CHAPTER 2

PLEADINGS

1. Introduction

Pleadings are the documents in which the plaintiff and the defendant set out all material facts in support of their case. Pleadings establish the facts and legal issues which are not agreed. Pleadings also enable the parties to evaluate each other's case so that a decision can be made either to proceed to trial or to settle the action on the most favourable terms possible. **2.001**

The most important objects of pleadings can be summarised as follows: **2.002**

- to clarify for the parties and the court exactly what is in issue between the parties;
- to give the parties sufficient information about each other's case to enable proper preparation (in terms of preparing evidence and understanding the law) for trial; and
- to record each party's case so that future litigation on the same issues can be avoided.

Pleadings are, therefore, documents of critical importance and it is vital not only to frame your own pleading accurately but also to analyse the opposing party's pleading in sufficient detail to understand fully the case being made against your client. Failure to do so may result in: **2.003**

- application being made for further and better particulars of the pleading (see Chapter 4) which will increase costs and lead to delay;
- your case, or part of it, being struck out (i.e. the court will refuse to consider it at trial);
- an inability to evaluate your own case because the issues between the parties are not clear; and/or
- additional legal costs (which may be large, particularly in the case of a late amendment) being incurred because of the need to amend pleadings before or even at trial.

In short, a badly drafted pleading may severely prejudice a party's case in terms of both merit and cost. **2.004**

(a) Definition

The term "pleading" which is referred to frequently in the Rules of the High Court (Cap.4A, Sub.Leg.) (RHC) includes the statement of claim, defence, reply, counterclaim, defence to counterclaim and any particulars given of pleadings (whether given voluntarily or pursuant to a request by the other side). There are other documents which also come within the definition, but those listed above will be the main ones you are likely to come across. The definition of "pleading" does not embrace **2.005**

a general endorsement on a writ, a petition, a summons, an originating summons, an affidavit or a notice of appeal.

(b) Statements of truth

2.006 All pleadings (and any amendments) are required to be verified by a Statement of Truth (RHC O.41A). RHC O.41A r.3 sets out who may sign a Statement of Truth. In general, it needs to be signed by the parties or their legal representative. When signed on behalf of a corporation, it should be signed by someone in a senior position. The form of a Statement of Truth for a pleading as required by RHC O.41A r.5 is:

> "[I believe] [the (plaintiff or as may be) believes] that the facts stated in this [name of document being verified] are true."

2.007 Statements of Truth are very important. The basic purpose is to ensure that documents put before the court accurately reflect the case of the party. The rule is designed to discourage pleadings which are unsupported by evidence or wholly speculative. The person signing the statement should take care to ensure that the facts stated in the pleading or document are correct. It may be contempt of court to sign a false statement of truth. In *Kinform Ltd v Tsui Loi*,[1] defendants who signed false statements of truth were found in contempt of court and sentenced to two weeks' imprisonment.

2. The Checklists

2.008 Checklists 2.1–2.6 require extensive use of the RHC which is really the only accurate guide to *procedure*. In addition to the RHC, it is, however, necessary to be familiar with the *practice* by which procedure is implemented in the Hong Kong courts. The checklists contain cross-references to explanations in this commentary.

2.009 The commentary that follows should be used in conjunction with the checklists, and therefore adopts the same principal headings, although some sub-headings have been added. The checklists and commentary have been written so that reference must be made to paragraphs of the RHC or other textbooks. The reason for this is that familiarity with the RHC and in particular, *Hong Kong Civil Procedure* (and textbooks such as *Bullen and Leake and Jacob's Precedents of Pleadings* and *Atkins' Court Forms*), is essential whilst a solicitor is gaining experience (and probably almost as essential, at least so far as the RHC is concerned, even when he thinks they know it all). Rules can and do change and it is unwise to rely on memory or historical knowledge when acting as a professional adviser. Further, always check the cumulative supplements to the RHC and also check whether any relevant circulars have been issued by the Chief Justice.

[1] [2011] 5 HKLRD 57.

3. Action before Drafting Pleadings

(a) Obtaining instructions from your clients

2.010 It is not always obvious from whom you are, or are supposed to be, taking instructions. You may know that a person is connected with a certain company or firm, but you may not know his position within that firm. It is important that you establish that the person from whom you are taking instructions has authority to give them.

2.011 Where the client is a company, instructions should be given either by a director or by someone with ostensible authority to give you instructions (e.g. the manager of the company). Indeed, you should ensure that you have authority to act for the company, e.g. by obtaining a board resolution. Where the client is a partnership or a firm, the instructions should either come from a partner, or you should clarify with a partner or a manager of the firm that the person you are dealing with has been authorised by them to instruct you in the matter. Failure to do so may lead to criticism from the client. In certain circumstances, it may even render your firm personally liable for costs.

(b) Analysis of documents

2.012 You should obtain from the client all documents that are relevant to the dispute, together with any oral explanation that is necessary. As disputes often relate to what was said between the parties as well as what was stated in writing, it is vital that you talk to the client about the case. In addition, getting the client to explain the contents of documents that are not immediately understandable can save a considerable amount of time when analysing them. Any discussions between the parties on social media or other electronic communications should also be obtained. These should be copied and preserved. As a real time written record of events they can be given much weight by the court. Your client may not recall having made statements in such conversations that could harm their case and it is of vital importance to obtain and copy all records as soon as possible.

2.013 It is important to establish, at the analysis stage, that there are no documents that might be relevant which you have not yet seen. When the question of discovery (see Chapter 7) is explored further with the client after the close of pleadings, an additional search by the client, prompted by the need to give full discovery, frequently results in further relevant documents being found. Ideally, all relevant documents should be obtained at the outset because their contents may affect the merits of your client's case and affect the way in which your client's pleading is drafted.

2.014 If there are technical documents or technical terms in the documents which are relevant to the dispute, it is important that you understand them fully. The client may be able to help you in this but, if not, you may have to seek independent technical advice (e.g. in the construction industry, many of the terms used are not comprehensible to a person without experience in that field).

2.015 If there is something you do not understand, either confirm with the client (to your own satisfaction) that it is irrelevant, or find out what it means. Where there are figures

in the documents, analyse them and make sure that these add up, rather than merely accepting that these are accurate.

2.016 Once you have gained an understanding of the factual background to your client's case, you should seek to identify all relevant causes of action (i.e. whether the claim should be brought in contract or in tort and, if the latter, what is required to establish the duty which it will be said has been broken and caused the damage). It is very important that you assess whether your client has a good claim in law and this will usually require legal research. Sometimes you may want to consult a colleague, or even instruct a barrister to advise if you remain unsure of the position after your research is complete.

2.017 Having identified the likely causes of action, you will need to decide from your reading of the documents and your assessment of the oral explanations given by the client whether there is sufficient evidence to support such a claim. For example, if the claim is in contract for the payment of a debt, there must be sufficient documentary or oral evidence to show the amount of the debt, the fact that it is owed by the defendant to the plaintiff, and to show that conditions precedent (such as service of notices) have been satisfied and the debt is already due and payable.

2.018 You will quite often find that there is more than one cause of action that you can pursue against the defendant. Where the RHC refers to "joinder" of causes of action (see RHC O.15 r.1), it means claiming in respect of more than one cause of action. For example, there may be a claim for damages arising from both breach of contract and from fraud.

2.019 It is normal to include in your pleading a claim in respect of more than one cause of action.

2.020 Although this question may seem technically difficult, in the normal case the answer to the question of whether a cause of action can be "joined" is straightforward and a matter of common sense. Generally speaking, if both the facts and the parties in respect of two separate causes of action are the same, the two causes of action can be joined.

2.021 You should next consider the possible parties against whom these causes of action can be brought.

(c) The parties to an action

2.022 When identifying possible defendants, a question of primary importance is whether a potential defendant has the financial resources to pay the damages claimed against it and to pay for the costs of the action should it lose. If you suspect that the potential defendant may not have sufficient funds to pay, the client must be advised of this (see Chapter 1). Joining extra parties may increase the financial exposure of your clients to costs, particularly, if the different defendants instruct different law firms. This risk should also be assessed when deciding whether to join an extra defendant.

2.023 When considering the financial means of defendants, always remember to check whether a defendant is likely to be insured. Although the insurer cannot be joined into the action, if an insurer accepts the defendant's insurance claim, it will provide the defendant with funds to pay the plaintiff's claim in whole or in part.

2.024 Just as there is often more than one cause of action to be pursued, there is often also more than one defendant who could be joined in the action. For example, in a claim in tort against builders for negligent work, there will probably be a cause of action against the contractor and the sub-contractor, both of whom will owe the plaintiff a duty of care.

2.025 If the client is contemplating issuing proceedings against a company, it is worth considering whether the directors of the company have incurred liability and if so, whether they too should be joined as co-defendants. A company search at the Companies Registry will reveal the identities and the addresses of the directors.

2.026 Alternatively, there may be more than one possible plaintiff with a right to claim in respect of the same cause of action. For example, a negligent driver might have a claim brought against him by more than one passenger in his vehicle. The term "joinder" of parties therefore means the inclusion of more than one plaintiff, and/or more than one defendant in the action.

2.027 The commentary contained in *Hong Kong Civil Procedure* under RHC O.15 r.4 deal in detail with the question of joinder of parties. The general rule is that no leave is required where, if separate actions were brought by more than one plaintiff, or against more than one defendant:

- those actions would involve some common question of law or fact; and
- the right to relief in those actions arises out of the same transaction or series of transactions.

(d) Legal status

2.028 It is important to establish the legal status of the plaintiff(s) and defendant(s) in the action. Special provisions affecting the way in which you will need to draft the statement of claim (or defence) and effect service are listed in Checklist 2.2. As pointed out in paras.2.010–2.011, this question is also important in establishing that the person giving you instructions has the authority to do so on behalf of the client.

2.029 An example of the importance of establishing the legal status of the plaintiff is where your client is a sole proprietor of a firm which is not a limited company. Unlike a limited company and unlike a partnership, the sole trader must sue in his own personal name and may not merely use the firm's trading name (although he may be sued in his trading name RHC O.81 r.9).

2.030 An example of the importance of establishing the legal status of a defendant is where you are suing a partnership. The advantage of suing partners in the name of their firm, rather than suing the individual partners, is that service of documents is easier and judgment can be enforced against the property of the firm within the jurisdiction or against the private property of any person identified in the action as

a partner pursuant to RHC O.81 r.5(2) (i.e. any person who acknowledged service of the Writ, or was served with the writ as a partner, or admitted in his pleading or adjudged as a partner). In the normal case you will, therefore, wish to sue a partnership under the firm's name. However, it may be that only one partner has any property worth pursuing, the others being financially destitute. Given that leave is required to enforce a judgment against any person who is not identified in the action as a partner (RHC O.81 r.5(2)) or was out of jurisdiction and did not acknowledge service of the writ, or was not served with the writ in accordance with the requirements of RHC (O.81 r.5(3)), you may wish to join that partner into the action personally.

2.031 A search in the Business Registration Register will sometimes provide the names of the partners and the address for service of all business letters. However, just because a person is not listed as a partner on the Business Registration Register does not mean that at law they are not a partner of the firm. Whether they are a partner is a question of fact that will be determined by the court. The provisions in the RHC relating to partnerships are complex and should be read carefully.

(e) Governing law and jurisdiction

2.032 The question of the governing law and the court of jurisdiction should be addressed at the outset. The sort of questions that should be asked are, "Where was the contract signed?", "Where were the obligations to be performed?", "Where did the alleged breach of contract occur?", "Where do the parties now reside and/or carry on business?", "Where is the subject matter of the contract located" and "Are there any terms in the contract governing the jurisdiction of disputes?".

2.033 If the dispute is outside the Hong Kong courts' jurisdiction and this question is raised, the courts will refuse to hear the claim.

2.034 If the contract is governed by foreign law but the dispute is within the Hong Kong courts' jurisdiction (e.g. because the defendant is resident in Hong Kong), you may need to plead those aspects of the foreign law upon which you are relying and evidence of foreign law may need to be given (usually by way of expert evidence), since foreign law must be proved as a question of fact in Hong Kong courts.

(f) Form of action

2.035 Finally, decide on the form of proceedings (see RHC O.5). This is important because it is embarrassing, to say the least, to begin proceedings by adopting the wrong procedure. It may also result in your action being time-barred. Generally, most civil disputes are commenced by writ of summons. Actions which must be commenced by writ include:

- claims in contract;
- claims in tort (other than trespass on land);
- claims based on an allegation of fraud, or for damages for breach of duty;

- claims in connection with an infringement of a patent; and
- other actions such as admiralty actions *in rem* and probate actions.

2.036 A writ is a specific type of court document, the form of which is set out in Sample Documents 2.1 and 2.2. This manual does not deal with the other ways of starting proceedings, for example by originating summons, or by motion or petition which must be used in certain circumstances, but which will almost certainly not be appropriate for actions involving claims for recovery of damages. By way of example, an action which could appropriately be started by originating summons would be one brought to obtain a court ruling upon the interpretation of a document. As another example, company winding-up proceedings must be, and matrimonial proceedings are most often, commenced by petition. These are specialized areas outside of the scope of a basic practice guide such as this.

2.037 It is worth noting here, however, that failure to commence the action in the correct form will not render the proceedings a nullity (see RHC O.2 r.1), but the court may require the proceedings to be brought in the correct form and may impose some penalty in costs on the party bringing the action. RHC O.28 r.8 provides the mechanism for changing the proceedings from one commenced by originating summons to one commenced by writ. However, in many cases, it may be easier to discontinue and recommence the action rather than to apply under RHC O.28 r.8, but limitation periods must always be borne in mind!

2.038 Reference should also be made to Practice Direction 19.1 (Pleadings) on pleadings and in personal injury actions to PD 18.1 (Personal Injuries List). The latter in particular deals in some detail with pleadings and the documents to be served with pleadings. It is important that the provisions of the practice directions are carefully followed. Failure to comply with the requirements of a practice direction may have cost consequences for the client and the solicitor personally.

