CHAPTER 1

OVERVIEW OF THE CIVIL PROCESS IN HONG KONG

INTRODUCTION

1.01 The users and potential users of a legal system judge that system in various ways. Among the factors that they consider when assessing the effectiveness of a legal system are cost, timeliness, the quality of the Judges and lawyers who work within it, the degree of transparency with which it operates, and the predictability and fairness of the results it delivers. One of the indications that people have judged a system favourably and have some confidence in it is their willingness to use it to resolve their legal disputes. The Hong Kong legal system enjoys this confidence. While there are legitimate complaints about such things as the excessive cost of litigation, there is also a consensus that Hong Kong is a well-developed and reliable legal system with an experienced judiciary. The choice of Hong Kong for the resolution of commercial disputes by parties who themselves have no connection with Hong Kong is some proof of this confidence. Any legal system that is concerned to foster this confidence must have a comprehensive and sophisticated set of procedural rules to regulate and direct civil process. Hong Kong has such a body of rules, and the purpose of this book is to explain the nature and operation of those rules. The principles and policies underlying the rules are also discussed and analysed because it is often by understanding the principle on which a rule is based, or the competing policies that gave rise to the rule, that we are better able to understand the rule and to apply it in practice. Hong Kong case law is the primary focus throughout the book, although where necessary, cases from other jurisdictions, principally England and Wales, are considered. Where issues of particular importance or complexity are explained, they are illustrated by examples based mainly on the facts of Hong Kong cases. We have also included references to *Hong Kong Civil Procedure 2008* (the White Book), so that readers may readily refer to it for further explanation and case citations.

CIVIL JUSTICE REFORM IN HONG KONG

1.02 In February 2000 the Chief Justice established the Working Party on Civil Justice Reform ("the Working Party"), with the following terms of reference:

> "To review the civil rules and procedures of the High Court and to recommend changes thereto with a view to ensuring and improving access to justice at reasonable cost and speed".

In November 2001 the Working Party published its Interim Report and Consultative Paper ("the Interim Report"), concluding that broad-based, coordinated and properly resourced reforms were called for. Paragraph 24 of the Interim Report stated that:

> "24. The available evidence indicates that the civil justice system in Hong Kong shares the defects identified in many other systems. In varying degrees, litigation in our jurisdiction:
>
> - Is too expensive, with costs too uncertain and often disproportionately high relative to the claim and to the resources of potential litigants.
> - Is too slow in bringing a case to a conclusion.
> - Operates a system of rules imposing procedural obligations that are often disproportionate to the needs of the case.
> - Is too susceptible to tactical manipulation of the rules enabling obstructionist parties to delay proceedings.
> - Is too adversarial, with the running of cases left in the hands of the parties and their legal advisers rather than the courts, and with the rules often ignored and not enforced.
> - Is incomprehensible to many people with not enough done to facilitate use of the system by litigants in person.
> - Does not do enough to promote equality between litigants who are wealthy and those who are not".

This frank recognition of the problems of expense, delay, complexity and access to justice was followed in the Interim Report by a thorough review of our civil justice system, reports on reforms in other jurisdictions which had experienced similar problems, some 80 proposals on possible reforms and an open invitation to the public to express its views. It certainly did. During the ensuing consultation period the Working Party's website received over 41,000 hits and 96 written submissions were made. Respondents included the Law Society of Hong Kong, the Hong Kong Bar Association, law firms and barristers' chambers, government departments, professional institutes and associations, charities and individuals. Following extensive deliberations, in March 2004 the Working Party published its Final Report, containing 150 wide-reaching recommendations.

1.03 Until the publication of the Final Report, there had been much deliberation as to whether Hong Kong should follow the example of England and Wales by implementing an entirely new civil procedural code ("the CPR") or whether reforms should be achieved by amendment to the existing procedural rules. The Bar Association and the Law Society favoured the latter, more conservative approach although there was a strong body of opinion, including a number of judges, supporting the former approach. At that time however, evidence was emerging from England and Wales that the success of the CPR was somewhat mixed, and had plainly failed so far to meet one of its key objectives, to bring down the cost of litigation. Noting in paragraph 25 of the Final Report that serious doubts existed as to whether some of the key benefits intended to flow from an entirely new code would in fact materialise if the CPR were adopted in Hong Kong, the Working Party made Recommendation 1, that "The proposed reforms recommended for adoption in this Final Report should be implemented by way of amendment to the RHC rather than by adopting an entirely new procedural code along the lines of the CPR".

1.04 At the time of the publication of the Working Party's Final Report, the Chief Justice appointed a Steering Committee on Civil Justice Reform ("the Steering Committee") "To oversee the implementation of the recommendations of the Final Report on Civil Justice Reform relating to the Judiciary". In April 2006 the Steering Committee, chaired by the Hon Mr Justice Ma, Chief Judge of the High Court, published a Consultation Paper on Proposed Legislative Amendments for the Implementation of the Civil Justice Reform. This Consultation Paper focused on the necessary amendments to primary legislation (mainly the High Court Ordinance (Cap.4)) and subsidiary legislation (mainly the Rules of the High Court (Cap.4A)). After consideration of comments made during the consultation period, in October 2007 the Steering Committee published Revised Proposals for Amendments to Subsidiary Legislation under the Civil Justice Reform. In January this year, the Civil Justice (Miscellaneous Amendments) Ordinance 2008 was passed. In February the Latest Draft of the Rules of the High Court (Amendment) Rules was posted on the Judiciary's website, followed in April by the latest draft of the Rules of the District Court and proposed amendments to other related subsidiary legislation.

1.05 Throughout this book we make reference to the civil justice reforms by using text boxes, so that readers may easily identify the main areas of change. In this chapter, we use text boxes to discuss two central concepts of the civil justice reforms, the underlying objectives (discussed below) and the principles of active case management (discussed at the end of the chapter), and to explain several of the specific procedural reforms. Readers should refer to the relevant chapters, however, for more detailed analyses of the reforms.

> Civil Justice Reform: Underlying Objectives
>
> How do the reforms address the defects in our civil justice system identified by the Working Party in 2001? The answer rests in part on the introduction of Underlying Objectives, set out in O.1A, r.1 of the Rules of the High Court which are:
>
> "(a) to increase the cost-effectiveness of any practice and procedure to be followed in relation to proceedings before the court;
>
> (b) to ensure that a case is dealt with as expeditiously as is reasonably practicable;
>
> (c) to promote a sense of reasonable proportion and procedural economy in the conduct of proceedings;
>
> (d) to promote greater equality between the parties;
>
> (e) to facilitate the settlement of disputes; and
>
> (f) to ensure that the resources of the court are distributed fairly".

The application by the court of the underlying objectives is explained in O.1A, r.2, which says that:

"(1) The court shall seek to give effect to the underlying objectives of these rules when it:

(a) exercises any of its powers (whether under its inherent jurisdiction or given to it by these rules or otherwise); or

(b) interprets any of these rules or a practice direction.

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

(3) The parties to any proceedings and their legal representatives shall assist the court to further the underlying objectives".

Underlying objectives such as these are increasingly common features of modern civil procedure rules. Their aim is to make explicit the goal of a just, quick and affordable civil justice system. They are intended to empower Judges to take greater control of the manner in which cases proceed.

SOURCES OF CIVIL PROCEDURE

Ordinances and rules

1.06 This book is concerned with the conduct of civil actions commenced in the High Court of the Hong Kong Special Administrative Region.[1] The High Court consists of the Court of First Instance and the Court of Appeal.[2] The sources of civil procedure in Hong Kong may be found both in primary and subsidiary legislation.

Ordinances

- Hong Kong Court of Final Appeal Ordinance (Cap.484);
- High Court Ordinance (Cap.4);
- District Court Ordinance (Cap.336); and
- Small Claims Tribunal Ordinance (Cap.338).

[1] See *The District Court Handbook 2002* (Sweet & Maxwell (Asia), China, 2002) for information concerning actions commenced and conducted in the District Court.

[2] Judgments of the Court of First Instance may be appealed to the Court of Appeal and ultimately to the Court of Final Appeal. Since 1 July 1997, the Court of Final Appeal has replaced the Privy Council as the final appellate court.

Rules

- Hong Kong Court of Final Appeal Rules;
- Rules of the High Court;
- District Court Civil Procedure (General) Rules; and
- District Court Civil Procedure (Forms) Rules.

Among these ordinances and rules, the Rules of the High Court are the most significant source of procedural law in Hong Kong. As subordinate legislation to the High Court Ordinance, they have the force of law. They are made, however, not by legislators but by a Rules Committee composed of Judges, solicitors, and barristers.[3] While it might seem incongruous that Judges exercise this "legislative" role, it is perhaps best understood as just one of several methods by which Judges regulate the practice and procedure of the courts.[4]

Judicial precedent

Case law is also an important source of procedure; in fact, it is impossible to understand procedural law without also being familiar with a large body of case law. For example, a pleading will be struck out under O.18, r.19 if it discloses no cause of action. Judges and litigants will refer to cases for the factors that will determine whether the applicant has met the burden of proof. Similarly, a writ may not be served out of the jurisdiction in most circumstances without the court's leave, pursuant to O.11, r.1. Case authority may be referred to by the court to determine whether the case is a proper one for service out of the jurisdiction. On a summary judgment application, the test that the applicant must meet is one stated not in O.14, but in cases decided under that rule. Judicial decisions thus play the crucial role of providing guidance and predictability in matters of civil practice and procedure.[5] 1.07

What is the position of English judicial precedent in Hong Kong since 1 July 1997? Its role was addressed in a decision of the Court of Final Appeal: 1.08

"The Common Law "maintained" by art 8 and sanctioned by art 18 of the Basic Law as part of the law of the Hong Kong Special Administrative Region must in general terms be the Common Law of England as applied to Hong Kong immediately before 1 July 1997. Furthermore, this court would not be bound by the decisions of the House of Lords in identifying and developing the Common Law of Hong Kong . . . It may be thought, however, that this court would not depart from the law as it applied immediately before 1 July 1997 without good reason".[6]

[3] See ss.54 and 55 of the High Court Ordinance (Cap.4).

[4] See Sir Jacob JIH, *The Fabric of English Civil Justice* (Stevens & Sons, London, 1987) pp 54 – 55.

[5] Sir Jacob JIH, *The Fabric of English Civil Justice* n 4 p 57.

[6] *Bank of East Asia Ltd v Tsien Wui Marble Factory Ltd & Others* [2000] 1 HKC 1 (CFA), decision of Nazareth NPJ at 91A – C.

Insofar as previous English authority relates to issues of civil procedure, it continues to be referred to by the Courts of Hong Kong and, although no longer binding, is of persuasive value. In April 1999, however, the new Civil Procedure Rules (CPR) were introduced in England and Wales. They differ in most respects from Hong Kong's civil procedural rules,[7] which means that many English decisions since that date decreased in significance. In certain instances, however, CPR case law will become a useful source when Hong Kong introduces its own civil justice reforms in April 2009, some of which are similar to the English CPR. Over the last 11 years Hong Kong has developed an extensive body of its own authority on procedural matters and undoubtedly this will increase following the introduction of the civil justice reforms in April 2009.

Practice Directions

1.09 Practice Directions are another source of law in Hong Kong, and an increasingly important source.[8] They are issued by the Chief Justice to regulate aspects of proceedings on which the Rules of the High Court are silent. Practice Directions deal with issues such as alternative dispute resolution procedures, the steps to follow when filing documents or obtaining a date for an interlocutory application, checklists of tasks which must be completed when setting a matter down for trial or appeal, and the conduct of actions of a particular nature, such as personal injury actions and actions involving construction disputes. Indeed, in recent years some Practice Directions have become more detailed, and in some instances impose a stricter regime than the rules themselves. One example is Practice Direction 4.1 on Appeals, which states that although the time period prescribed in O.59, r.9(1) for lodging bundles is seven days before the hearing, the documents should be lodged at least 14 days before the hearing.[9] Another striking example is the Practice Direction on Personal Injury Cases, which sets out a very comprehensive body of rules governing personal injury litigation in both the pre-action and post-action stages[10] and which operates in many respects in a manner similar to a pre-action protocol. There are numerous reported cases in Hong Kong in which Judges have criticised lawyers for failing to follow the Practice Directions and have threatened to dismiss future applications in which the Practice Directions are not followed.[11] While Practice Directions do not have the force of law, failure to follow them runs the risk of costs penalties being imposed and even of an action being dismissed.

Inherent jurisdiction of the court

1.10 In addition to the legislative sources of civil procedure, the High Court also has the inherent jurisdiction to control its own procedure, to ensure that the process of the court is not used to achieve injustice, and generally to prevent abuse of the process of the court.[12] Sir Jack Jacob has described this power in the following way:

7 The Civil Procedure Rules ("CPR") which came into force in April 1999.

8 The current Practice Directions are set out in of *Hong Kong Civil Procedure 2008* ("the White Book") ("HKCP 2008"), Vol 1, Pt A.

9 See the discussion below, paragraph 15.39, and paragraph 19 of PD 4.1.

10 See below, Chapter 19, for a comprehensive review of PD 18.1.

11 See, for example, *Tong Yi Sang & Another v Fung Law & Ng & Others* [1993] 2 HKC 665 (HC).

12 See Sir Jacob JIH, "The Inherent Jurisdiction of the court" (1970) 23 *Current Legal Problems*, p 23.

> "It is not to be confused with the statutory jurisdiction of the court nor with the exercise of discretionary judicial powers. It is not derived from any statute or rule of law, but from the very nature of the court as a court of law, which is why it is called "inherent". The underlying principle . . . is that the essential character of a court of law necessarily involves that it should be invested with the power to maintain its authority, to control and regulate its process and to prevent its process from being abused or obstructed. Such a power is intrinsic in a superior court of law; it is its very lifeblood . . .".[13]

The court has an inherent jurisdiction, for example, to exercise control over its own officers, including solicitors, and may make a solicitor personally liable for costs where it is found that the solicitor's conduct amounts to a serious dereliction of duty.[14] The court also has an inherent jurisdiction to dismiss an action for want of prosecution if the plaintiff has not complied with the rules or an order of the court, or there has been excessive delay in prosecuting the action.[15]

PRE-ACTION CONSIDERATIONS

General considerations

Once a solicitor has confirmed that he is free to act[16], there are a number of important issues regarding the contemplated litigation that may need to be discussed with the client at the initial interview or shortly after: 1.11

- Is litigation in Hong Kong the right method of solving the dispute? A review of the documents may reveal the presence of a binding foreign jurisdiction clause or arbitration clause, effectively preventing proceedings in Hong Kong. Alternatively, the facts may indicate that another method of dispute resolution may be more appropriate in the circumstances. For example, where the amount of the claim is small or where the parties have an ongoing relationship that they wish to protect, an attempt to negotiate a settlement quickly, without recourse to litigation, may be in the client's better interests. The dispute may also be well-suited to mediation or to some other form of alternative dispute resolution.
- If litigation is appropriate, in which court should the proceedings be commenced? The High Court has unlimited civil jurisdiction, although if a case is within the monetary jurisdiction of the District Court, a Judge of the High Court may transfer the case to the District Court. Sometimes it is thought that

13 Sir Jacob JIH, n 4, pp 60 – 61.

14 *Que Jocelyn Co (t/a Scented Delights) v Broadair Express Ltd (No 2)* [1999] 4 HKC 381 at 384. Such an order may also be made pursuant to O.62, r.8.

15 There are also express powers given to the Court by the rules of court to dismiss actions where there has been a failure to comply with the rules of court. See, for example, O.19, r.1 (failure to serve a statement of claim) and O.24, r.16 (failure to comply with discovery obligations).

