equal footing** The right of a litigant to be represented by the solicitors or advocates of his or her choice is fundamental and well-established, and that right is not removed by the “level playing field” or the requirement of proportionality in CPR 1.1(2) [in Hong Kong Order 1A rule 1(c)]: *Maltez v Lewis* [1999] 21 LS Gaz R 39 ChD. However, CPR 1.1(2)(a) [in Hong Kong Order 1A rule 1(d)] may be invoked on the issue of costs, both at the assessment [taxation] stage – see *R on the application of Wolfsohn v Legal Services Commission* [2002] EWCA Civ 250, [2002] All ER (D) 120 (Feb) – and in relation to an application for a costs order – *R (CPRE) v Hammersmith and Fulham London Borough Council* [1999] Times, 26 Oct. The equal footing provision may also be invoked in relation to an application for permission [leave] to amend: see *Woods v Chaleff* [2002] NJLR 1276.

The denial of legal assistance to a person who needs to be represented in proceedings may in some circumstances involve a breach of human rights under Article 6 [of the European Convention on Human Rights].\*But the mere fact that one party has legal representation which the other cannot afford does not by itself entitle the lay litigant to legal aid in order to achieve equality of arms. A judge should not cease hearing a case, or application, where a party appearing in person has asserted that judges in general, including those listed to hear his case, were likely to favour submissions by members of the legal profession over those of a lay litigant. Nor should such an assertion by itself justify the court in urging the Legal Services Commission [Legal Aid Department in Hong Kong] to grant legal aid. Both points were made by the Court of Appeal in *Triodos Bank NV v Dobbs* [2005] EWCA Civ 630 [2005] Times, 11 May.

\* The Civil Court Practice here refers readers to the following commentary elsewhere in the work (III HUM [28.2A]), on the European Convention, which may be relevant in Hong Kong under the Basic Law and the Bill of Rights:

**Legal assistance in the determination of civil rights and obligations** The provision of free legal assistance may sometimes be required because of the complexity of the procedure or the case: *Airey v Ireland (Application 6289/73)* [1979] 2 EHRR 305, followed in *P C & S v United Kingdom (Application 56547/00)* [2002] 3 FCR 1 [2002] Times 16 Aug ECHR, a freeing for adoption case. A denial of free legal assistance in the defence of libel proceedings is not necessarily a breach of Articles 6 or 10: *McVicar v United Kingdom (Application 46311/99)* [2002] NLJR 759, ECHR. A litigant who wishes to establish that without legal aid his right to effective justice would be

violated has a relatively high threshold to cross: *Perrotti v Collyer-Bristow (a firm)* [2003] EWCA Civ 1521, [2004] 2 All ER 189.

The denial of legal aid to the defendants in a substantial libel case has been held to contravene the requirements of fairness in Article 6.1: *Steel v United Kingdom (Application No 64816/01)* [2005] Times, 16 Feb, ECHR.

In England, a party who wishes to rely on ‘equal footing’ as a ground for the court to restrain another party in the conduct of the litigation, should demonstrate that it is conducting the proceedings in a manner conducive to limiting expense as far as practicable: *McPhilemy v Times Newspapers* [1999] 3 All ER 775 (CA). The same should be true with regard to the objective of ‘fairness’ in Hong Kong.

In *Ma Hoi Ki v Li Chi Chuen & Anor* [2009] 2 HKC 488 (para 18) this objective was cited in *obiter dicta* to the effect that the court might refuse to allow counsel’s fee for advising on settlement in straightforward low quantum proceedings in the District Court involving a party under disability and thus requiring approval of the court under Order 80. The court said (at para 14) that on implementation of the civil justice reforms, it must be vigilant to ensure that costs incurred by parties are reasonable and proportionate ‘not only from the perspective of the person under disability but also from an *inter partes* perspective’.

**[1A.1.8] Objective (e) – facilitate settlement**

Objective (e), to facilitate settlement of disputes, does not have a direct equivalent in CPR 1.1. However, there is something similar in CPR 1.4 which deals with the court’s duty of active case management. That has been replicated in Hong Kong’s Order 1A, rule 4(2)(f). See the commentary thereunder.

The rules have always had the objective of encouraging settlement. The costs sanction normally imposed on the losing party is a good example, being a strong incentive to settle. This objective requires more – settlement should not only be encouraged, but facilitated. Thus on an application for discovery or interrogatories (or any other type of interlocutory order) the court should now take into account whether the order sought might facilitate settlement, by clarifying issues or otherwise.

**[1A.1.9] Objective (f) – fair distribution of court resources**

Objective (f), that the resources of the court shall be distributed fairly, closely resembles CPR 1.1(2)(e) which gives the English court the task of ‘allotting to [a case] an appropriate share of the court’s resources, while taking into account the need to allot resources to other cases’. By this objective the court should take into account not only the needs of the particular case, but those of others which are waiting to be heard. The civil courts are a public dispute resolution service available to everyone and this objective makes clear that litigants with large budgets cannot necessarily expect to be allowed whatever court time they can afford. However, there will continue to be ‘big’ cases calling out for a greater share of court resources than most, and the proportionality objective in rule 1(c) should be taken into account along with fair distribution in rule 1(f) when considering whether they should be allotted such a share.

The Civil Court Practice, our sister publication in the UK, says (at para CPR 1.1[7]) of the equivalent English provision:

**Allotting an appropriate share of the court’s resources** In *SBJ Stephenson Ltd v Mandy* [1999] The Times, 21 July, the Court of Appeal said that it would not be a good use of the court’s resources to explore the merits of an appeal against an interlocutory injunction when the trial date was less than a month

away, and the claimant had given a cross-undertaking in damages. In *Arbuthnot Lathan Bank Ltd v Trafalgar Holdings Ltd* [1997] The Times, 29 December; [1998] 1 WLR 1426 (CA) Lord Woolf MR explained that delay or disruption resulting from a proposed course would be assessed not solely by reference to the effect on the parties, but also by reference to other litigants.

## 2. Application by the Court of underlying objectives (O. 1A r. 2)

(1) The Court shall seek to give effect to the underlying objectives of these rules when it –

- (a) exercises any of its powers (whether under its inherent jurisdiction or given to it by these rules or otherwise); or
- (b) interprets any of these rules or a practice direction.

(2) In giving effect to the underlying objectives of these rules, the Court shall always recognize that the primary aim in exercising the powers of the Court is to secure the just resolution of disputes in accordance with the substantive rights of the parties.

(L.N. 152 of 2008)

### NOTES

#### [1A.2.1] Origin and scope of Order 1A rule 2

Order 1A rule 2(1) derives from CPR 1.2 which likewise provides that the court must give effect to the underlying [in England ‘overriding’] objectives when it exercises its powers or interprets the rules. Unlike the Hong Kong rule, the English equivalent is expressly subject to CPR 76.2 which provides for modification of the overriding objective in proceedings under the Prevention of Terrorism Act 2005.

#### [1A.2.2] When does the court apply the underlying objectives?

The underlying objectives apply to all proceedings, whether commenced before or after the civil justice reforms came into force on 2 April 2009: *Liquidator of Wing Fai Construction Co Ltd v Yip Kwong Robert & Ors* [2011] 6 HKC 432, [2012] 1 HKLRD 589, (2011) 14 HKCFAR 935 (FACV 3/2011; 08.12.2011) (CFA). However, when evaluating the conduct of a party, such as delay in proceedings, the court does not disregard the circumstances and statutory structure in place at the relevant time: *Wing Fai* (para 29). See also *Nanjing Iron & Steel Group Int’l Trade Co Ltd & Ors v STX Pan Ocean Co Ltd & Anor* HCAJ 177/2006 (Reyes J; 07.09.2009) (para 14) and *Interasia Bag Manufacturers Ltd v Commissioner of Inland Revenue* [2009] 5 HKLRD 818 (CA).

Applications to the Court of Appeal for leave to appeal to the CFA may, ‘in the spirit of Order 1A’, be dealt with on paper, with the parties’ agreement: *Luck Continent Ltd v Cheng Chee Tock Theodore & Ors* CACV 107/2012 (Stock & Lam VPP, Lunn JA; 27.01.2014).

#### [1A.2.3] Rule 2(2) – primacy of just resolution and rights of the parties

Order 1A rule 2(2) states that the underlying objectives should be given effect by the court bearing in mind that the ‘primary aim’ is just resolution of disputes in accordance with the rights of the parties. Inclusion of this provision was recommended by the Chief Justice’s working party on civil justice reform (final report, recommendation

3) in response to concerns that ‘the new methodology might divert the court from deciding cases in accordance with their substantive merits’ (final report, para 89(a)).

It is arguable that this provision has a similar effect to the English overriding objective of enabling the court to deal with cases justly. See the commentary under Order 1A rule 1.

## 3. Duty of the parties and their legal representatives (O. 1A r. 3)

The parties to any proceedings and their legal representatives shall assist the Court to further the underlying objectives of these rules.

(L.N. 152 of 2008)

### NOTES

#### [1A.3.1] Duty to assist the court

Order 1A rule 3 imposes a duty on the parties to assist the court in furthering the underlying objectives. It derives from CPR 1.3, but is broader in that it expressly extends to the parties’ legal representatives. The following points are taken from the commentary on the duty to assist the court as set out in our sister publication in the UK, *The Civil Court Practice* (at paras CPR 1.3[1] & [2]) :

**The duty of the parties** The duty plainly extends to the legal advisors and legal representatives of the parties: see *Geveran Trading Co Ltd v Skjevesland* [2002] EWCA Civ 1567, [2003] 1 All ER 1 (para 37). The duty of the parties extends to co-operating with each other and with the court in relation to fixing the trial date. Further, where the dates upon which an expert witness will be available are given to the court, a party should indicate which dates are merely inconvenient, and which dates are effectively impossible *eg* because the expert is committed to give evidence in another matter: *Matthews v Tarmac Bricks & Tiles Ltd* [1999] All ER (D) 692 (CA). CPR 1.3 also requires a publicly funded litigant to honour his obligations to the Legal Services Commission [Legal Aid Department in Hong Kong] so far as they relate to the continuation of his certificate: *R (Murray) v Hampshire CC (No 2)* [2003] EWCA Civ 760.

Similarly, parties must cooperate in explaining any procedural points which they intend to take: where one party warned the other that it would oppose an application (by reason of a failure to comply with the rules) but refused to identify the basis on which there had been non-compliance (the contention being a failure to comply with the requirements of CPR 36 in respect of a Part 36 offer [in HK see O 22]), the court rejected the undisclosed and technical objection on the ground that the objecting party should not be allowed to reap any benefit from non-cooperation in breach of CPR 1.3 and CPR 1.4 [Order 1A rules 3 & 4]: *Hertsmere Primary Care Trust v Estate of Babindra-Anandh* [2005] EWHC 320 (Ch), [2005] 3 All ER 274.

In complex cases ‘the advocates who are expected to be instructed to appear at the trial should attend case management conferences or pre-trial reviews before the judge so that they can discuss with him in a collaborative manner ways in which the conduct of the trial might be made less burdensome if the issues are handled in a particular way’: *Morris v Bank of America National Trust & Savings Ass’n* [2000] 1 All ER 954 (CA) (para 52).

It is incumbent on practitioners appearing in any court to take all steps they can in accordance with CPR 1.1 and CPR 1.3 [in Hong Kong Order 1A rule 1 and 3] to reduce the costs of proceedings and such steps include the use of video conferencing: *Pastouna v Black* [2005] EWCA Civ 1389, [2005] NLJR 1847.

As to when evidence may be taken by video-link in Hong Kong, see the commentary under Order 39 rule 1. The above passage continues:

**Duty to keep the court informed of likely settlement or adjournment** The parties must inform the court immediately when a case or application has been settled, or is unlikely to proceed. Otherwise there is a risk of serious waste of resources, including waste of judicial time, and the possible harm to other parties of getting their application or case heard: see *Tasyurdu v Immigration Appeal Tribunal* [2003] EWCA Civ 447. Similarly, where judgment has been reserved by the court, the parties must inform the court as soon as they become aware of any development which might make it unnecessary for judgment to be delivered: *HFC Bank plc v HSBC Bank plc* [2000] 144 Sol Jo LB 182 (CA).

If a case of any complexity, due for hearing on a Monday, settles, or is about to settle, late on Friday, the parties should not wait until Monday to inform the court, but should try and pass the information on by whatever means may be available. In particular they should take advantage of the 24 hour telephone service: *Yell Ltd v Garton* [2004] EWCA Civ 87, 80 (Feb).