4. Drafting the Writ and Statement of Claim

2.039 The formal requirements in drafting pleadings are set out in full in RHC O.18 and must be referred to. When drafting a statement of claim or any other pleading, it is well worth reading through the whole of RHC O.18 to check that the pleading is technically correct and deals with all relevant issues. RHC O.18 can itself therefore be used as a checklist.

2.040 The difference between a writ endorsed with a general endorsement and a writ endorsed with a statement of claim is essentially that the former is very short and contains only a summary of the claim, while a statement of claim is much longer and sets out all material facts upon which the plaintiff relies.

2.041 The word "endorsement" or "indorsement" means writing or typing the necessary wording upon the writ, or attaching to it a document that contains the necessary wording, and referring to that document in the writ.

2.042 The reasons a general endorsement would be used rather than setting out the case in full are:

- time constraints (e.g. because of the imminent expiry of a limitation period or because a defendant is about to leave the country); or
- because documentation or instructions are insufficient to enable you to draft the statement of claim at that stage; or
- because you are issuing a writ merely to preserve your client's right of action without necessarily intending to serve the writ immediately; or
- because the client does not wish all the facts of the case to be set out in a document to which any member of the public has access. (A copy of a writ can be obtained by anybody searching at the Registry—see RHC O.63 r.4.)

2.043 The full requirements for the wording of the endorsement are set out in RHC O.6 r.2 which you should read. Every writ must, at the very minimum, be endorsed with the following:

- a concise statement of the nature of the claim made and the relief or remedy required in the action;
- where the claim is only for a debt or a liquidated demand, a statement of the amount claimed, including the amount claimed for costs, together with a statement that further proceedings will be stayed if the defendant pays the amount claimed within the time limit for acknowledging service; and
- where the only remedy the plaintiff is seeking is the payment of money, with a statement that the defendant may make an admission in accordance with RHC O.13A within the period fixed for service of the defence.

2.044 With regards to the first point, RHC O.6 r.2 uses the word "or" between "nature of the claim made" and "the relief or remedy". However, the Court of Final Appeal in *Moulin Global Eyecare Holdings Ltd v Olivia Lee Sin Mei*[2] held that the "or" should be read "and", meaning that a concise statement of nature of the claim (for example, "The Plaintiff's claim is for breach of contract") and the relief or remedy sought must be included.

2.045 The distinction between what are material facts (which should all be pleaded) and what is merely evidence (which should not be pleaded) is sometimes a fine one. A good guide is to plead only the essential facts necessary to prove your client's case. If there are additional facts which support these essential facts, these can be regarded as evidence and need not be pleaded. For example, in the statement of claim in Sample Document 2.2, the fact that the suits were packed badly, causing irreparable damage to them, is an essential fact which has to be pleaded. Details of who did the packing, how and in what circumstances constitute evidence.

[2] (2014) 17 HKCFAR 466, [23].

2.046 The expression "alternative and inconsistent allegations" means that the plaintiff and the defendant can plead different allegations arising from the facts as pleaded by them. RHC O.18 r.12A, however, requires that the party have reasonable grounds for doing so. (See *Yiu Ka Fung Vincent v Info-Vantage*[3] for a discussion of the law on this point.) For example, a defendant in a contract case may allege in the alternative that:

- there was no agreement; or
- if there was an agreement, there was no damage; or
- if there was an agreement and there was damage, nevertheless, the damage was not caused by the defendant and/or the claim is statute-barred.

2.047 There is a general practice that the law should not be pleaded. However, a point of law may be raised in the pleading (RHC O.18 r.11). If a point of law is not pleaded, this does not prevent it being raised at trial. An example of this would be that the claim was statute-barred. However, one should not plead any of the law relating to that issue; one should merely raise the point. The one exception to this rule is the need to plead any aspects of foreign law upon which you seek to rely (see para.2.034).

2.048 The writ and statement of claim can be drafted in English or Chinese. If there is any doubt about the defendant's ability to understand the language of the proceedings, a short endorsement in the other official language should always be drafted and attached to the writ (see PD 24.2 (Endorsement in the Chinese Langauge to be Made on Court Documents).

5. Commencement of Proceedings

2.049 A sealed copy (not a photocopy) of the writ must be served upon each of the defendants. As stated previously, the requirements of service are set out in detail in the notes to RHC O.10, 11, and 65 and it is vital that these are followed closely if valid service is to be achieved. By way of example, when serving a writ on a limited company, the writ must be left at or sent by post to the registered office of the company. Documents cannot be served effectively on a limited company by, for instance, inserting them through its letter box. This is different from the requirements of service upon a firm where the writ may be served:

- personally on one or more of the partners; or
- on any person having, at the time of service, the control or management of the partnership business at its principal place of business; or
- by ordinary first class post addressed to the principal place of business within the jurisdiction.

2.050 It is important to note in particular the need to apply for leave of the court to serve proceedings out of the jurisdiction (see RHC O.11).

[3] (CACV 96/2014, [2016] HKEC 87).

2.051 Service requirements vary according to the parties. For example:

- an individual: serve personally or, if his whereabouts are unknown, at his last known address (RHC O.65 r.2);
- a Hong Kong limited company: serve at the company's registered office, either by first class post or by hand (RHC O.10 r.1, RHC O.65 r.3 and Companies Ordinance (Cap.622) s.827;
- a registered non-HK company: serve on its authorized representative or place of business Companies Ordinance s.803);
- a minor or a psychiatric patient: see RHC O.80 r.16;
- a body corporate: see RHC O.65 r.3; and
- a partnership: see RHC O.81 r.3.

2.052 Failure to effect valid service can be extremely frustrating and time-consuming. For example, you could enter judgment in default of service of notice of intention to defend only to have the judgment set aside some time later because service was shown to be invalid. Furthermore, when you are close to the end of the limitation period (in personal injury cases the limitation period is only three years), or nearing the end of the validity period of the writ (i.e. the 12 months allowed for service of an issued writ), ineffective service can have drastic consequences. There will also be adverse costs consequences for the party failing to effect valid service.

2.053 If it proves impracticable or impossible to serve the writ or statement of claim or any other documents, you should consider making an application to court for an order for substituted service (see Sample Documents 2.7 and 2.8) (RHC O.65 r.4). Before making an application for leave to effect substituted service, ensure that the recommended guidelines set out in *Hong Kong Civil Procedure 2018*, Vol.1, para.65/4/1 have been followed.

2.054 If the validity of the writ expires before service can be effected, the plaintiff can apply to the court for leave to extend the validity of the writ for a period of not more than 12 months (RHC O.6 r.8). As it is the duty of the plaintiff to serve a writ on the defendant promptly, the plaintiff must show a good reason for allowing the validity of the writ to lapse (see *Hong Kong Civil Procedure 2018*, Vol.1, para.6/8/3–4).

2.055 Once the writ is served, it is very important that all relevant dates are noted in the diary. Effective noting of relevant dates keeps the plaintiff's solicitor aware of the times at which it may be possible to enter judgment in default. As solicitor for the defendant, failure to diarise dates for an important step may result in judgment being obtained against your client.

(a) Judgment in default

2.056 An application for judgment in default of acknowledgment of service can be made for certain types of claims set out in RHC O.13. Essentially, this covers claims for liquidated or unliquidated sums, detention of goods or possession of land. The application is made by filing an affidavit of service and draft judgment for approval. An interest calculation must be made for these purposes.

2.057 Judgment in default of defence may also be obtained for the same type of claims. As a prerequisite to this step, the plaintiff must ensure that two clear days prior notice in writing is served on the defendant where the defendant has filed an acknowledgment of service indicating his intention to defend (see RHC O.19 r.8A and Chapter 4).

2.058 Where judgment in default is sought for other claims, such as claims for an injunction, an application can only be made after the time limited for filing a defence expires (that is, 42 days after service of the writ (including the day of service)), even if the defendant is in default of acknowledgment of service. The application is made by summons and heard by a master or a judge depending on the relief sought (see RHC O.13 r.6 and O.19 r.7). In the case of injunctions, the application is heard by a judge as masters do not have the power to grant injunctions other than by consent (RHC O.32 r.11(1)(d)).

6. Consideration of the Defence

2.059 When the defendant's solicitor has served and filed a defence to the statement of claim, you will need to read and understand it. In the light of your consideration of the defence, you should re-analyse the documents and factual background to the case and decide whether or not the points made in the defence are persuasive legally (perhaps more persuasive than your own conclusions when drafting the statement of claim!). You must also decide whether the defendant will have sufficient evidence to support his case.

2.060 The commentary to RHC O.18 r.19 in *Hong Kong Civil Procedure 2018* explain in detail the basis upon which a defence may be struck out in whole or in part and should be read very carefully. Furthermore, if the defence does not disclose any triable issue, consideration should be given to whether to take out an application for summary judgment under RHC O.14.

2.061 Just as before, when the documents were being analysed with a view to drafting the statement of claim, consideration of the evidence is extremely important. If a defendant admits certain facts pleaded in the statement of claim, it will not be necessary to produce evidence to prove those facts. Alternatively, if a fact is denied or expressly not admitted, it will be necessary to produce evidence of that fact at trial. For example, if a defendant does not admit to signing a certain document, the document bearing the defendant's signature will have to be produced at trial and evidence given by someone who saw him sign it or alternatively by someone who can recognise his signature.

2.062 The facts pleaded by the defendant should be compared closely with the facts pleaded in the statement of claim and the evidence should be reviewed with this comparison in mind. It may well be that new facts, hitherto unknown to you, are pleaded by the defendant. Those facts may affect the merits of your case and your client's comments upon the facts will have to be obtained. This stage of preparation is a good opportunity to evaluate your client's case and its prospects of success.

2.063 It may be necessary, because of certain matters pleaded in the defence, for the statement of claim to be amended or for a reply to be served. The question of amendment of pleadings is dealt with in Chapter 4. A reply is not normally necessary and need only be served if it has been decided:

- to plead specifically any matter which makes the claim or defence of the other party unmaintainable—for example performance, release, estoppel, limitation, fraud or illegality;
- to plead specifically any matter which raises new issues of fact;
- to admit part of the other party's pleading—this may save on costs (see generally RHC O.18 r.8 and Checklist 2.7).

2.064 As regards consideration of the contents of a defence to counterclaim, the same considerations apply as to the main defence.

7. Action to be Taken on Behalf of the Defendant

2.065 The considerations that should be addressed by a plaintiff's solicitor generally also apply when advising a defendant to an action. As the defendant's solicitor, you must gain a full understanding of all relevant documents and evidence (written and oral), and you must analyse the law and evaluate the evidence. You should identify other possible defendants with a view to commencing third party proceedings (see paras.2.073–2.080) and ultimately, you must assess your client's chances of success at trial.

2.066 Again, noting all relevant dates in the diary (e.g. time for filing of the notice of intention to defend and the defence) is essential and failure to do so may result in judgment being entered against your client. As an example, if default judgment is entered against the defendant for failure to serve a notice of intention to defend, or a defence, he will need to apply to the court to set aside the judgment. In such instances, not only is he required to give a satisfactory explanation on oath of the failure to comply with the rules, he will also have to put forward, again on oath, the merits of his case to satisfy the court that he has a triable defence. Even if the defendant succeeds in setting aside the judgment, only in rare instances will he not be ordered to pay the plaintiff's legal costs occasioned by his set aside application. (See also para.4.008)

2.067 It is important to allow yourself sufficient time to draft an adequate defence. Under CJR, bare denial of the averments of fact in the statement of claim is no longer allowed. The defendant has to state the reasons for the denial and put forward his version of events to rebut the allegations. (RHC O.18 r.13(5)) Care should be taken when requesting an extension of time to file the defence. While it was normal for at least one extension of time to be granted without having to apply to the court before CJR, this is not necessarily the case now that the defendant has 28 days to file his defence. The plaintiff may insist on, and the court may make, an "unless order" even if an extension of time is granted.

2.068 Before drafting the defence, you should consider whether your client has *any* claims that can be brought against the plaintiff. If so, these may be made in the same action

by way of counterclaim (RHC O.15 rr.2 and 3). The counterclaim should be pleaded immediately after the defence in the same document. Such claims do not need to arise out of the same subject matter as the plaintiff's claim. The advantages of bringing a counterclaim are that:

- it does not involve the expense of commencing fresh proceedings (although the court may order that the counterclaim is tried separately from the plaintiff's claim);
- it may reduce the plaintiff's claim against the defendant if a set-off is appropriate; and
- tactically, it allows the defendant to go on the attack in the proceedings.

2.069 When drafting a counterclaim, you should take into account the same considerations as you would if you were commencing a separate action even though the counterclaim is contained in the body of the defence under a heading "Counterclaim" (see Sample Document 2.4). The writ itself must be in Form No 1 in Appendix A to the RHC. Check RHC O.6 to ensure compliance with the rules in drafting the writ. Also see paras.2.029–2.047.

2.070 Before drafting the defence and counterclaim, you should familiarize yourself with the terms of RHC O.18 and the notes to it using it both as a guide and as a checklist.

2.071 A counterclaim may constitute an equitable defence by way of set-off against the plaintiff's claim if it arises out of the same transaction or a transaction closely associated with the transaction which is the subject of the plaintiff's action. A counterclaim can be as large or larger than the plaintiff's claim. A counterclaim will not prevent the plaintiff from obtaining summary judgment against the defendant, for part or all of its claim, if there is no equitable defence by way of set-off. In such a case, the court will enter judgment in favour of the plaintiff with respect to part or all of the main claim and leave the defendant to pursue the counterclaim.

2.072 It is important to bear in mind that where a counterclaim is served with a defence, a defence to the counterclaim must be pleaded irrespective of whether a reply is necessary (RHC O.18 r.3(2)); otherwise the defendant may enter judgment under RHC O.19 on the counterclaim against the plaintiff (See RHC O.19 r.8).