16 Prior to accepting any instruction, a solicitor is under a professional obligation to ensure that he (and his firm) are free to act and are not prevented from doing so by a conflict of interest. See *The Hong Kong Solicitors' Guide to Professional Conduct*, Vol 1, ("The Solicitors' Guide"), Chapter 3, 7 and 9 in particular.

a tactical advantage may be obtained by commencing an action in the High Court to put pressure on the defendant (for example, because writs issued in the High Court are published) even though the case is likely to be transferred to the District Court later because it is within the District Court's monetary limit. Before doing so, care should be taken to inform the client that issuing a Writ in the High Court may expose the client to the High Court scale of costs, including counsel fees.[17]

- Is the debtor worth suing? The client may not have thought far beyond commencing proceedings, but there is little point in doing so if any judgment subsequently (and expensively) obtained cannot be enforced because the defendant has no assets. This issue is discussed in more detail below in the context of the cost of litigation.[18]
- What are the client's causes of action? Is there a likelihood that the defendant may have a counterclaim? If so, the client will require an explanation of the implications – that he may become a defendant to a counterclaim in the same action. If a solicitor is instructed by a client who has been sued, however, the advice will centre on matters such as whether the client is able to plead a set-off or counterclaim, or whether a third party notice should be issued.[19]
- What is the applicable limitation period, and is the client within the specified time limit for commencing proceedings?[20] Particular care should be taken where a time limit is identified that is due to expire very shortly. The consequences of the expiry of the time limit will require explanation, and instructions may be needed from the client to commence proceedings urgently.
- Do the client's circumstances require an immediate remedy in the form of injunctive relief? If there is evidence, for example, that a client's former employee is acting in breach of a restrictive covenant in his contract of employment, an interlocutory injunction may be needed to restrain those activities until the disputed breach is resolved. If it is feared that the defendant is about to dissipate his assets, then an application for a Mareva injunction may be advised. An Anton Piller order (or an order for pre-action discovery) might be appropriate for the client whose intellectual property rights are being infringed.[21]
- If there is an international aspect to the dispute, Hong Kong may not be the *forum conveniens* for the resolution of the dispute and the client may need advice from overseas lawyers regarding remedies available in another jurisdiction. There may be other jurisdictional issues requiring explanation even if proceedings in Hong Kong are contemplated, such as the need to apply for leave to serve a foreign defendant out of the jurisdiction.

[17] See *Que Jocelyn (t/a Scented Delights) v Broadair Express Ltd (No 2)*, n 14 for an example of the consequences of a solicitor's failure to advise the client of the costs implications of commencing a case in the High Court which is within the monetary jurisdiction of the District Court. See also Chapter 16.

[18] Paragraphs 1.12 – 1.14. Enforcement of judgments is discussed in Chapter 17.

[19] These issues are explored in Chapters 2 and 3.

[20] See the Limitation Ordinance (Cap.347) and any other relevant legislation. Limitation issues are discussed in Chapter 5.

[21] Injunctions are discussed in Chapter 9. Pre-action discovery is discussed in Chapter 12.

The cost of litigation

The statement that civil litigation is a very expensive business is hardly newsworthy. However, costs implications and methods of financing the proceedings merit some attention, and these are discussed below. The high cost of litigation was one of the primary factors prompting the recent major reform of civil procedure in the United Kingdom and is surely a contributing factor in the recent increase in Hong Kong of litigants in person in civil proceedings, unable to afford professional legal advice but not eligible for legal aid. **1.12**

Although solicitors know that it is impossible to anticipate with any degree of precision at the outset of an action the total cost of taking the case to trial, this is most unsatisfactory from the client's point of view. Therefore, as a matter of conduct, solicitors are obliged to explain as fully as possible the likely costs involved. A question that may be uppermost in the client's mind is whether the outcome of any litigation will justify the costs incurred in achieving it, and this risk assessment should be discussed with the client not only at the outset, but also at key stages during the proceedings. **1.13**

In addition to explaining to clients how they will be billed, solicitors should also inform clients of their potential liability in respect of the opposing party's costs if unsuccessful. Even if successful, a client is unlikely to make a full recovery of all the costs and disbursements that he pays to his own solicitor. Usually, a successful party recovers approximately three-quarters of his costs upon taxation. The solicitor should explain to the client that there will be some irrecoverable costs, and should refer to the taxation process, including the various bases upon which costs may be taxed.[22] In addition, it may also be appropriate to explain the effect of various costs orders, such as an order to pay the costs of an interlocutory application "forthwith". During the conduct of the litigation, various interlocutory applications may be made with costs implications that are potentially very important for the client. For example, if a defendant successfully obtains an order for security for costs, this will have the effect of staying the action until the security has been paid.[23] All discussions relating to costs issues should be recorded in written form, both to assist the client's understanding and to serve as a record for the solicitor's file. As we stated above, Hong Kong's civil justice reforms give cost-effectiveness and proportionality a central place in the conduct of civil proceedings, and impose on legal representatives a positive duty to assist the court to achieve these objectives. The likely result of these new reforms will be to increase the responsibilities of legal representatives to monitor the costs of proceedings and to keep their clients advised on costs matters. **1.14**

Financing the proceedings

The manner in which the proceedings are to be financed is a vital pre-action consideration. We have noted that, on taking instructions, as a matter of conduct a solicitor is obliged to give the client the best information possible about the likely cost of the matter. Solicitors should explain their charge-out rates and also those of other members of the firm who may also be involved in the case. Solicitors are also required **1.15**

[22] These issues are discussed in Chapter 16.

[23] Security for costs is discussed in Chapter 11.

payment), and at the same time consider that the *defendant* had an arguable defence sufficient to warrant unconditional leave to defend.[120] According to this view, an interim payment could be awarded to a plaintiff on a summary judgment application only if the defendant got *conditional* leave to defend (or, of course, if there is an order for summary judgment for the plaintiff). There is also authority to support the contrary view that there is no inconsistency between unconditional leave to defend and an order directing the defendant to make an interim payment to the plaintiff.[121] The better view, and the one supported by the weight of authorities, is that unconditional leave to defend is inconsistent with an order for an interim payment.[122] This situation arose, with a twist, in *Shenzhen Envirotec Electronics Co Ltd v Cellplus (HK) Ltd.*[123] The plaintiff and defendant agreed that the plaintiff's summary judgment application would be dismissed by consent order. Several months later the plaintiff applied for an interim payment. The judge held that such an application, in the face of the consent order and without any evidence of a change in circumstances since the summary judgment application was dismissed, was an abuse of process. The likely inability of the plaintiff to refund the interim payment should it lose at trial was also a significant consideration. The request for an interim payment was refused.

ORDER 86

6.49 Order 86 governs applications for summary judgment in actions relating to agreements for the sale and purchase of property, for example, specific performance, rescission, or return of a deposit.[124] The same general principles that apply in O.14 applications apply in applications under O.86.[125] There is a threshold onus on a defendant to show that there is a triable issue.[126] There are, however, some procedural differences between the two orders. While applications under both of these orders can only be brought in an action begun by writ, there is no requirement in O.86 that the defendant acknowledge service or that the plaintiff serve a statement of claim.[127] The notice period is also shorter – 4 days under O.86 rather than the ten clear days required under O.14.

120 See *British and Commonwealth Holdings v Quadrex Holdings* [1989] 3 All ER 492 (CA); *Shenzhen Envirotec Electronics Co Ltd & Others v Cellplus (HK) Ltd & Others* [2005] HKEC 100 (CFI).

121 *Ricci Burns v Toole* [1989] 3 All ER 478 (CA).

122 This was the view preferred by Suffiad J in *Wong Sau Kam and Yeung Kong, the Administrators of the estate of Yeung Ki Yee v Shum Yuk Fong* (unrep, HCPI 798/1998, 1 December 2000) (CFI), at 10R – 11R. See also *Andrews v Schooling* [1991] 1 WLR 783 (CA).

123 [2005] HKEC 1100 (CFI).

124 See HKCP 2008 marginal note 86/1/1 for a discussion of the scope of "rescission" and "specific performance" in the context of this Order. Order 86 is not limited to contracts for the sale of land, but applies to any specific performance action.

125 See, for example, *Super Town Investments Ltd v Ives Development Ltd & Others* [2007] HKEC 933 (CFI), especially paragraphs 5, 6, and 66.

126 *Concord Property Development Ltd v Li Pui Leung & Another* [2005] HKEC 970 (CFI).

127 However, if the plaintiff does not serve a statement of claim, the plaintiff's affidavit in support of the application will have to give particulars of the claim, in addition to stating that in the deponent's belief there is no defence to the claim. For further details of the requirements of the affidavit in support and the draft minutes of judgment, see HKCP 2008 marginal notes 86/2/2 – 86/2/3.

CHAPTER 7

DEFAULT JUDGMENT

GENERAL PRINCIPLES

7.01 The provisions for default judgment in O.13 and O.19 enable plaintiffs to obtain judgment without having to prove their case at trial, if the defendant fails either to acknowledge service or to file a defence. The policy underlying these provisions is that procedural time limits are meant to be complied with, and judgment in default is a sanction for failing to comply.[1] A judgment in default is not a judgment on the merits, and accordingly no appeal lies from the decision to grant default judgment. The potential severity of depriving a defendant of the right to defend against the plaintiff's claim and to appeal the decision granting a default judgment is tempered, however, by the right of a defendant to apply to set the judgment aside.[2]

7.02 A plaintiff may enter judgment against a defendant who has failed either to give notice of intention to defend or to serve a defence within the time periods prescribed in the rules.[3] Judgment in default can also be entered if a defendant has expressly stated the intention not to defend by ticking the relevant box on the acknowledgement of service form. Except in the cases in which leave of the court is required,[4] entering default judgment is an administrative act, completed by filing the required documents at the Registry of the High Court.[5]

> Civil Justice Reform: Default Judgments
>
> The O.13 and O.19 procedures only allow the plaintiff to enter judgment where the defendant has failed either to acknowledge service or to file a defence. As the Working Party put it, the process only applies where the defendant unconditionally surrenders to the claim (Final Report, Section 8, paragraph 170). During the consultation process, the Working Party identified a need for a process which would enable a defendant to admit all or part of a claim and to propose terms for satisfying money judgments. This proposal was widely

1 The failure of a defendant to give notice of intention to defend might also indicate that the defendant does not wish to contest the plaintiff's claim.

2 See below, paragraph 7.13. The court will also try to balance the plaintiff's right to insist on compliance with the time limits, with the need to protect a defendant from the harsh result of a default judgment – see below, n 21.

3 Order 13 (no notice of intention to defend); O.19 (no defence filed).

4 See paragraph 7.06.

5 See HKCP 2008, marginal notes 13/0/13, 13/0/14 and 19/2/3 – 19/2/5 for a discussion of the documents required on an application for default judgment without leave.

supported and resulted in new O.13A, Admissions in Claims for Payment of Money. It is a comprehensive code that is additional to the O.13 and O.19 procedures, allowing defendants to propose payment terms (as to time and instalments) in submitting to entry of judgment by default, which applies to both liquidated and unliquidated claims.

Essentially, under new O.13A a defendant may admit the whole or part of a claim for a liquidated or an unliquidated amount of money by filing an admission at the Registry and serving a copy of it on the plaintiff. The admission includes any payment proposals that the defendant wishes to make. The forms (in Appendix A) are straightforward. If the defendant seeks time to pay, he must give details of his employment, financial status, income, expenses and liabilities. The defendant's admission is a formal declaration and is subject to the Oaths and Declaration Ordinance (Cap.11). The plaintiff then has 14 days within which to file and serve a request for judgment, using the corresponding forms. If he does not do so, the claim will be stayed until the request is filed. Upon receipt of the plaintiff's request, the court shall enter judgment, deciding the amount where the claim is unliquidated. The judgment shall take into account any payments made and shall include costs and interest where specified (O.13A, r.12). In the case of unliquidated claims, the court has power to give directions.

The new O.13A procedures are alternatives to the procedures under O.13 and O.19. Order 13A may also be used in respect of counterclaims and claims made under O.16, rr.1 or 8 and r.9 subject to necessary modifications.

What is the position if a party wishes to amend or withdraw an admission? The court has a discretion to allow a party to do so under r.2(3).

The foregoing is a summary of the key features of the new O.13A admissions procedure. The new O.13A should be read in conjunction with the new forms which relate to it (Form16 and Forms16A – E) in Appendix A.

Failure to give notice of intention to defend

7.03 A defendant must serve an acknowledgement of service and notice of intention to defend within 14 days after service of the writ.[6] If the defendant fails to do so, or returns the form having indicated the intention not to defend, the plaintiff can enter judgment. If the claim is for a liquidated amount, the plaintiff will get final judgment.[7] A liquidated amount is one which is ascertained and does not need to be assessed, such as a claim for repayment of a loan. If the claim is for an unliquidated amount, the plaintiff will get interlocutory judgment, with damages to be assessed.[8] An unliquidated amount is one which is not yet ascertained and needs to be assessed, for example, a claim for damages for personal injuries.

6 Order 12, r.5.
7 Order 13, r.1.
8 Order 13, r.2.

Failure to serve a defence

7.04 The defendant must serve the defence within 14 days after service of the statement of claim.[9] If the defendant fails to do so, the plaintiff can enter default judgment. Final judgment would be given for a liquidated amount and interlocutory judgment would be given for an unliquidated amount.[10]

When leave is not required

7.05 Default judgment can be obtained without leave for the following claims:

- liquidated demand;[11]
- unliquidated damages;[12]
- detention of goods;[13]
- possession of land;[14] and
- any combination of these claims.[15]

When leave is required

7.06 If the claim is not one of the claims listed above, leave of the court is required before judgment in default can be entered.[16] If a defendant in such an action fails to give notice of intention to defend, the plaintiff should proceed with the action *as if* the defendant had given notice of intention to defend.[17] This means that the plaintiff should serve the statement of claim, if not already served, and wait for the defendant to serve the defence within the prescribed time. If the defendant fails to serve a defence, the plaintiff may then apply to the court for leave to enter judgment.[18] Another option for such a plaintiff who has more than one claim against the defendant would be to abandon the claims that fall outside the scope of O.13, rr.1 – 4 and O.19, rr.2 – 5 and to enter default judgment for the claims that fall within those rules. In this way, the plaintiff could avoid the requirement of obtaining leave.

9 Order 18, r.2.
10 Order 19, rr.2 and 3.
11 Order 13, r.1; O.19, r.2.
12 Order 13, r.2; O.19, r.3.
13 Order 13, r.3; O.19, r.4. If the relief the plaintiff requests is delivery of the goods without giving the defendant the option to pay the assessed value, the plaintiff cannot enter default judgment in the usual way but must apply by summons for judgment for delivery of the goods.
14 Order 13, r.4; O.19, r.5. Default judgment cannot be obtained if the claim for possession of land arises out of a mortgage transaction. The plaintiff's solicitor must certify, in a claim for possession of land, that the defendant is not claiming any relief of the nature specified in O.88 (judgment in mortgage actions). Judgment in default in an action for possession of land will not be given if there is no such certification. See also HKCP 2008 marginal note 13/4/1 for the particulars that the statement of claim must contain in a possession action if the plaintiff wishes to apply for default judgment.
15 Order 13, r.5; O.19, r.6.
16 Order 13, r.6; O.19, r.7. This category includes claims for an injunction, an account, and specific performance. Remember that in claims for the delivery of goods without giving the defendant the alternative of paying the assessed value of the goods, the plaintiff must apply by summons for default judgment: O.13, r.3(1)(b); O.19, r.4(1)(b).
17 Order 13, r.6(1).
18 Order 19, r.7.