The duty to inform the court if hearing dates will need revision was recognised in Hong Kong even before this rule came into force. See *Mandecly Ltd & Anor v Hao Wei & Ors* [2005] 2 HKLRD 592, and see the commentary under Order 34 rule 2. In Hong Kong the clerk to the duty judge can be reached outside court hours on mobile telephone number 9137 9005 (High Court) and 9137 9004 (District Court).

### [1A.3.2] Duty to assist court does not require disclosure of unfavourable evidence

The duty of legal representatives to assist the court does not require them to disclose evidence favourable to the other side. The legal representative's duty to the client remains paramount in this regard. See *Khudados v Hayden & Ors* [2007] EWCA Civ 1316 (13.12.2007) where it was argued that the defendant's counsel, appearing to oppose an adjournment application, ought to have disclosed a medical report obtained by their side, which would have substantiated the health grounds relied upon by the unrepresented applicant, who was absent from the hearing. Dismissing this argument, Ward LJ said (at paras 38–9):

The question is to what extent if at all a barrister who must promote and protect fearlessly and by all proper and lawful means his lay client's best interests is bound to disclose *evidence* favourable to the other side. I draw the distinction between *evidence* favourable to the other side and *law* in the form of all relevant decisions and legislative provisions which may be unfavourable towards the contention which he argues. It seems to me that the better view is that a barrister would fail in his duty to his own client were he to supplement the deficiencies in his opponent's evidence. The fact that the other side is a litigant in person cannot make any difference as to the manner in which he fulfils his duties to the client, to the other side and above all to the court. In my judgment, counsel cannot be criticised for failing to disclose the further report.

The learned judge went on specifically to consider whether the duty to assist the court under CPR 1.3 (Order 1A rule 3 in Hong Kong) affected the position stated above. He said:

... it is at most a duty to the court, not to the other side. The duty is to help the court further the overriding objective [‘underlying objectives’ in Hong Kong]. The primary duty to further the overriding objective is imposed on the court itself. It is the court which must dispose of cases justly ... In my judgment fairness does not require counsel to place his own client at a substantial disadvantage by acting contrary to his interests. Whatever may be the requirement to help the court, it cannot in my judgment, extend so far as to impose upon counsel a duty in conflict with his proper duty to his client.

Counsel's duty to lay client is found inter alia in paragraphs 110 and 135 of the Code of Conduct of the Hong Kong Bar Association. The duty to the court to make known relevant law is found in para 136. With regard to solicitor advocates, see chapter 10 of the *Hong Kong Solicitors' Guide to Professional Conduct* vol 1 (2<sup>nd</sup> ed).

### [1A.3.3] Duty to assist the court reinforces duty not to put forward unarguable case

Even in the absence of express provision in the conduct guide, solicitors are under a professional duty ‘(i) not to include in court documents that they drafted any contention which they did not consider to be properly arguable and (ii) not to instruct counsel to advance contentions which they did not consider to be properly arguable’: *Richard Buxton (Solicitors) v Mills-Owens* [2010] EWCA Civ 122, [2010] 1 WLR 1997. There it was held that this duty is ‘reinforced’ by the English equivalent of Order 1A rule 3. As a result, a firm of solicitors was entitled to terminate the retainer of a client who persisted in instructions that they take unarguable points on an appeal.

### [1A.3.4] Breach of duty to assist court – costs consequences

Failure to comply with a direction of the court is breach of the duty to the court under Order 1A rule 3, and may be taken into account on the question of costs under Order 62 rule 5 (conduct): *Islamic Republic of Iran Shipping Lines v Phiniquia Int'l Shipping LLC & Ors* [2015] 1 HKLRD 44, [2014] HKCU 2535 (HCMP 2034/2014; Cheung CJHC & Lam VP; 03.11.2014). In that case, referring to *Mitchell v News Group Newspapers* [2014] 2 All ER 430, [2014] 1 WLR 795 and *Denton v TH White Ltd* [2014] 1 WLR 3926, [2014] EWCA Civ 906, [2014] 4 Costs LR 752 the court observed (para 4) that a global assessment of any such costs would be fair; that it would not be right to adopt a ‘too mechanistic approach’ in case management, and it would be a disproportionate invitation to satellite litigation to enquire into the details of how much additional cost had been incurred.

Failure to inform the court in a timely fashion that a dispute has been rendered academic is a breach of duty to the court, and may result in an order for indemnity costs: *Re CY Foundation Group Ltd* FACV 4/2014 (10.12.2014) (CFA). In that case the Court of Final Appeal ordered indemnity costs against an appellant in a shareholders' dispute for failure to inform the court until the last minute that a change in shareholding had effectively resolved the matter.

## 4. Court's duty to manage cases (O. 1A r. 4)

(1) **The Court shall further the underlying objectives of these rules by actively managing cases.**

(2) **Active case management includes –**

## ORDER 22

## OFFERS TO SETTLE AND PAYMENTS INTO COURT

## I. PRELIMINARY

## 1. Interpretation (O. 22 r. 1)

## (1) In this Order –

“claim” includes, where the context so permits or requires, a counterclaim;

“counterclaim” includes, where the context so permits or requires, a claim;

“defendant” includes, where the context so permits or requires, a defendant to a counterclaim;

“offeree” means the party to whom an offer is made;

“offeror” means the party who makes an offer;

“plaintiff” includes, where the context so permits or requires, a counterclaiming defendant;

“sanctioned offer” means an offer made (otherwise than by way of a payment into court) in accordance with this Order;

“sanctioned payment” means an offer made by way of a payment into court in accordance with this Order;

“sanctioned payment notice” means the notice relating to a sanctioned payment required to be filed under rule 8(2).

## (2) Where in an action the plaintiff makes more than one claim, a reference in this Order to –

- (a) the whole claim is to be construed as a reference to all the claims in their entirety;
- (b) a part of a claim is to be construed as a reference to any one or more of the claims or a part of any one or more of the claims; and
- (c) an issue arising from a claim is to be construed as a reference to an issue arising from one or more of the claims.

(L.N. 152 of 2008)

## NOTES

**[22.1.1] Origin and scope of Order 22**

Order 22 was completely replaced on implementation of the civil justice reforms in 2009. The new Order 22 is based on Part 36 of the English CPR. It provides for sanctioned offers and sanctioned payments whereby parties may seek to settle civil disputes short of full trial. To encourage settlement the Order provides for sanctions

against a party who rejects a sanctioned settlement proposal but fails to achieve a better result by continuing with the proceedings. Those sanctions include costs and interest penalties.

The sanctioned offer provided for in Order 22 is similar to the *Calderbank* offer which was developed by the courts, and latterly expressed in the former Order 22 rule 14. The sanctioned payment is similar to the former procedure whereby a defendant could make a payment into court as an offer of settlement. What distinguishes the new procedures is the enhanced costs and interest sanctions for a party who refuses to settle but does not achieve a better result by continuing the proceedings. See Order 22 rules 23 and 24.

There are some significant differences between Hong Kong's new Order 22 and CPR Part 36. (Note that CPR part 36 was amended in 2007, and Hong Kong's Order 22 appears to have been based on the earlier version.) First, the Hong Kong procedure differentiates between money claims and non-money claims to some extent with the 'sanctioned payment' and 'sanctioned offer' procedures, the latter being applicable to both (see rule 2), whereas in the English rules there is just the 'Part 36 offer' procedure applying to all types of claim. Secondly, a sanctioned payment under the Hong Kong rules requires actual payment into court, rather than a mere offer to pay as in England: see the definition of 'sanctioned payment' in rule 1. The Chief Justice's working party deliberately chose to retain, in Hong Kong, the requirement that a defendant must make an actual payment to qualify for costs protection: see para 303 of the working party's final report. Thirdly, the English procedure applies even before commencement of proceedings (CPR 36.3(2)(a)), whereas the Hong Kong rules expressly preclude this possibility (Order 22 rules 3(3) and 5(6)). At the consultation stage it was proposed that the new Order 22 procedure be applicable at the pre-action stage if so provided by pre-action protocol, but no such provision is found in Order 22.

**[22.1.2] Order 22 rule 1(2) – meaning of 'claim'**

Order 22 rule 1(2) qualifies the definition of 'claim' in rule 1(1) where more than one claim is made. It was added as a result of comments from the Bar Association on an earlier draft of the new Order 22. The civil justice reform steering committee said that the paragraph should be added to make it clear that in this Order 'the word "claim" can mean a claim in a cause of action or that "claims" can mean the claims made in more than one cause of action' (Judiciary Administration paper CJRS 3/2008, para 26).

**[22.1.3] Objective of Order 22**

In England it has been said that the purpose of CPR Part 36, their equivalent of Order 22, is 'to motivate parties to make, and to accept, appropriate offers of settlement': *Walsh v Singh* [2011] EWCA Civ 80 (10.02.2011) (para 6). This should be equally true in Hong Kong. In the final report of the Chief Justice's working party on CJR (para 292) it was said:

The proposed sanctioned offers and payments aim to encourage the parties to take possible settlement seriously and to avoid unproductive prolongation of the litigation. A plaintiff who rejects a sanctioned offer or payment and then fails to achieve a better result at the trial may, despite winning the case, be ordered to pay all of the defendant's costs incurred after the time when the plaintiff could have accepted the offer. This substantially mirrors the rules [on payment into court in the former] Order 22 of the RHC. The major change brought about by CPR 36 involves rules providing that a defendant who

rejects a plaintiff's sanctioned offer and then finds that the plaintiff does better at the trial, may be ordered to pay indemnity costs and additional interest up to base rate plus 10% on the sum awarded.

So far as costs are concerned, of the previous procedure it was said, in *Findlay v Railway Executive* [1950] 2 All ER 969 (CA):

The main purpose of the rules for payment into court is the hope that further litigation will be avoided, the plaintiff being encouraged to take out the sum paid in, if it be a reasonable sum, whereas, if he goes on and gets a smaller sum, he will be penalised wholly or to some extent in costs. Once, therefore, the money has been paid in, the *lis* between the parties simply is: Is that sum sufficient to cover the damage which has been suffered.

In addition, some or all of the interest payable on the judgment sum may be disallowed: rules 23(2) and 24(2).

#### [22.1.4] Contractual rules inapplicable

The provisions of Order 22 are 'entirely procedural in nature', and 'not affected by the law of contract': *Rai Rana Magar Pabitra & Anor (personal representatives) v Pacific Construction (HK) Co Ltd* [2011] 3 HKLRD 469, [2011] 3 HKC 550 (para 20). Thus the common law rule that an offer lapses upon being rejected does not apply: *Gibbon v Manchester City Council* [2010] EWCA Civ 726. Likewise a without prejudice counter-offer does not have the effect of revoking a prior sanctioned offer: *Wealthy Century Investment Ltd v DBS Bank (HK) Ltd (No 2)* [2010] 6 HKC 130.

#### [22.1.5] Stage of proceedings at which Order 22 applicable

The sanctioned payment and sanctioned offer procedures under Order 22 apply only after commencement of proceedings. See rule 3(3) and rule 5(6) respectively, and the commentary thereon.

#### [22.1.6] Application of Order 22 at interlocutory stage

The rules are silent as to whether Order 22 applies at the interlocutory stage of proceedings. However, rule 5(3)(a) contemplates a sanctioned offer applying to an 'issue' arising from a claim, and rule 8(1) does the same for a sanctioned payment. There does not appear to be any reason why a sanctioned payment or sanctioned offer may not be taken into account on an interlocutory application. Clearly, a sanctioned payment or sanctioned offer could be relevant where such an application results in judgment in favour of one of the parties. Thus, in *The Garden Co Ltd v Smart Year Ltd* [2009] HKCU 1497, [2009] 5 HKLRD 542 (HCA 640/2009; Chu J; 09.10.2009) (para 38 *et seq*), where the court granted summary judgment to the plaintiff, the plaintiff's earlier sanctioned offer, which had not been accepted, was taken into account and the defendant was ordered to pay indemnity costs. In *Flyworld Group Co Ltd v Crecedor Industrial Co Ltd* [2015] HKCU 1105 (HCA 101/2014; DHCJ Kent Yee; 19.05.2015) (para 25 *et seq*) the court proceeded on the basis that an unaccepted sanctioned offer in relation to a striking out application could be taken into account on costs; however, it did not in the event accede to the application to award indemnity costs.