2.073 With a view to facilitating early settlement of claims, a defendant may now make an admission to all or part of a claim. The procedures are set out in the new RHC O13A introduced under the CJR. This new order applies to monetary claims only (liquidated or unliquidated) and allows a defendant who admits liability to propose terms (such as amount of settlement or time of payment) on which judgment would be entered. The court may then determine any outstanding issues on paper or at a hearing, or give such directions as it considers appropriate

(a) Action by the defendant on third party proceedings (RHC O.16)

2.074 You may often find that if your client has been joined as a defendant into the proceedings, there are other parties whom the plaintiff has not joined into the action

HCA [*number*]/20[*year*]

IN THE HIGH COURT OF THE
HONG KONG SPECIAL
ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE

ACTION NO [*number*] OF 20[*year*]

BETWEEN

SPLENDID DEVELOPMENTS
LIMITED *Plaintiff*

and

GOOD-OH CONSTRUCTION CO
LIMITED *Defendant*

BEFORE MASTER [*name*] OF THE
HIGH COURT IN CHAMBERS

ORDER

Filed on the [date] day of [month] 20[year].

AN Other & Co
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Rosery Building
Central
Hong Kong
Ref:
Solicitors for the Plaintiff

Chapter 6

INJUNCTIONS

1. Introduction

An injunction is either an order of the court that a person shall refrain from carrying out a specific act, or an order requiring a person to perform an act (other than the payment of money). The first of these categories of injunction is called a "prohibitory" injunction and the second is called a "mandatory" injunction. Prohibitory injunctions are much more common than mandatory injunctions for reasons which will appear below. **6.001**

Injunctions may be sought as a final remedy in an action, in which case they are called "permanent" injunctions, or at some other stage in the action, in which case the injunction is called an "interim" or "interlocutory" injunction. This distinction will be discussed further below. **6.002**

2. Circumstances in which a Permanent Injunction may be Obtained

The circumstances in which a permanent injunction can be obtained will vary according to the branch of the substantive law under which the claim for an injunction arises. A detailed discussion of those circumstances is outside the scope of a manual concerned with legal practice but some principles merit a mention. **6.003**

Awarding damages and granting an injunction are both remedies which the court may order in favour of a litigant. In general, the purpose of damages is to compensate the plaintiff for an infringement of his legal rights which has already occurred. The purpose of an injunction is to require the defendant to act, or not to act, in a certain manner and thereby prevent (or in some cases rectify) the infringement of the plaintiff's legal rights after the order is made. **6.004**

(a) Prohibitory injunction

A prohibitory injunction is, therefore, an appropriate remedy where the plaintiff's objective is to prevent his rights from being infringed in the future. For example, where the defendant has been persistently trespassing on the plaintiff's land, or where the defendant is in business and has been selling articles which infringe copyright owned by the plaintiff, the element of repetition and continuity will justify the granting of an injunction. On the other hand, where the defendant has failed to deliver goods in accordance with a sale of goods contract, there is no likelihood that the breach of contract will be repeated, and so damages for breach of contract would be a more appropriate remedy. **6.005**

In some cases, even where there is an element of continuity, an award of damages will still be an adequate remedy for the plaintiff. For example, if a contract for the supply of raw materials to a factory called for the materials to be delivered on the first day of every month for a period of two years and the defendant refused to deliver materials after the first month, the court would not require the defendant to comply with the **6.006**

contract by means of an injunction. In such a case, the plaintiff could easily obtain his supply of raw materials from another source and if he suffered a loss because the alternative source was more expensive, then he could be compensated for that loss by an award of damages.

6.007 It should be noted that it is possible for both damages and an injunction to be awarded in the same action. For example, in an action for trespass, the plaintiff could be awarded damages to compensate him for damage to his land caused by the trespassing and an injunction to prevent the trespass being repeated in the future.

(b) Discretion to grant

6.008 In every case where an injunction is sought, the court has, in theory, a discretion as to whether or not the remedy should be granted. In the case of prohibitory injunctions, there are, in practice, many cases where an injunction will be ordered as a matter of course, but the grant of an injunction is discretionary. Every case depends upon its own particular facts.

(c) Mandatory injunction

6.009 An example of a mandatory injunction would be a case where an easement is interrupted by the construction of a building along the path of the easement. In such a case, the court can order that the building should be demolished to allow the easement to be used once again. However, in some cases the cost of undoing what has already been done may involve the defendant in expenses disproportionate to the infringement of the plaintiff's rights. For example, in the case of the easement referred to above, if the plaintiff used the blocked right of way extremely infrequently, the court might, in its discretion, decide that an award of a small amount of damages would be a more appropriate remedy than granting a mandatory injunction which would cause great expense to the defendant.

6.010 In deciding whether and how to exercise its discretion, the court may take account of the conduct of both the plaintiff and the defendant. Conduct can be especially important in the case of mandatory injunctions. Where a defendant has acted without regard to his neighbour's rights, "wantonly and quite unreasonably", he may be ordered to restore the *status quo* even if the expense to the defendant is disproportionate to the advantage to the plaintiff. Alternatively, where the defendant has acted "reasonably", though wrongly, the court may refuse to make a mandatory order involving the defendant in heavy expenditure.

6.011 A further important factor in connection with mandatory injunctions is that the injunction should define precisely what the defendant is ordered to do. This principle was decided in *Redland Bricks Ltd v Morris*[1] which contains a general discussion about the factors affecting the decision whether a mandatory injunction should or should not be granted. In that case, the House of Lords refused to grant a mandatory

[1] [1970] AC 652.

injunction requiring the defendant to restore support to the plaintiff's land partly because the injunction requested gave the defendant no indication of what exactly was to be done to restore the support.

(d) *Quia timet* injunction

6.012 It is also possible to apply for *quia timet* injunctions. Damages can only be awarded in respect of an injury which was actually suffered before the action was brought. However, if the plaintiff learns that the defendant is about to infringe his legal rights, he may obtain an injunction to prevent such an infringement from occurring. Such an injunction is called a *quia timet* injunction. For example, if a plaintiff learns that a newspaper containing a libel against him is about to be printed, then subject to the law concerning injunctions in the case of defamation generally, the plaintiff may obtain an injunction to prevent the publication of the libellous statement. The injunction is available even though, technically, no libel is committed until the publication occurs.

(e) Availability of injunctions

6.013 Examples of the areas of the substantive law where injunctions may be sought as remedies include:

- *disputes related to property and to landlord and tenant matters*: injunctions may be awarded to prevent trespass or nuisance from occurring, to prevent interference with easements or rights to light or to require compliance with the covenants in a lease;
- *intellectual property matters*: injunctions are often sought as remedies for infringement of intellectual property rights such as copyright, patents, designs, trade marks and also in connection with the tort of passing-off; and
- *commercial matters and confidential information*: injunctions can be awarded to prevent disclosure of information passed by one party to another in confidence. This often occurs in the context of an employment contract where the employee has taken up new employment with a rival to his former employer and the former employer considers that the employee will or may pass on confidential trade secrets. Injunctions may also be issued in these circumstances to enforce valid restrictive covenants in an employment contract.

These are only a few of the common circumstances where resort may be had to the remedy of an injunction. *Mareva* injunctions and *Anton Piller* orders are discussed further from para.6.077 onwards.

(f) Interlocutory injunction

6.014 A permanent injunction can only be granted after the full trial of an action. The steps taken before a trial in an action seeking injunctive relief are identical to the steps in

an action for damages. In other words, there must be a writ, the service of a statement of claim, the usual exchange of pleadings, witness statements and discovery and inspection of documents, case management conference, pre-trial review, the exchange of experts' reports (where appropriate) and any other interlocutory proceedings.

6.015 As the various steps can take considerable time, the plaintiff often considers that he will suffer an irreparable loss if the defendant is permitted to continue to infringe the plaintiff's rights in the period up to trial. In those circumstances, the plaintiff may choose to apply for an interlocutory injunction which, if granted, would require that "until Judgment or further order" the defendant should not continue with or repeat the conduct of which the plaintiff complains. (The quoted phrase is used in the order itself, making it clear that the injunction only binds the defendant until judgment is granted in the action or until some other order is made varying the terms of the injunction, if that is sooner.)

6.016 When the court is hearing an application for an interlocutory injunction, it acts only on the basis of affidavit evidence presented to it by the parties. It does not undertake a full investigation of the facts such as would take place at the trial itself. The court's objective is to preserve the *status quo* in difficult circumstances where the court does not know whether the plaintiff or the defendant will ultimately prove to be right.

6.017 The court's position in these circumstances is difficult because, whichever way it acts, it may do injustice: denying an interlocutory injunction to a plaintiff with a good claim for an injunction at trial may result in the plaintiff suffering a loss for which an award of damages is not adequate compensation, but granting an injunction against a defendant who is successful at trial may result in the defendant being inhibited from acting in a perfectly lawful manner and thereby suffering loss.

6.018 The court has the power to order a speedy trial under RHC O.29 r.5 and the court will sometimes do so if it grants or declines to grant an injunction. A speedy trial order will include directions for discovery and exchange of witness statements and, if the judge considers it appropriate, for the setting down of the case for trial. The order can also include that any interlocutory applications be made to a judge so as to avoid delays in the masters' courts. It is also possible to apply for a speedy trial as an alternative to an interlocutory injunction. (See Practice Direction 5.3 (Listing and Hearing of Summonses for Interlocutory Orders and Injunctions) para.9 and *WL Gore & Associates GmbH v Geox SpA*[2] for the principles to be applied) However, the court's practice is only to list applications for interlocutory injunctions before the Summons Judge. Any application to the Summons Judge for a speedy trial must be made at the same as an application for an interlocutory injunction.

6.019 Section 21L of the High Court Ordinance (Cap.4) and RHC O.29 gives the court jurisdiction to grant interlocutory injunctions. Section 21L(1) provides:

> "The Court of First Instance may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the Court of First Instance to be just or convenient to do so."

[2] [2008] EWCA Civ 622.

RHC O.29 r.1(1) provides:

> "An application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of the cause or matter, whether or not a claim for the injunction was included in that party's writ, originating summons, counterclaim or third party notice, as the case may be."

6.020 These rules do not, however, give guidance about the circumstances in which an interlocutory injunction will be granted. Guidelines for such applications were laid down by Lord Diplock in the House of Lords in *American Cyanamid Co v Ethicon Ltd*.[3] The guidelines may be summarised as follows:

- the plaintiff must show that he has a good arguable claim to the right he seeks to protect—he must show that there is a serious question to be tried;
- if there is a serious question to be tried, the court should consider the adequacy of damages as a remedy for either side if the interlocutory injunction is granted or denied; and
- if the question of whether or not the interlocutory injunction should be granted cannot be resolved by addressing the two questions above, then the court considers the balance of convenience. In other words, the court considers the relative amounts of non-compensatory damage which would be suffered by each of the parties if an interlocutory injunction was to be granted or denied.

6.021 The Privy Council in *National Commercial Bank Jamaica Ltd v Olint Corp Ltd*,[4] while approving the *American Cyanamid* test held that "The basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other." The Privy Council also held that the principle was the same whether the court was granting a mandatory or prohibitory interlocutory injunction. In granting a mandatory injunction there may be a greater chance of causing irremediable prejudice but this was only a factor to be taken into account. Ma J (as he then was) reached similar conclusions in *Music Advance Ltd v Incorporated Owners of Argyle Centre Phase*[5] (which was decided in 2002, but only reported in 2010).

6.022 There are, however, some particular cases where the *American Cyanamid v Ethicon* guidelines may not apply. These include the following:

- *actions against a public authority:* governmental authorities should not be prevented from exercising their statutory powers unless the plaintiff has shown a strong *prima facie* case that his claim for a permanent injunction will succeed at trial (See *Yau Ka Po v Chief Executive in Council*[6] for a discussion of the principles);

[3] [1975] AC 396.
[4] [2009] 1 WLR 1405.
[5] [2010] 2 HKLRD 1041.
[6] (HCAL 221/2015, [2016] HKEC 239), [82]–[94].

- *where the grant or refusal of an injunction at the interlocutory stage will dispose of the action*: in such cases, a higher standard is required of the plaintiff before the defendant will be deprived of his right to dispute the plaintiff's case at a full trial (see *CEF Holdings Ltd v Mundey*[7], *Lansing Linde Ltd v Kerr*[8] and *Hong Kong Civil Procedure 2018*, Vol.1, para.29/1/18); and
- *where there is no arguable defence*: where it is clear the defendant does not have an arguable defence, the court will not consider the adequacy of damages as a remedy nor the balance of convenience. (*Yeko Trading Ltd v Chow Sai Cheong Tony*).[9]

(g) Procedure

6.023 In common with the vast majority of other interlocutory applications, an application for an interlocutory injunction should be made by issuing a summons. A master has no jurisdiction to hear a contested application for an injunction (RHC O.32 r.11); so the summons must be issued to be heard before a judge. The summons must be served in the usual way to give two clear days' notice before the date fixed for the hearing of the summons, which is normally a Friday morning at 10:00 am (Summons Day). If a Friday falls on a public holiday, then the Summons Day will be held on Thursday that week. Evidence in the form of affidavits or affirmations should also be served at least two clear days before the hearing (RHC O.32 r.3).

6.024 The practice in the Court of First Instance is for all *inter partes* injunction applications to be listed on Friday mornings at 10:00 am, (Summons Day) before a judge (the Summons Judge). If a Friday falls on a public holiday, then the Summons Day will be held on the previous working day. The Summons Judge generally changes each week. It is often the Duty Judge for that week, but can be another judge of the court. If a large number of applications are listed to be heard before the Summons Judge, the court will assign cases to other judges who do not have hearings on that day. On occasions the Summons Judge will direct the parties to attend before another judge. PDs 5.3 (Listing and Hearing of Summonses for Interlocutory Orders and Injunctions) and 11.1 (*Ex parte*, Interim and Interlocutory Applications for Relief (Including Injunctive Relief)) should be referred to for rules for listing and hearing summonses for interlocutory orders and injunctions.