Notice before entering default judgment: O.19, r.8A

7.07 If a defendant has given notice of intention to defend but has not yet served a defence, the plaintiff cannot enter default judgment without first giving the defendant notice in writing that he intends to do so.[19] Plaintiffs can satisfy this requirement by giving notice to the defendant even before the defendant is in default,[20] as long as this notice is given *after* the notice of intention to defend has been filed and two clear days *before* entering judgment. This rule was not intended to be a "second chance" for a defaulting defendant; its real purpose is to indicate to the defendant that the plaintiff is insisting on strict compliance with the procedural rules.[21] An application for an extension of time made after receipt of the notice will not prevent the plaintiff from entering default judgment, although where there is a hearing of an application for default judgment, the court may exercise its discretion to adjourn the matter to the same time as the hearing of the application for the extension of time.[22]

7.08 The O.19, r.8A notice is not required if:

- the defendant has not given notice of intention to defend;[23]
- the case is one in which leave to enter default judgment must be obtained;[24]
- the defendant is not represented by a solicitor and has failed to state in the acknowledgement of service an address for service;[25] or
- the court has already made an order stipulating a time within which the defence must be filed.[26]

Stay of execution of default judgment

7.09 If the claim against the defendant is one for a liquidated demand and the defendant does not intend to contest the proceedings, the defendant can apply for a stay of execution by writ of *fieri facias* by ticking the appropriate box on Form 14. This will serve as a stay of execution of the judgment for 14 days. The defendant must then apply within that 14-day period under O.47, r.1 for a permanent stay of execution of the judgment.[27] This provision applies only to execution by writ of *fieri facias* because all other forms of execution require a judicial act, such as an order nisi in charging

[19] Order 19, r.8A.

[20] *Ho Yuen Tsan & Othrs v Hop Wing Transportation Company Ltd* [1996] 4 HKC 259 (HC), at 266B – D.

[21] *Ho Yuen Tsan & Others v Hop Wing Transportation Company Ltd*, n 20. However, the Court of Appeal has criticised the tactical use of default judgment proceedings under O.13 and O.19. On an application to set aside a default judgment the court will balance the right of the plaintiff to insist on compliance with the time limits, with the need to avoid "arid satellite litigation" and to protect a defendant who was not intentionally delaying the proceedings from the harsh results of a default judgment: see *L & M Specialist Construction Limited v Wo Hing Construction Company Limited* (unrep, CACV 147/2000, 12 July 2000) (CA).

[22] *Schindler Lifts (Hong Kong) Ltd v Ocean Joy Investments Ltd* [2002] (CFI) 1 HKLRD 279; see also *Ho Yuen Tsan & Others v Hop Wing Transportation Company Ltd*, n 20.

[23] Order 13 would apply in such cases.

[24] The notice is not necessary because there is already a requirement in such cases to notify the defendant of the application for leave to enter default judgment: see paragraph 7.06.

[25] Order 19, r.8A(2)(b).

[26] Order 19, r. 8A(2)(a); *Cheng Chun Chun v Chow Chung Tao and Yan Wai Chun* (unrep, HCA 12016/1999, 12 May 2000) (CFI).

[27] Order 13, r.8.

order proceedings, which would give a defendant the opportunity to state a case before a judge for a stay of execution.[28]

7.10 A defendant's application for legal aid will result in an automatic stay of 42 days of any judgment entered in default. When deciding whether to lift the stay, the court will consider various factors, including the merit of the defence and, if the application for legal aid was late, whether there is any reason or justification for the delay.[29] If the court is satisfied that the defendant is likely to be granted legal aid, the stay will only be lifted in exceptional circumstances, such as evidence of the plaintiff's urgent, immediate need for the money to which the judgment relates.[30] If the stay is not lifted, any appeal must be adjourned until after the 42-day period has expired.

Defendants by counterclaim and third parties

7.11 Judgment in default of *notice of intention to defend* cannot be entered against a plaintiff in the main action who becomes a defendant by counterclaim pursuant to O.15, r.2. The reason for this is that a plaintiff who becomes a defendant by counterclaim must respond with a defence to the counterclaim, not with a notice of intention to defend. That plaintiff is therefore exposed to judgment in default of defence under O.19 in the same way as any other defendant.[31] The situation is different where a person who is not already a party to the action is joined by the plaintiff as a defendant by counterclaim pursuant to O.15, r.3.[32] The original defendant must serve on the new defendant by counterclaim a form of acknowledgement of service in Form 14, with such modifications as the circumstances require. If the defendant by counterclaim fails to return the acknowledgement indicating the intention to defend, default judgment may be entered under O.13.[33]

7.12 The rules regarding third party default are governed by O.16. If a third party does not file a notice of intention to defend or fails to file a defence when ordered to do so, the court may give leave under rule 5 for the defendant to enter judgment in default for contribution, but not for indemnity. Indemnity judgments must be applied for under r.7.[34]

SETTING ASIDE DEFAULT JUDGMENTS

7.13 The consequences of default judgments are severe because they deprive defendants of access to all of the procedures available to litigants (for example, discovery) and of the opportunity to have the dispute adjudicated and determined at a trial. This situation is

[28] See HKCP 2008 marginal notes 13/8/1 – 13/8/2.

[29] *The China State Bank Limited v Wong Chun Ying t/a Wing Fung Hong Company* (unrep, HCA 10825/1999, 6 April 2000) (CFI); *Wealthy Unit International Enterprises Limited v Chan Wai Ting and Lai Kat Tat Joseph* [1999] HKCU 361 (CFI).

[30] *Wealthy Unit International, Wealthy Unit International Enterprises Limited v Chan Wai Ting and Lai Kat Tat Joseph* [1999] HKCU 361 (CFI).

[31] Order 19, r.8.

[32] See paragraphs 3.11 – 3.13 for a discussion of joinder under O.15, r.3.

[33] Order 15, r.3(2).

[34] See *Premier Fashion Wears v Li Hing Chung* [1994] 1 HKC 213 (CA), at 216 but where in a summons for an application for an indemnity judgment reference is made to O.16, r.5 rather than O.16, r.7, any indemnity judgment entered will not be irregular unless prejudice was caused by the error of invoking r.5 rather than r.7.

mitigated by the right of a defendant to apply to set the judgment aside. The application is by summons in the action to a Master, supported by an affidavit. The principles that govern the discretion to set aside default judgments vary depending on whether the judgment is regular or irregular.

7.14 The distinction between regular and irregular judgments exists because courts have found it necessary to use different rules depending on the circumstances in which the judgment was entered. Defendants who receive proper notice of the proceedings but who fail through neglect, or for some other reason, to defend or to give notice of intention to defend, are in a very different position from defendants who either get no notice and only find out about the proceedings after judgment has been entered, or against whom judgment has been entered prematurely. Defendants in the first category must ask for the indulgence of the court because they have failed to follow the rules. They are asking for a second chance, and they are also asking the court to displace a judgment entered by a plaintiff who has followed the rules and who has certain rights flowing from the judgment. Defendants in the second category, however, have broken no rule, and have not even been given the opportunity to comply with the rules. They find themselves "in default" not because of any act or omission on their part and often as a result of some failure on the part of the plaintiff. The distinction between regular and irregular judgments is intended to protect such defendants from having default judgments entered against them through no fault of their own, and to ensure that plaintiffs and defendants comply with the Rules of Court.[35]

7.15 The general rule on costs is that where the court sets aside an irregularly obtained judgment, the plaintiff will be ordered to bear the costs of the application because the judgment was not properly obtained. If however the court sets aside a regular judgment on the ground that the defendant has a meritorious defence, the defendant will be ordered to bear the costs of the application. Alternatively, the costs of the application will be made in the cause of the action.[36] These general rules are subject to the broad principle that the award of costs are in the absolute discretion of the court.

REGULAR JUDGMENTS

7.16 A regular judgment is one that has been obtained in compliance with the relevant procedural rules. In exercising the broad discretion to set aside a regular judgment, the court will ask whether the defence asserted has *a real prospect of success*.[37] What does "real prospect of success" mean? In deciding whether this test is satisfied, the court must consider the merits of the defendant's case. A defendant cannot satisfy the test merely by showing an arguable defence, although this would be sufficient to obtain

35 The comments in paragraph 7.14 are taken from Cameron, "Irregular Default Judgments: Should Hong Kong Discard the "As of Right" Rule?", published in *Hong Kong Law Journal*, Vol 30, Part 2, 2000, 245, at 265 – 268.

36 *Ko Sin Yun v Chan Chuen* [2007] 1 HKLRD 324 (CA).

37 One of the leading cases is *Premier Fashion Wears Ltd v Li Hing Chung*, n 34; See also *AXA China Region Insurance Co Ltd & Another v Pacific Century Insurance Co Ltd & Others* (unrep, [2006] HKCU 1059) (CFI); *Cheung Wai Kwan v Wan Pak Keung & Another* [2001] HKLRD (Yrbk) 99 (CFI); *Dao Heng Bank v Chan Chiu Chung* [1997] HKLY 529 (CFI); *GH Fountain v Bank of America National Trust Savings Association* [1990] 2 HKLR 158 (CA); *Broadway Sportswear Ltd v Chow Cheuk-Man* [1994] 1 HKLR 377; *Alpine Bulk Transport v Saudi Eagle Shipping Co Inc* [1986] 2 Lloyd's Rep 221 (CA).

leave to defend under O.14.[38] A defendant who applies to set aside a regular default judgment must go further and satisfy the court that the defence presented carries some degree of conviction. In order to determine whether the defendant has satisfied the test, the court has to form a provisional view of the probable outcome of the action.[39]

Example

The defendant (with another person, X) was the tenant of premises owned by the plaintiff. After the lease expired, the defendant stayed on and paid rent on a monthly basis. The plaintiff then gave the defendant notice of termination of the tenancy. The plaintiff did not also give the notice to X. The defendant did not give vacant possession and the plaintiff sued. The defendant's solicitors failed, despite the defendant's instructions, to file a defence. The plaintiff obtained default judgment and the defendant applied to set it aside. The defendant argued that the plaintiff's notice of termination of the tenancy was invalid because the plaintiff had not served it on X, the other tenant. The defendant also argued that her defence was not filed because of the negligence of her solicitors, which should not be visited upon her. The Court of Appeal held that the notice of termination was valid and that the defence therefore had no real prospect of success. That being the case, it was irrelevant that the defence was not filed due to the defendant's solicitors' negligence.[40]

7.17 It is not essential for a defendant who is applying to set aside a default judgment to give a reasonable explanation for the default. The court may take the explanation into account, but it is not a prerequisite to getting a judgment set aside.[41] The primary consideration is whether the defence has merits to which the court should pay heed, and if merits are shown the court will not want to let stand a judgment on which there has been no proper adjudication.[42] However, in exceptional circumstances even where the defence has merit the court may refuse an application to set a judgment aside in the absence of a satisfactory explanation. For example, if the defendant delays making the application for several years without satisfactory explanation, the application may be refused because of the prejudice the plaintiff would suffer if it were granted.[43] It is common and best practice for defendants to try to explain the reason for their default. Defendants should include this explanation in their affirmation in support of the application to set the judgment aside.

38 See paragraphs 6.02 – 6.05. There is still some doubt in Hong Kong as to the appropriate test where a defendant applies under O.14, r.11 to set aside a summary judgment. This is discussed in paragraphs 6.28 – 6.30.

39 *Premier Fashions*, n 34 at 219H – 220C; *El Vince Ltd v Wu Wen Sheng* [2001] 3 HKLRD 445; *Hung Ling Chun v Chow Yung Fong* [2001] HKEC 681 (CFI); *AXA China Region Insurance Co Ltd & Another v Pacific Century Insurance Co Ltd & Others*, n 37, *Nazla and Nora Enterprises (Gambia) Ltd v Ng Chi Yu & Others* [2005] HKEC 480.

40 *Park Kit Investment Ltd v Cheung Wan Ping* [1999] 3 HKC 841 (CA).

41 See also *Evans v Bartlam* [1937] AC 473 (HL); *Korea Sonbak Shipping Co v Charter Harvest Shipping Ltd* [1994] 1 HKC 494 (CFI), and the cases cited there.

42 See *Evans v Bartlam*, n 41; *GH Fountain v Bank of America National Trust Savings Association*, n 37 Clough JA at 171 – 172; *Dao Heng Bank*, n 37, Stone J at 9D – G.

43 *Young Bing Ching (Deceased) v Chow Yung Fong & Another* [2001] 2 HKLRD 394.

Requirements of the affidavit on an applications to set aside a default judgment

7.18 If the judgment is a regular judgment, the court will have to be satisfied that there is a defence with a real prospect of success. This is an inquiry into the merits of the defence. (Whether the court can also inquire into the merits if the judgment is *irregular*, is discussed below[44]). The defendant must condescend to particulars in the affidavit in order to establish that there is a defence with a real prospect of success. If the defence has been settled at the time of the application to set the default judgment aside, exhibiting that defence to the affidavit, even in draft form, might improve a defendant's chances of success.

Conditional leave to defend

7.19 If the court decides to set aside a regular default judgment because there is a defence with a real prospect of success, it will order the defendant to file and serve a defence by a specified date. The court might also attach conditions to its order, for example that the defendant must pay into court all or a portion of the amount of the plaintiff's claim.[45] This approach appears to be less popular with Hong Kong Courts than it was in the pre-CPR Courts in England.[46] In *L & M Specialist Construction Limited v Wo Hing Construction Limited*,[47] the Court of Appeal acknowledged that the broad language of the relevant rules allows judges to impose any appropriate terms in the exercise of their discretion. The court also stated, however, that it would be a rare case in which a payment into court would be ordered as a condition of setting aside a judgment. There would have to be "something specific in the defendant's conduct or in the case" to justify imposing such a condition, "to encourage the proper future conduct of the litigation and to provide a measure of security for the plaintiff".[48] An example might be breaches of the Rules of Court by the defendant that appear to be tactics to delay the progress of the action. In the *L & M* case, the procedural infraction was so minor that the Court of Appeal found the condition imposed by the court below was not justified.[49]

Judgments entered for failure to comply with an unless order

7.20 Hong Kong Courts take what can fairly be described as a forgiving approach toward defendants who fail to comply with orders prescribing a time within which a defence must be filed. This is consistent with the lenient philosophy of our courts regarding the violation of peremptory and unless orders.[50] Among the factors considered are

[44] Paragraphs 7.22 – 7.27.

[45] *Singh v Atombrook* [1989] 1 WLR 810 (CA); *City Construction Contracts (London) Ltd v Adam* (unrep, The Times, 4 January 1988) (CA); HKCP 2008 marginal note 13/9/15.

[46] See, for example, *Korea Sonbak Shipping Company*, n 41 and *Dongguan Dongxiang Decoration Co Ltd v Universal Right Ltd* (unrep, CACV 42/1999, 22 April 1999) (CA).

[47] Note 21.

[48] Note 21, Ribeiro JA at 5. See *Po Kwong Marble Factory Ltd v Wah Yee Decoration Co Ltd* [1996] 4 HKC 157 (CA) for an example of a case in which the *L &M Construction Ltd* test for attaching conditions might (arguably) be satisfied.

[49] Note 21. The plaintiff agreed to an extension of time for filing the defence. On the day the defence was due, the defendants took out a summons seeking an additional 14-day extension to file their defence. The defendants sent the defence to the plaintiffs and asked them to consent to late filing so that the application to extend time (due to be heard on the following day) would not be necessary. The plaintiffs entered judgment on the day they received this request.