#### [22.1.7] Application of Order 22 to arbitration proceedings

In response to comments received at the consultation stage, it was said that arbitration proceedings are 'clearly covered' by Order 22, 'although it will be rare for sanctioned offers or payments to be made in O 73 proceedings'. (Judiciary Administration paper CJRS 3/2008, para 27).

#### [22.1.8] Application of Order 22 to Admiralty proceedings

Order 22 applies to Admiralty proceedings, subject to certain modifications. See Order 75 rule 24.

#### [22.1.9] Application of Order 22 to appeals

There is no provision extending Order 22 to appeals. In *Lung Po Kwan & Anor v Tang Kam Sheung & Anor* [2011] HKCU 852 (CACV 164/2010; Tang Ag CJHC, Le Pichon JA & Saunders J; 05.05.2011); it was said, on an application for indemnity cost of an appeal, that the Court of Appeal was not concerned with a sanctioned offer, 'none could have been made' (para 11).

Nevertheless, a sanctioned offer or sanctioned payment made in first instance proceedings may affect the costs of an appeal. See *MGA Entertainment Inc v Toys & Trends (HK) Ltd & Ors* [2012] 5 HKC 372 (CACV 104/2011; Tang VP, Cheung & Lunn JJA; 08.08.2012) (para 73) where the costs of an appeal were awarded on an indemnity basis because of a sanctioned offer, made below, which if accepted would have meant there would have been no appeal. See also *Montrio Ltd & Anor v Tse Ping Shun David* [2013] HKCU 286 (CACV 291/2011; Yuen, Kwan & Lam JJA; 21.01.2013). In *Sino Trifone Ltd v Fond Express Logistics Ltd & Anor* [2013] HKCU 1190 (HCMP 2366/2012; Fok & Barma JJA; McWalters J; 22.05.2013) indemnity costs of an unsuccessful application for leave to appeal to the Court of Final Appeal were awarded on the basis of the same reasoning. Based on the aforementioned cases, the Court of Appeal set out the following general principles in *Ryder Industries Ltd (formerly Saitek Ltd) v Chan Shui Woo & Anor* [2015] 2 HKC 582 (CACV 164 & 165/2013; Lam VP, Barma JA & Poon J; 13.03.2015) (para 34):

- (i) A sanctioned offer made below does not entitle the party making it to invoke Order 22 for the purpose of the costs of an appeal.
- (ii) In dealing with costs below, the Court of Appeal should take into account the sanctioned offer below where appropriate, having regard to all the circumstances, including how the appeal was disposed of.
- (iii) In dealing with the costs of the appeal, the Court may take into account the sanctioned offer below where appropriate, having regard to all the circumstances, including the result of the appeal.

The Court of Appeal expressly left open the question whether a fresh sanctioned offer may be made in an appeal, and suggested that the High Court Rules Committee consider clarification by amendment if necessary (para 34(1), note 3).

In *Wong Tang Keung v Lee Wai Engineering Co Ltd (No 2)* [2014] 1 HKLRD 409, [2013] HKCU 2077 (CACV 165/2012; Lam VP, Yuen & Chu JJA; 05.09.2013) a sanctioned payment made after service of Notice of Appeal, and not bettered on the appeal, resulted in an order that the offeree pay indemnity costs of the appeal and enhanced interest on costs. The offeree was not represented and it appears that the issue of whether O 22 applies on an appeal was not raised.

The situation is different in England where CPR 36.3(2)(b) expressly provides for a Part 36 offer to be made in appeal proceedings. As a result it has been held in

England that the protection of a part 36 offer made at first instance does not carry through to an appeal: *P&O Nedlloyd BV v Utaniko Ltd* [2003] EWCA Civ 174 (19.02.2003) (para 6). In England the Court of Appeal will only exercise the powers under Part 36 if a fresh Part 36 offer is made in the appeal: *Rowlands & Ors v Bryn Alyn Community (Holdings) Ltd & Anor* [2003] EWCA Civ 383 (24.03.2003) (paras 11–14).

In both jurisdictions a party can protect itself as to the costs of an appeal by making an admissible offer to settle such as an offer ‘without prejudice save as to costs’. See *P&O* (above, para 8), and see *Lung Po Kwan* (above) where the Hong Kong Court of Appeal awarded indemnity costs of an appeal to a party who had made a without prejudice save as to costs offer to abandon the appeal.

#### [22.1.10] Offers and payments in relation to costs

With regard to proposals to settle a liability for unquantified costs, see Order 62A.

#### 2. Offer to settle with specified consequences (O. 22 r. 2)

(1) **A party to an action containing a money claim or a non-money claim or both arising from any cause or causes of action may make an offer to settle the whole claim, a part of it or any issue arising from it in accordance with this Order.**

(2) **An offer made under paragraph (1) may take into account any counterclaim or set-off in the action.**

(3) **An offer made under paragraph (1) has the consequences specified in rules 20, 21, 22, 23 and 24 (as may be applicable).**

(4) **Nothing in this Order prevents a party from making an offer to settle in whatever way he chooses, but if that offer is not made in accordance with this Order, it does not have the consequences specified in this Order, unless the Court so orders.**

(L.N. 152 of 2008)

#### NOTES

##### [22.2.1] Types of offer to settle under Order 22

Order 22 rule 2 provides that any party may make an offer to settle in accordance with this Order. The Order provides for two types of offer to settle, the sanctioned offer and the sanctioned payment. The procedures for making such proposals are set out in rules 5 and 8 respectively. Settlement involving both a sanctioned offer and a sanctioned payment is also possible. This is contemplated by the wording of rule 2(1) and is expressly provided for by rule 3(1). See the commentary under that latter rule.

##### [22.2.2] Other types of offer to settle – ‘Calderbank’ offers

Order 22 rule 2(4) expressly preserves the right of a party to make an offer to settle of any type, whether of the type contemplated by this Order or not. However, a proposal not of the Order 22 type will only have Order 22 consequences if the court so orders. The equivalent provision in England is CPR 36.1(2).

The court retains a discretion to take into account a proposal not of the Order 22 type in making an order for costs. See Order 62 rule 5(1)(g). The Chief Justice’s working party specifically recommended that this be stated expressly in the rules (final report, recommendation 42). With regard to ‘Calderbank’ offers (offers ‘without

prejudice save as to costs’) that discretion is restricted by Order 62 rule 5(1)(d) by which the court may not take such an offer into account if the party making it could have protected its position as to costs by making a sanctioned offer or sanctioned payment under Order 22. Thus, there is no impediment to making a ‘Calderbank’ offer despite the repeal of the former Order 22 rule 14 which gave such offers recognition within these rules. However, such an offer will only afford costs protection in the unusual event that the sanctioned proposals under Order 22 were not available or appropriate. For example, a sanctioned offer which does not attract the consequences of Order 22 because of non-compliance with the rules may be treated as a *Calderbank* offer: see the commentary under Order 22 rule 5 referring to *Kwok Chin Wing v 21 Holdings Ltd* [2011] 3 HKC 542. Furthermore, a *Calderbank* offer made before action should be taken into account because sanctioned proposals under Order 22 can only be made after commencement of proceedings: see rules 3(3) and 5(6). For discussion of the costs consequences of such offers, see the commentary under Order 62 rule 5.

With regard to awards of enhanced interest, the Chief Justice’s working party chose to confine the possibility of such an order to settlement proposals within Order 22 (final report, recommendation 43). As a result only the normal provisions as to interest apply to non-Order 22 settlement proposals (as to which see the commentary under Order 42 rule 1, and as to interest on costs see the commentary under Order 62 rule 3).

##### [22.2.3] Application to money and non-money claims

It is clear from Order 22 rule 2(1) that the sanctioned payment and sanctioned offer procedures under the Order are both intended to be available in respect of both money and non-money claims. However, it is difficult to see how a payment of money alone can satisfy a non-monetary claim such as a claim for an injunction or a declaration. Under the previous Order 22 it was held that a payment into court could not satisfy a claim for a declaration: *Associated Engineers Ltd v Lo Chee Pui* [2003] 2 HKC 316 (CA).

##### [22.2.4] Stage at which sanctioned settlement proposal may be made

Sanctioned offers and sanctioned payments may only be made after proceedings have been commenced: rules 3(3) and 5(6). See the commentary under those rules. This is different from the situation in England under CPR Part 36. The Chief Justice’s working party noted resistance in Hong Kong to adopting the English position, and decided against it (final report, para 301). This does not mean that the parties are not encouraged to settle their disputes before action is commenced. It simply means that the costs and other consequences laid down in Order 22 will not apply to a pre-action proposal. The Chief Justice’s working party made it clear that ‘parties should be encouraged to settle their disputes by negotiation’ even where Order 22 is not extended to apply to pre-action proposals (recommendation 40).

The Chief Justice’s working party did envisage the possibility that sanctioned offers (though not sanctioned payments) could be made before proceedings have been commenced in specialist proceedings if provision is made accordingly by pre-action protocol (final report, para 301). At the consultation stage, the draft Order 22 contained provision to that effect, but it was omitted when the Amendment Rules 2008 were made. The requirement that proceedings have been commenced is discussed further under rule 3.

Once proceedings have been commenced there is no time limitation for making a settlement proposal under either procedure. It is even possible to make a proposal after trial has begun. However, late proposals (made less than 28 days before

commencement of trial) may only be accepted if the parties agree on liability for costs or with leave: rules 15(2) and 16(2). Late proposals which are not accepted may not be fully effective in protecting the offeror as to costs. See *Standard Metal Mfy (HK) (a firm) v Ace Accessories Ltd* [1990] HKDCLR 1 where the court considered whether a plaintiff had sufficient time to consider a payment into court made only 4 days before trial. And see rule 23(6)(b) and rule 24(5)(b) which require the court to take into account the 'stage in the proceedings' at which a sanctioned proposal was made, in deciding whether it might be unjust to impose the enhanced costs and interest sanctions.

### [22.2.5] Offer to settle not an admission of liability

Under the former Order 22 payment into court procedure it was held that a payment into court was not an admission as to liability or the merits: *Sun Jianqiang v Trans-Island Limousine Service Ltd* [2004] 1 HKC 533 (CA). See also *Ng Ming Chor v Pui Hing Construction Co Ltd & Ors* DCCJ 496/1996 (Judge To; 26.05.1998) citing *French v Kingswood Hill Ltd* [1961] QB 96. The same should be true of a sanctioned payment or sanctioned offer under the current Order 22.

## II. MANNER OF MAKING SANCTIONED OFFER OR SANCTIONED PAYMENT

### 3. Defendant's offer to settle (O. 22 r. 3)

(1) **An offer by a defendant to settle the whole or part of a claim or an issue arising from the claim does not have the consequences specified in this Order unless it is made by way of a sanctioned offer or a sanctioned payment or both.**

(2) **Where an offer by a defendant involves a payment of money to the plaintiff, the offer must be made by way of a sanctioned payment.**

(3) **A sanctioned payment may only be made after the proceedings have commenced.**

(L.N. 152 of 2008)

### NOTES

#### [22.3.1] Consequences of Order 22 flow only from sanctioned offer or payment

Order 22 rule 3(1) provides that in the case of a defendant's settlement proposal, the costs and interest consequences of the Order flow only from a sanctioned offer or payment made under its terms, and rule 3(2) provides that an offer involving payment of money must be made by way of sanctioned payment. These provisions should be read together with rule 2(4), which makes it clear that parties are free to make settlement proposals in any way they choose, and Order 62 under which the court has a discretion as to costs. Thus even where a settlement proposal does not come within Order 22, the court has powers which may be exercised to give an Order 22-like effect, at least to some extent. So far as costs are concerned, this point is made in the final report of the Chief Justice's working party on civil justice reform where it is said (at para 319):

In Hong Kong, s 52A of the HCO provides that, subject to the provisions of

rules of court, the costs of and incidental to all civil proceedings in the High Court are in the court's discretion. The introduction of sanctioned offers would not affect this residual discretion which would enable the court to make an adverse costs order reflecting an unreasonable rejection of an 'unsanctioned offer'.

The working party makes a similar point with regard to interest at para 323 *et seq* of its final report. See, however, *Tsang Chiu Tung v Chan Chong Shing t/a Shing Kee Water Pipe & Drainage Services* [2011] 2 HKC 384 (para 33) where a judge of the District Court declined to take into account a without prejudice offer to pay money on the ground the offeror could have made a sanctioned payment.