6.025 The summons can be issued at any time after the writ is issued. It may even be issued immediately after the issue of the writ so that when you send the clerk to court to deal with the issue of the writ, he can, at the same time, be given the blank copies of the summons to allow that to be issued straightaway. In such cases, the common practice is to serve the summons at the same time and in the same manner as serving

[7] [2012] IRLR 912.
[8] [1991] 1 WLR 251.
[9] [2000] 2 HKC 612.

the writ. This is necessary because, before the defendant has acknowledged service of the writ there will be no address for service on the record to allow ordinary service in accordance with RHC O.65 to take place.

6.026 The Clerk of Court will mark on the summonses for all injunction applications the date of the next Summons Day provided that two clear days' notice can be given to the respondent. If the matter is urgent but not so urgent as to apply *ex parte* on notice to the Duty Judge, an order for abridgment of time can be sought and should be included in the summons.

6.027 You should take great care in drafting the summons because, in effect, this amounts to drafting the operative part of the injunction itself. Care is required in order to make the injunction effective and because the court will refuse to grant an injunction which is too imprecise (see para.6.011 and *The Staver Co Inc v Digitext Display Ltd*).[10]

6.028 The affidavit in support of the application, which should be sworn by the plaintiff, or if a company, by a director wherever possible, should be limited to evidence necessary to give a clear, concise and fair statement of relevant facts. It should not contain matters of argument, which should be confined to the skeleton argument (see para.6.030). Exhibits to affidavits should be strictly limited to the issues in the application (see PD 11.1 para.23 "*Ex Parte*, Interim and Interlocutory Applications for Relief (Including Injunctive Relief)").

6.029 When serving a writ accompanied by a summons for an interlocutory injunction and supporting evidence, it is most important to ensure that whoever serves the writ and accompanying documents swears an affidavit of service. This is because the defendant may not appear on the date for the hearing of the summons so, unless there is evidence to show the court that the documents were properly served, the court will refuse to grant the injunction even if the case appears to be clear on the basis of the plaintiff's affidavit evidence.

6.030 Agreed court bundles (comprising relevant court documents) should be lodged not less than 24 hours and where possible 48 hours before the hearing (see PD 5.3, para.7.1). The applicant's succinct skeleton argument should be filed in court by 9:30 am one clear day before the hearing (that is, 48.5 hours before the hearing), and the respondent's skeleton should be filed no later than 2:30 pm on the day before the hearing (see PD 5.3, para.7.3).

6.031 On the date for hearing the *inter partes* summons, the defendant may appear with some affidavit evidence answering the plaintiff's evidence in support of his application for an interlocutory injunction. In such a case, the court may be able to deal with the application but, more commonly, the application will be adjourned because there is no time available to deal with it. In those circumstances, the plaintiff may wish to apply for an interim injunction or undertakings pending the hearing (see para.6.033).

6.032 In other cases, the defendant may appear on the date fixed for the hearing of the summons, but he may not have had sufficient time to prepare evidence in response to

[10] [1985] FSR 512.

the plaintiff's application. The defendant will, therefore, wish to have the summons adjourned. In practice, he may offer undertakings to the court in order to persuade the plaintiff to agree to the adjournment. If acting for the plaintiff, you and counsel (if instructed) must decide whether to agree to the adjournment and accept the undertakings or attempt to fight the summons.

6.033 In most cases, the court will allow the defendant some time to prepare his evidence, so, in reality, the plaintiff must decide whether the undertakings offered by the defendant are adequate or whether he is likely to obtain a more satisfactory result by applying to the court *ex parte* for an interim injunction which will last until the hearing of the summons can take place. The common practice is for undertakings to be negotiated, for a timetable for the service of evidence to be agreed between the solicitors for the plaintiff and the defendant and for a date to be obtained when the court can set aside enough time to hear the case properly.

6.034 The undertakings may be in the same terms as the injunction sought by the plaintiff or they may be in some slightly varied form. If acting for the defendant, you may wish to negotiate with the plaintiff so that he will accept some more limited protection for the short period until the hearing for the interlocutory injunction can take place.

6.035 Where the respondent offers any undertaking to the court, the court will take steps to ensure that the respondent has given the undertaking and understands its nature. The court may for example require the respondent to sign the undertaking personally or for solicitors to confirm consent on their letterhead (see PD 5.3, para.8.3).

6.036 The undertakings are not merely contractual undertakings between the parties but are undertakings given to the court by the solicitor or counsel on behalf of the party. A breach of such an undertaking is punishable as contempt of court in exactly the same way as a breach of an injunction. For this reason, it is important for both the plaintiff and the defendant to be precise when agreeing upon the terms of the undertakings. It is usually best to draw up the undertakings and incorporate them into the order of the court adjourning the summons for an interlocutory injunction. This has the result of recording the undertaking so that the terms will be clear to everyone and the defendant can regulate his conduct accordingly.

(h) Evidence

6.037 In cases which are subject to the *American Cyanamid* guidelines, the affidavit evidence should cover all of the matters which the court may wish to address in accordance with those guidelines. However, the affidavit evidence should be limited to evidence necessary to give a clear, concise and full statement of relevant facts and should not contain matters of arguments (PD 11.1, paras.23 and 24). An interlocutory injunction is, by definition, an interlocutory application, so affidavit evidence for an interlocutory injunction may contain statements of information or belief, with the sources and grounds thereof, in addition to evidence which the deponent could give from his own knowledge (RHC O.41 r.5(2)).

6.038 It is particularly important to ensure that the affidavit sets out clearly the source of an applicant's information or belief. It is common to find expressions in affidavits such as, "I am informed by employees of the plaintiff and verily believe that …". That is not a sufficient statement of the source of a deponent's belief but, often, the point is not taken in interlocutory applications before masters. An application for an injunction, however, is the type of case where a defendant is likely to take every point which is available to him, and a failure to comply with RHC O.41 r.5(2) may be fatal to a plaintiff's application.

(i) Evidence of a good arguable case

6.039 The *American Cyanamid* principles mean that for most cases it is unnecessary for a plaintiff to show that he has a case which is more likely than not to succeed. The standard of evidence required, therefore, is not very high, but it is important to have some evidence about every element of the plaintiff's cause of action. For example, in a case where a plaintiff sought to prevent a defendant from producing drawings which infringed drawings in which the plaintiff claimed to own copyright, it would be necessary to show that the plaintiff had title to the copyright. This might involve showing that the drawings were all made by employees of the plaintiff or that the maker of the drawing who was not an employee assigned copyright in the drawing to the plaintiff. A simple assertion that the plaintiff had title to the copyright would be insufficient to demonstrate a good arguable case. The evidence under this heading should also deal with the factors relevant to whether the plaintiff will be awarded a permanent injunction at trial.

(j) The adequacy of damages

6.040 There are two aspects to the evidence about this factor. First, the applicant must seek to show that an award of damages at the trial would not compensate him adequately for the loss which he would suffer if the interlocutory injunction was not granted. This evidence may take a variety of forms, depending on the particular type of case. In the case of an application for an injunction to prevent the obstruction of an easement, the plaintiff might show that he has no other means of access to his property. In an intellectual property case concerning the infringement of a patent, the plaintiff might file evidence to show that his business would be destroyed if the defendant were allowed to market an infringing product until the trial of the action could be heard. This means that you must carefully question your client about these matters to ensure that all possible evidence is placed before the court.

6.041 The second aspect regarding evidence of the adequacy of damages as a remedy relates to the plaintiff's undertaking in damages. As has been noted above, when the court decides whether or not to grant an interlocutory injunction, it usually does not know whether the plaintiff will succeed in his claim for a permanent injunction at trial. If the plaintiff fails, the defendant may suffer loss as a result of the interlocutory injunction.

6.042 One way in which the court deals with this possibility is to require the plaintiff, as a condition for granting the injunction, to give an undertaking to the court to comply with any order which the court may make as to damages, should the court decide that the defendant has suffered damage for which the plaintiff ought to pay. This is known

as the cross undertaking in damages. Requiring such an undertaking to be given is standard practice so that an applicant for an interlocutory injunction should offer the undertaking as a matter of course. In many cases, it may be appropriate to include details in the affidavit concerning the plaintiff's assets in order to show that if any award of damages is made against the plaintiff pursuant to an undertaking, the plaintiff has sufficient assets to cover such a sum. The evidence in the affidavit should then deal with the likely level of any such damages and, if possible, show that damages will be an adequate remedy for any loss which the defendant might suffer. The court may require the applicant to fortify the cross undertaking by payment into court of a sum of money or some other form of security (*Hong Kong Civil Procedure 2018*, Vol.1, para.29/1/24).

(k) The balance of convenience

6.043 Many factors are relevant to the court's consideration of the balance of convenience. The first point which the court will consider will be the adequacy of damages as a remedy for either party if the decision at the trial about the grant of a permanent injunction is different from the decision at the interlocutory stage. Evidence about this aspect of the balance of convenience will already have been covered by the part of the evidence dealing with the adequacy of damages (see paras.6.040–6.042).

6.044 Another important factor is the speed with which the plaintiff has made his application for an injunction. Injunctions are discretionary remedies and if there has been a very long delay, the court may consider that the applicant has acquiesced in the infringement of his rights and may even refuse a permanent injunction. The promptness of the application is much more relevant to interlocutory injunctions. If the applicant has sought an interlocutory injunction very soon after learning about the infringement of his rights, the court is much more likely to be persuaded that an injunction ought to be granted. On the other hand if, having learned about the infringement of his right, the applicant delays and allows the defendant to continue with the alleged infringement and in particular if the defendant is allowed to incur expenditure, then an interlocutory injunction is less likely to be granted. (See *King Fung Vacuum Ltd v Toto Toys Ltd*[11] and *Abbott GmbH & Co KG v Pharmareg Consulting Co Ltd*[12] for discussion of the issues around delay).

6.045 For example, in an intellectual property case where the defendant has been marketing a new product which the plaintiff considers to amount to an infringement of a patent, a delay by the plaintiff of, for example, one or two months after learning about the infringing product would probably be fatal to an application for an interlocutory injunction. However, a delay of a week or so would not be fatal where, during that time, the plaintiff took legal advice and a letter before action was written requiring the defendant to stop the infringement. Each case would turn on its own facts, but the important point is that if you act in a case in which there is any significant delay, you should include in the evidence an explanation why the delay occurred.

[11] [2006] 2 HKLRD 785.
[12] [2009] 3 HKLRD 524.

6.046 The general approach of the court to the "balance of convenience" is to do its best to preserve the *status quo* pending the trial. It is for this reason that speed on the part of the plaintiff is often important. If a defendant has, for example, set up a factory and is manufacturing products, it would be disastrous to cause that business to stop production until the trial. However, if the plaintiff had acted promptly and had written to the defendant before the allegedly infringing business got under way, the plaintiff would have a better chance of success. The loss of a business opportunity is not, usually, something which the courts consider to be sufficient to prevent an interlocutory injunction from being granted, particularly where a defendant starts up a business knowing that he is likely to be sued.

(l) Evidence on behalf of the defendant

6.047 If acting for the defendant, the evidence you prepare should deal with the *American Cyanamid* factors, replying to the evidence given by the plaintiff and setting out additional matters which the defendant wishes the court to consider. It is important for a defendant to show some of the evidence which will be relied upon to defend the action at the trial. This is important even if it is obvious that the court will not be able to decide the dispute on the affidavits, because unless a defendant demonstrates how he will fight the case, the court may conclude that there is no serious question to be tried and may simply grant the interlocutory injunction without considering either the adequacy of damages as a remedy or the balance of convenience.

6.048 The defendant's evidence about the adequacy of damages as a remedy will seek to show the contrary view of the matters set out in paras.6.040–6.042, from the standpoint of the plaintiff. For example, if a complaint of infringement of copyright is made, the defendant might show that an award of damages based on the sale of the allegedly infringing product will be sufficient to compensate the plaintiff. On the other hand, the defendant may seek to show that he could not be compensated by damages for matters such as wasted advertising expenses, closing down factories producing the product and damage to commercial relationships which would be caused if the defendant's products were no longer available.

6.049 With regard to the balance of convenience, the defendant might show that whereas there is a risk of damage to the plaintiff, it would be inevitable that he, the defendant, would suffer damage. For example, a former employee who has taken a job, allegedly in breach of a restrictive covenant, could show that an interlocutory injunction would involve the loss of his job and inevitable irreparable harm, whereas the risk of damage to the plaintiff's business if the defendant continues to work is only small.

(m) *Ex parte* application

6.050 There are some cases where the need for relief from the court is so urgent, or is subject to such special circumstances, that the usual procedure of serving a summons and evidence and waiting for the contested hearing of the summons is not appropriate. In these circumstances, one of the parties may apply to the court *ex parte* for the appropriate relief to be granted. In an *ex parte* application, the applicant makes his application without

having first issued a summons and often without giving any notice whatsoever to the other party. In some circumstances, though, the other party may learn of the application and may, if he chooses, attend court when the application is made.

6.051 So far as injunctions are concerned, there are three general circumstances where an *ex parte* application is appropriate:

(1) where the purpose of the application would be frustrated if the other party had any notice of the proceedings;

(2) where the need for an injunction is very urgent and there is not sufficient time to issue a summons in the usual way; or

(3) where a summons has been issued but the court cannot hear the *inter partes* application for some time, either because of the court's other business or because the defendant requires time to serve evidence.

6.052 The most common examples of applications falling into the first category are applications for *Mareva* injunctions and *Anton Piller* orders which are dealt with separately below. In those cases, the plaintiff often argues that if the defendant knew of the application for the injunction, he would proceed to destroy evidence (in the case of an *Anton Piller* order), or remove his assets from the jurisdiction (in the case of a *Mareva* injunction).