[50] See the discussion of unless orders in paragraphs 8.04 – 8.07.

whether the violation of the order was the first such violation, whether the defendant had been given a fair chance in terms of extensions before the order was made, and whether the plaintiff suffered any prejudice as a result of the defendant's violation of the order.[51]

IRREGULAR JUDGMENTS

7.21 An irregular judgment is one entered in circumstances where the relevant procedural rules have not been followed.[52] The law in Hong Kong regarding the terms on which an irregular judgment will be set aside is not entirely settled. There are three different approaches:

- An irregular judgment will be set aside without any inquiry into the merits, and unconditionally.
- An irregular judgment will be set aside without any inquiry into the merits, but conditions might be attached.
- An irregular judgment will be set aside if the defence has merit, ie if there is a real prospect of success.

While the weight of authority in Hong Kong appears to favour the second of these three possible approaches – setting aside without considering the merits but possibly attaching conditions – there is some judicial support for the first and third approaches. We will consider each of these in turn.

No inquiry into the merits, and no conditions

7.22 The conventional rule regarding applications to set aside irregular judgments is that the "as of right" principle ("*ex debito justitiae*") applies.[53] What does "as of right" mean in the context of setting aside an irregular judgment? Traditionally, it has been interpreted to mean that courts will not inquire into the merits of the defence. Once they decide that the judgment is irregular, they will order that it be set aside, no questions asked and no conditions attached.[54]

No inquiry into merits, but conditions attached

7.23 More recently in Hong Kong, however, the definition has been altered to the extent that the court will still refuse to consider the merits but might use its discretion to attach

[51] *Dongguan Dongxiang Decoration Co Ltd v Universal Right Ltd*, n 46; *Korea Sonbak Shipping Co v Charter Harvest Shipping Ltd*, n 41. See also *China Dragon International Ltd v Pang Hong* [2007] 2 HKLRD 655 (CFI) and *Golden Tech (Asia) Ltd v Po Yuen (To's) Machine Factory Ltd* [2002] HKEC 1013].

[52] A judgment can also be obtained irregularly, however, in a case in which the plaintiff complies with all of the procedural rules but the proceedings do not come to the attention of the defendant. When this happens, it is usually in a situation in which the plaintiff has chosen to serve the defendant by a method other than personal service, for example, inserting the writ through a letterbox.

[53] *White v Weston* [1968] 2 QB 647 (CA); *Anlaby v Praetorius* (1888) 20 QBD 764 (CA).

[54] *White v Weston*, n 53; *Anlaby v Praetorius*, n 53.

conditions to the order for leave to defend.[55] The rationale for this approach is that the "as of right" rule, while prohibiting an inquiry into the merits of the defence, does not require a court to shut its mind to the factors that made the judgment irregular:

> "'*Ex debitio justiciae*' or as of right means without going into the actual merits of the defence. It does not mean shutting one's eyes to the circumstances surrounding the question of service and why things went wrong in that regard. The court's statutory jurisdiction is unfettered."[56]

Example

The plaintiff sued the defendant for the balance due under a contract for the sale and installation of marble panels. The plaintiff used a process server to effect personal service. The process server served after hours and put the papers under a locked door of what he mistakenly, but understandably assumed was the registered office of the defendant. The office layout with which he was confronted was confusing. As service was not properly effected as required by s.356 of the Companies Ordinance, it had to be set aside. However, considering the defendant's way of organising its office location and numbering the doors, the court thought there was a real risk that any judgment the plaintiff might get would be an empty one. They ordered the defendant to make a payment into court.[57]

The preferred approach in Hong Kong is that an irregular judgment will be set aside "as of right" and without an inquiry into the merits, but with conditions attached if warranted by the conduct of the defendant.[58] For example, if the defendant does not put forward any defence and his conduct suggests that he intended to evade service, or if the defendant delays applying to have the judgment set aside for a substantial length of time, then the judgment, although irregular, may be set aside on the condition that the defendant makes a payment into a court of the judgment sum.[59]

---

55 *Po Kwong Marble Factory Ltd v Wah Yee Decoration Company Ltd*, n 48.

56 *Po Kwong Marble Factory Ltd v Wah Yee Decoration Company Ltd*, n 48, Bokhary, JA (as he then was) at p 162.

57 *Po Kwong Marble Factory Ltd v Wah Yee Decoration Company Ltd*, n 48. We can also rely on the language of O.13, r.9 and O.19, r.9 as support for this approach because of the broad discretion that those rules give to judges to set aside default judgments on such terms as they consider appropriate. In *Po Kwong Marble*, Nazareth VP expressed concern, but did not dissent, that attaching any condition would be inconsistent with the "as of right" rule. He referred to *Fok Chun Hung v Lo Yuk Shi* [1995] 2 HKC 648 (CA) as support for his reservations. See also *White vWeston*, n 53, which seems to suggest that it is not appropriate to impose conditions when setting aside an irregular judgment.

58 In *L & M Specialist Construction Limited*, n 21, it was held that conditions should be attached only in very exceptional circumstances. However, the court in that case was dealing with a regular judgment, and they did not explicitly extend their comments to irregular judgments. The *Po Kwong Marble Factory* approach has since become the favoured one. See *Bank Austria Aktiengesellschaft v Sukamto* [2002] 1 HKC 232 (CFI); *Liu Chong Hing Bank Ltd v Union World (HK) Ltd & Others* [2004] HKEC 1277 (CA); *Kerry Freight (Hong Kong) Ltd v Del Prado Asia Ltd* [2005] 3 HKLRD 804 (CFI) and *Sinokawa Investment (Holdings) Ltd & Another v Li Chun* [2006] 3 HKLRD 441 (CFI).

59 See for example *Kerry Freight (Hong Kong) Ltd v Del Prado Asia Ltd*, n 58; *Sinokawa Investment (Holdings) Ltd & Another v Li Chun*, n 58.

Consideration of the merits: is there a real prospect of success?

7.24 The "real prospect of success" test is the same test that a court uses when deciding whether to set aside a regular judgment. Applying it when considering irregular judgments effectively abolishes the traditional division between the two types of judgments. In *Honour Finance*,[60] the Court of Appeal stated that a defendant who applies to set aside an irregular judgment has *a confident expectation*, not a right, that the judgment will be set aside. The defendant would have to show not just lack of notice of the writ or some other irregularity, but also "a good ground of defence".[61] This was a significant departure from the traditional "as of right" rule. However, subsequent cases revealed a clear judicial preference for the more traditional approach of ignoring the merits if the judgment is irregular.[62]

7.25 The next significant development was *Po Kwong Marble*.[63] In that case, the Court of Appeal decided that it would be inappropriate, on an application to set aside an irregular judgment, to consider the merits of the defence. To this extent it is consistent with the traditional approach and inconsistent with *Honour Finance*. However, *Po Kwong Marble* arguably extended the traditional approach because the Court of Appeal also decided that it would be acceptable, in an appropriate case, to attach conditions when an irregular judgment is set aside. As we noted above, the *Po Kwong Marble* approach is the preferred approach in Hong Kong today. For a few years, there was some support for considering the merits on an application to set aside a default judgment even if that judgment was irregular. Judges criticised the regular/irregular distinction and commented favourably on the wisdom and common sense of considering the merits of the defence on an application to set aside a default judgment. In *Chu Kam Lun*,[64] for example, Nazareth VP stated that he was attracted by the view of the English Court of Appeal in *Faircharm Investments Ltd v Citibank International plc*.[65]

---

60 *Honour Finance Co Ltd v Chui Mei Mei* [1989] 2 HKLR 146 (CA), at p 150.

61 *Honour Finance Co Ltd v Chui Mei Mei*, n 60.

62 One of the best examples of this preference is the decision of the Court of Appeal in *Fok Chun Hung v LoYuk Shi*, n 57, in which Godfrey JA commented that the court in *Honour Finance* "did not have the benefit of adversary argument". He also stated that the court's reasoning in *Honour Finance* was inconsistent with the traditionally accepted approach in Hong Kong and England that a judgment obtained irregularly will be set aside without any inquiry into the merits of the defence. He relied on one of the leading English cases on this point, *Willowgreen Ltd v Smithers* [1994] 2 All ER 533 (CA). While the Court of Appeal in *Fok Chun Hung* was able to resolve the issue before it without having to choose between the *Honour Finance* approach and the traditional approach, leaving the matter "to be considered on some other occasion" (p 653), they implicitly rejected *Honour Finance* in favour of the traditional approach.

63 Note 48.

64 *Chu Kam Lun v Yap Lisa Susanto* [1999] 3 HKC 378 (CA). See also *Bank Austria Aktiengesellschaft v Sukamto*, n 58, where the judge stated *obiter* that he found the *Faircharm* approach every bit as attractive as did Nazareth VP in *Chu Kam Lun v Yap Lisa Susanto:* "If there is no defence, then there cannot be any point in prolonging the agony. To do so is to rely on empty formalism in the name of justice." Similarly, in *Kerry Freight (Hong Kong) Ltd v Del Prado Asia Ltd*, n 58, the judge found the defendant's allegations unbelievable but noted that despite his "gloomy view of the merit of the defendant"s defence" he was not in a position to follow the *Faircharm* approach.

65 The Times, 20 February 1998, English CA. In *Chu Kam Lun v Yap Lisa Susanto* [1999] 3 HKC 378 (CA), Leong JA considered *Faircharm* and observed that whilst it appeared to be a practical approach (385B – C), it was not necessary to consider the case further. In the court below, Sears J had held that because the defendant had no defence to the claim, it would be pointless to set aside the irregularly entered judgment. There seems to be only one reported case in which *Faircharm* was followed, not just favourably considered: *Pollard Construction Co Ltd v Yung Yat Fan* [1999] 3 HKC 109 (CFI). A judgment was entered for too large a sum and was therefore irregular. Cheung J recognised that he had the discretion to change the amount. He followed *Faircharm*, considered the merits of the defence in exercising his discretion, decided that the defendant would lose on a summary judgment application, and refused to set aside the default judgment.

In *Faircharm*, Sir Christopher Staughton stated that if a defendant is bound to lose on a summary judgment application, it would be a waste of time to set aside a default judgment just because it was irregular.

7.26 This is a sensible view. If a defence has no merit, and the defendant is bound to lose on an application for summary judgment, why should the default judgment be set aside solely on the basis that the judgment was obtained irregularly? The result will be another application, this time for summary judgment, with all of the extra use of judicial resources and expense associated with such an application. The Court in *Chu Kam Lun* did not have to decide the matter, because they could not say that the defence would be bound to fail on a subsequent summary judgment application.[66] On the one hand, the commitment of Hong Kong Courts to case management and to reducing expense and delay favours the English approach in *Faircharm*. If there is no defence, that is something which should be determined at the first opportunity, rather than after the parties and the system have incurred the expense of another (summary judgment) application. On the other hand, adopting the English approach in *Faircharm* would be "a major departure from the long-established position"[67] that the merits are irrelevant if the judgment is irregular. The traditional rule protects defendants against the harsh results of default judgments and encourages plaintiffs to follow the relevant procedural rules. Furthermore, while *Faircharm* is attractive, it is relatively easy to distinguish the case on its facts. The defendant Citibank, by wrongfully surrendering a policy of insurance to the insurer, had destroyed the plaintiff's right of subrogation in the policy. Sir Christopher Staughton referred to "the delay, discourtesy and unbusinesslike behaviour of Citibank, only part of which is set out in this judgment".[68] He concluded:

> "But if indeed Citibank would be bound to lose [on a subsequent application for summary judgment], I do not, *in the circumstances of this case*, consider that there is such a degree of fundamental error to require that the judgment be set aside. After all the tortured misunderstanding on both sides in this case and the regrettable imprecision in the pleading and court documents, it is time that justice is done once and for all in relation to the sum of £7,788.99".[69]

As he considered that Citibank would be bound to lose on an application for summary judgment, he dismissed its appeal against the refusal to set aside the default judgment. He also explicitly reserved the possibility that there might be an irregularity which was so fundamental that the judgment in such a case would have to be set aside.[70]

Irregular judgments and O.2

7.27 An application to set aside an irregular judgment is subject to O.2, r.2(1). That rule states that a defendant who wishes to have an irregular judgment set aside must apply within a reasonable time and before taking any fresh step after becoming aware of the

66 Page 355H, Nazareth VP.
67 Page 355H, Nazareth VP.
68 *Faircharm*, n 65, p 7.
69 *Faircharm*, n 65, p 6.
70 *Faircharm*, n 65. These issues are discussed at length in *"Irregular Default Judgments: Should Hong Kong Discard the "As of Right" Rule?"*, n 35.

irregularity. The "reasonable time" does not begin to run until the defendant knows, not only of the facts that caused the judgment to be irregular (for example, that he was out of the jurisdiction when the writ was inserted in his letter box), but also that those facts made the judgment irregular (that his absence from the jurisdiction when service through his letter box was attempted means that the judgment subsequently entered against him was irregular).[71] However, where the defendant delays making an application to set aside the judgment (on the ground of irregularity) because of correspondence and without prejudice communications with the plaintiff, but no agreement is reached and the defendant subsequently applies to the court, the court will not regard the delay as unreasonable.[72]

Example

The plaintiff bank served the defendant through a letter box. No notice of intention to defend was received and judgment was entered. The defendant was not in the jurisdiction when the writ was served and it did not come to his attention until much later. He did not know about the default judgment until he found out that his account in another bank had been frozen. The judgment was therefore an irregular one because he had received no notice of the proceedings. He issued separate proceedings against the plaintiff bank claiming damages for the loss he had suffered as a result of his new account being frozen. He applied to set aside the default judgment ten months after discovering that it had been entered. The plaintiff argued that the application was not made within a reasonable time and that the defendant had waived the irregularity by taking a fresh step in the proceedings (the fresh action against the bank) after becoming aware of the irregularity. The judgment was set aside on the basis that the defendant did not know the judgment was irregular until *after* he had started the new action against the bank. He could not have waived rights that he did not know he had.[73]

Types of irregular judgments

Ineffective service

7.28 The most common example of an irregular judgment is one entered in an action in which the writ was not properly served in accordance with the rules governing service. The problem usually arises with documents served by registered post or through a letterbox. These are permitted alternatives to personal service,[74] but for such service to be effective there are three prerequisites:

- service must be effected on a defendant at his or her usual or last known address;[75]

71 *Wing Lung Bank Ltd v Ho Man Lam* [1999] 3 HKC 368 (CFI); *Mercedes-Benz AG v Leiduck Herbert Heinx Horst & Another* [1994] 3 HKC 216 (CA).
72 *Tse Fui v Hung Cheung Kwong* [2007] 1 HKLRD 918 (CA).
73 *Wing Lung Bank Ltd v Ho Man Iam* [1999] 3 HKC 368 (CFI).
74 Order 10, r.1(2).
75 Order 10, r.1(2).