With regard to plaintiffs' offers to settle, see rule 4.

#### [22.3.2] Settlement by combined sanctioned offer and sanctioned payment

It is possible to use both sanctioned offer and sanctioned payment in making a settlement proposal. This follows from the wording of rule 3(1) to the effect that a settlement proposal will have the consequences of Order 22 if made by sanctioned offer, sanctioned payment 'or both'. See *Lin Yanjin v Smart Billion Eng'g Ltd* [2011] HKCU 1571 (HCPI 739/2009; Master Ng; 10.08.2011) (para 59). A combined settlement proposal of that type would be appropriate where the offer involves both payment of money and other terms. The monetary aspect of such a settlement proposal cannot be included in a sanctioned offer as it must be made by sanctioned payment pursuant to rule 3(2). See below.

As noted by the court in *Lin Yanjin*, the form for acceptance of a sanctioned payment (Form 23 in Appendix A) provides that acceptance of a sanctioned payment made in combination with a sanctioned offer is treated as acceptance of both.

#### [22.3.3] Rule 3(2) – offer involving payment must be made by sanctioned payment

Order 22 rule 3(2) provides that a defendant's offer to settle by payment of money must be made by way of sanctioned payment. A sanctioned offer to make a payment of money is not valid: *Cheung Shuk Han v Chik Wai Yin* [2013] 4 HKC 311 (DCCJ 3428/2010; Deputy Judge Jonathan Chang; 10.12.2012) (paras 6–7). This does not mean that other forms of offer involving payment are not possible. In fact the right of a party to propose settlement of any type is preserved by rule 2(4). What rule 3(2) means is that if a defendant wishes to make a settlement proposal carrying the sanctions provided for by Order 22, it must, if it involves payment of money, be made by way of sanctioned payment. Thus in the case of mixed claims, seeking both monetary and non-monetary relief, it is necessary to make a sanctioned payment in respect of the monetary claim rather than including it in a sanctioned offer in respect of the non-monetary claim. See the commentary above on combined sanctioned offer and sanctioned payment.

*Offer of payment in the future* – can this be made in a manner carrying the consequences of Order 22? *Leung Lai Kwan v Lo Kai Wing* [2015] 4 HKC 377 (HCA 1158/2011; DHCJ Saunders; 18.05.2015) suggests that the answer is in the negative. There the court expressed the view (paras 10–15) that a party's offer to make monthly payments of \$3,500 for life could not be made by sanctioned payment because it would be impossible to assess the amount; nor could it be made by sanctioned offer because it involved the payment of money. However, the court does not appear to have been referred to the possibility of a combined sanctioned offer and sanctioned payment,

discussed above. It is submitted that it should have been possible to make a sanctioned payment of, say, the first monthly instalment, together with a sanctioned offer for payment of the future instalments.

**[22.3.4] Rule 3(3) – no sanctioned payment before action**

Order 22 rule 3(3) expressly provides that a sanctioned payment may only be made after proceedings have been commenced. Order 22 rule 5(6) makes the same provision for sanctioned offers – see the commentary under that rule.

In Hong Kong at the pre-action stage a potential defendant may consider making a *Calderbank* offer or tendering the amount of the potential plaintiff's claim. A *Calderbank* offer may be made before action: *Oriental Press Group v Apple Daily* [1996] 3 HKC 615 (CA) and may be taken into account by the court on the question of costs pursuant to Order 62 rule 5(1)(d). A tender before action will give rise to a defence if proceedings are commenced (provided it is then paid into court: see Order 18 rule 16 and the commentary thereunder) and could be taken into account by the court on the question of costs under Order 62 rule 5(1)(e) as a matter of conduct of the parties, which expressly includes pre-action conduct: rule 5(2)(d).

**[22.3.5] Sanctioned payment not a bar to jurisdictional challenge**

In *Towers v Morley* [1992] 1 WLR 511 (CA) it was held that a defendant who made a payment into court under the former Order 22 could still challenge the validity of service of the writ. The same should be equally true of a sanctioned payment.

**4. Plaintiff's offer to settle (O. 22 r. 4)**

**An offer by a plaintiff to settle the whole or part of a claim or an issue arising from the claim does not have the consequences specified in this Order unless it is made by way of sanctioned offer.**

(L.N. 152 of 2008)

**NOTES**

**[22.4.1] Origin and scope of Order 22 rule 4**

Order 22 rule 4 provides that the enhanced costs and interest consequences set out in the Order apply only to plaintiffs' offers of settlement which are made by way of sanctioned offer. Thus, although a party remains free to put forward a *Calderbank* offer (see the commentary under rule 2 above), and such an offer may in some circumstances affect the incidence of costs, it is likely to attract only the usual level of costs and interest. The equivalent provisions in England are found in CPR 36.1.

This rule may be read as conflicting with the closing words of Order 22 rule 2(4) which appear to reserve to the court a power to order that the enhanced costs and interest consequences shall apply to an offer to settle not made in accordance with this Order. The two provisions might be reconciled by reading rule 2(4) as merely preserving the court's broad discretionary powers as to costs and interest which exist outside Order 22.

With regard to settlement proposals by defendants, see rule 3.

**5. Form and content of sanctioned offer (O. 22 r. 5)**

- (1) A sanctioned offer must be in writing.
- (2) A sanctioned offer may relate to the whole claim or to part of it or to any issue arising from it.

**(3) A sanctioned offer must –**

- (a) state whether it relates to the whole claim or to part of it or to an issue arising from it and if so to which part or issue;
  - (b) state whether it takes into account any counterclaim or set-off; and
  - (c) if it is expressed not to be inclusive of interest, give the details relating to interest set out in rule 26(2).
- (4) A defendant may make a sanctioned offer limited to accepting liability up to a specified proportion.**
- (5) A sanctioned offer may be made by reference to an interim payment.**
- (6) A sanctioned offer may be made at any time after the commencement of proceedings but may not be made before such commencement.**
- (7) A sanctioned offer made not less than 28 days before the commencement of the trial must provide that after the expiry of 28 days from the date the sanctioned offer is made, the offeree may only accept it if –**

- (a) the parties agree on the liability for costs; or
- (b) the Court grants leave to accept it.

**(8) A sanctioned offer made less than 28 days before the commencement of the trial must provide that the offeree may only accept it if –**

- (a) the parties agree on the liability for costs; or
- (b) the Court grants leave to accept it.

(L.N. 152 of 2008)

**NOTES**

**[22.5.1] Origin and scope of Order 22 rule 5**

Order 22 rule 5 derives, in part, from CPR 36.2. However, the two provisions are by no means identical. The English rule is shorter.

Rule 5 deals with the form and content of offers which are intended to be sanctioned offers carrying the consequences provided for in this Order.

**[22.5.2] Form and content of sanctioned offer**

Order 22 rule 5(1) stipulates that a sanctioned offer must be in writing, however there is no prescribed form. It should be sufficient to set out the offer in a letter. Care should be taken to include all of the information required by rule 5(3).

In addition a sanctioned offer must provide that acceptance will in certain circumstances require leave. Rule 5(7) applies where the offer is made 28 or more days before trial, and requires the offer to provide that if not accepted within 28 days, leave to accept it will be required unless the parties agree on the liability for costs. Rule 5(8) applies where the offer is made less than 28 days before trial, and requires that the offer provide that any acceptance is only possible with agreement as to liability

expiration of the period, if any, specified under rule 8(2), or of such period as extended under rule 8(3).

(3) The plaintiff shall give not less than three months' written notice to the defendant of his intention to apply for further damages and, if the defendant is to the plaintiff's knowledge insured in respect of the plaintiff's claim, to the insurers.

(4) The plaintiff must take out a case management summons as to the future conduct of the action within 21 days after the expiry of the period of notice referred to in paragraph (3).

(L.N. 152 of 2008)  
 (5) At the determination of the case management summons the Court shall give such directions as may be appropriate for the future conduct of the action, including, but not limited to, the disclosure of medical reports and the place, mode and date of the hearing of the application for further damages.

(L.N. 152 of 2008)  
 (6) Only one application for further damages may be made in respect of each disease or type of deterioration specified in the order for the award of provisional damages.

(7) The provisions of Order 29 with regard to the making of interim payments shall, with the necessary modifications, apply where an application is made under this rule.

(8) The Court may include in an award of further damages simple interest at such rate as it thinks fit on all or any part thereof for all or any part of the period between the date of notification of the plaintiff's intention to apply for further damages and the date of the award.

(Enacted 1988)

## ORDER 38

### EVIDENCE

#### I. GENERAL RULES

##### NOTES

###### [38.0.1] Cross-reference to primary legislation

Order 38 is enacted pursuant to section 55B of the High Court Ordinance which specifically empowers the rules committee to make rules regulating the manner by which particular facts may be proved and the mode by which evidence may be given. It should be read together with the Evidence Ordinance (Cap 8).

###### [38.0.2] Scope of Order 38 Part I

Part I of Order 38 sets out general rules concerning the use of evidence in court proceedings. It includes rule 2A under which the exchange of witness statements is usually ordered in civil actions.

**General rule: witnesses to be examined orally (O. 38 r. 1)**

**Subject to the provisions of these rules and of the Evidence Ordinance (Cap. 8) and any other written law relating to evidence, any fact required to be proved at the trial of any action begun by writ by the evidence of witnesses shall be proved by the examination of the witnesses orally and in open court.**

##### NOTES

###### [38.1.1] When evidence to be taken orally or in writing

Order 38 rule 1 states the general principle that the evidence of witnesses at trial should be given orally in open court. There are many exceptions by which evidence may be given in writing in specific circumstances. Some examples are the following:

- Rule 1 by its own terms applies only to actions begun by writ. In proceedings commenced by originating summons evidence is normally given by affidavit (see Order 28 rule 1A). Likewise evidence is normally given by affidavit in applications for judicial review, habeas corpus and other types of proceedings not initiated by writ.
- Order 38 rule 2A(7)(a) empowers the court to order that written witness statements stand as evidence-in-chief.
- Order 38 rule 9 provides for the use of deposition evidence at trial.
- In personal injury actions it is commonly directed that medical records of treating hospitals be admitted as agreed evidence. Such evidence is agreed in the sense that its authenticity is not challenged, so it is not necessary for the makers to be called, but no admission is made as to the truth of the contents: *Padamlal v Dashing (Holi) Co Ltd & Anor* HCPI 100/2008 (Fung J: 24.10.2008).

- Also in personal injury actions the court commonly orders that expert reports be admitted into evidence without calling the makers to give oral evidence: *Shrestha Kalyan v Acciona Infraestructuras SA* HCPI 710/2007 (Fung J; 22.09.2008).

### [38.1.2] Oaths and affirmations

See the Oaths and Declarations Ordinance (Cap 11) and see also the commentary under Order 41.

### [38.1.3] Refreshment of memory

Section 51(6) of the Evidence Ordinance preserves the common law with respect to the circumstances in which a document, used to refresh memory and subsequently made the subject of cross-examination, may be made evidence in the proceedings. Prior to amendment of the Ordinance in 1999 the provision was found in section 48(2).

### [38.1.4] Hostile witnesses

As to hostile witnesses, see sections 12, 13 and 14 of the Evidence Ordinance. There has been some debate in the criminal courts in Hong Kong as to whether a judge ought to treat a witness as hostile once it is established that the witness has made a previous inconsistent statement (see *R v AM Lai Yung* [1973-76] HKC 417, [1976] HKLR 249; *Wu Man-choi v R* [1979] HKLR 174 and *R v Cheung Ting Wai* [1977-79] HKC 102). Three propositions are common ground:

- (1) there must be sufficient evidence upon which a judge may find a witness to be hostile;
- (2) whether there is such sufficient evidence is for the judge to decide; and
- (3) proof that the witness has made a previous inconsistent statement will often be sufficient.

But will proof that the witness has made a previous inconsistent statement always be sufficient? It is submitted that the effect of the latter two decisions cited above is to answer this question in the negative, but the circumstances in which proof of a previous inconsistent statement will not suffice are not clear. In *Wu Man-choi* (above), at 179, it was said that, 'So far as we are aware the only reason for treating Miss To as hostile was that she had made the previous inconsistent statements. That would have been a sufficient reason if the judge was satisfied that the previous statement had been voluntary, [denied by the witness in this case] but not otherwise'. In *Cheung Ting Wai* (above), the court held:

As we interpret *Fraser*, when read with earlier authorities, the main factor which will influence the judge in deciding whether or not to declare a witness hostile is the inconsistency between his earlier statement and his evidence. But we agree with the passage in *Wu* which states that it is not the only factor. The judge should, for instance, consider the degree of inconsistency as well as the fact of it, its importance to the trial, and the demeanour and attitude of the witness. But, having done so, he is entitled to declare a witness hostile on the ground of inconsistency alone.