6.053 Applications for *Mareva* injunctions often fall into the second category of case where there is a need for extremely urgent action to be taken, for example, before assets owned by the defendant (e.g. properties, cash at banks) will be liquidated or leave the jurisdiction. Other circumstances may include cases where an injunction is sought to prevent the disclosure of confidential information or cases where irreversible damage is imminent. An example would be a case where the plaintiff sees construction machinery on the defendant's land which threatens to destroy pipes through which the plaintiff claims to have the benefit of an easement and in the absence of the pipes, the plaintiff's property would become uninhabitable.

6.054 Examples of the third category have already been given in paras.6.031–6.033.

6.055 The procedures specifically relating to *Mareva* injunctions and *Anton Piller* orders are set out in paras.6.081–6.147, but there are a few further points which apply to *ex parte* applications generally.

6.056 Any significant delay by the plaintiff will be extremely prejudicial to an application for *ex parte* relief. In particular, cases where the plaintiff claims to require the relief urgently will lack credibility if there has been a delay before making the application to court.

6.057 Notwithstanding this, if it is at all possible, the plaintiff should try to prepare the documents which would be required for an interlocutory injunction and he should do this as thoroughly as the circumstances permit before applying to court. This consideration applies, in particular, to the affidavit evidence upon which the plaintiff relies. Also, wherever possible the plaintiff should prepare a draft writ and a draft of the order that he requires (see paras.6.060 and 6.061).

6.058 In general, subject to an obligation to be truthful, it is up to the parties to decide which evidence they will, and will not, lay before the court when making an application. *Ex parte* applications are an exception to this rule. A party applying for an *ex parte* injunction is required to make full and frank disclosure. In *ex parte* applications the court will not, generally, hear any evidence or argument from one of the parties, so the applicant and his solicitor owe a duty to the court to ensure that *all* relevant evidence is placed before the court. That includes evidence which is unfavourable to the party making the application. If the applicant fails to comply with that duty of full and frank disclosure, then the order made on the basis of incomplete evidence may be set aside, irrespective of the overall merits of the case.

6.059 As a solicitor you should explain the duty of full and frank disclosure to your client and ask the client to let you know about any circumstances and material facts which might be unfavourable to the application. If you are in any doubt as to whether the evidence is relevant, you should include the evidence in the affidavits and allow the court to decide on relevance.

6.060 While a writ is usually required to be issued before the application is made (see PD 11.1, para.20) often there will be no time to do so. In some cases, issuing a writ will be inappropriate because it would alert the defendant to the fact that a claim is about to be made against him, thereby losing the element of secrecy necessary in some applications. This consideration is of particular force in Hong Kong where lists of the writs issued in the High Court are published daily in newspapers. However, the applicant should, if at all possible, prepare a draft writ which can be shown to the court, and the applicant will almost certainly be required to give an undertaking to issue the writ forthwith (which means as soon as reasonably practicable). If no writ has been issued prior to the grant of the order, an "intended action number" will be allocated by the clerk to the judge hearing the urgent application. The sealed copies of the court order(s) served upon the defendant should be marked with this number.

6.061 The applicant should prepare a draft of the order that he wishes the court to make. This draft order should include not only the relief which the applicant requires but also any undertakings which the applicant is likely to have to give. Undertakings might include an undertaking to issue a writ forthwith, an undertaking to swear and file an affidavit (if the affidavit has not been sworn before the application is made), an undertaking to abide by any order of the court as to damages payable to the defendant if it is subsequently decided that the order should not have been made and any other undertakings required by the particular case.

6.062 The application should be accompanied by a skeleton argument setting out precisely how the case meets the requirements for the order sought and, if applicable, specifying any exceptional circumstances claimed to justify the grant of the relief sought. The skeleton argument should also identify the precise passages in the evidence relied upon (PD 11.1, para.27) and should, including in applications made *ex parte* on notice, be served on the opposite party together with the draft order and the evidence at the same time as it is lodged with the court (PD 5.3, para.7.3 and PD 11.1, para.30). The skeleton argument also needs to make full and frank disclosure and should identify any legal provisions or authorities that may assist the Defendant and point to any facts that the counsel or solicitor making the application feels should be specifically drawn

to the attention of the court. Solicitors who have instructed counsel should review the skeleton argument prepared by counsel to ensure that it is not inadvertently misleading and gives proper full and frank disclosure. You should not rely on counsel solely to do so. Solicitors generally have a better understanding of all the evidence and counsel may have prepared the skeleton on short notice and not be aware of all the issues in a case.

6.063 The applicant should ensure that the papers, together with a draft of the order which the court is invited to make, are delivered to the court as soon as possible to enable the judge to have sufficient time to read and digest them all before the hearing (see PD 11.1, para.19). During the opening hours of the Registry from Monday to Friday in urgent cases which require an immediate order, the solicitor for the applicant or the clerk should take the papers to the Deputy Clerk of Court (Civil) at Room G32, ground floor of the High Court who will direct him to the Duty Judge or if the Duty Judge is not available, any judge or deputy judge who is free. The judge will take a brief look at the papers then inform the applicant of when he should attend court to make the application. At any other time the Duty Judge should be contacted via telephone directly, and the hearing will take place at a location of the Duty Judge's choice (e.g. at the Duty Judge's residence). The Duty Judge rota (with contact details) is circulated periodically by the Law Society and is posted with the daily cause lists at the High Court. If the application is not urgent, i.e. does not necessarily require an immediate order, the solicitor should ask the Clerk for an appointment before a judge in the usual way (PD 11.1).

6.064 Precisely what happens may vary from judge to judge. If acting for the applicant, you should enquire of the judge's clerk whether the judge would like to see the papers before hearing the application and offer to provide the papers to the clerk at some convenient time so that the judge may read the papers privately. Most judges prefer to deal with *ex parte* applications in this way, while some, although rare, prefer to be taken through the papers by the solicitor or counsel during the course of the application itself.

6.065 In extreme cases, there may be no time to swear an affidavit, or even to prepare an affidavit. In that case the solicitor or counsel presenting the application must explain the facts of the case to the judge orally. In these rare cases, the applicant will be required, in addition to the other undertakings, to undertake to make and file an affidavit verifying the facts explained to the court by his solicitor or counsel (PD 11.1, para.21).

6.066 In more rare circumstances, the urgency of the case may not even permit an application to be made at the court building. In those circumstances, the Duty Judge may be telephoned on the Duty Judge mobile telephone (the number of which may be obtained from circulars periodically issued by the Law Society) and an appointment made to attend before the Judge at his residence to allow an order to be made.

6.067 In cases of the most extreme urgency, an application may even be made to the judge by telephone, but it should be emphasised that this type of application will be very rare indeed and the judge will require some considerable persuasion about the urgency of the case before agreeing to grant an injunction in those circumstances. One example of such a case was a situation where a passenger arriving at Hong Kong's International

Airport had been refused admission to Hong Kong and was threatened with immediate deportation in circumstances which were arguably contrary to the Immigration Ordinance (Cap.115). A judge of the High Court granted an injunction by telephone preventing the deportation.

6.068 Where secrecy is not involved, a plaintiff will sometimes give a defendant or his solicitors notice of an *ex parte* application (this is called an *ex parte* on notice application). A defendant may also hear from other sources. A defendant's solicitor who hears of an *ex parte* application is faced with a number of tactical choices. The solicitor must first decide whether or not to attend the court when the application is made or whether simply to wait to receive whatever order the court makes and to deal with the problem at that time. It is almost always better to attend at court if the opportunity arises. Although a judge hearing an *ex parte* application should be vigilant to protect the interests of a defendant, in practice, it is difficult for a judge to see how an injunction granted on an *ex parte* application will affect the defendant. If his solicitor is in attendance, the impact of the injunction on the defendant can be explained.

6.069 If the solicitor attends court himself, or instructs counsel to do so (if that is desirable and time is available), a further tactical decision arises. The defendant's representatives may simply "observe" the application while themselves taking no active part. If an order is granted, the defendant may then apply straightaway for the order to be set aside. This is probably not the best course to take in most cases, so arguing against the order is probably the most appropriate step. It is generally easier to prevent an order from being made than it is to persuade a judge that the order which he has made ought to be set aside.

(n) Service of the injunction

6.070 For an injunction to have any real value, it must be enforceable. The provisions for enforcement are set out in RHC O.45. Disobedience to an injunction may be enforced by an order of committal for contempt or by a writ of sequestration (RHC O.45 r.5) but it is a prerequisite to enforcement in this way that a copy of the order must be served personally on the person required to do or abstain from doing the act in question. Also, in the case of an order requiring a person to do an act, the copy must have been served before the expiration of the time within which the party was required to do the act (RHC O.45 r.7(2)). However, a prohibitory injunction may be enforced notwithstanding that service of a copy of the order has not taken place if, pending service, the court is satisfied that the person had notice of the injunction either by being present in court when the order was made, or by being notified of the terms of the order, whether by telephone, telegram or otherwise. It should be noted, however, that service should still be effected where possible because these exceptional circumstances only apply "pending service".

6.071 Accordingly, it is important in any case to ensure that once an injunction has been obtained, it is properly served. The first step is to draw up the order containing the injunction. This is done in the same way as other orders of the court, by presenting a draft for approval to the clerk of the judge who made the order, and then by presenting the approved draft and the appropriate numbers of copies to the Registry at LG1,

High Court Building for the order to be sealed in the usual way. In very urgent cases, the judge can be asked to sign on the order which has the effect of a sealed order.

6.072 Each copy of the order to be served must be "endorsed" with a notice (i.e. the notice must be written on it) informing the person on whom the copy is served that if he neglects to obey the order within the time specified therein (or if the order is to abstain from doing an act, then if he disobeys the order), he is liable to process of execution to compel him to obey it. In the case of a company or other legal corporation where the order is served on an officer of the company (see para.6.073), the order must be endorsed with a notice stating that if the body corporate neglects to obey the order within the time specified (or fails to abstain from doing a particular act), then the officer on whom the order was served is liable to process of execution to compel the body corporate to obey it (RHC O.45 r.7(4)). Such a notice is called a "penal notice".

6.073 The order must then be served personally on the defendants and in the case of companies, it may also be served on the directors and the secretary of the company or other officers of other types of corporations. Note that to bring committal or sequestration proceedings against a director of the body corporate defendant or his property, the injunction order must have been personally served on that director together with a penal notice (RHC O.45 r.7). Where the order is served on an officer of the corporation, that officer will be in contempt if the corporation fails to obey the order, except in very rare circumstances such as cases where the director is "non-executive" and has no knowledge or control of the circumstances giving rise to the disobedience to the order.

6.074 Personal service of the document is made by leaving a copy of the document with the person to be served, or in the case of a company registered under the Companies Ordinance (Cap.622), by leaving a copy of the document at the company's registered office or by posting it to the registered office. In the case of other bodies corporate, it is necessary to examine the ordinance under which the body is incorporated to see whether provision is made for the service of documents. In the absence of any such provision, service may be effected by serving the documents personally on the chairman or president of the body, or the clerk, secretary, treasurer or other similar officer thereof (RHC O.65 rr.2 and 3).

6.075 When an attempt is made to serve an injunction, it will frequently be the case that the defendant will not wish to accept service. This is particularly likely to occur in the case of *ex parte* injunctions when the defendant may have had no prior warning of the proceedings. Special considerations apply to *Anton Piller* orders which are dealt with below, but some matters apply generally.

6.076 It is not necessary for the defendant actually to take the document into his hand. The server can, if necessary, inform the defendant of the nature of the order (he should say that it is an injunction) and place it at the defendant's feet. Where there is evidence to suspect that a defendant will avoid service, judges have been willing to order substituted service of urgent injunctions by email or by social media. The court will need to be satisfied that the accounts work and the person has been accessing the accounts.

6.077 Consideration should be given as to whether the defendant or officer of a company is likely to refuse to accept service. If it is thought that refusal is possible, and the

individual concerned is likely to understand only Cantonese, Mandarin or another language, then the person serving the document should be prepared to inform the defendant in both English and Cantonese, Mandarin or that other language that the document is an injunction.

6.078 There are firms of private enquiry agents who will accept instructions to serve individuals with court orders. It may be economical to instruct such a firm to serve an injunction provided that the enquiry agents can be given sufficient information to identify the defendant or the person on whom the injunction is to be served. In cases where it is thought not only that the defendant may refuse to accept service but that he may react violently to being informed that an injunction has been issued against him, instructing a firm of enquiry agents might be the most appropriate course as they are generally experienced in dealing with such situations.

6.079 If a firm of enquiry agents is instructed to serve an injunction, they should be given an appropriate draft affidavit of service so that it can be proved to the court that the injunction has been properly served.

6.080 In any case where an injunction is served, an affidavit of service should immediately be prepared and sworn by the party who served the document. The absence of such an affidavit will be fatal to an application to enforce the injunction unless it can be proved that it was properly served. If a breach of the injunction takes place some months after service of the injunction, the individual who served the injunction may be unobtainable (for example because they are on holiday) or they may not be able to remember some matter relevant to the service of the injunction, so the affidavit of service must be made contemporaneously.

3. *Mareva* Injunction

6.081 Interlocutory injunctions need not be limited to those which give the plaintiff similar protection to that which he seeks at trial when he is seeking a permanent injunction. Injunctions can be issued where it is necessary to prevent future orders of the court from being frustrated or where for some other reason it is necessary for the court to intervene at an interlocutory stage to prevent an injustice being done. Examples of this power are the development of the *Mareva* injunction and the *Anton Piller* order. These two orders have been described as the "nuclear weapons" of civil litigation and they can be potent in assisting a plaintiff in the prosecution of an action.