- the defendant must have been within the jurisdiction at the time of service; and[76]
- the documents must have come to the notice of the defendant.[77]

7.29 If a defendant can show that the documents served at his last known address or through a letterbox did not come to his attention, any default judgment obtained will be irregular. The focus is not just on delivery, but also on notice.[78] When one considers the purpose and intent of O.13 and O.19, this approach makes sense. Default judgments are obtained because defendants fail to give notice of intention to defend, or to defend, proceedings. If "the proceedings" have never come to the defendant's notice, then he cannot be expected to give notice of an intention to defend those proceedings, or to enter a defence. However it is not sufficient for the defendant to merely assert in an affidavit that he has not received the Writ. The court is entitled to reject, or attach no weight to such an assertion unless evidence, such as an explanation, is put forward to support it.[79]

Application to cross-examine process server

7.30 It is possible to get leave to cross-examine the process server on an application to set aside default judgment. A court has the unfettered discretion to permit cross-examination on an affidavit in an interlocutory matter if there are good and sufficient reasons for doing so, having regard to all of the circumstances of the case.[80]

Example

The defendant applied to set aside a judgment entered in default of notice of intention to defend. The defendant submitted that the plaintiff inserted the writ through a letterbox at an address where the plaintiff should have known the defendant could no longer be contacted. The defendant also said that the plaintiff had deliberately chosen an unusual method of service to avoid the risk that the writs would be returned if served by registered post. The court observed that service by inserting through a letterbox is a permitted method of service and one used by litigants. The defendant's suggestion that it was evidence of a fear of the writs being returned if served by registered post was "no more than a suspicion". The request to cross-examine was merely an attempt to fish for evidence to prove the suspicion and was rejected.[81]

76 *Chu Kam Lun v Yap Lisa Susanto*, n 66; *Desirable International Fashions Ltd v Chiang Shi Chau* [1997] 3 HKC 170 (HC); *Barclays Bank of Swaziland v Hahn* [1989] 1 WLR 506 (HL).

77 See, for example, *Sinokawa Investment (Holdings) Ltd & Another v Li Chun* [2006] 3 HKLRD 441 (CFI); *Bank of China (Hong Kong) Ltd v Hung Chun Wai & Others* [2004] 2 HKLRD H3 (CA); *Cosec Nominees Ltd & Another v Lau Hon Ming* [2001] 2 HKLRD 581 (CFI); *Fok Chun Hung v Lo Yuk Shi*, n 57; *Chan Kam Lun v Yap Lisa Susanto*, n 66.

78 See, for example, *Cosec Nominees Ltd & Another v Lau Hon Ming, Ming*, n 77, applied in *Bank of China (Hong Kong) Ltd v Hung Chun Wai & Others*, n 77; *Desirable International Fashions v Chiang Shi Chau*, n 76; *Chan Kam Lun v Yap Lisa Susanto*, n 66; *Fok Chun Hung v Lo Yuk Shi*, n 57.

79 See, for example, *Bank of China (Hong Kong) Ltd v Cheung King Fung* [2007] 1 HKLRD 462; *M & R Marking Systems Inc v Tse Mee Shuen & Others* [2002] HKEC 29 (CFI).

80 *Kwan Kam Wah v Chan Wai Ming* (unrep, HCA 11512 & 12693/1999, 13 March 2000), at p 5 C – F, relying on *Wendy Wenta Seng Yuen v Philip Pak-yiu Yuen* [1984] HKLR 431 (CA).

The right to cross-examine the process server includes, in an appropriate case, cross-examining to impeach the good faith of the opinion stated in the affidavit of service that the writ would have come to the defendant's knowledge within seven days. What is an appropriate case? The defendant must provide a proper foundation for the exercise of the court's discretion. The defendant in the above example failed to do so. The process server's affirmation was based on information provided by the plaintiff. The process server was carrying out the instructions of his principal and could not be expected to have had any actual knowledge of whether the defendant had moved. For these reasons, the court found that no useful purpose would be served by cross-examining the process server.[82]

Service by registered post: O.13, r.7(3)

7.31 If a plaintiff chooses to serve a writ on a defendant by registered post, and the writ is returned undelivered after the plaintiff has entered default judgment, the plaintiff must apply under O.13, r.7(3) either for the judgment to be set aside or for directions that the writ should be treated as having been duly served.[83] It might be thought that such a judgment is irregular because the plaintiff did not receive the writ. However, in the opinion of the Court of Appeal in *Fok Chun Hung*, such a judgment would be a regular judgment because the plaintiff complied with the rules regarding service, and because judgment was entered before the writ was returned. These facts are a good example of the difficulties that often arise in neatly categorising a default judgment as either regular or irregular.[84]

Judgment entered for more than the amount due

7.32 A judgment entered for too large a sum is an irregular judgment and may be set aside as of right.[85] Setting aside such a judgment is not, however, the only option.[86] Both the defendant and the judgment creditor have the right to apply to amend the judgment.

81 *Kwan Kam Wah v Chan Wai Ming*, n 80.

82 *Kwan Kam Wah v Chan Wai Ming*, n 80, at 5N – 6H. See also *Law Kwok Hung v Tse Ping Man & Another* [1999] 4 HKC 397 (CFI).

83 Such a direction would be appropriate if the defendant could show that despite the return of the writ as "undelivered", the plaintiff had knowledge of the service of the writ: *Fok Chun Hung v Lo Yuk Shi*, n 57.

84 The Court of Appeal in *Fok Chun Hung* set the "regular" judgment aside as of right. In their opinion, the defendant was not a person who, having failed to give a notice of intention to defend or to defend, came to seek the indulgence of the court. He was one who protested that he could not respond because he had not received notice of the proceedings. In these circumstances, the only fair result, in the opinion of the Court of Appeal, was that the proceedings had to be set aside unconditionally and without considering the merits. However, the court did not consider it appropriate to describe the judgment as irregular, because the plaintiff had followed all of the relevant procedural rules, including those regarding service.

85 See HKCP 2008 marginal notes 13/1/2, 13/1/3 and 13/9/3, and the cases referred to there.

86 See *Pollard Construction Co Ltd v Yung Yat Fan (t/a Golden Year & Co)* [1999] 3 HKC 109 (CFI); *Muir v Jenks* [1913] 2 KB 412. The court in *Pollard Construction* accepted and followed the *Faircharm* approach and considered the merits of the defence before deciding whether to set aside the irregular judgment.

Plaintiffs can apply to amend on either their own summonses or by summons in response to a defendant's summons to set aside the judgment. These applications would be *inter partes*, but the court may give leave to amend on a plaintiff's *ex parte* application if the defendant consents, or if:

- the judgment was signed for too much due to a slip or mistake;
- the application is made promptly;
- the application is made before the defendant has notice of the judgment; and
- the application is made before execution or other proceedings on the judgment.[87]

Parties under a disability

7.33 It is possible to get judgment in default against minors and mentally incapacitated persons. However, where a person under a disability has failed to acknowledge service, a guardian *ad litem* must be appointed before default judgment is entered.[88] Any judgment entered in default of this rule, including a judgment entered in circumstances where the plaintiff did not know that the defendant was a person under a disability, will be set aside as irregular.

Other types of irregular default judgment

7.34 We have seen that the most common type of irregular judgment is one entered in proceedings in which there was no effective service on the defendant.[89] Other examples of irregular judgments (in addition to one entered for too large a sum, discussed in paragraph 7.31), include those obtained:

- while an O.12, r.8 application was pending;
- where notice was required, but not given, under O.19, r.8A;
- without leave when leave was required (for example, under O.13, r.6);
- before the time limited for acknowledging service has expired;
  - where the defendant files an acknowledgement of service after the time for doing so has expired but before the default judgment the plaintiff enters is sealed by the court;[90] or
  - where judgment is entered for a liquidated sum but the indorsement of claim is for unliquidated damages.[91]

Disputing jurisdiction: O.12, r.8

7.35 A defendant who wishes to dispute the jurisdiction of the court should give notice of intention to defend the proceedings in the usual way and should then apply, within the

[87] See HKCP 2008 marginal note 13/1/3.
[88] Order 80, r.6.
[89] This occurs most frequently where personal service is *not* used and despite the plaintiff's full compliance with the rules regarding alternatives to personal service.
[90] *Kwan Tat Chung v Ho Cheuk Kwun & Others* [2003] HKEC 36.
[91] *UDL Contracting Ltd v Apple Daily Printing Ltd & Another* [2008] HKEC 100 (CFI).

time limited for service of a defence, for one of the types of relief set out in O.12, r.8. This rule is intended only for those cases in which the applicant says that the court has no jurisdiction. It is not intended for situations in which an applicant is asking the court to refrain from exercising the jurisdiction it undoubtedly has.[92] The purpose of these provisions is to enable a defendant to acknowledge service and to give notice of intention to defend without thereby foregoing any right to challenge the court's jurisdiction. Order 12, r.8 should be read with r.7 which expressly provides that acknowledging service of a writ does not constitute a waiver by the defendant of any irregularity in the writ or in its service.

Example

The plaintiff issued a writ but did not serve it within the 12-month period of validity. The plaintiff applied after the expiration of the 12-month period for an order extending the validity of the writ. That order was granted, and the writ was served on the defendant. The defendant's opinion was that there was no "good reason", as required by O.6, r.8, to extend the validity of the writ. The defendant acknowledged service and gave notice of intention to defend, and immediately applied for an order under O.12, rr.8(a) and (d) to discharge the order extending the validity of the writ and to set aside the service of the writ on him.[93]

Civil Justice Reform: Disputing Jurisdiction

We have seen that O.12, r.8 allows a defendant to acknowledge service without waiving his right to challenge the court's jurisdiction over the plaintiff's claim. The defendant then has until the expiry of the time limited for service of a defence to make an application on the grounds set out in r.8(1). The ambit of r.8 is extended by the adoption of Recommendation 17 of the Final Report, so that it now makes express provision for applications for a stay of proceedings, usually based on the ground of *forum non conveniens*. This follows CPR 11 and provides procedural certainty. The new r.8 sets out the procedure and r.8(2A) specifies the grounds for the application, which are that:

(a) considering the best interests and convenience of the parties to the proceedings and the witnesses in the proceedings, the proceedings should be conducted in another court;

[92] *United Phosphorus Limited v China Merchants Shipping & Enterprises Company Limited* (unrep, HCCL 81/1997, 24 March 1999) (CFI) and the cases referred to there. The jurisdiction of the court in that case was not challenged, but there was an argument that it should decline to exercise that jurisdiction on the basis of forum *non conveniens* and an exclusive jurisdiction clause in bills of lading. The court's inherent jurisdiction, and not O.12, r.8, was therefore the basis on which the application had to be decided.
[93] This example is similar, but not identical, to the facts in *Lee Fai (t/a Fai Kee Timber) v Chan Kui* [1997] 1 HKLRD 1154 (CA) and *Dixon v Grand Hyatt Hong Kong Co Ltd* [1994] 2 HKC 489 (CA).

(b) the defendant is entitled to rely on an agreement to which the plaintiff is a party, excluding the jurisdiction of the court, and
(c) in respect of the same cause of action to which the proceedings relate, there are other proceedings pending between the defendant and the plaintiff in another court.

Order 12, r.11 sets out the transitional arrangements.

CHAPTER 8

DISMISSAL FOR WANT OF PROSECUTION

GENERAL PRINCIPLES

Civil Justice Reform: Delay and the Underlying Objectives

Delay in prosecuting cases has become less of an issue as a result of more active judicial case management, Practice Directions that prescribe specific timetables for the progress of cases, and a growing awareness of the need to think about delay not just in terms of the consequences it will have on the parties to a particular case, but its consequences for the proper administration of justice. We should now add to this list the new underlying objectives and the Court's duty to manage cases as set out in new O.1A. The Court "shall seek to give effect to the objectives when it interprets any rule or practice direction. These objectives include increasing the cost-effectiveness of any practice or procedure, dealing with cases expeditiously, promoting proportionality and procedural economy, and ensuring that Court resources are distributed fairly. A safeguard against too aggressive an approach to dismissal for delay is contained in O.1A, r.2(2), which states that the primary aim of the rules "is to secure the just resolution of disputes in accordance with the substantive rights of the parties."

8.01 The court's power to dismiss a plaintiff's claim for want of prosecution derives from the rules of court (for example, where the plaintiff fails to take out a summons for directions,[1] to serve a statement of claim,[2] or to comply with discovery obligations[3]) and from the court's inherent jurisdiction to control its own process.[4] The principles underlying the court's power to dismiss a plaintiff's claim for want of prosecution are that the litigation should be conducted as expeditiously and efficiently as possible, and that delay in prosecuting a case is bad for the parties and for the administration of justice. The same principles will guide the exercise of the court's discretion whether it is acting under the rules of court or under its inherent jurisdiction. In practice, for example, if a plaintiff fails to take out a summons for directions and the defendant applies to dismiss the case for want of prosecution, the application to dismiss will usually be made under both O.25, r.1(4) and the court's inherent jurisdiction. The principles that govern the exercise of the court's discretion were stated in such landmark

1 Order 25, r.1(4).
2 Order 19, r.1.
3 Order 24, r.16(1).
4 The nature of the court's inherent jurisdiction generally as a source of procedural rules is explained in Chapter 1.

cases as *Allen v Sir Alfred McAlpine & Sons Ltd*[5] and *Birkett v James*,[6] and have since been followed in many Hong Kong cases.[7]

8.02 Our Court of Appeal has observed that as there is a plethora of cases on the subject of dismissal for want of prosecution, all with different factual backgrounds, a measure of caution is required in attempting to apply the relevant principles in a particular case.[8] This means that the principles developed in the cases are to be treated as guidelines rather than as inflexible rules that displace judicial discretion. There are two distinct situations in which a court might exercise the discretion to dismiss a case for want of prosecution. The first of these is where there has been intentional ("contumelious") default. The second situation is where there has been delay which, although not considered to be intentional, is inordinate and inexcusable and has caused prejudice to the defendant or a third party. We will now consider each of these categories.

INTENTIONAL DEFAULT

8.03 An action may be dismissed if the plaintiff:

- deliberately disobeyed a peremptory order of the court; or
- has otherwise behaved in a manner that amounts to an abuse of the process of the court.

Violation of a peremptory order

8.04 A peremptory order

> "is one which makes clear to the other party, either from its terms or from the circumstances in which it was made, that exact compliance with no further argument is required by the court within a stated time, and indicating expressly or by implication, that default will incur serious consequences".[9]

An "unless" order, which is an example of a peremptory order, sets a period of time within which an act is to be done, failing which the ordered consequences will follow. An unless order must comply with O.42, r.2 by stating clearly the precise time within which the stated act (for example, service of a list of documents) is to take place. There are two ways to draft an unless order. One is to specify the period of time after the service of the unless order within which the act must be done.

5 [1968] 2 QB 229 (CA).
6 [1978] AC 297 (HL).
7 See, for example, *Bouygues SA v Red Sea Insurance Co Ltd* [1997] 4 HKC 149 (CA); *Hongkong & Shanghai Banking Corp Ltd v Kuan Tao Sheng & Others* [1998] 1 HKC 438 (CA); *Nathaniel Hymer v The Mass Transit Railway Corporation & Others* [2000] 2 HKLRD 589 (CA); *Kerry Foodstuffs Co Ltd v Phulsawat Navy Co Ltd* [1999] 3 HKC 523 (CA).
8 *Ong Ee Chang v Li Tung Lok QPL (Holdings) Limited* (unrep, CACV 194/1999, 1 December 1999) (CA) at p 9.
9 HKCP 2008 marginal note 25/L/3. See Practice Direction 16.5 ("Peremptory Orders").

Example

". . . unless within 21 days from the service of this order the plaintiff serves a list of documents, the action be dismissed with costs".

The second approach is preferable because it is more precise. It states the specific date and time by which the act must be done.

Example

". . . unless by 5 pm on 21 July 2001 the defendant serves a list of documents, judgment be entered for the plaintiff with costs".

The effect of such an order is that judgment would be automatic immediately after the time by which the act had to be done. There would be no need for anyone to do anything further to give effect to the order.[10]

8.05 In theory, an unless order is a last chance. It puts the defaulting party on notice that no further default will be tolerated and that one final opportunity is being given to do the ordered act. It should be made only as a last resort and after there has already been significant delay on the part of the defaulting party.[11] However, the failure to comply with an unless order does not automatically result in dismissal of the claim or defence of the defaulting party. If that party can show that there was no intention to flout the order and can point to extraneous circumstances as the cause of the failure to comply, the claim or defence will not be struck out.