The last sentence is ambiguous in context but it is submitted that acceptance that the declaration or non-declaration of a witness as hostile is a matter for the discretion of the court necessarily implies that a judge is not bound to find that a witness is hostile

notwithstanding a previous inconsistent statement has been proved. However, absent any acceptable explanation of the inconsistency, a court may so declare without fear of being overruled.

### [38.1.5] Previous convictions

See section 15 of the Evidence Ordinance, relating to indictable offences, and sections 2 and 3 of the Rehabilitation of Offenders Ordinance (Cap 297) relating to spent convictions.

Questions as to convictions for summary offences which are not misdemeanours, which convictions are not spent and, nevertheless, tend to weaken the character of the witness or question the witness's trustworthiness as a witness of truth may still be permissible at common law.

### [38.1.6] Previous inconsistent statements

As to previous inconsistent statements of a witness or consistent statements adduced to rebut a suggestion of recent fabrication in civil cases, see sections 13, 14, and 51 (previously 48(1)) of the Evidence Ordinance.

### [38.1.7] Language of evidence

Section 5 of the Official Languages Ordinance (Cap 5) provides that a party or witness may testify in any language. If a witness uses a language other than English or Chinese it will have to be translated into the official language chosen for use in the proceedings under rule 3 of the High Court Civil Procedure (Use of Language) Rules (Cap 5C), to which see the commentary under Order 35 rule 7. Sometimes translation between Chinese dialects is required.

### [38.1.8] Payment of witnesses

Expert witnesses are usually paid by the parties who call them, and the fact of payment is irrelevant to admissibility of their evidence: *Tang Ping Choi v Secretary for Transport* [2004] 3 HKC 178, 185H-I (CA). Payment of other witnesses is not usual and may be undesirable. See *Kwan Yim Kwan Peggy v Namkung Promotions (Worldwide) Ltd* [2007] 3 HKC 314 (CA) (para 12) where it was held that payment to a non-expert witness must be disclosed to the court before the witness gives evidence, and that the fact of payment is relevant to assessment of credibility.

### [38.1.9] Examination-in-chief and cross-examination of witnesses – defendant's obligation to put its case to plaintiff's witnesses

A defendant who intends to adduce evidence which contradicts that of a witness for the plaintiff is obliged to put that evidence to the plaintiff's witness in cross-examination so as to provide an opportunity to comment. Failure to do so resulted in parts of the defendant's evidence being excluded in *Secretary for Justice v Yu's Tin Sing Enterprises Co Ltd* HCA 398/2006 (Recorder Kwok SC; 09.09.2008).

#### 2. Evidence by affidavit (O. 38 r. 2)

(1) **The Court may, at or before the trial of an action begun by writ, order that the affidavit of any witness may be read at the trial if in the circumstances of the case it thinks it reasonable so to order.**

(2) **An order under paragraph (1) may be made on such terms as to the filing and giving of copies of the affidavits and as to the production of the deponents for cross-examination as the Court thinks fit but, subject**

to any such terms and to any subsequent order of the Court, the deponents shall not be subject to cross-examination and need not attend the trial for the purpose.

(3) In any cause or matter begun by originating summons, originating motion or petition, and on any application made by summons or motion, evidence may be given by affidavit unless in the case of any such cause, matter or application any provision of these rules otherwise provides or the Court otherwise directs, but the Court may, on the application of any party, order the attendance for cross-examination of the person making any such affidavit, and where, after such an order has been made, the person in question does not attend, his affidavit shall not be used as evidence without the leave of the Court.

#### NOTES

##### [38.2.1] Court's discretion to allow evidence by affidavit at trial

Order 38 rule 2 provides that the court may permit evidence to be adduced by affidavit at trial. Reference should also be made to the similar power in section 44 of the Evidence Ordinance (Cap 8). Under both provisions the evidence may be received with or without cross-examination. Affidavit evidence to be used at trial should be confined to matters within the personal knowledge of the deponent (Order 41 rule 5(1)) unless a direction is made under Order 38 rule 3(2)(a) permitting statements of information or belief. Each case must depend on its own facts and circumstances: *High Fashion Garments Co Ltd v Ng Siu Tong & Ors* [2003] 2 HKC 562, 567E-F. Where a party wishes to rely on an affidavit at trial without calling the witness, the proper procedure is to apply for directions accordingly before the case is set down for trial: see *Cheung Wei Man Vivien & Anor v Centaline Property Agency Ltd & Ors* [2004] 1 HKC 692, 695B-D. The application should be made at the case management stage pursuant to Order 25.

In the *High Fashion Garments* case, a plaintiff sought to rely on affidavit evidence of a witness in Singapore who did not wish to travel to Hong Kong for health reasons. Deputy Judge Lam was of the view that the witness's evidence could have a significant impact on the case and held that on balance, the defendants should not be deprived of an opportunity to cross-examine. In the circumstances, the learned deputy judge allowed the application to adduce affidavit evidence at trial, but subject to the condition that the witness attend for cross-examination by video-link from Singapore.

Where the affidavit evidence sought to be adduced at trial is seriously contested, it is not appropriate for the court to allow it to be adduced without the witness being required to attend for cross-examination, whether in person or by video-link: see *Cheung Wei Man Vivien & Anor v Centaline Property Agency Ltd & Ors* [2004] 1 HKC 692, 694D-E.

In the *High Fashion Garments* case it was said (*obiter*, at 568G) that, the 1999 amendments relaxing the criteria under which hearsay evidence is admissible, did not change the prior law as to admissibility of affidavit evidence under this rule. The decisions in *Rover International Ltd v Cannon Film Sales Ltd* [1987] 1 WLR 1597 and *Re Dominion International Group plc* [1995] 1 WLR 649 were cited by the learned deputy judge in this regard.

##### [38.2.2] Cross-examination on affidavit

Order 38 rule 2(3) underpins the practice whereby evidence in proceedings commenced otherwise than by writ of summons, and on interlocutory applications, is normally given by way of affidavit.

The sub-rule goes on to provide that the court may order that a deponent attend to be cross-examined on his affidavit. The circumstances in which this discretion will be exercised were considered by the Court of Appeal in *Yuen Wendy v Yuen Philip* [1984] HKLR 431. It was held that there is no generally applicable requirement that special circumstances must be shown and *Oriental Pacific Mills Ltd (No 2) v Nan Fung Woollen Mills Ltd & Ors* [1965] HKLR 703 was not to be read as supporting such a proposition. Cross-examination would be ordered where the interests of justice so dictate (citing *Smith and Fawcett* [1942] 1 Ch 304), and the burden on the applicant was 'to establish that in all the circumstances of the case there is a good and sufficient reason for the application'. The court would consider whether 'great delay and expense might be entailed'. It was incumbent on the applicant 'to show that the proposed cross-examination might be productive of a useful result' at the interlocutory stage. Cross-examination would not be allowed in interlocutory proceedings on matters which should be canvassed at the hearing of the action. See the judgment of Fuad JA at 436E-I. In result, the Court of Appeal upheld a judge's decision to order cross-examination on an affidavit seeking to resist an application for disclosure of accounts in a matrimonial case. The judgment of the Court of Appeal in *Yuen Wendy* continues to be regarded as authoritative: see *Waters v Malahon Credit Co Ltd* [2004] 2 HKC 94 (CA); *Pacific Electric Wire & Cable Co Ltd v Texan Management Ltd & Ors* HCA 2203/2004 (Deputy Judge Muttrie; 28.02.2006); *Taihan Electric Wire Co Ltd & Anor v Lee Chi Yuen Arctic & Ors* [2013] HKCU 2104 (HCA 454/2013; Au-Yeung J; 10.09.2013); *SFC v Ernst & Young* [2013] 6 HKC 156; HCMP 1818/2012.

Where there is an order for cross-examination on an affidavit and the person fails to attend, the court will usually order that the affidavit may not be used in evidence without leave: *Re Chow Kam Fai David* [2004] 2 HKC 645 (CA) (para 15).

With regard to fugitives from justice, who do not wish to come to Hong Kong to be cross-examined, see the commentary under Order 39 rule 2.

The court will be slow to grant leave to cross-examine on the affidavit of an alleged contemnor in contempt proceedings. This is because of the penal consequences of the proceedings. See *Comet Products UK Ltd v Hawkex Plastics Ltd & Anor* [1971] 2 QB 67 (per Lord Denning MR); *Kwan v Extra Excel (Malaysia) Sdn Bhd & Ors* [2007] 7 MLJ 250. If leave to cross-examine is given, the court may limit its scope as in *Lexi Holdings plc v Luqman* [2007] EWHC 1508 (Ch) (02.07.2007) (para 8).

#### 2A. Exchange of witness statements (O. 38 r. 2A)

(1) The powers of the Court under this rule shall be exercised for the purpose of disposing fairly and expeditiously of the cause or matter before it, and saving costs, having regard to all the circumstances of the case, including (but not limited to) –

- (a) the extent to which the facts are in dispute or have been admitted;
- (b) the extent to which the issues of fact are defined by the pleadings;
- (c) the extent to which information has been or is likely to

be provided by further and better particulars, answers to interrogatories or otherwise.

(2) At the determination of a case management summons in an action commenced by writ the Court shall direct every party to serve on the other parties, within such period of the hearing as the Court may specify and on such terms as the Court may specify, written statements of the oral evidence which the party intends to adduce on any issues of fact to be decided at the trial.

(L.N. 152 of 2008)

The Court may give a direction to any party under this paragraph at any other stage of such an action and at any stage of any other cause or matter.

Order 3, rule 5(3) shall not apply to any period specified by the Court under this paragraph.

(3) Directions under paragraph (2) or (17) may make different provision with regard to different issues of fact or different witnesses.

(4) Statements served under this rule shall –

(a) be dated and, except for good reason (which should be specified by letter accompanying the statement), be signed by the intended witness and must be verified by a statement of truth in accordance with Order 41A; (L.N. 152 of 2008)

(b) sufficiently identify any documents referred to therein; and

(c) where they are to be served by more than one party, be exchanged simultaneously.

(5) Where a party is unable to obtain a written statement from an intended witness in accordance with paragraph (4)(a), the Court may direct the party wishing to adduce that witness's evidence to provide the other party with the name of the witness and (unless the Court otherwise orders) a statement of the nature of the evidence intended to be adduced.

(6) Subject to paragraph (9), where the party serving a statement under this rule does not call the witness to whose evidence it relates, no other party may put the statement in evidence at the trial.

(7) Subject to paragraph (9), where the party serving the statement does call such a witness at the trial –

(a) except where the trial is with a jury, the Court may, on such terms as it thinks fit, direct that the statement served, or part of it, shall stand as the evidence in chief of the witness or part of such evidence;

(b) the witness may with the leave of the Court –

(i) amplify his witness statement; and

(ii) give evidence in relation to new matters which have arisen since the witness statement was served on the other party;

(L.N. 152 of 2008)

(c) whether or not the statement or any part of it is referred to during the evidence in chief of the witness, any party may put the statement or any part of it in cross-examination of that witness.

(7A) The Court may grant leave under paragraph (7)(b) only if it considers that there is good reason not to confine the evidence of the witness to the contents of his witness statement.

(L.N. 152 of 2008)

(8) Nothing in this rule shall make admissible evidence which is otherwise inadmissible.

(9) Where any statement served is one to which the Evidence Ordinance (Cap. 8) applies, paragraphs (6) and (7) shall take effect subject to the provisions of that Ordinance and Parts III and IV of this Order.

The service of a witness statement under this rule shall not, unless expressly so stated by the party serving the same, be treated as a notice under that Ordinance; and where a statement or any part thereof would be admissible in evidence by virtue only of that Ordinance, the appropriate notice under Part III or IV of this Order shall be served with the statement notwithstanding any provision of those Parts as to the time for serving such a notice.

(L.N. 152 of 2008)

(10) Where a party fails to comply with a direction for the exchange of witness statements he shall not be entitled to adduce evidence to which the direction related without the leave of the Court.