6.082 A *Mareva* injunction is an interlocutory injunction restraining a party to any proceedings from removing from the jurisdiction of the Court of First Instance, or otherwise dealing with, assets located within that jurisdiction (see High Court Ordinance s.21L(3)). In some rare circumstances, the court may go even further and make an order in respect of assets situated outside the jurisdiction. The *Mareva* injunction has the effect of "freezing" assets so that an existing judgment, an anticipated judgment or an arbitration award may be satisfied from those assets.

6.083 A standard form of *Mareva* Injunction (Injunction Prohibiting Disposal of Assets in Hong Kong) is provided in PD 11.2 (*Mareva* Injunctions and *Anton Piller* Orders). This should be referred to in all cases. Sample Document 6.4 shows a *Mareva* Injunction

that has been amended to suit the needs of a specific case. For any *Mareva* Injunction application, the standard form in PD 11.2 should be used and amended as necessary. Sample Document 6.4 gives an indication how this can be done. However, the facts and circumstances of each case will vary and a solicitor must give careful consideration as to which parts of the standard form may be varied or deleted. Any variation or deletion will need to be explained to the judge at the hearing of the application.

6.084 A *Mareva* injunction does not give the plaintiff any security over the assets which are affected by the injunction. In other words, if the defendant goes bankrupt or (in the case of a company) goes into liquidation, the plaintiff is in the same position as other unsecured creditors. Those with charges over the assets, or debenture holders with the benefit of a floating charge which has crystallised by the time the company goes into liquidation, will obtain access to the assets notwithstanding the existence of a *Mareva* injunction.

(a) When the court will grant a *Mareva* injunction

6.085 The jurisdiction to grant a *Mareva* injunction is exercisable in any case where it appears just and convenient to the court to grant the injunction (High Court Ordinance s.21L). The court is likely to conclude that it is just and convenient to grant the injunction if the plaintiff can show, on the evidence as a whole, that:

- there is at least a good arguable case that he will succeed at trial; and
- that refusal of an injunction would involve a real risk that the judgment or award in his favour would remain unsatisfied.

(See *Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft mbH & Co KG*[13] and also *Honsaico Trading Ltd v Hong Yiah Seng Co Ltd*).[14]

(b) A good arguable case

6.086 The court must not try to resolve conflicts of evidence on the basis of affidavits alone or to decide difficult questions of law. The approach here is the same as the test in *American Cyanamid Co v Ethicon Ltd* (see para.6.020; see also *Derby & Co Ltd v Weldon*).[15]

(c) A real risk of dissipation of assets

6.087 The plaintiff does not have to show an intention to dispose of assets specifically as a reaction to the litigation. Also, he need not show that the risk of dissipation, hiding or removal of assets is more likely than not (see *Third Chandris Shipping Corp v Unimarine SA*).[16] The court also need not expect proof of previous defaults or specific

[13] [1983] 1 WLR 1412.
[14] [1990] 1 HKLR 235.
[15] [1990] Ch 48.
[16] [1979] 1 QB 645.

instances of commercial malpractice. The court should simply consider the evidence as a whole and may draw inferences.

6.088 There are various examples of cases where the court has found sufficient evidence of a real risk of dissipation of assets. Relevant considerations include:

- events which put the reliability of the defendant in doubt;
- the involvement of foreign companies whose structure invites comments—these might include the involvement of BVI, Panamanian or Liberian companies where it is often hard to determine who has the true ownership or control of the companies;
- that the defendant discloses nothing about his assets (may be relevant);
- that the defendant asserts that he is of good standing but does not support the assertion by any tangible evidence;
- that the defendant has overseas connections (the mere fact of being abroad is *not* sufficient); and
- the use of nominees and the ability to hide assets (see *Adams v Cape Industries Plc*[17] and *Trustor AB v Smallbone (No 2)*).[18]

6.089 Section 21M of the High Court Ordinance enacted in 2009 also provides for *Mareva* Injunctions to be granted in support of foreign proceedings if the judgment in the foreign proceedings will ultimately be enforceable in Hong Kong. This changed the law which did not provide for such applications in the past.

(d) Assets of the defendant within the jurisdiction

6.090 The nature of the defendant's assets will often be hard to identify. There are some obvious matters which should be checked (e.g. identifying whether a defendant company owns its office premises by checking with the Land Registry). In addition to this, private enquiry agents or credit rating agencies can often provide the information including the names of the defendant's bankers.

(e) Limits of the *Mareva* injunction

6.091 One limit has been described above, namely that the injunction will not give the plaintiff security, so that the plaintiff will rank as an unsecured creditor in the event of the bankruptcy or liquidation of the defendant.

6.092 Similarly, the court will not freeze the business activities of the defendant, even if those activities are loss-making. The *Mareva* injunction is directed at a defendant who may attempt to make himself "judgment-proof" by hiding his assets. It will not be

[17] [1990] Ch 433.
[18] [2001] 1 WLR 1177.

used to protect a plaintiff in the situation where the defendant is merely not a good business person.

6.093 Another limit applying to a *Mareva* injunction is that an individual defendant will be allowed to withdraw a stipulated amount each week to use for his ordinary living expenses. This amount will vary, so an individual defendant who is used to an affluent lifestyle may be allowed to withdraw a relatively large sum for his personal living expenses.

6.094 The defendant will be allowed to use assets which are the subject of the *Mareva* injunction to pay his legal expenses.

(f) The "worldwide" *Mareva* injunction

6.095 Until 1988, the courts in Hong Kong and in England limited the jurisdiction to grant *Mareva* injunctions to assets within the court's own jurisdiction. In 1988, there was a change in policy and it has been decided that, in cases where a defendant has assets abroad, and assets within the jurisdiction are insufficient to satisfy the potential judgment, the court will grant a *Mareva* injunction preventing the defendant from dissipating any assets, wherever they are located. However, the effect of such an injunction differs substantially from a "domestic" *Mareva* injunction in that third parties who are abroad will not be affected by the order unless the order is recognised by the foreign court by way of separate proceedings commenced in that foreign jurisdiction. In addition, the court must act carefully to avoid a conflict of jurisdiction between itself and the court of the state where the assets are situated. These circumstances are discussed in *Derby & Co Ltd v Weldon* (see para.6.085) and *Derby & Co Ltd v Weldon (Nos 3 and 4)*.[19] See also the commentary in *Hong Kong Civil Procedure 2018*, Vol.1, para.29/1/83. PD 11.2 sets out a standard form worldwide *Mareva* Injunction.

(g) Other remedies available with a *Mareva* injunction

6.096 In addition to granting the *Mareva* injunction itself, the court may order discovery or interrogatories to require the defendant to disclose the whereabouts of his assets and other information which will enable the injunction to operate more effectively. In some cases, it may also be appropriate to ask for a receiver to be appointed to take control of some of the defendant's assets, such as income-producing properties.

(h) Procedure to obtain a *Mareva* injunction

6.097 The general matters relevant to applications for *ex parte* injunctions described in paras.6.056–6.069 apply in the case of *Mareva* injunctions. The plaintiff's solicitor should do his best to prepare a draft writ, an affidavit or draft affidavit (if there is not sufficient time to swear the affidavit), a draft order and a skeleton argument.

[19] [1990] Ch 65.

6.098 The duty of full and frank disclosure is particularly important in cases of *Mareva* injunctions, so evidence of the plaintiff's ability to comply with the undertaking in damages and, in particular, any evidence of the plaintiff's financial difficulties must be included in the affidavit. As part of the duty of disclosure, the plaintiff should set out any points and arguments which he fairly expects that the defendant will advance to show that the injunction should not be granted.

6.099 In addition to the undertakings mentioned above, a number of undertakings from the plaintiff are set out in the standard form in PD 11.2.

6.100 An undertaking to serve a copy of the order on any third party to whom the plaintiff has given notice of its terms will generally be required. It is usual in the case of *Mareva* injunctions to give notice of the injunction to the defendant's bankers or to anyone else holding assets belonging to the defendant. Someone who wilfully permits a breach of the injunction to take place, having had notice of its terms, is liable for contempt of court.

6.101 Also commonly required is an undertaking to notify the defendant and any third party to whom the plaintiff shall have given notice of the order, of the right to apply to the court, upon notice to the plaintiff, to vary or set aside the order insofar as it may affect them. Again, this undertaking is for the protection of third parties such as banks who may be put to inconvenience and difficulty by being given notice of a *Mareva* injunction. The standard form *Mareva* injunction specifically provides that banks' right of set off in respect of any facility granted to the defendant before it was notified of the *Mareva* injunction will not be affected (see *Oceanica Castelana Armadora SA of Panama v Mineralimportexport*[20] and *Illustrious Assets Ltd v Lu Chung Chun*).[21]

6.102 An undertaking is generally required stating that the plaintiff will pay the reasonable costs and expenses incurred by any third party to whom notice of the injunction is given in ascertaining whether he has in his possession any assets to which the order applies or otherwise in complying with the terms of the order. If representing the plaintiff, you should warn your client about this requirement before the application for a *Mareva* injunction is made.

6.103 If a bank is served with a *Mareva* injunction, it is likely to incur legal expenses in taking advice to determine how the injunction applies to it. The bank may also incur expenses in searching its records to determine which of the defendant's account numbers are affected by the orders. The cost of searches of a bank's records, in particular, can be very expensive indeed. This is one reason why, if possible, the plaintiff should obtain as much information as possible about the defendant's assets, including his bank account numbers, before starting the proceedings.

6.104 Once the injunction has been obtained, notice of the injunction should be given to the defendant, his bankers and anyone else who may be holding assets. They should then be served with the injunction as outlined in paras.6.070–6.080. In the case of banks or third parties, it is also often useful to approach them informally once they have been

[20] [1983] 1 WLR 1294.
[21] [2008] 3 HKLRD 432.

given notice of the injunction to discuss how the injunction will work and to check, in a relatively informal manner, that the third parties are likely to comply with the terms of the order.

(i) Acting for the defendant

6.105 A solicitor acting for a defendant who has been served with a *Mareva* injunction is not likely to have been consulted about the substantive dispute before the injunction was issued. He should, therefore, first check with his client about the facts of the substantive dispute to see whether it is possible to argue that the plaintiff has no reasonable cause of action.

6.106 Subject to that, the first job of the solicitor for the defendant is to go through the affidavit in support of the *Mareva* injunction carefully with his client, to ascertain whether there has been any material non-disclosure which might form the basis for an application to discharge the order. Failing that, the defendant's solicitor should investigate whether he can present evidence to the court to show that his client is not the type of client who is likely to dissipate assets either within the jurisdiction or abroad, or offer an appropriate undertaking in return for a discharge or variation of the *Mareva* injunction. The defendant's solicitor should also check whether the injunction makes sufficient provision for the defendant's living expenses (in the case of an individual defendant) or for the carrying on of the defendant's business. If necessary, an application can be made to vary the injunction to make sufficient provision. The standard form order set out in PD 11.2 specifically states that the defendant (or anyone notified of the order) may apply to the court at any time to vary or discharge the order, (or so much of it as affects that person), but anyone wishing to do so must first inform the plaintiff's solicitors.

6.107 The return date for the *Mareva* will be the next Summons Day which could be as short as two days away. You need to discuss with the client whether to consent to the continuation of the injunction, seek a variation to the order or apply to discharge the injunction. If very urgent you can apply to vary or discharge the inunction immediately by going back to the judge who granted the injunction *ex parte* on notice. However, in most cases, applications are made at the return date. If there is an application to discharge, the court will usually give directions for evidence and fixing a hearing date. However, in urgent cases, an application to discharge can be heard by the Summons Judge if the judge's schedule allows. You should seek to agree directions with the other side. If they are agreed, the directions can be placed before the judge by way of consent summons.

4. *Anton Piller* Order

(a) Introduction

6.108 The *Anton Piller* order is the second "nuclear weapon" of civil litigation. It has been described as a "civil search warrant" and this description gives some indication of the nature of the order, but it is also misleading. The essence of an *Anton Piller* order is that it requires the occupant of premises to permit the applicant and his solicitor to enter those premises, to search for and, in some circumstances, remove certain documents

allegedly relating to the infringement of the applicant's rights. It does *not* authorise the plaintiff's solicitors or anyone else to enter the premises against the defendant's will. It does not authorise the breaking down of doors, nor slipping in by a back door nor getting in by an open door or window. It only authorises entry and inspection with the permission of the defendant.

6.109 This may seem self-defeating, but it should be remembered that the *Anton Piller* order requires the defendant to give permission, with the result that if he does not give permission, he is guilty of a contempt of court (see Lord Denning MR in *Anton Piller KG v Manufacturing Processes Ltd*).[22] Although the order is not, therefore, a search warrant, the obtaining and execution of an *Anton Piller* order brings a solicitor into the "front line" of litigation in circumstances where he is often face-to-face with the defendant and needs to make potentially very important decisions, often on the basis of little in the way of evidence and with little time available.

6.110 A standard form *Anton Piller* order (Order to Allow Entry and Search of Premises) is set out in PD 11.2. Sample Document 6.6 shows an *Anton Piller* order that has been amended to suit the needs of a specific case. For any *Anton Piller* order application, the standard form in PD 11.2 should be used and amended as necessary. Sample Document 6.6 gives an indication of how this can be done. However, the facts and circumstances of each case will vary and a solicitor must give careful consideration as to which parts of the standard form may be varied or deleted. Any variation or deletion will need to be explained to the judge at the hearing of the application.

(b) Circumstances in which an order may be obtained

6.111 Guidelines were laid down by the English Court of Appeal in *Anton Piller KG v Manufacturing Processes Ltd*, Ormrod LJ set out three "essential" pre-conditions:

(1) there must be an extremely strong *prima facie* case;

(2) the damage, potential or actual, must be very serious for the applicant; and

(3) there must be clear evidence that the defendants have in their possession incriminating documents or items, and that there is a real possibility that they may destroy such material before any application *inter partes* can be made.