Example

The defendant was conducting the proceedings from a prison cell in Indonesia. His Hong Kong solicitors had to obtain a permit from the Indonesian courts before they could visit their client in prison. They delayed in obtaining the permit, and the result of this delay was that the defendant was unable to file an affidavit of disclosure within the time stipulated in an unless order. The trial judge gave judgment for the plaintiffs as a result of the defendant's non-compliance with the order. The defendant appealed. The Court of Appeal stated that a party should not be made to suffer because of a mistake of his solicitors. In this case the defendant did not intentionally ignore the order and the failure of his solicitors to get the necessary permit to visit him in prison met the extraneous circumstances test.[12]

10 *Dongguan Dongxiang Decoration Co Ltd v Universal Right Ltd* (unrep, CACV 42/1999, 22 April 1999) (CA) at 3G – J.
11 In *Dongguan Dongxiang Decoration Co Ltd v Universal Right Ltd* (unrep, CACV 42/1999, 22 April 1999) (CA) at 3G – J, the court observed that as the unless order had been made on only the second application of the defendant for an extension of time to file and serve its defence, it was a harsh order in the circumstances. The defendant might have expected at least one more chance before an unless order was made with the serious consequences that such an order would have: p 5F – N.
12 *Tan Eddy Tansil v PT Bank Pembangunan (Indonesia) Persero* [1996] 1 HKC 231 (CA), following *Re Jokai Tea Holdings* [1992] 1 WLR 1196 (CA).

This approach is contrary to the weight of English authorities under the pre-CPR rules. The leading case is *Hytec Information Systems Ltd v Coventry City Council,*[13] in which the Court of Appeal expressed the view that, as a general rule, the court would not distinguish between the default of litigants and of their advisers.[14] There has been some judicial comment in Hong Kong in favour of this approach, but the law still is as stated in *Tan Eddy Tansil*: a legal adviser's failure to comply with an unless order on behalf of a client should not adversely affect the client if that can be avoided without injustice to the other party.[15]

8.06 In *Hytec Information Systems*, the court reiterated the basic principle that a peremptory order is an order of last resort.[16] Ward LJ stated the principles that should guide the exercise of judicial discretion in such cases. These include:

- An unless order is the defaulting party's last chance.
- A failure to comply will ordinarily result in the sanction (usually dismissal of the claim or defence) being imposed.
- This sanction is required by the broader interests of the administration of justice.
- Exoneration will require that something beyond the party's control caused the default.
- The matter is one for judicial discretion depending on the facts of each case.
- The interests of justice require that justice be shown to the injured party for the procedural inefficiencies caused by the twin scourges of delay and wasted costs.
- Any injustice to the defaulting party comes a long way behind the injustices to the injured party caused by delay and wasted costs.

13 [1997] 1 WLR 1666 (CA).

14 [1997] 1 WLR 1666 (CA) at 1675H. This comment must be considered in the context of the particular facts of the case. The conduct of the defendant's legal advisers, especially counsel (who displayed "an arrogant disdain to the court's authority"), was egregious. The court intimated that if the defendant's legal advisers had made a genuine attempt to appear and explain why they thought the order (to serve particulars) had been complied with, the result might have been different. In other words, they might then have met the "extraneous" circumstances test and avoided dismissal of the action for failure to comply with the order.

15 In *Chow Kai Sang v Toi Samuel & Others* [1996] 4 HKC 330 (HC), for example, the judge would have rejected the division between the conduct of a party and that party's legal advisers in the context of violations of unless orders "were the matter free from authority" (p 334H). In *Dongguan Dongxiang Decoration Co Ltd v Universal Right Ltd* [1999] 1 HKC 790, the trial judge referred to the Hong Kong and English authorities and to the different approaches regarding whether a distinction should be drawn between the conduct of parties themselves and their legal advisers. He purported to follow *Tan Eddy Tansil*, n 12, but nevertheless refused to set aside the judgment. He said it could not be set aside without injustice to the plaintiff. The Court of Appeal reversed this decision, primarily on the basis that the unless order should not have been made in the first place because it was too harsh, having been made after only the second application by the defendant for an extension of time. Rogers JA expressed the view that the defendant "might have expected at least one more chance". In *Ming Pao Enterprise Corp Ltd v CIM Co Ltd* [1999] 1 HKC 497 (CFI), Keith J observed that the weight of the English authorities was in favour of not distinguishing, in the context of violations of unless orders, between the conduct of the parties and their legal advisers. It is clear from his comments that he would have followed the English approach but for the *Tan Eddy Tansil* decision (see pp 501B – 502F).

16 N 13 at 1674 H.

8.07 Our Court of Appeal has relied on and approved these general guidelines,[17] but has not explicitly endorsed the *Hytec* view that the court should not exonerate defaulting defendants if the fault was that of their legal representatives. The *Hytec* approach is less forgiving than the Hong Kong approach. These different approaches reflect an emphasis on different values. In *Hytec*, the emphasis is on the public interest in the administration of justice, especially the need to avoid expense and delay. In *Tan Eddy Tansil*, however, the approach is more individualistic and the emphasis is on avoiding potential injustice to litigants who find themselves in default through no fault of their own.

Abuse of process

8.08 An action may be struck out where there is no inordinate and inexcusable delay and resulting prejudice, and no violation of a peremptory order, but the plaintiff conducts the case in a manner that is considered to be an abuse of the process of the court.[18] A leading case is *Grovit v Doctor*, in which the House of Lords stated that commencing an action with no intention to pursue it to a conclusion could amount to an abuse of process justifying dismissal of the claim without any need to show delay.[19] This case and the "abuse of process" principle for which it stands were considered by the Court of Appeal in *New China Hong Kong Group Ltd & Another v AIG Asian Infrastructure Fund LP*.[20] The defendant's application to dismiss at first instance was successful in circumstances where the limitation period had not yet expired, the period of delay complained of was approximately two years, there was no breach of any order of the court and there had been no warning by the defendants to the plaintiffs that an application to dismiss for want of prosecution would be brought.[21] The Court of Appeal reversed the judge's decision to dismiss the proceeding. Stone J described the defendant's application as "tactically opportunistic and unmeritorious", and stated:

> "As the circumstances of this case neatly illustrate, unless the *Grovit v Doctor* line of argument is confined to those instances which are patently abusive of the process, and may be demonstrated to be so, there is a danger that the time-honoured and established *Birkett v James* doctrine – in terms of inordinate and inexcusable delay coupled with consequent prejudice – in effect will be emasculated by the back door, with the result that undue and inordinate delay, leading to inference to prosecute the action no further, and hence characterisation as an abuse of process, will be sufficient to get home on a strike-out in the absence of the required element of prejudice."[22]

17 In *Lessy SARL v Pacific Star Development Ltd* [1997] 3 HKC 306 (CA), Godfrey JA (in obiter comments at p 312D – E) recommended the *Hytec* guidelines to practitioners and expressed the hope that our Court of Appeal might give similar guidance. In *Chen Shun Zhong v Success Civil & Foundation & Others*, (unrep, CACV 300/1999, 27 July 2000) (CA), the Court of Appeal cited the *Hytec* principles with approval, but not also the *Hytec* view that as a general rule the court will not distinguish between the conduct of the litigant and the solicitor where there has been a violation of an unless order.

18 *Birkett v James*, n 6, per Lord Diplock at p 318E – G. In *Chevalier (E & M Contracting) Ltd v Rotegear Development Ltd and Others* [2005] HKEC 1236 (CFI), an award of indemnity costs was made where the action was struck out for want of prosecution that amounted to an abuse of process.

19 [1997] 1 WLR 640 (HL). See *New China Hong Kong Group Ltd & Another v AIG Asian Infrastructure Fund LP* [2005] 1 HKLRD 383 (CA) for analysis and discussion of *Grovit v Doctor*.

20 [2005] 1 HKLRD 383 (CA).

21 See the comments of Stone J at [2005] 1 HKLRD 383 (CA), paragraph 61.

22 [2005] 1 HKLRD 383 (CA), paragraph 66.

The clear message from the Court of Appeal is that the "abuse of process" route to dismissal for want of prosecution is for exceptional cases and should not be seen as a ready alternative to the power of the court to strike out cases for inordinate and inexcusable delay.[23] It is also clear from their decision that delay alone, no matter how substantial, is not abuse of process.[24]

8.09 There is one aspect of the Court of Appeal decision that is in our view questionable. The court stated that there must be evidence that the plaintiff's disregard of the rules of court was with "full awareness of the consequences" of that disregard.[25] Woo V-P observed that the judge below had not "made any finding that the plaintiffs appreciated the consequences of their inaction in these proceedings."[26] It may be argued that the combined effect of the principles that civil procedure rules are to be obeyed and that cases should be advanced as expeditiously as possible are themselves sufficient notice to all legally represented litigants of the consequences of inaction. But as Stone J stated in *New China Hong Kong Group*: "In principle considerable caution must be exercised before acceding to that which, for shorthand purposes, I will term the *Grovit v Doctor* strike-out application, tempting though it may be for the courts proactively to demonstrate, in line with the modern mood, that the rules of procedure are there to be obeyed, and that cases should not be permitted to drag."[27]

8.10 Lord Diplock's *Birkett v James* test derives from a fundamental principle of the administration of English civil justice – the purpose of the courts is to settle disputes and to declare rights as between individual litigants. *Birkett v James* is consistent with the traditional preference of common law courts not to deprive a party of a full hearing on the merits except in the most egregious cases. If delay has caused a party to incur extra cost, the preferred response has been to compensate that party with a costs order. In several cases in 1997 and 1998, however, this approach changed. Twenty years on, the test set out in *Birkett v James* was found to be unsuitable in some respects. One of the first attacks on the test was made in *Sparrow v Sovereign Chicken Limited*.[28] In that case Millett L. J. expressed the view that the law had taken a wrong turn when it insisted that inordinate and inexcusable delay was not enough to justify dismissing a case for want of prosecution. The most significant turning point, however, was *Arbuthnot v Trafalgar*,[29] in which the Court of Appeal rejected the traditional test in the following ways:

1. They expanded the scope of "prejudice" by putting it squarely in the context of court-controlled case management. They observed that the increasing pressure on judges to be active case managers imposed additional burdens on them and on the entire infrastructure of the courts. It is therefore in the best interests of all litigants that "the court's time is not unnecessarily absorbed in dealing with the satellite litigation which non-compliance with the timetables laid down in the rules creates".[30] The consequences of delay to other litigants and to the courts had become a consideration of increasing importance.[31]
2. The Court of Appeal stated that a "wholesale disregard of the rules" (whether or not there had been a violation of a peremptory order) could result in dismissal on two separate bases. It could be an abuse of process and therefore fit within the first part of the traditional test (intentional default), but it could also be a separate ground for striking out an action with no requirement of prejudice, and even if the relevant limitation period had not expired.[32]

[23] [2005] 1 HKLRD 383 (CA) at paragraphs 68 – 70, referring to and endorsing the comments of Auld LJ in *Miles v McGregor* (unrep, English Court of Appeal, 23 January 1998).
[24] [2005] 1 HKLRD 383 (CA), paragraphs 23 – 24
[25] [2005] 1 HKLRD 383 (CA), paragraph 35.
[26] [2005] 1 HKLRD 383 (CA), paragraph 37.
[27] [2005] 1 HKLRD 383 (CA), paragraph 63.
[28] 8 June 1994, CA (unrep), discussed in Scott IR, "Disregard of Procedural Time Limits as Abuse of Process" (1998) 17 CJQ 83.
[29] *Arbuthnot Latham Bank Ltd & Others v Trafalgar Holdings Ltd & Others* [1998] 2 All ER 181 (CA).

8.11 While Hong Kong Courts have endorsed the need for more active judicial case management to reduce expense and delay, as reflected in numerous Practice Directions and decided cases,[33] they have not specifically endorsed or applied the *Arbuthnot* approach. Furthermore, it seems that *New China Hong Kong Group Ltd* rejects *Arbuthnot*, or at least that part of *Arbuthnot*, summarised above in (2), which states that a wholesale disregard of the rules may, without more, result in dismissal. Future interpretations and applications of *New China Hong Kong Group Ltd* must, however, take account of its particular facts. The period of delay complained of was relatively small. The limitation period had not expired. There was no violation of a court order, peremptory or otherwise. There had been no indication from the defendant that an application to dismiss was forthcoming. There was non-compliance with the rules of court, but to equate that non-compliance with abuse of process was, for the court of Appeal, too big a jump from the principles established in *Birkett v James* and *Grovit v Doctor*.[34]

INORDINATE AND INEXCUSABLE DELAY

8.12 If a defendant cannot point to an abuse of process or a violation of a court order, the action might still be dismissed for want of prosecution if there has been inordinate and inexcusable delay. The defendant must show:

[30] *Arbuthnot Latham Bank Ltd & Others v Trafalgar Holdings Ltd & Others* [1998] 2 All ER 181 (CA), p 191E – G.
[31] *Arbuthnot Latham Bank Ltd & Others v Trafalgar Holdings Ltd & Others* [1998] 2 All ER 181 (CA). For a more recent statement by Lord Woolf of these principles, see *Jones v University of Warwick* [2003] 1 WLR 954 at paragraph 25: "A judge's responsibility today in the course of managing litigation requires him, when exercising his discretion in accordance with the overriding objective contained in CPR Part 1, to consider the effect of his decision upon litigation generally... Proactive management of civil procedure, which is at the hear of the CPR, is not only concerned with an individual piece of litigation which is before the court, it is also concerned with litigation as a whole."
[32] *Arbuthnot Latham Bank Ltd & Others v Trafalgar Holdings Ltd & Others* [1998] 2 All ER 181 (CA) at pp 191H – 192B. The Court of Appeal recognised a new category of case justifying dismissal, one which does not fit within the "intentional default" category, but for which it is not necessary to establish prejudice or the expiry of the limitation period. This new category had already been recognised in *Grovit v Doctor*, n 19.
[33] See, for example, PD 4.1, Civil Appeals to the Court of Appeal, discussed in Chapter 15; PD 18.1, The Personal Injuries List, discussed in Chapter 19, and the cases discussed in Chapter 1, "Case Management".
[34] *New China Hong Kong Ltd Group & Another* was applied in *Wing Ming Garment Factory Ltd v The Incorporated Owners of Wing Ming Industrial Centre & Another* [2005] HKEC 722.

- inordinate (ie prolonged) delay;
- the delay is inexcusable;
- the limitation period has expired; and
- the delay has caused prejudice to the defendant.

Inordinate delay

8.13 Inordinate delay has been described as materially longer than the time usually regarded by the profession and the courts as an acceptable time.[35] As the editors of Hong Kong Civil Procedure 2008 have observed, this is easier to identify than to define.[36] This standard will change over time as views of what is regarded as acceptable also change. Concerns about expense and delay, and the resulting more assertive management of cases by judges, have arguably lowered the threshold of what is an inordinate period of delay.

8.14 There are three relevant time periods to consider when determining whether delay has been inordinate:

- delay before issuing the writ;
- delay after issuing the writ but before expiry of the limitation period; and
- delay after issuing the writ and after expiry of the limitation period.