(11) Where a party serves a witness statement under this rule, no other person may make use of that statement for any purpose other than the purpose of the proceedings in which it was served –

(a) unless and to the extent that the party serving it gives his consent in writing or the Court gives leave; or

(b) unless and to the extent that it has been put in evidence (whether pursuant to a direction under paragraph (7)(a) or otherwise).

(12) Subject to paragraph (13), the judge shall, if any person so requests during the course of the trial, direct the Clerk of Court to certify as open to inspection any witness statement which was ordered to stand as evidence in chief under paragraph (7)(a).

A request under this paragraph may be made orally or in writing.

(13) The judge may refuse to give a direction under paragraph (12) in relation to a witness statement, or may exclude from such a direction any words or passages in a statement, if he considers that inspection should not be available–

(a) in the interests of justice or national security;

(b) because of the nature of any expert medical evidence in the statement; or

- (c) for any other sufficient reason.
- (14) Where the Clerk of Court is directed under paragraph (12) to certify a witness statement as open to inspection he shall—
- prepare a certificate which shall be attached to a copy ("the certified copy") of that witness statement; and
  - make the certified copy available for inspection.
- (15) Subject to any conditions which the Court may by special or general direction impose, any person may inspect and (subject to payment of the prescribed fee) take a copy of the certified copy of a witness statement from the time when the certificate is given until the end of 7 days after the conclusion of the trial.
- (16) In this rule—
- any reference in paragraphs (12) to (15) to a witness statement shall, in relation to a witness statement of which only part has been ordered to stand as evidence in chief under paragraph (7)(a), be construed as a reference to that part;
  - any reference to inspecting or copying the certified copy of a witness statement shall be construed as including a reference to inspecting or copying a copy of that certified copy.
- (17) The Court shall have power to vary or override any of the provisions of this rule (except paragraphs (1), (8) and (12) to (16)) and to give such alternative directions as it thinks fit.

(L.N. 223 of 1997)

## NOTES

**[38.2A.1] Exchange and filing of witness statements**

Under Order 38 rule 2A(2) the court is required at the determination of the case management summons under Order 25 to direct the parties to serve written statements of the oral evidence they intend to adduce at trial. Rule 2A(4)(c) requires that opposing litigants should exchange their witness statements simultaneously. The rule does not require that witness statements be filed in court. That is only necessary where the court so directs: practice direction 24.1, para 9.

In *Cheung Kai Wing v Mok Sheung Shum & Anor* [1993] 2 HKC 113 (CA), Kaplan J commented on the impact the witness statement procedure has had on civil litigation. His Lordship said, at 126C–D:

It is no exaggeration to say that Order 38 rule 2A has revolutionised the way in which civil litigation is conducted in England and in Hong Kong. Prior to the coming into force of this rule, it was frequently and authoritatively stated that litigation under our system was conducted on a 'cards on the table' approach.

His Lordship went on to quote from the judgment of Steyn J in *Mercer v Chief Constable of the Lancashire Constabulary* [1991] 1 WLR 367 where it was said:

RSC Order 38 rule 2A has proved a most useful innovation which, to the great benefit of parties and the administration of justice, has been accommodated in

our adversarial system. The system was borrowed from the tried and tested system for international commercial arbitration.

**[38.2A.2] Formal requirements for witness statements**

The formal requirements for witness statements are set out in Order 38 rule 2A(4). In summary, they are:

- they must be dated;
- they must be signed by the intended witness (except where there is good reason);
- they must be verified by a statement of truth in accordance with Order 41A;
- where documents are referred to, those documents should be sufficiently identified.

With regard to (c) above, that is the requirement that a witness statement be verified by statement of truth, see also Order 41A rule 2(b) which is to the same effect. For discussion of statements of truth generally, see the commentary under Order 41A. Note in particular that Order 41A rule 7 provides that a witness statement which is not verified by statement of truth is not admissible in evidence unless the court orders otherwise.

**[38.2A.3] Scope and content of witness statements**

Witness statements should be comprehensive statements of the whole of the witnesses' evidence. In *Hanwa Kozai (HK) Ltd v Hangyiu Ltd* [1995] 1 HKC 841 Keith J, referring to an earlier judgment of his own, said as follows (at 842D–F):

In *Ng Kam Chun Stephen v Chan Wai Hing Janet* HCA No A3036/92, I said that "the witness statement should contain the whole of the witness' evidence in the detail in which the witness would have given it if his evidence had been elicited by oral questions at the trial" ... In my view, that practice should prevail whether or not the master has at the same time ordered that the statement should stand as the witness' evidence-in-chief. I see no room for a witness statement which represents a half-way house between the pleadings (which are limited to the assertions which the parties seek to prove, and are not intended to incorporate the evidence which the parties propose to call to prove those assertions) and the witness statements (which are intended to set out the evidence which the parties propose to call to prove the facts asserted in the pleadings).

Witness statements, like affidavits, should not go into legal argument nor should they contain 'lawyeresque' designed to prove a case. See *Dah Sing Bank Ltd v Sing Hai Handbags Manuf'y Ltd & Ors* [2007] 3 HKC 515 and the other authorities cited in the commentary preceding Order 41 rule 1.

In *Vastco Textiles Ltd v Super Glory Corp Ltd* [2011] HKCU 2061 (HCA 1678/2009; Deputy Judge Mimmie Chan; 11.10.2011) the court struck out various passages in a witness statement on the ground that they were either immaterial to the pleaded issues, not within the knowledge of the witness, speculation and guesswork, of no relevance to the matters pleaded or matters of the witness's belief which have no place in a statement.

See also the commentary below on the circumstances in which a witness may give evidence beyond the scope of his or her witness statement, and see the commentary on hearsay evidence in Part III of this Order.

**[38.2A.4] Translation of witness statements**

In *Cheung Kai Wing v Mok Sheung Shum & Anor* [1993] 2 HKC 113 (CA), Kaplan J dealt with the problem frequently encountered in this jurisdiction of non-English-speaking witnesses who give statements in English. At 127E–F his Lordship said:

In cases where the witnesses cannot speak or understand English, it is crucial that the solicitor concerned should translate and explain the statement to their intended witness before it is signed and the solicitor should so declare on the face of the statement.

In some cases the court has gone further and directed that a Chinese-language version of a witness statement be prepared and signed by the deponent.

**[38.2A.5] Witness statements as evidence-in-chief**

Order 38 rule 2A(7)(a) empowers the court to order that witness statements stand as evidence-in-chief, except where there will be a jury trial. The power is a matter for the judge's discretion: *So Amy & Ors v Au Leslie* [1995] 2 HKC 113, 118H (CA); though in *Cheung Kai Wing v Mok Sheung Shum t/a Mok Sum Kee & Anor* [1993] 2 HKC 113, 128A–C (CA) it was suggested that the parties could procure such an order by consent.

In *Cheung Kai Wing* (above) it was said (at 128D–E) that an order that witness statements stand as evidence-in-chief will likely be appropriate 'in most commercial cases and most personal injury cases'. In *Hanwa Kozai (HK) Co Ltd v Hangyiu Ltd & Anor* [1995] 1 HKC 841, 842 it was said that such an order is not appropriate where the witness statements 'reveal a significant conflict of evidence between two or more witnesses'. The most important factor for a judge to consider in deciding whether to make such an order 'is the extent to which the evidence of a particular witness is likely to be controversial, and his credibility put in issue': *So Amy* (above, at 118G–I). However, all the circumstances should be taken into account and the judge retains discretion even where there are conflicts on the evidence: see *Bam Ganesh v Hussein Maroof* CACV 47/2007 (Rogers VP, Le Pichon JA & Barma J; 16.07.2008), where Le Pichon JA said (para 18):

As to the *So* case, I would observe that what is there stated does not take away the judge's discretion. Trials would be needlessly prolonged if in every case where the evidence of a witness is controversial and his credibility is put in issue (and that must arise in most cases), evidence in chief has to be given. The judge's discretion [is] to be exercised sensibly having regard to the circumstances of the particular case.

The judge should consider the witness statements one by one rather than making a blanket order for witness statements to stand as evidence-in-chief: *Richardson Greenshields of Canada (Pacific) Ltd v Tze Yim* HCA 6690/1987 (Kaplan J; 18.10.1991) (para 66), referring to *Mercer v Chief Constable of Lancashire* [1991] 1 WLR 367. Indeed 'it is wrong in principle to make orders applying to all witness statements without regard to the extent to which the witness' evidence is likely to be controversial and go to the heart of the dispute': *So Amy* (above, at 118H–I), also referring to *Mercer* (at 371H).

At trial, where a statement has earlier been ordered to stand as evidence-in-chief, the witness will normally be asked to confirm or adopt the statement as his or her evidence. The statement may be supplemented by oral evidence: 'it is usual for the judge to permit some oral amplification, especially in the light of evidence already given at the trial': *Cheung Kai Wing* (above, 128E–F).

**[38.2A.6] Circumstances in which witness may give evidence beyond the scope of witness statement**

Order 38 rule 2A(7)(b), read together with rule 2A(7A), permits the court to grant leave to a witness to amplify his or her witness statement, or give evidence on matters which arose after the witness statement was served, where there is good reason. The rule was amended to that effect on implementation of the civil justice reforms in 2009. The purpose was to implement recommendation 100 of the Chief Justice's working party on civil justice reform, which called for 'introducing greater flexibility in permitting a witness to amplify or supplement his witness statement'. Previously a witness was allowed to give evidence beyond the scope of his or her witness statement only with the consent of the other parties, or if there had been a direction of the court limiting the scope of the witness statement to specific issues, or if the new evidence concerned matters arising subsequent to service of the witness statement. The working party considered these to be 'very limited circumstances' (final report, para 589).

The problem addressed by the amendments under the civil justice reforms implemented in 2009 was identified in the interim report on civil justice reform at paras 471 *et seq.* It was there said:

... it is widely recognized that the practice which has developed in relation to witness statements, reflecting adversarial excesses, has seriously tarnished the benefits of the procedure, particularly in heavy cases. Witness statements have become regarded as documents to be carefully crafted by counsel, going through several drafts, covering every detail and with every nuance discussed in conference with the client...

If a witness will not be allowed to add to his witness statement, or if he will be criticised if he needs to correct any errors or ambiguities in it, conscientious legal advisers will quite properly consider it their duty to make the statement as comprehensive as possible, covering numerous possible lines of inquiry and minutely checking the statement for errors.

Underlying the above observations is clearly a desire to keep costs down.

The equivalent provisions in England are CPR 32.5(3) and (4), which are in the same terms as Hong Kong's Order 38 rule 2A(7) and (7A).

In proposing adoption of the more liberal English position, the Chief Justice's working party expressed the view that as a general rule, a witness statement should still cover all of the witness's evidence. Thus a grant of leave to depart therefrom may still be regarded as exceptional.

In most cases it will be preferable to seek leave to file a supplementary witness statement (as to which see below) instead of waiting in hope that the court will, in its discretion, allow additional evidence from a witness when called.

**[38.2A.7] 'Deemed put' procedure to expedite trial**

At trial the court may adopt a 'deemed put' procedure 'whereby all matters raised in a witness statement which impact upon the evidence to be given by other witnesses are to be deemed to have been put to such other witnesses'. See *Aspial Investment Ltd & Anor v Mayer Corporation Development Int'l Ltd* [2014] 1 HKC 161; CACV 162/2012 (para 59). There it was held that this procedure should not be adopted for 'important aspects of a party's case', which should instead be 'specifically put to the witnesses on whose evidence they may impact, so as to afford such witnesses a full and fair opportunity to comment on, or respond to, those matters'.

## ORDER 62

## COSTS

## PRELIMINARY

## 1. Interpretation (O. 62 r. 1)

## (1) In this Order—

“certificate” includes allocatur;

(HK) “contentious business” means business done, whether as a barrister, solicitor or advocate, in or for the purpose of proceedings begun before the Court or before an arbitrator, umpire or arbitral tribunal under the Arbitration Ordinance (Cap 609); not being common form probate business;

(10 of 2005; 17 of 2010)

“costs” include fees, charges, disbursements, expenses and remuneration;

“the Court” means the High Court or any one or more judges thereof, whether sitting in Court or in chambers, the Registrar or assistant registrar or master;

(HK) “District Court” means the District Court established under the provisions of the District Court Ordinance (Cap 336), and any judge of that court;

“legal representative” in relation to a party to proceedings, means a counsel or solicitor conducting litigation on behalf of the party;

(L.N. 152 of 2008)

(HK) “mentally disordered person” means a person who is so far disabled in mind or who is so mentally ill or subnormal due to arrested or incomplete development of mind as to render it either necessary or expedient that he, either for his own sake or in the public interest, should be placed and kept under control;

(HK) “non-contentious business” means any business done by and as a solicitor which is not contentious business;

“party entitled to be heard on taxation” means —

- (a) a party entitled to payment of costs;
- (b) a party who has acknowledged service or taken any part in the proceedings which gave rise to the taxation proceedings, and who is directly liable under a costs order made against him;
- (c) a person who has given the party entitled to payment of costs and the Registrar written notice that he has a financial interest in the outcome of the taxation; or

- (d) a person in respect of whom a direction has been given under rule 21(3).