(c) A strong *prima facie* case

6.112 This test is different from and more onerous than the test of a "good arguable case" or a "serious question to be tried" which applies in the case of interlocutory injunctions generally, including *Mareva* injunctions. The evidence must deal with all elements of the cause of action and show that the plaintiff is likely to succeed. However, the case need not be so clear, for example, as in a case where there is an application for summary judgment under RHC O.14. The application is inevitably made *ex parte*, so the general rules set out in paras.6.058–6.059 concerning the need to make full and

[22] [1976] Ch 55, 59–61.

frank disclosure (including disclosing any point which may fairly be taken by the defendant against the plaintiff's claim) apply to *Anton Piller* orders.

(d) Serious damage for the applicant

6.113 This requirement has two parts. First, the loss or damage caused by the alleged wrongful actions of the defendant must be serious and there must be evidence to show that. Second, if the material believed to be in the defendant's hands is destroyed, the plaintiff must be able to show that the plaintiff's chances of success at trial would be seriously prejudiced.

(e) Evidence of possession: possibility of destruction

6.114 The court will often be prepared to draw inferences under this head. For example, in a case concerning the infringement of copyright in architectural drawings, the court may be prepared to infer from evidence that the defendant's drawings are so similar to those of the plaintiff that they are likely to have been copied, and that the defendant has copies of the plaintiff's drawings. In addition to showing the existence or likely existence of such material, it must be shown that there is a "real possibility" that evidence or infringing material will be destroyed. Such evidence is generally very difficult to obtain and it has been common for the court to infer the probability of disappearance or destruction of evidence where it is clearly established on the evidence before the court that the defendant is acting in an underhand manner. But even in those cases, it is not always appropriate to assume that the defendant will refuse to comply with an order of the court requiring him to preserve or deliver up documents. The court may take the view that evidence is not enough to show that a person will flagrantly breach a court's order. Cases are likely to depend on their own facts (see Hoffmann J in *Lock International Plc v Beswick*).[23]

(f) Scope of the order

6.115 The order falls into three parts. First, there is a notice to the defendant concerning the nature of the order and the defendant's rights. Secondly, there is a recital that the order has been granted based on undertakings given by the plaintiff set out in schedules to the order. Finally, there is the substantive order that allows for the entry and search of the premises.

(i) *Notice to defendant*

6.116 The notice to the defendant seeks to explain the order in plain English and advises those who receive it of their obligations under the order and their rights under the order including their right to seek legal advice before complying with the order, provided that such advice is sought and obtained immediately.

[23] [1989] 1 WLR 1268.

(ii) *Undertakings*

6.117 Because of the extreme nature of the *Anton Piller* order, a number of the undertakings given are required by the court to go as far as possible to minimise the potential harm which may be done to the defendant by the order. These are set out in Schedule 2 to the standard form order.

6.118 One undertaking required is that copies of the affidavit and exhibits read to the court at the *ex parte* application be served. In some cases, exhibits may be confidential and provision can be made, for example, for the plaintiff's solicitors to serve confidential exhibits upon the defendant's solicitors on their undertaking not to show them to the defendant without the leave of the court or the consent of the plaintiff.

6.119 Also relating to service, the plaintiff must undertake to serve the defendant with an *inter partes* summons that will be returnable at the next summons day. In some cases, where execution may take some time or service may be delayed, the court may list the return date as the Summons Day following the next Summons Day.

6.120 An undertaking is required: "Not, without the leave of the court, to use any information or documents obtained as a result of carrying out this Order nor to inform anyone else of these proceedings except for the purposes of these proceedings (including adding further defendants) or commencing civil proceedings in relation to the same or related subject matter to these proceedings until after the return date." The standard form undertaking is not entirely clear as to whether civil proceedings can be brought against third parties prior to the return date. If this is likely to be necessary, this should be pointed out to the judge and leave of the court sought to allow the information obtained as a result of the *Anton Piller* order to be used against third parties implicated in the same wrongful handling of infringing goods (e.g. suppliers or customers of the defendant business). After the return date, subject to any orders the court may make, the plaintiff is free to use the materials obtained under the order to protects its rights including any civil or criminal proceedings. (*Sony Corp v Anand*[24] and *Kensington International Ltd v ICS Secretaries Ltd*).[25]

6.121 The usual cross undertaking in damages, given when any interlocutory injunction is granted, is required.

Undertakings by the plaintiff's solicitors

6.122 The plaintiff's solicitors are required in Schedule 4 of the standard order to give the following undertakings:

(1) To answer at once to the best of their ability any question as to whether a particular item is a listed item.

[24] [1981] FSR 398.
[25] [2008] 4 HKLRD 589.

(2) To return the originals of all documents obtained as a result of the order (except original documents which belong to the plaintiff) as soon as possible and in any event within two working days of their removal.

(3) Where ownership of any item obtained as a result of the order is in dispute, to deliver the article into the keeping of solicitors acting for the defendant within two working days from receiving a written undertaking by them to retain the article in safe keeping and to produce it to the court when required.

(4) To retain in their own safe keeping all other items obtained as a result of the order until the court directs otherwise.

6.123 In addition, the order requires the order to be served by the plaintiff's solicitors and prohibits any items being removed from the premises until a list of all items to be removed has been prepared. In England the courts will often require an *Anton Piller* order to be served by independent supervising solicitors so as to ensure that only items covered by the order are taken. The appointment of a supervising solicitor can add substantially to the costs of execution. The courts in Hong Kong do not, in general, require the appointment of a supervising solicitor but, do so in certain cases. If no one in the firm of solicitors seeking the order has experience of executing an *Anton Piller* order, serious consideration should be given to appointing a supervising solicitor with experience in executing *Anton Piller* orders so as to avoid problems during execution. The execution of an *Anton Piller* order can be very stressful as well as requiring diplomacy and tact. It is essential that a solicitor with experience is on site.

6.124 Many of these undertakings or requirements arise from the English case of *Columbia Picture Industries Inc v Robinson*[26] and the Hong Kong case of *Ng Chun Fai v Tamco Electrical & Electronics (Hong Kong) Ltd*[27] where the practice relating to *Anton Piller* orders was examined in detail by both courts.

6.125 The Court of Appeal in *Tamco Electrical & Electronics (Hong Kong) Ltd v Ng Chun Fai*[28] held *inter alia* that:

- an applicant's solicitors and counsel in an *ex parte* application come under a duty to assist the judge so as to ensure as far as possible that the court does not make an order which perpetrates an injustice against the absent party; and
- no order in the *Anton Piller* form should be made unless necessary in the interests of justice; nor in terms wider than necessary to achieve the legitimate object of the order; nor unless there is real reason to believe that without such an order the respondent would disobey an injunction for the preservation of the evidence the destruction of which would defeat the ends of justice.

[26] [1987] Ch 38.
[27] [1994] 1 HKLR 289.
[28] [1994] 1 HKLR 178.

(iii) *Relief granted*

Prohibitory injunction

6.126 The grant of a prohibitory injunction is common in cases where the complaint concerns the infringement of intellectual property rights, passing-off or the misuse of confidential information.

Delivery up of material

6.127 The defendant (or whoever is in charge of the premises) is ordered to deliver up to the person serving the order all items falling within the terms of the injunction. If documents are involved, there may be a proviso that the defendant retains documents which are necessary for the continuation of its business.

Disclosure of information

6.128 If infringement of intellectual property rights is involved, the defendant may be ordered to disclose the names and addresses of all suppliers and customers, as well as manufacturers, and details of future consignments which are expected. The defendant may also be ordered to disclose the whereabouts of infringing material or documents relevant to the action.

Search

6.129 The defendant, or whoever is in charge of its premises, must permit the plaintiff's representatives (usually not exceeding a specific number and accompanied by the solicitor serving the order) with another solicitor or employee of the firm to enter and search. The order requiring permission for searches to be given should be extended to other premises at which the items covered by the order may be kept and to locations disclosed pursuant to an order for disclosure of information, and other places such as cars, outbuildings or godowns.

Affidavit of compliance

6.130 The standard form order requires the defendant to set out all the information required to be disclosed under the order or, in the case of confidential information, to confirm that all such information has been delivered up.

Secrecy

6.131 Where the defendant operates at more than one set of premises or it is suspected that other locations may be disclosed during the execution of the order and the plaintiff suspects that the first person on whom the order is served may "tip-off" others, the defendant will be ordered to keep the action confidential and not to contact such people to inform them of the action. In any event, in such circumstances, the plaintiff's solicitors should, where possible, synchronise the execution of the order at all the locations at the same time.

Liberty to apply

6.132 There is always a liberty to apply to vary or set aside an *ex parte* order, but in *Anton Piller* orders, it is always made clear that such a liberty exists. The standard form order set out in PD 11.2 specifically states that the defendant (or anyone notified of the order) may apply to the court at any time to vary or discharge the order, (or so much of it as affects that person), but anyone wishing to do so must first inform the plaintiff's solicitors.

(g) Application to the court

6.133 The procedure to be followed is the same as for *ex parte* applications generally (see paras.6.050–6.069). The plaintiff's solicitor should, therefore, have prepared a draft writ, a draft order, a skeleton argument and an affidavit wherever possible. In *Anton Piller* cases, the requirement for full disclosure to be made in the affidavit is of particular importance and the failure to make full disclosure will be viewed very seriously by the court, so the need for accuracy and full disclosure must be very strongly emphasised to the client when the affidavit is being prepared.

(h) Service of the order

6.134 Anyone concerned with the service of an *Anton Piller* order should read the full reports of *Columbia Picture Industries Inc v Robinson* (see para.6.124) *Universal Thermosensors Ltd v Hibben*[29] as examples of matters which can arise during the service of an order. Worthy of note are the criticisms made by the judges of the solicitors involved in those cases. Great care is necessary both to comply with the express undertakings and to ensure that you do not exceed that which is permitted by the order.

6.135 Various points should be borne in mind. For example, many copies of the court documents may be required. There may be more than one defendant and there may be a number of premises to be served. Where one of the defendants is a company, it is usually desirable to serve individual directors in addition to serving the company itself and the persons in charge of the various premises.

6.136 It is necessary that each defendant, and most desirable that all others who are served (such as the persons in charge of premises or directors of defendant companies), be served with the following documents:

- copy affidavits and photocopies of non-confidential exhibits (copies of confidential exhibits should be kept to hand to be given to the defendant's legal advisers if they appear and if that is permitted by the order);
- the writ and form of acknowledgement of service (for those who are not actually defendants, photocopies of the writ will be sufficient);

[29] [1992] 1 WLR 840.

- the summons, if the court has directed that a summons should be issued;
- a sealed copy of the *Anton Piller* order itself endorsed with a penal notice according to the circumstances (see Sample Document 6.6);
- a letter from the plaintiff's solicitors setting out the documents enclosed, explaining the terms of the order in ordinary language and suggesting that the defendant take legal advice immediately. (This letter is not compulsory, but it is a very useful document indeed. In complying with the undertaking to explain the order to the defendant fairly and in everyday language, the letter can be used as a "script" when explaining the order orally and will, therefore, be very useful evidence of compliance with the undertaking.); and
- a copy of the order translated into Chinese (N.B. some judges in Hong Kong may request a copy of the draft order in Chinese at the time of the *ex parte* hearing).

6.137 If an order is being executed at a number of premises, contact between the various groups is essential.

6.138 The order should be served at a sensible time. The standard order provides that it may only be served between the hours of 9:30 am and 5:30 pm Monday to Friday and 9:30 am to 1:00 pm on a Saturday. However, if service is made too late in the day, even though the service is within the terms of the order, the defendant may be unable to take legal advice or, once the defendant has been given the opportunity to take legal advice, it may be too late to complete the search and any necessary follow-up work such as preparing receipts, etc., on the same day.

6.139 There should be someone in authority at the plaintiff's solicitors' office to co-ordinate the groups and deal with questions as they arise. Ideally, that should be a partner in the firm who has knowledge of *Anton Piller* orders. It is important to be able to demonstrate to the court that a partner or a very senior solicitor took personal control of the operation and that the order was executed properly and responsibly. In an appropriate case, a partner may find it advisable to speak to the defendant's legal advisers if they should appear.

6.140 If there is any doubt about whether the defendant or the person in charge of the premises will speak English, then a Chinese-speaking lawyer or at least some responsible person who can act as an interpreter should be present to translate the order to the defendant or to read and explain the Chinese version of the order to the defendant. Similarly the team should incorporate a female member if it is likely that the premises being searched is a private residence likely to be occupied by a woman alone. Consideration should also be given to whether the order should be translated and served in English and Chinese or the letter serving the order should be written in English and Chinese. In some cases, it may be necessary for a Chinese endorsement to be made on the writ in accordance with PD 24.2 (Endorsement in the Chinese Language to be Made on Court Documents) (see Chapter 2).

6.141 If possible, each team serving the order should include one senior solicitor and one junior solicitor or trainee solicitor. The junior member of the team should dictate

the progress of the execution of the *Anton Piller* order into a hand-held dictaphone contemporaneously from start to finish. Everything that might conceivably be relevant should be noted, including times, persons present, the location of documents and material discovered in the search process, the identity of the lawyers for the defendant and matters such as arguments raised about the validity of the order, the extent of disclosure or the manner in which the order is executed. An IT expert, either from the plaintiff's solicitors' office or from a specialist firm, should also be included in the team to check the defendant's computers. Generally, evidence is now stored electronically and provisions for checking, and if necessary mirroring, the defendant's computer system should be made in the order. The order should also make provision for the defendant to provide passwords and access to cloud storage systems to allow these to be checked and mirrored if necessary. The standard form order does not provide for computer experts and appropriate wording should be added to the order to allow a computer expert to check and, if necessary, mirror a hard drive. Any mirrored hard drive should be delivered to an independent solicitor. The parties can then agree how the mirrored hard drive is to be searched. The order should include provisions that the defendant's disclose passwords and any cloud storage accounts.