Except in cases of intentional default, such as the violation of a peremptory order, an action will not be struck out for want of prosecution before the relevant limitation period has expired.[37] The reason for this approach is that the plaintiff could simply issue fresh proceedings, thus causing further delay.[38] On an application by a defendant after the limitation period has expired, however, a court will take into account all of the previous periods of delay in determining whether there has been inordinate and inexcusable delay. In theory, therefore, a defendant could apply one day after the limitation period has expired to dismiss the plaintiff's action for want of prosecution. If the delay prior to the expiry of the limitation period was substantial, the defendant would not also have to show delay after expiry of the limitation period.[39]

8.15 What if the only delay prior to expiry of the limitation period occurred before proceedings were issued? This delay could not by itself justify dismissing the action for want of prosecution, but it could be taken into account in determining whether delay after issuing the writ is inordinate and inexcusable.[40] The effect of long delay before issuing the writ is that any post-writ delay will be looked at critically by the court and will more readily be regarded as inordinate and inexcusable than it would if the action had been commenced soon after the accrual of the cause of action.[41] It could

35 Hong Kong Civil Procedure 2008 marginal note 25/L/5 (referring to *Birkett v James*, n 6).
36 HKCP 2008 marginal note 25/L/5.
37 There are a few *very limited* exceptions to this general rule. See HKCP 2008 marginal note 25/L/8.
38 See, for example, *HSBC v Kuan Tao Sheng*, n 7 at p 444E – F, and below, paragraph 8.17; *Sun-Ioms Maintenance Ltd & Others v Shi Kai Biu & Others* [2006] 2 HKLRD F1 (CA).
39 In practice it rarely happens this way because if there is inordinate and inexcusable delay before proceedings are issued, that pattern of behaviour usually continues after proceedings are issued.
40 *Birkett v James*, n 6.
41 *Birkett v James*, n 6; *Department of Transport v Chris Smaller (Transport) Ltd* [1989] A.C. 1197 (HL), per Lord Griffiths at 1208A – B.

also lower the prejudice threshold by requiring the defendant to show only something more than minimal additional prejudice caused by the post-writ delay.[42] These issues were considered in *Secan Ltd v Hsin Yieh Architects & Associates Ltd*.[43] The Court of Appeal described the case as a "late start" case. Proceedings were not issued until 6 years after the loss and the statement of claim was filed and served approximately one year later than it should have been, the plaintiff having obtained leave to file and serve it out of time. During the period after the claim should have been filed and when it was filed, the defendant's insurers were placed in liquidation. The Court of Appeal said that because this was a late start case, there was a greater need for speed after the writ was issued than would otherwise have been required.[44]

Inexcusable delay

8.16 Applications to dismiss cases for want of prosecution are not usually made until there has been significant delay, with the result that in most reported cases, the courts are satisfied that the delay has been inordinate. Similarly, the plaintiffs in such cases are often not able to offer an excuse for their delay. Examples of cases in which delay might be excusable are where the plaintiff was unable to give instructions due to illness, or was waiting for a response to an application for legal aid. Impecuniosity, however, is not an excuse for delay. While a court might, and arguably should, afford an impecunious plaintiff some additional time to raise funds, there must come a time when a defendant is entitled either for the action to progress or to come to an end.[45]

Example

The defendant applied to dismiss an action for want of prosecution. The plaintiff submitted that she had been representing herself and was unaware of the effect of delay. She was also a party in other proceedings with the same defendant and submitted that they had been negotiating, during the alleged period of delay, to resolve all of the actions between them. The court said that while it did not want to encourage an unrepresented party to unduly delay a case, it would be appropriate to be more lenient to a litigant in person than a legally represented party.[46]

It should be evident from this discussion that defendants are usually able to satisfy the requirements of "inordinate and inexcusable delay" with relative ease. The same is true of the requirement that the limitation period has expired, but not of the requirement to establish prejudice.

42 *Birkett v James*, n 6; *Department of Transport v Chris Smaller (Transport) Ltd*, n 41; *Hong Kong Scaffold Building Contractor Company Limited v On Lee General Contractors Ltd* (unrep, HCCT 1/98, 24 January 2000) (CFI); HKCP 2008 marginal note 25/L/5.
43 [2003] 3 HKLRD 227 (CA).
44 [2003] 3 HKLRD 227 (CA), paragraphs 11 – 13.
45 See the comments in *Nathaniel Hymer v The Mass Transit Railway System*, n 7 at 607.
46 *Lee Shuet May v Yau Chau Leung* (unrep, HCA 10914/1995, 3 April 2000) (CFI).

Limitation period has expired

8.17 We have discussed this above.[47] The court will not dismiss an action for want of prosecution (unless it is a case of intentional and contumelious default) before the relevant limitation period has expired. The reason is that the plaintiff could simply issue proceedings for the same cause of action at any time before expiry of the limitation period, thereby only aggravating the delay, prejudice, and expense.[48] Furthermore, it would be wrong for the court to interfere in this way with the express intention of the Limitation Ordinance (Cap.347) that a person has the right to commence an action at any time within the periods stated there.[49]

Prejudice

8.18 In addition to satisfying a court that the plaintiff's delay is both inordinate and inexcusable, the defendant must also show that the delay has caused prejudice to the defendant. The defendant can satisfy this requirement if:

- the delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action; or
- the delay is likely to cause or to have caused other serious prejudice to the defendants either between themselves and the plaintiffs, between each other, or between the defendants and a third party.[50]

Whether the alleged prejudice fits in one or the other of these categories, the defendant must show that there is a causal link between the delay and the inability to have a fair trial or other prejudice.[51]

Example

During the plaintiff's inordinate and inexcusable delay in prosecuting a medical negligence claim, the defendant's insurance arrangements changed. The result of the change was that the defendant, not its insurers, would have to pay any damages awarded to the plaintiff. If there had been no delay, judgment would have been given sooner and the insurer would have been responsible for satisfying the judgment. The causal link between the delay and the financial prejudice was proved, and the plaintiff's action was dismissed for want of prosecution.[52]

47 Paragraph 8.14.
48 *Birkett v James*, n 6 at 322D – E.
49 *Birkett v James*, n 6 at 320C – E.
50 See, for example, *Allen v Sir Alfred McAlpine*, n 5; *Birkett v James*, n 6; *Nathaniel Hymer v The MTRC*, n 7; *Kerry Foodstuffs Co Ltd v Phulsawat Navy Co Ltd & Others*, n 7; *HSBC v Kuan Tao Sheng*, n 7.
51 *HSBC v Kuan Tao Sheng*, n 7; *Rath v CS Lawrence and Partners* [1991] 1 WLR 399 at 410. See also *Computronics International v Piff Shipping Ltd* [1997] 2 HKC 53 (CA) at 60 and *Bouygues SA v Red Sea Insurance Co Ltd*, n 7 at 157F – H.
52 *Antcliffe v Gloucester Health Authority* [1992] 1 WLR 1044 (CA).

Example

The defendant argued that it had suffered serious prejudice because a number of its re-insurers had gone into liquidation during the period of delay, which meant that it could not be indemnified in full against the plaintiffs' claim. The court was not satisfied that if there had been no delay, judgment in the action would have been given before the liquidation of the re-insurers occurred. Furthermore, the defendant had what the court described as unusual insurance arrangements (having re-insured almost 100 per cent of its liabilities), and the liquidation of the re-insurers might therefore have occurred even if there had been no inordinate and inexcusable delay. No nexus had been proved between the liquidation and the delay. The alleged prejudice was therefore entirely speculative.[53]

Substantial risk that a fair trial is no longer possible

Examples of the circumstances that could constitute this type of prejudice include: 8.19

- the death or disappearance of important witnesses;[54]
- impaired memory of an important witness due to illness or the passage of time;[55] or
- inadvertent destruction of important documents or evidence.[56]

One of the types of prejudice most frequently alleged to establish that a fair trial is no longer possible is that the witnesses' memories have dimmed due to the passage of time. Courts accept as a general principle and as a matter of common sense that memories dim with the passage of time. It does not follow, however, that a fair trial is no longer possible. All of the circumstances will be considered, including the period of delay, the existence of documents to which the prospective witnesses can refer to refresh their memories, and the measures taken by the defendants upon receiving notice of the action to preserve evidence (including preserving documents and proofing witnesses).[57] The defendant would know as well as anyone else that memories dim with the passage of time, and would be expected to take precautions at an early stage to address that potential problem. 8.20

53 *Bouygues SA v Red Sea Insurance Company Limited*, n 7.
54 This could be either the defendant's witness or the plaintiff's witness.
55 In *HSBC v Kuan Tao Sheng*, n 7, the defendant had suffered a stroke during the period of inordinate and inexcusable delay. This would have satisfied the prejudice requirement, but for the conduct of the defendant in condoning the plaintiff's delay: see 449E.
56 If the documents were destroyed due to the fault or negligence of the defendant, however (for example, by being stored in a place that was exposed to the elements), this would not satisfy the prejudice requirement.
57 *Nathaniel Hymer v The Mass Transit Railway Corporation*, n 7 See also *Leecom Holdings Ltd & Another v David Tsui Po Wing* [2006] HKEC 381 (CFI).

Example

The plaintiff sued the defendant for wrongful termination of an employment contract. The plaintiff was relying on an oral contract, and it was accepted that the oral evidence of the parties and their witnesses would be vital if the case went to trial. The oral evidence would relate to events that happened ten years earlier. The judge found that there had been inordinate and inexcusable delay and that this would affect the possibility of a fair trial. He refused to dismiss the action, however, because the defendant had, seven years earlier, failed to comply with an order in the action to exchange witness statements (the plaintiff had also failed to comply with that order). On appeal, the court said it was proper for the judge to have taken into account the defendant's failure to prepare its own case and to comply with the order to exchange witness statements. However, even if the defendant had complied with the order, it would still have suffered prejudice because oral evidence was vital and would relate to events that happened ten years ago. Furthermore, there had been significant amendments to the pleadings since the order to exchange witness statements had been made.[58]

This example underlines the discretionary nature of these decisions and the need to consider and weigh all of the relevant factors when exercising the discretion. Here the Court of Appeal seems to have been most influenced by the combined effect of the length of the delay and the fact that oral evidence would be so pivotal at the trial of the plaintiff's action.

8.21 A defendant who alleges that a fair trial is no longer possible must, in the affidavit in support of the application, identify specific reasons why a lost witness or document, or forgotten information or events, are essential to the defendant's case. If the evidence that the witness would have given, or that was contained in the document, is either unimportant, or can be given by some other witness, or is contained in other available documents, the prejudice requirement has not been met. The affidavit must also explain the efforts that the defendant had made to locate any missing witnesses or documents, and with what results.

Example

The plaintiff alleged an oral contract with the defendant. The defendant stated that the plaintiff's delay had made it impossible for the defendant to have a fair trial because two of the three key witnesses for the defendant had left the defendant's employment and had emigrated, and the third was working for a competitor. The court found that the key employees had departed around the

[58] *Lee Pui Kuen v Asia Television Ltd* (unrep, CACV 135/2000, 5 July 2000) (CA). One can understand why the Court of Appeal reversed the judge if the only criticism of the defendant was that it had failed to comply with an order to exchange witness statements. However, if the defendant could have preserved the vital evidence by preparing the witness statements, but failed to do so, one would be less inclined to prefer the Court of Appeal's decision. The decision is an example of the rare case in which a Court of Appeal will reverse the refusal of a trial judge to dismiss an action for want of prosecution: see the relevant discussion below, paragraph 8.28.

time when proceedings were commenced and that any prejudice resulting from their departure was not therefore a result of the plaintiff's delay. The defendant could have taken statements from the employees and had presented no evidence indicating what attempts had been made to contact them. Finally, the defendant's affidavit did not say that the witnesses had been contacted and that they had informed the defendant that they were unwilling to assist the defendant in the presentation of its case. For these reasons, the necessary degree of prejudice had not been established by the defendant.[59]

Example

The plaintiff claimed against the defendant for the recovery of money paid by the plaintiff, at various times and in varying amounts, for the benefit of the defendant. The action was commenced approximately three years after the cause of action arose and there was a further four-year period of inactivity after the writ was issued. The judge was satisfied that there was inordinate and inexcusable delay. The defendant alleged prejudice on the basis that (i) certain important banking documents would most likely have been destroyed during the period of delay and (ii) the passage of time would have resulted in dimmed or distorted memories in a case in which oral evidence would be important. The defendant failed to establish prejudice because he did not offer specific examples of the documents that had been destroyed and the reason why that destruction would cause prejudice. Similarly, the bare assertion that delay would result in dim memories was inadequate. The defendant would have to identify the specific witnesses and the nature of their evidence.[60]

Other prejudice

8.22 There are some types of prejudice which, while not creating a substantial risk that it is impossible for the defendant to have a fair trial, have been accepted as sufficiently serious to satisfy the prejudice requirement. The following are among the most common examples of this type of prejudice:

- damage to professional reputations;
- anxiety caused by litigation;
- a change in insurance arrangements during the period of delay;
- bankruptcy of one of the parties who might have contributed to any award of damages; and
- significant damage to the defendant's business interests.

[59] *Lee Kin Yan, t/a Ka Shing Engineering Company v Honeywell Limited* (unrep, CACV 35/2000, 19 May 2000) (CA). This case is also an example of one in which, even if prejudice had been established, there was no causal link or nexus between the prejudice and the plaintiff's delay.

[60] *Lee Shuet May v Yu Chau Leung*, n 46. This case is also instructive on the issue of possible excuses for a plaintiff's inordinate delay.

8.23 The first of these, damage to professional reputation, has long been accepted as capable of satisfying the prejudice requirement on an application to dismiss a case for want of prosecution. One of the leading examples of such a case is *Biss v Lambeth Southwark and Lewisham Area Health Authority*.[61] The negligence action had been running for 11 and a half years and had caused considerable anxiety to the defendant nurses, whose professional reputations were at stake. This "Biss-type prejudice"[62] has been recognised by Hong Kong Courts.[63]

Example

The plaintiff sued the defendant solicitors for fraud, professional negligence, and conversion, later dropping the claims of fraud and professional negligence. After a period of inordinate and inexcusable delay, the defendants applied to dismiss the case for want of prosecution. The court of Appeal acknowledged that allegations of fraud and negligence against professional men and women will always constitute serious prejudice which may call for dismissal of the action. In this case, however, there was no such prejudice because the plaintiff had decided to proceed only with the conversion claim.[64]

In *Nathaniel Hymer v The Mass Transit Railway Corporation*,[65] the Court of Appeal stated that the prejudice caused to defendants by having an action hang over their heads for a long period of time is "a well-recognised head of prejudice, *particularly* where professional men and organisations are involved . . ." (emphasis added). This is an implicit recognition of the fact that the anxiety caused by having an action hanging over one's head can amount to prejudice for all defendants, not just those who happen to be professionals. However, courts will be cautious about regarding the anxiety that accompanies almost any litigation as sufficient prejudice, by itself, to justify striking out an action.[66]

8.24 Another common type of prejudice is damage to the defendant's financial or business interests. This can take many forms, including a change in insurance arrangements, loss of business opportunities and the bankruptcy of a party who would have contributed to any award in favour of the plaintiff.

61 [1978] 1 WLR 382 (CA).

62 As described by Ribeiro JA in *Nathaniel Hymer v The Mass Transit Railway Corporation*, n 7. This type of prejudice is often attributed to *Biss*, but had earlier been recognised as a legitimate type of prejudice for the purposes of dismissal for want of prosecution in *Allen v Sir Alfred McAlpine & Sons Ltd*, n 5 at 275A – B.

63 *Nathaniel Hymer v The Mass Transit Railway Corporation*, n 7; *Can-Asia Capital Co Ltd v Kwok Yee William* [1995] 1 HKC 521 (CA).