(L.N. 152 of 2008)

“taxed costs” means costs taxed in accordance with this Order;

(HK) “taxing master” means the Registrar as taxing master;

“wasted costs order” means an order made under section 52A(4) of the Ordinance.

(L.N. 152 of 2008)

(2) In this Order, references to a fund, being a fund out of which costs are to be paid or which is held by a trustee or personal representative, include references to any estate or property whether immovable or personal held for the benefit of any person or class of persons; and references to a fund held by a trustee or personal representative include references to any fund to which he is entitled (whether alone or together with any other person) in that capacity, whether the fund is for the time being in his possession or not.

## NOTES

[62.1.1] General note on interpretation of Order 62 with reference to English cases

Order 62 of the Hong Kong rules is substantially the same as its equivalent in England as it existed prior to April 1986. In that month (and subsequently) there have been substantial amendments to the English rules on costs which have not been adopted in Hong Kong. As a result, English decisions since April 1986 need to be considered in light of the differing rules in the two jurisdictions.

## 2. Application (O. 62 r. 2)

(HK)(1) This Order shall apply to all proceedings in the Court, except non-contentious or common form probate proceedings and proceedings in matters of prize.

(2) Where by virtue of any Ordinance the costs of or incidental to any proceedings before an arbitrator or umpire or before a tribunal or other body constituted by or under any Ordinance, not being proceedings in the High Court, are taxable in the Court of First Instance, the following provisions of this Order, that is to say, rule 7(4), rule 8D (except paragraph (4)), rule 8E, rule 9D(1) and (4), rules 13 and 13A, rules 14 to 16, rule 17(1), rules 17A and 17B, rule 18, rules 21 (except paragraph (4)), 21A, 21B, 21C and 21D, rules 22 to 26, rule 28A (except paragraphs (4) and (7)), rules 32A and 32B and rules 33 to 35, shall have effect in relation to proceedings for taxation of those costs as they have effect in relation to proceedings for taxation of the costs of or arising out of proceedings in the High Court.

(L.N. 152 of 2008)

(2A) Where rule 22 has effect under paragraph (2), a reference to the Court of First Instance in rule 22(9)(a) is to be construed as a

reference to the arbitrator, umpire, tribunal or other body, as the case may be.

(L.N. 152 of 2008)

(3) This Order shall have effect subject to the provisions of the District Court Ordinance (Cap. 336) and to any rules made thereunder and to any other enactment.

(4) The powers and discretion of the Court as to costs under sections 52A and 52B of the Ordinance and under the enactments relating to the costs of criminal proceedings to which this Order applies shall be exercised subject to and in accordance with this Order.

(L.N. 152 of 2008)

#### NOTES

##### [62.2.1] Proceedings to which Order 62 applies

Order 62 rule 2 sets out the extent to which the Order applies to legal proceedings. Subject to certain exceptions, the Order applies to all contentious proceedings in the High Court, and to taxation in the Court of First Instance of costs awarded in certain alternative dispute resolution (ADR) fora, and certain tribunals.

##### [62.2.2] Application to probate and administration matters

Order 62 does not apply to non-contentious probate proceedings (meaning unopposed applications under the Non-Contentious Probate Rules (Cap 10) for grants of probate or letters of administration in relation to the estate of a deceased person): rule 2(1). However, the exception does not extend to contentious probate proceedings of the type governed by Order 76, and the Order does apply to those.

##### [62.2.3] Application to proceedings in prize

Order 62 does not apply to 'proceedings in matters of prize': rule 2(1). Such proceedings, which must be very rare, are in relation to ships or property captured at sea as spoils of war. In relation to such proceedings see also item 4 in the table to Order 1 rule 2(2).

##### [62.2.4] Application to alternative dispute resolution

Rule 2(2) applies certain of the provisions of Order 62 to proceedings before an arbitrator or umpire where by statute, the costs of such proceedings are taxable in the Court of First Instance. With regard to arbitral proceedings, see section 75 of the Arbitration Ordinance (Cap 609) which provides for taxation by the court where the parties have so agreed, unless the arbitral tribunal otherwise directs. The section was amended in 2013 to make it clear that such taxation shall be on the party and party basis unless otherwise directed by the arbitral tribunal.

##### [62.2.5] Application to tribunal proceedings

Rule 2(2) applies some of the provisions of Order 62 to taxation of costs awarded by statutory tribunals where, by Ordinance, such costs are taxable in the Court of First Instance. An example is section 12(2) of the Lands Tribunal Ordinance (Cap 17), which has been interpreted as providing that costs in that tribunal should be taxed in

the CFI: *Incorporated Owners of Honour Building v Lou Chui-sim & Anor* LDBM 266/1999 (Judge Li; 17.07.2001); *Leung Yin Ling v IO of No 165 Wong Nai Chung Rd* [2002] 4 HKC 328.

##### [62.2.6] Application to criminal proceedings

Order 62 applies to orders for costs in criminal proceedings: rule 2(4). However, this is subject to the Costs in Criminal Cases Ordinance (Cap 492) and subsidiary legislation thereunder which contain specific provisions with regard to such costs. Under rule 5(2)(b) of the Costs in Criminal Cases Rules (Cap 492A) awards of costs in criminal proceedings in the Court of First Instance or Court of Appeal are taxed by the Registrar of the High Court. Certain of the provisions of Order 62 are expressly applied to such taxations: see rule 8(3) of Cap 492A, applying Order 62 rules 33 and 34.

##### [62.2.7] Rule 2(4) – ambit of the court's discretion as to costs

Section 52A(1) of the High Court Ordinance gives the court 'full power' to determine 'by whom and to what extent' costs are to be paid. This power extends to the making of costs orders against non-parties by virtue of HCO section 52A(2), which was amended to that effect by the Civil Justice (Miscellaneous Amendments) Ordinance (No 3 of 2008) in force from 2009. See Order 62 rule 6A with respect to costs against non-parties.

Order 62 rule 2(4) provides that the court's discretion as to costs is to be exercised in accordance with this Order. The provision applies to the broad discretion under section 52A, as well as the power under section 52B in relation to costs only proceedings (as to which see rule 11A), and to costs orders in criminal cases. This has the effect of narrowing the ambit of the discretion somewhat, in that Order 62 contains specific guidance as to the incidence and quantum of costs. See in particular rule 3(2), which stipulates that costs shall generally follow the event; rule 5, which stipulates certain matters which should be taken into account, and rule 28 which regulates the amount of costs to be allowed on taxation.

##### [62.2.8] Contribution cases

The court's discretion with respect to costs is fettered in contribution cases by section 6 of the Civil Liability (Contribution) Ordinance (Cap 377), which provides that a plaintiff who commences more than one action against defendants, who are jointly or otherwise together liable to compensate him, will be entitled to costs only on the first judgment.

##### [62.2.9] Costs of amicus curiae

There is a discretion to order a party to pay the costs of an *amicus curiae* appointed to assist the court in a particular case. The discretion should be exercised 'sparingly'. See *Lau Wing Hong v Wong Wor Hung (No 2)* [2007] 3 HKC 574. In that case an *amicus* was appointed by the court, with concurrence of the parties, and instructed by the Registrar of the High Court, to be paid out of public funds. On discontinuance of the relevant part of the plaintiffs' claim, they were ordered to pay 2/3 of the costs of the *amicus*.

## ENTITLEMENT TO COSTS

## 3. Order as to entitlement to costs (O. 62 r. 3) (L.N. 152 of 2008)

(1) Subject to the provisions of this Order, no party shall be entitled to recover any costs of or incidental to any proceedings from any other party to the proceedings except under an order of the Court.

(2) If the Court in the exercise of its discretion sees fit to make any order as to the costs of or incidental to any proceedings (other than interlocutory proceedings), the Court shall, subject to this Order, order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs.

(L.N. 152 of 2008)

(2A) If the Court in the exercise of its discretion sees fit to make any order as to the costs of or incidental to any interlocutory proceedings, it may, subject to this Order, order the costs to follow the event or make such other order as it sees fit.

(L.N. 152 of 2008)

(3) The costs of and occasioned by any amendment made without leave in the writ of summons or any pleading shall be borne by the party making the amendment, unless the Court otherwise orders.

(4) The costs of and occasioned by any application to extend the time fixed by these rules, or any direction or order thereunder, for serving or filing any document or the doing of any other act (including the costs of any order made on the application) shall be borne by the party making the application, unless the Court otherwise orders.

(5) If a party on whom a notice to admit facts is served under Order 27, rule 2, refuses or neglects to admit the facts within 7 days after the service on him of the notice or such longer time as may be allowed by the Court, the costs of proving the facts shall be paid by him, unless the Court otherwise orders.

(6) If a party –

(a) on whom a list of documents is served in pursuance of any provision of Order 24, or

(b) on whom a notice to admit documents is served under Order 27, rule 5,

gives notice of non-admission of any of the documents in accordance with Order 27, rule 4(2) or 5(2) as the case may be, the costs of proving that document shall be paid by him, unless the Court otherwise orders.

(7) Where a defendant by notice in writing and without leave discontinues his counterclaim against any party or withdraws any particular claim made by him therein against any party, that party shall, unless the Court otherwise directs, be entitled to his costs of the counterclaim or his costs occasioned by the claim withdrawn, as the case

may be, incurred to the time of receipt of the notice of discontinuance or withdrawal.

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

(9) Where any person claiming to be a creditor–

(a) seeks to establish his claim to a debt under any judgment or order in accordance with Order 44, or

(b) comes in to prove his title, debt or claim in relation to a company in pursuance of any such notice as is mentioned in Order 102, rule 13,

he shall, if his claim succeeds, be entitled to his costs incurred in establishing it, unless the Court otherwise directs, and, if his claim or any part of it fails, may be ordered to pay the costs of any person incurred in opposing it.

(10) Where a claimant is entitled to costs under paragraph (9), the amount of the costs shall be fixed by the Court unless it thinks fit to direct taxation, and the amount fixed or allowed shall be added to the claimant's debt.

(11) Where a claimant (other than a person claiming to be a creditor) having established a claim to be entitled under a judgment or order in accordance with Order 44 has been served with notice of the judgment or order pursuant to rule 3 or 15 of that Order, he shall, if he acknowledges service of the notice be entitled as part of his costs of action (if allowed) to costs incurred in establishing his claim, unless the Court otherwise directs; and where such a claimant fails to establish his claim or any part of it he may be ordered to pay the costs of any person incurred in opposing it.

(12) Where an application is made in accordance with Order 24, rule 7A or Order 29, rule 7A, for an order under section 41, 42 or 44 of the Ordinance, the person against whom the order is sought shall be entitled, unless the Court otherwise directs, to his costs of and incidental to the application and of complying with any order made thereon and he may, after giving the applicant 7 days' notice of his intention to do so, tax such costs and, if they are not paid within 4 days after taxation, sign judgment for them.

## NOTES

## [62.3.1] Rule 3(1) – no recovery of costs except under order

Order 62 rule 3(1) provides that as a general rule, costs may only be recovered under an order of the court. Exceptions are provided for elsewhere in Order 62, notably rules 10 and 11. Those provide, *inter alia*, that a party against whom proceedings have been withdrawn or discontinued without leave may claim taxed costs without the need for an order.

The court may make an order for costs under its general power in section 52A of the High Court Ordinance and this Order whether or not a claim to costs has been pleaded. See Order 18 rule 15(1). It is sometimes said that costs are always in issue.

Different considerations apply where a claim to costs, or a particular level of costs, arises from contract – see the commentary under Order 62 rule 28 concerning contracts as to the level of costs.

See Order 42 rule 5B(6) for the court's power to make an order *nisi* as to costs.