6.142 The solicitors executing the order should consider carefully whether the police should be asked to be in attendance when the order is served. If there are likely to be a number of people in the premises which are being raided, or it is suspected that the defendant may have "underworld" or "triad" connections, then this is a sensible precaution. Alternatively, private enquiry agents can be engaged to provide security services, if necessary.

6.143 The police are often unenthusiastic about getting involved in civil matters as they are, in general, short of manpower. It may, therefore, be difficult to persuade them to spare officers to attend at the raid. If it is thought that there is a serious danger of physical violence, then a partner in the firm should speak to a police officer not below the rank of senior inspector. If the police attend, however, they have no powers to take any steps to assist the execution of the order and can only intervene if a breach of the peace or some other offence is committed. They attend merely as observers. Note also that the order specifically prohibits the order being executed at the same time as a search warrant. Special care should be taken to ensure that the impression is not given that the police are in attendance to execute a search warrant.

6.144 If the defendant or the person in charge of the premises refuses to allow those executing an *Anton Piller* order to enter the premises, they cannot insist on entering. They can only tell him that he will be in contempt of court if he fails to comply with the order and advise him to take legal advice forthwith.

6.145 Be courteous to the respondent and anyone else in the premises. The service of an *Anton Piller* order is often a shocking and extremely disturbing experience for respondents to the order. However, after the initial shock and hostilities have been overcome, many respondents to orders recognise that they are being served with an order of the court by an officer of the court. If the solicitor and those executing the order are courteous, respondents to such orders will often be reasonably co-operative. In executing the order you may come across embarrassing personal materials or items. If they have nothing to do with the case ignore them as much as you can and do everything possible to limit personal embarrassment.

(i) Acting for the defendant

6.146 When acting for a defendant who is served with an *Anton Piller* order, it is important to ascertain the precise terms of the order and to ensure that they are being complied with by the persons serving the order. If all the undertakings in the order are not fulfilled, then the defendants need not permit entry. Subject to this proviso, the essential rule is that if no fault can be found with the order, the client must be advised to comply with it. To safeguard your client's interests, you should, as the defendant's solicitor, obtain a receipt for the items delivered up and, if it is agreed that any contentious items should be retained or that any other part of the order may be varied, you should ensure that the solicitor serving the order confirms that agreement in writing before leaving. The standard form *Anton Piller* order also deals with documents which may be privileged.

6.147 In the English case of *Bhimji v Chatwani*,[30] the court held that a defendant who offered undertakings to deliver the material which was the subject of the order to his solicitor pending an application for the injunction to be discharged and in the meantime refused to comply with the order was not in contempt. However, this is a risky course for the defendant to take because defendants who refuse to comply with injunctions do so at their peril if their application to discharge the injunction fails. Probably the best course, if time and resources allow, is for one member of the defendant's solicitor's firm to attend at the defendant's premises where the order is being executed to ensure that the plaintiff's solicitors comply with their undertakings and only take material which is strictly covered by the order. At the same time, another member of that firm should apply to court (*ex parte*, but on notice to the plaintiff) for the discharge of the order or for the order to be varied in return for undertakings given by the defendant to the court to preserve and/or to deliver those documents to the defendant's solicitors (who will also have to give their undertaking to the court to preserve them and, if necessary, to produce them at court).

6.148 The commentary in para.6.107 relating to the return date for a *Mareva* injunction applies equally to the return date for an *Anton Piller* order. If computers and/or other data have been mirrored and delivered to independent solicitors or other materials have been delivered to independent solicitors, the order of the return date should cover with how these materials are to be dealt with.

5. Enforcement of Injunctions: Committal Proceedings

6.149 A person who has disobeyed an injunction is guilty of contempt of court. There are two types of contempt: "criminal" and "civil". Criminal contempt consists, in broad terms, of actions taken by people which affect the administration of justice, such as the

[30] [1991] 1 WLR 989.

publication of inaccurate or scandalous material concerning a trial or a pending action, or bad behaviour in the courtroom itself. In those circumstances, the action of the court in respect of the contempt is intended to punish the person who has committed the contempt. Breaches of court orders are civil contempt's of court. Steps taken by the court in the case of civil contempt have a dual purpose.

6.150 The court has various means of dealing with a civil contempt of court, but the most common is the committal to prison of the person who is in contempt until he "purges" his contempt by apologising to the court and agreeing to comply with the original order or, in less serious cases, the imposition of a fine.

6.151 The following section of this chapter describes the procedure relevant to committal proceedings. It is important to note at the outset that, although the proceedings relate to a civil action, they are treated as quasi-criminal proceedings so that any procedural errors by the plaintiff/prosecutor may cause the application for committal to fail, with the result that a fresh application will be required.

(a) Procedure

6.152 The procedure for committal is governed by RHC O.52. Before starting contempt proceedings, it is necessary to obtain leave to apply for committal under RHC O.52 r.2. The application must be made *ex parte* to a judge, supported by a statement setting out the name and description of the applicant and the name, description and address of the person sought to be committed, together with the grounds on which his committal is sought. The application must also be supported by an affidavit, to be filed before the application is made, verifying the facts relied on. The grounds supporting the application should be set out in full detail (see commentary in *Hong Kong Civil Procedure 2018*, Vol.1, para.52/2/6).

6.153 There will not normally be a hearing, but the affidavit and statement should be first taken to the Deputy Clerk of Court (Civil) located in Room G32, G/F High Court Building who will mark down the name of the Judge that will deal with the matter. The papers should then be filed the Registry on the lower ground first floor of the High Court Building. The statement and the affidavit should be lodged the day before the judge deals with the application. If the papers are in order, the Judge will inform the applicant in writing that leave has been granted. The judge may impose terms as to costs and as to the giving of security when he gives leave to make an application for an order of committal. The applicant should take the Judge's letter to the Registry when issuing the originating summons. When an application for leave is refused or is granted on terms, the applicant may appeal against the judge's order to the Court of Appeal within 10 days after the order.

6.154 The application for an order for committal is made by originating summons. The originating summons must be entered within 14 days after leave was granted. An originating summons is entered when the date is fixed for the hearing of the summons. RHC O. 52 r.3 does not state if the form of originating summons used should be Form 8 (general form) or Form 10 (expedited form). However, given the requirement to enter a date quickly, it appears appropriate to use the expedited form (see RHC O.7 r.2) unless the matter is not urgent. The date is fixed by applying initially to the Deputy Clerk of

Court in the same way a date is fixed for the hearing of a summons (see para.6.063). Unless the judge granting leave has otherwise directed, there must be at least eight clear days between service of the originating summons and the day of the hearing of the originating summons. If it is thought that it may be difficult to serve the notice of originating summons personally, then some time should be allowed when fixing the date for the hearing to ensure that the originating summons can be served in good time.

6.155 The originating summons must be drafted carefully so that it makes it clear that the order applied for is an order for committal of the individual alleged to be in contempt and gives details of the breaches of the order which that person is alleged to have committed. The courts have made it clear that the grounds for committal must be clearly stated (see *Hong Kong Civil Procedure 2018*, Vol.1, para.52/3/1). It is safest to copy completely the grounds relied upon to obtain *ex parte* leave. In order that the grounds are clearly stated, Sample Form 6.8 sets out the Statement in application for leave to apply for committal as an annex to the Originating Summons.

6.156 The originating summons must be served personally on the respondent unless the court dispenses with service (which will only happen in very rare cases). The statement and affidavit used to obtain leave must also be served personally with the order.

6.157 It will be prudent to ensure that an affidavit of service is prepared by the person who serves the originating summons, the statement and the affidavit so that the court will be able to act if the respondent does not attend court on the date for hearing the originating summons.

6.158 The hearing of the application for an order for committal will be in open court, except in the limited categories of cases set out in RHC O.52 r.6(1) (matters relating to infants, persons with mental disorders and secret processes).

(b) Evidence in support of a committal order application

6.159 Generally, affidavit evidence is used in support of the application. Committal proceedings are quasi-criminal in nature. Because of this, there has been a view that at least for criminal contempt hearsay evidence is not admissible. This has now been explicitly rejected by the Hong Kong Court of Appeal which has held that hearsay is admissible in both civil and criminal contempt cases. Nevertheless, the court must be sure to ensure that no unfairness arises from the admission of such evidence. (See *Numeric City Ltd v Lau Chi Wing*).[31]

6.160 The first element of evidence required is evidence that the order alleged to have been breached was served personally on the respondent and endorsed with the appropriate penal notice or, in the case of prohibitory injunctions, that the respondent had notice of the order. The affidavit evidence must then prove the precise breach of the order set out in the originating summons . If any element of the evidence is incomplete, the court will not make an order for committal, even if the evidence shows some other breach of the order. The court will only allow an applicant to rely upon

[31] [2016] 4 HKLRD 812, [23]–[33].

the grounds for committal set out in the originating summons (see RHC O.52 r.6(3)) except in rare cases where leave may be given to rely upon different grounds. See Sample Document 6.7.

(c) Orders which may be made by the court

6.161 If the court finds the respondent guilty of contempt of court when the originating summons is heard, it has a wide variety of options as to the order it may make. The court may, of course, commit the respondent to prison (see *A O Smith Holdings (Barbados) SRL v Zhang Dacheng*).[32] If it does this, an order for committal will be made and the Court Bailiff will arrest the respondent. However, the court may, alternatively, order the respondent to pay a fine or to give security for his good behaviour or any combination of these orders. The court may also grant a further injunction.

[32] (HCMP 1132/2011, [2012] HKEC 793).

CHECKLISTS

6.1 General Procedure for Interlocutory Injunctions

Keep Client Informed Throughout

Parties

		Tick information obtained
1	Warn the client about the consequences of the undertaking in damages and the possibility of fortification of the undertaking by payment of a sum of money into court.	☐
2	If no writ has been issued, prepare a writ to be issued immediately before the issue of the summons and provide the necessary undertaking.	☐
3	Prepare an affidavit or affirmation in support of the application for the interlocutory injunction.	☐
4	Issue the writ (if not already issued) and issue a summons to be heard by a judge. • When fixing the date for the hearing of the summons, allow at least two clear days between the service of the summons and the date for the hearing (usually the next Summons Day).	☐
5	Arrange for the affidavit to be sworn or the affirmation to be made.	☐
6	Serve the summons and affidavit/affirmation. • If served together with the writ, personal service of all documents is required.	☐
7	Make an affidavit of service.	☐
8	Prepare a skeleton argument setting out: • how the case meets the requirements for the order sought; • the exceptional circumstances justifying the grant of a world-wide injunction (if applicable); • identifying the precise passages in the evidence relied upon.	☐ ☐ ☐
9	Prepare a draft order.	☐
10	Send a draft index of the court bundle (containing relevant court documents) to the other side for comments. Once agreed, prepare court bundles.	☐

11 It is good practice to lodge and serve court bundles and the skeleton argument (with case authorities) at the same time, noting that PD 5.3 requires that:
- court bundles be served not less than 24 hours and if possible 48 hours before the hearing; and
- the skeleton argument be served by 9:30 am two days (one clear day) before the hearing.

☐
☐

6.2 Evidence in Support of an Application for an Interlocutory Injunction

	Tick information obtained
Keep Client Informed Throughout	
1 Prepare evidence to show that the plaintiff has a good arguable case, or that there is a serious question to be tried at the hearing of the action. • Some evidence must be provided concerning every element of the plaintiff's cause of action and dealing with the factors relevant to whether the plaintiff will be awarded a permanent injunction at trial.	☐
2 Gather evidence illustrating that an award of damages at the trial would not adequately compensate the applicant for the loss which he would suffer if an interlocutory injunction was not granted until the trial.	☐
3 Ensure that your evidence includes evidence that, if the applicant failed to obtain a permanent injunction at the trial, damage to the respondent could be assessed in monetary terms so that the respondent could be compensated after an assessment of damages on the applicant's undertaking in damages.	☐
4 Obtain evidence showing that the applicant has sufficient assets to pay any likely award of damages pursuant to the applicant's undertaking.	☐
5 Make a list of factors relevant to the "balance of convenience" (see paras.6.043–6.046) including: • the absence of delay before the application for an injunction is made or, if appropriate, an explanation of the delay; • evidence concerning the *status quo* and how granting the injunction will preserve the position for both parties pending the trial.	☐ ☐

6.3 *Ex Parte* Injunctions

Keep Client Informed Throughout

		Tick information obtained
1	Wherever possible, prepare the following documents: • draft writ; • draft order; • affidavit/affirmation or draft thereof; • skeleton argument.	☐ ☐ ☐ ☐
2	Gather evidence as detailed in Checklist 6.2 but, additionally, prepare evidence to show the need for an *ex parte* application including: • the need for secrecy; • the need for great urgency; or • the prejudice which might occur to the plaintiff if an *inter partes* hearing were to take place.	☐ ☐ ☐
3	Explain to the client the duty to make full and frank disclosure. • Deal with this issue expressly in the affidavit and skeleton argument in support of the application.	☐
4	If there is sufficient time to prepare papers, telephone the Deputy Clerk of Court (Civil) to arrange for the hearing of the application before a Judge or the Duty Judge when those papers are ready.	☐

6.4 Action after Obtaining the Injunction

Keep Client Informed Throughout

		Tick information obtained
1	Comply with any undertakings given when the injunction was obtained.	☐
2	In the case of prohibitory injunctions, notify anyone to whom the injunction applies (who was not in court) of the terms of the injunction. • Notification can be by telephone fax or email.	☐
3	Draw up the order containing the injunction.	☐
4	Decide who must be served with the injunction. • Consider directors or other officers of companies as well as any named defendants.	☐
5	Prepare copies of the injunction for service on the appropriate persons. • Endorse the copies with an appropriate penal notice.	☐
6	Arrange for the injunctions to be served personally.	☐
7	Prepare affidavits/affirmations of service.	☐