### [62.3.2] Rule 3(2) – when court shall order costs to follow the event

Order 62 rule 3(2) states the general rule that costs shall follow the event. It provides that when making an order for costs other than in interlocutory proceedings, the court 'shall' order that costs follow the event unless in the circumstances of the case some other order should be made. In other words the rule prescribes that in general the court's broad discretion under section 52A of the Ordinance to determine 'by whom' costs should be paid, should be exercised so as to require the unsuccessful party to pay the successful party's costs.

Prior to amendment of rule 3(2) as part of the civil justice reforms, in effect from April 2009, the rule that costs 'shall' follow the event applied equally to interlocutory and other proceedings. Now under rule 3(2A) the court 'may' order that costs of interlocutory proceedings follow the event. The purpose of the amendment was to facilitate the court making use of costs orders to deter unreasonable interlocutory applications. See the commentary on the costs of interlocutory applications some paragraphs below.

The meaning of an order that costs follow the event was described in the following words in *Like Soon Co Ltd v Tsai Kui Kan & Ors* [1986] HKC 142, 144A–B (CA):

... we have always understood the expression 'costs to follow the event' to mean that the costs expended in obtaining the particular decision that the court has just made should be recovered by the party in whose favour that decision went. Or if the court were dealing with more than one matter, or more than two parties, then the costs should be recovered by each successful party.

### [62.3.3] Circumstances in which the court will make an order other than that costs follow the event

The rule that costs shall follow the event is not absolute. The court retains a discretion in all cases. This point is expressed emphatically in *Donald Campbell & Co Ltd v Pollak* [1927] AC 732, 811:

A successful [litigant] ... has no doubt, in the absence of special circumstances, a reasonable expectation of obtaining an order for the payment of his costs ... but he has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them.

Order 62 rule 3(2) expressly qualifies the rule that costs shall follow the event by providing that the court may make some other order as to the whole or any part of the costs in the circumstances of the case. Relevant circumstances as to when a successful party may be denied part of the costs, or even ordered to pay costs to the unsuccessful party, are set out in *Re Elgindata Ltd (No 2)* [1992] 1 WLR 1207, 1214A–C (CA) where the following 4 principles were expressed by Nourse LJ:

- (i) Costs are in the discretion of the court.
- (ii) They should follow the event, except when it appears to the court that in the circumstances of the case some other order should be made.

- (iii) The general rule does not cease to apply simply because the successful party raises issues or makes allegations on which he fails, but where that has caused a significant increase in the length or cost of the proceedings he may be deprived of the whole or a part of his costs.
- (iv) Where the successful party raises issues or makes allegations improperly or unreasonably, the court may not only deprive him of his costs but may order him to pay the whole or a part of the unsuccessful party's costs.

The above principles clearly apply in Hong Kong: see *La Chemise Lacoste SA v Crocodile Garments Ltd* [2000] 4 HKC 317, 327B–E (CA); *KWKM v KSW CACV 432/2006* (Yuen JA & Chu J; 15.06.2007). They are frequently cited by the court in considering whether to depart from 'costs follow the event'. See, for example, *Chow Kee James t/a Tapbo Civil Eng'g Co v Transway Construction & Eng'g Ltd HCCT 11/2006* (Deputy Judge Gill; 23.05.2007). However, they are not an exhaustive list of the circumstances in which the court may depart from the usual order. This is clear from the cases discussed in the following paragraphs.

In exercising its discretion as to costs the court will take into account all of the relevant circumstances. The fact that a party succeeded on a point raised by the court itself is irrelevant: *Wong Hing Cheong v Wah E Investment Ltd & Anor* [2002] 3 HKC 59, 69F–G (CA).

Since the implementation of the civil justice reforms in 2009 the court may be more ready to depart from the usual rule that costs follow the event. See *Hung Fung Enterprises Holdings Ltd & Anor v Agricultural Bank of China* [2012] 3 HKLRD 679; [2012] HKCU 1275 where (at para 100) Kwan JA said:

Although the principles in [*Elgindata*] continue to apply after the Civil Justice Reform, the approach these days is to regard the proposition that costs should follow the event not as a general rule but only operates to shift to the unsuccessful party the burden of showing why some different approach should be adopted on the facts of the particular case (*Chan Mei Yiu Paddy & Anor v SJ HCAL 16/2007* (Saunders J; 09.12.2010)), the rationale being that a mechanistic adoption of follow the event principle may result in parties incurring unnecessary costs in civil litigation (*Wong Kam Tong v IO Yuen Long Tin Shing Court HCMP 1454/2011* (CA; 06.12.2011)).

See also Order 62 rule 7 which gives the court an express power to depart from the principle that costs follow the event in cases of misconduct or neglect.

### [62.3.4] Order for proportion or fraction of costs

The court may, in exercise of its discretion, limit the extent to which costs are recovered by reference to a proportion, such as a fraction or percentage, or by reference to the costs of a particular stage of the proceedings. The power to make such orders is express in Order 62 rule 9(4)(a). See also Order 62 rule 5(1)(f) and 5(2)(a). It is sometimes exercised to reflect shared success. See the commentary concerning those rules.

### [62.3.5] No order as to costs

The court may in its discretion expressly make no order as to costs.

In *Wong Hing Cheong & Anor v Wah E Investment Ltd & Anor* [2002] 3 HKC 59 (paras 31–33) the Court of Appeal held that no order as to costs was fair where a party discontinued claims of 'substantial merit' following an erroneous decision by

the court below on a point of jurisdiction. At para 30, Rogers VP expressed the view that it was irrelevant whether a case is decided on a point raised by the parties or the court.

In *Secretary for Justice v Lau Kwok Fai Bernard & Anor* (2005) 8 HKCFAR 304 no order as to costs was made against the losing litigants in a constitutional challenge brought in the public interest. See the discussion below on the costs of public interest litigation.

In *Solicitor v Law Society of Hong Kong & Secretary for Justice (No 2)* [2004] 2 HKLRD 754 the Court of Final Appeal held that as a general rule costs will not be ordered against an intervener in important constitutional cases. In that case the Secretary for Justice had intervened in litigation over the constitutional validity of legislation.

In *Lion Will Investment Ltd v Triple Will Ltd* CACV 200/1992 (Power VP, Nazareth & Bokhary JJA; 23.07.1993) (para 17) it was argued that no order as to costs is 'usual' on a vendor and purchaser summons under section 12 of the Conveyancing and Property Ordinance (Cap 219). The Court of Appeal did not doubt that to be the case. However, an examination of the authorities suggests that such an order is often the result of agreement of the parties or consent, rather than exercise of the court's discretion. See, for example *Lo Shea Chung & Anor v Lo Hung Bui* [1997] 2 HKC 723 (CA); *Goldful Way Dev't Ltd v Wellstable Dev't Ltd* [1999] 1 HKLRD 563; *WOC Finance Co Ltd v Wing On Cheong Investment Co Ltd* [2000] 2 HKLRD 713 and *Leonart Ltd v Turn Fine Dev't Ltd* [2001] 3 HKLRD 353. This is perhaps explained by the fact that in certain instances a vendor purchaser summons is taken out to benefit both sides by clarifying title or contractual rights, unlike the more common hostile litigation.

In *Chan Ka Lim v Chow Wai Kin* CACV 405/2007 (Rogers VP, Le Pichon & Cheung JJA; 14.10.2008) the Court of Appeal made no order as to costs of an appeal and a cross-appeal, both of which were successful, where the net result was a variation of the quantum of damages ordered below by less than one-half of one percent. Le Pichon JA said (at para 40) that the variation was 'de minimis', and that neither party could be said to have been successful.

Where a judgment of the court is silent as to costs the result is that neither party will have any claim to costs. This follows from rule 3(1) which provides that (save as provided elsewhere in Order 62) no party is entitled to recover costs except under an order. However, the situation may be different with respect to an interlocutory order which is silent as to costs, and the court subsequently makes an order for the general costs of the action. In such case the order for the general costs of the action has been interpreted to extend to the costs of the interlocutory order: *Friis v Paramount Bagwash Co Ltd* [1940] 2 KB 654.

### [62.3.6] Reverse order as to costs

There are cases in which the court has been prepared to depart from the rule that costs follow the event to such an extent that it orders the successful party to pay the unsuccessful party's costs. See *Spruce v University of Hong Kong* CACV 58/1991 (Cons Ag CJ, Kempster & Macdougall JJA; 20.08.1991); [1991] HKCU 460 (reversed on appeal on other grounds: see [1993] 2 HKLR 65 (PC)). However, such an order is appropriate 'only in the most unusual circumstances': *Union Base Ltd v Tsang Shek Tong* [1998] 2 HKC 349, 351G-H (CA). It appears that there must be some fault attributable to the successful party to justify such a costs order. It is not a proper judicial exercise of discretion to order a completely successful party to pay costs: *Kierston v Joseph L Thompson & Sons, Ltd* [1913] 1 KB 587 (CA).

A reverse order as to costs was considered appropriate in *Chen Lai Fung v Pang Ming Wai Elix Jane t/a Herbage TCM Medical Centre* DCEC 1615/2012 (Deputy Judge Kot; 11.01.2013) on the ground that there was there had been no need to commence legal proceedings because it was clear from pre-action correspondence that settlement was possible.

### [62.3.7] Costs where only nominal or trivial damages awarded

A plaintiff who is awarded only a nominal amount of damages may not be regarded as successful for the purpose of the rule that costs follow the event. In *Elpe Int'l (FE) Ltd v Hewlett Packard (HK) Ltd* CACV 58/1993 (Power VP, Nazareth & Bokhary JJA; 30.07.1993) (para 32) Bokhary JA cited *Anglo-Cyprian Trade Agencies Ltd v Paphos Wine Industries Ltd* [1951] 1 All ER 873 and *Alltrans Express Ltd v CVA Holdings Ltd* [1984] 1 WLR 394 and said:

So the courts do not proceed on the basis that a party who recovers anything, even if only nominal damages, is *prima facie* entitled to costs provided he is not confronted by a payment into court of as much or more than what he recovered. Rather, the courts, looking at the realities, ask themselves the question, 'who really won?'

See also *Galium Dev't Ltd & Ors v Winning Pty Management Ltd* CACV 186/2003 (Woo VP, Le Pichon & Yuen JJA; 06.07.2005) citing *Anglo-Cyprian* (above) and *The Zinnia* [1984] 2 Lloyd's Rep 211. It has been held that the same principle applies where only a 'small or trivial' amount is awarded: *Hong Chi Fat Thomas & Anor v Alexander Sung Wai Yip* DCCJ 3196/2004 (Deputy Judge KW Wong; 12.09.2007) (para 23).

The result may be no order as to costs, as in *Tai Yip Dyeing Fty Ltd v Kong Hoi Sang* HCA 2917/2004 (Saunders J; 04.04.2007). Such an order is 'the usual practice' in defamation cases where the jury awards only nominal damages: *Ki Ping Ki Paul v Oriental Daily Publisher Ltd* [1999] 3 HKC 672, 675D, referring to *Martin v Benson* [1927] 1 KB 771 and *Pamplin v Express Newspapers (No 2)* [1988] 1 WLR 116. Alternatively the court may apportion costs as between plaintiff and defendant, as in *Tsun Fat Finance Co Ltd v Commissioner of Police* HCA 7017/2000 (Deputy Judge Fung; 04.10.2002). Or the court may go so far as to order the plaintiff to pay the defendant's costs, as in *Hong Chi Fat Thomas* (above).

### [62.3.8] Cost of litigation over estate or trust

See also the commentary under Order 62 rule 6 concerning the costs of contentious probate litigation, and the costs of personal representatives and trustees.

The costs of all parties in non-hostile litigation over an estate or trust (for example on a construction point) will normally be paid out of the fund. However, where the litigation is hostile (such as where there are factual disputes) costs will normally follow the event. See *Hongkong Bank Trustee Ltd v Lee See Ching John* [1998] 2 HKC 706, 707H-708F. Similar principles were applied in relation to a Chinese *t'ong* or *t'so* in *To Kan Chi & Ors v To Kin Wah & Anor* HCMP 509/2002 (Yam J; 29.09.2005); CACV 68/2006 (Rogers VP & Chu J; 27.02.2007). See also the commentary under Order 85 concerning the *Beddoe* order, by which trustees may protect themselves against personal liability for costs.

### [62.3.9] Costs of minority shareholder

A minority shareholder who brings proceedings for the benefit of the company may seek a pre-emptive order for indemnification by the company in costs. See *Chung*