64 *Can-Asia Capital Co Ltd v Kwok Yee William* [1995] 1 HKC 521 (CA) at 530C – I.

65 N 7.

66 *Department of Transport v Chris Smaller (Transport) Ltd* [1989] 1 All ER 897, per Lord Griffiths at 904J, approved in *Can-Asia Capital Ltd v Kwok Yee William*, n 63 at 531A.

Example

Where during the period of inordinate and inexcusable delay, a change in the defendant's insurance arrangements meant the defendant, not its insurers, would have to pay any damages awarded to the plaintiff, this was held to be financial prejudice caused by the plaintiff's delay.[67]

Example

The plaintiff in a personal injury action failed to prosecute his claim during a 15-year period. The defendant submitted that of the four witnesses who were present at the time of the accident, two of them could not be located and the other two had no recollection of the accident. Of the four doctors who had examined the plaintiff, two of them had died and one was retired in Thailand. The medical evidence was significant because it was clear from the medical reports that there were different opinions as to the nature and gravity of the plaintiff's injuries. There had also been a huge increase in awards in personal injury cases in the 15-year period. There was a substantial risk that a fair trial was not possible and there was financial prejudice as a result of the increase in personal injury awards.[68]

8.25 Loss of insurance is a common ground advanced to establish prejudice. The loss of insurance during a period of delay can leave a litigant "totally exposed and vulnerable financially."[69] A defendant who proves that it has suffered such a loss need not necessarily adduce additional specific evidence to establish prejudice. In *Secan Ltd v Hsin Yieh Architects & Associates Ltd*, the court of Appeal stated:

> ". . .It is really a matter of common sense that once insurers are involved, they would review and evaluate the claim and take appropriate steps to resolve the claim where possible. Furthermore, the strength of any party in negotiations is often affected by its perceived ability to finance litigation. The period [of delay in this case] was sufficiently long to enable that to be done. The defendant was therefore deprived of the opportunity of having the benefit of that review and any possible settlement that might have ensued. In my judgment that prejudice is real and not speculative."[70]

This is not to say, however, that defendants who have suffered a loss of insurance during periods of delay will always be able to establish the requisite prejudice to justify an order dismissing a case for want of prosecution. As we have explained above, there must be a causal connection between the delay and the alleged prejudice. So, for example, where a defendant had "unusual" reinsurance arrangements such that the

67 *Antcliffe v Gloucester Health Authority*, n 52.

68 *Pau Chi Tak v Hong Kong Telephone Co Ltd* (unrep, HCA 106/1987, 31 May 2000) (CFI).

69 *Secan Ltd v Hsin Yieh Architects & Associates Ltd* [2002] 3 HKLRD 227 (CA), paragraph 14, Le Pichon JA.

70 *Secan Ltd v Hsin Yieh Architects & Associates Ltd*, n 69.

liquidation of its insurers might have occurred even without the plaintiff's delay, the defendant was unable to establish the required causal link between the plaintiff's delay and the liquidation.[71]

DEFENDANT'S CONDUCT

8.26 If a defendant has, by its conduct, led the plaintiff to believe that the action can proceed notwithstanding the plaintiff's delay, the court will usually exercise its discretion against dismissal. The most important factor here will be the extent to which the conduct of the defendant led the plaintiff to incur additional costs. If any costs incurred were minor, as compared with the inordinate delay of the plaintiff, then the judge will likely attach only slight weight to such conduct. However, if the defendant's conduct led the plaintiff to incur substantial additional costs, the judge will attach considerable weight to the defendant's conduct.[72]

Example

Where after a period of delay which was both inordinate and inexcusable, the defendant wrote to the plaintiff asking for particulars of the statement of claim, this was a clear intimation by the defendants that they were prepared for the action to proceed, and that the plaintiff should accordingly go to the expense of preparing the particulars. They had therefore acquiesced in the plaintiff's delay.[73]

While some courts have traditionally tried to explain this principle on the basis of the defendant's conduct having raised an estoppel, or as waiver or acquiescence, this explanation has been rejected.[74] If an estoppel arises (and that is questionable), it could not be an automatic bar to dismissal because the court would have to do whatever it considered equitable in the circumstances. The better view is that the defendant's conduct is just one factor, along with others, that a court can consider when deciding whether to exercise the discretion to dismiss the plaintiff's case.[75]

Example

The plaintiff sued his employer and several doctors, alleging, among other things, unsafe working conditions and negligent medical treatment. After a period of considerable delay, the plaintiff issued a Notice of Checklist Hearing. The defendant doctors stood by for some eight months after the plaintiff issued the Notice before applying to dismiss the action. It must have been obvious to them that the plaintiff, having issued the Notice of Checklist Hearing, was intending to incur substantial expenses in that eight-month period. The conduct of the defendants in standing by and doing nothing, while not a decisive factor on its own, was an added factor that influenced the judge to allow the appeal.[76]

71 *Bouygues SA v Red Sea Insurance Co Ltd* [1997] 4 HKC 149 (CA).

72 *Roebuck v Mungovin* [1994] 2 AC 224 (HL) at 236 – 7, approved in *Nathaniel Hymer v The MTRC*, n 7.

73 *Roebuck v Mungovin* [1994] 2 AC 224 (HL), p 274. See also *HSBC v Kuan Tao Sheng*, n 7, where the defendants had consented to the plaintiff not setting the action down for trial and had asked the plaintiff whether they would add another party. By this conduct they had induced the plaintiff to incur further costs and had condoned the delay.

74 See the comprehensive review of the relevant authorities and issues in *Nathaniel Hymer v The MTRC*, n 7.

75 *Roebuck v Mungovin*, n 72, followed in *Nathaniel Hymer v The MTRC*, n 7.

8.27 The conventional wisdom is that mere inaction on the part of the defendant will not be a bar to that defendant's request for dismissal of the plaintiff's claim, and that there must have been some positive action by which the defendants intimated that the case could proceed.[77] As the preceding example shows, however, in some cases merely standing by, as opposed to doing a positive act such as asking for particulars of the statement of claim, can be sufficient to defeat a defendant's application to dismiss the plaintiff's claim for delay. The question is whether the defendants by their conduct induced the plaintiff to incur further costs in the reasonable belief that the defendants wanted the action to proceed notwithstanding the plaintiff's delay.[78]

APPEALS

8.28 Appeals from judges who refuse to strike out an action for want of prosecution are not often successful. The refusal of an application to strike out is a matter of discretion, and the Court of Appeal will interfere with the exercise of that discretion only if it is satisfied that the judge erred in principle, or to promote consistency in the exercise of the discretion.[79] Where the case is one in which the conditions for dismissing an action for want of prosecution are satisfied, it does not follow that the case must be dismissed. It remains a matter of discretion, taking all of the circumstances of the case into account, whether or not to do so. The fact that another judge might have dismissed the action is the essence of discretion, and will not be sufficient to justify a reversal of the decision on appeal.[80]

76 *Nathaniel Hymer v The MTRC*, n 7.

77 See *Allen v Sir Alfred McAlpine*, n 5 at 272D – G.

78 *HSBC v Kuan Tao Sheng*, n 7 at 450B – C.

79 *Lee Pui Kuen v Asia Television Limited*, n 58, is an example of a case in which the Court of Appeal reversed the decision of a Deputy Judge who had dismissed the defendant's application to strike out the action for want of prosecution. See also *Secan Ltd v Hsin Yieh Architects & Associates Ltd* [2002] 3 HKLRD 227 (CA), in which the Court of Appeal reversed the decision of Burrell J on the grounds that he had failed to take proper account of both pre-writ and post-writ delay.

80 *Kerry Foodstuffs Co Ltd v Phulsawat Navy Co Ltd & Others*, n 7; *Nathaniel Hymer v The MTRC*, n 7.

On legal aid taxations, counsel fees shall be such as may be allowed on taxation or, if no taxation, as may be determined by the Director of Legal Aid.

> Civil Justice Reform: Counsel Fees
>
> The new rules contain a new test for taxation of the fees of opposing counsel. The amount of those fees is left to the discretion of the taxing master. The factors to which the taxing master shall have regard in exercising the discretion have not changed. They are set out above in paragraph 16.38.

Brief fees

16.41 The brief fee covers the work done to prepare for the trial, and attendance at the first day of the trial.[139] In the usual case, counsel is not entitled to be remunerated apart from or in addition to the brief fee for work done that is necessary for the proper representation of the client at the trial, unless there is a separate agreement to that effect.[140] If counsel is instructed to perform other work that is necessary or proper within the meaning of O.62, r.28(2), a fee for such work can be claimed as a separate item of costs.[141] In complex litigation, such additional work is often necessary to establish the future direction and conduct of the case in the interests of the lay client, and might assist in settling the case before trial. It will often be requested at an early stage and when it is not yet clear whether the case will even go to trial. To suggest that all such advisory work done before trial is "preparation for trial" and therefore covered by the brief fee, gives too expansive an interpretation to preparatory work and ignores the fundamental principle that costs will be allowed if they are necessary or proper within the meaning of O.62, r.28(2).[142] It would also cause practical difficulties where the parties decide to change counsel during the case.

Example

The defendant opposed the plaintiff's claim for counsel fees for advisory work done before trial, including perusing papers, research, drafting an affidavit, preparing a chronology, and considering expert reports. The defendant argued that such work ought to have been covered by the brief fee. The advisory work was done many months before trial and before the hearing of a preliminary issue as to whether the action was time-barred. The fees were allowed (as taxed down by the master) on the basis that the advisory work was done early in the proceedings, was not in any way a duplication of the work covered by the brief fee, and was done necessarily and upon proper instruction.[143]

139 *Yeung Shu & Another v Alfred Lau & Co (a firm) and Chang Pao Ching (Third Party)* [2000] 1 HKLRD 231 (CA); *Xinyuan Trading Co Ltd v NPH Petrochemicals Limited*, n 28; *Loveday v Renton & Another (No 2)* [1992] 3 All ER 184 (CA).

140 *Yeung Shu & Another v Alfred Lau & Co (a firm) and Chang Pao Ching (Third Party)*, n 139 at p 236.

141 *Yeung Shu & Another v Alfred Lau & Co (a firm) and Chang Pao Ching (Third Party)*, n 139, Ribeiro JA at p 235D – E.

142 *Yeung Shu & Another v Alfred Lau & Co (a firm) and Chang Pao Ching (Third Party)*, n 139 at p 235H – J.

143 *Yeung Shu & Another v Alfred Lau & Co (a firm) and Chang Pao Ching (Third Party)*, n 139.

Chapter 17

ENFORCEMENT OF JUDGMENTS

METHODS OF ENFORCEMENT

17.01 Once a judgment has been perfected,[1] the court plays no further role unless asked to do so. Costs are taxed or agreed and the unsuccessful party, or possibly its insurer, complies with the judgment order, for example by paying the sum ordered to the successful party or complying with an order for specific performance. It is in the unsuccessful party's best interests to comply with the order as soon as possible, particularly where money judgments are concerned, because interest accrues from the date of the judgment.[2] If, however, the unsuccessful party does not do so, then the successful party must consider how to enforce the judgment. There are two distinct categories of judgment – those that are monetary and those that are not, an example of the latter being an injunction for specific performance. This chapter will examine separately the methods of enforcement available for each category. As a preface to the following discussion, it should be noted that the rules allow a judgment creditor to proceed with more that one form of enforcement at the same time. It is not necessary to wait until costs have been taxed before commencing enforcement proceedings.

> **Recent Developments**
>
> In 2006, Mainland China and Hong Kong entered into an arrangement to facilitate the reciprocal enforcement of judgments in civil and commercial matters (the Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the courts of the Mainland and of the HKSAR pursuant to Choice of Court Agreement between Parties Concerned ("the Arrangement")). On 23 April 2008, the Mainland Judgments (Reciprocal Enforcement) Ordinance was passed in Hong Kong, to give effect to the Arrangement. Shortly afterwards the Department of Justice announced that this Ordinance will come into operation on a day to be appointed by the Secretary for Justice, after the Supreme People's Court has promulgated the necessary judicial interpretation to give effect to the Arrangement. Following promulgation, the ordinance come into operation on 1 August 2008. This is a welcome development because until now, it has been difficult to enforce Mainland judgments in Hong Kong and practically impossible to enforce Hong Kong judgments in the Mainland. We discuss the new regime in Part C below.

1 In accordance with O.42, r.4 a judgment must be drawn up and the procedure for doing this is contained in O.42, r.5. A judgment that has not been drawn up cannot be enforced.

2 Order 42, r.3 provides that a judgment takes effect from the day of its date so interest accrues from the date of the judgment and not from the date on which the judgment was drawn up.

PART A: ENFORCEMENT OF MONETARY JUDGMENTS

Identifying and locating the judgment debtor's assets

17.02 As we noted in Chapter 1, when contemplating whether to commence a legal action it is essential to investigate whether any judgment ultimately obtained will be capable of enforcement. However, although assets may have been identified at the pre-litigation stage, by the time judgment is obtained further investigations may be required as the debtor's financial position could be very different. One possibility is to appoint an inquiry agent who may be able to find out details of the defendant's assets within a short space of time. The advantages of using an inquiry agent are speed and secrecy, the latter being an important consideration if it is suspected that the defendant intends to avoid his obligations.

Oral examination of a judgment debtor pursuant to O.48

17.03 The judgment creditor may choose to apply to the court for an oral examination of the judgment debtor, to obtain full particulars of all his assets, liabilities, income, and expenditure,[3] supported by documentation. This procedure may be followed when the judgment debtor does not pay the judgment sum immediately. It compels the judgment debtor to appear in open court before a master, where he is effectively cross-examined about his income and assets by the plaintiff's solicitor or barrister. Failure to attend on the given date may result in the judgment debtor's committal to prison. The procedure is commenced by the judgment creditor applying *ex parte* on affidavit to the court for an order under O.48, r.1.[4] A sealed copy of the order (which bears a penal notice)[5] and appointment, together with conduct money representing the judgment debtor's reasonable travel expenses to and from court for the appointment, is served personally. Sometimes this step alone provides the judgment debtor with sufficient impetus to pay and no further action is needed. Otherwise, the examination proceeds at the appointed time. The first appointment is usually a call-over at which the master gives standard directions[6] and fixes a time for the oral examination. The judgment debtor may be ordered to bring specified documentation, such as bank statements, account ledger books, and any other relevant information. If the documentation brought by the judgment debtor is voluminous or

3 The description of the full particulars is taken from O.49B, r.1A(2) (pertaining to the execution and enforcement of judgment for money by imprisonment). The equivalent paragraph in O.48, r.1(1) (oral examination of a judgment debtor) is not so specific although in practical terms, the information sought and the questions asked will be virtually the same. The proper scope of an Order 48 examination was considered by Reyes J in *Bloomsbury International Ltd v Nouvelle Foods (Hong Kong) Ltd* [2005] HKEC 445. Where a party to an action has given undertakings to the court it is not a legitimate use of cross-examination to test whether the party was complying with his undertakings and therefore whether he was in contempt of court; *Phillips v Symes* [2003] All ER (D) 105 (Dec).

4 The affidavit is lodged at the High Court Registry and a master reviews the application. Thereafter, the order is drawn up and served.

5 Pursuant to O.45, r.7(4). A suggested wording is "Unless you, (judgment debtor's name), obey this order you may be held in contempt of court and liable to process of execution to compel you to obey it". See HKCP 2008 marginal note 45/7/6 for other forms of wording, including those appropriate where the judgment debtor is a body corporate.

6 See Heilbronn, Booth and McCook, "*Enforcement of Judgments in Hong Kong*", Butterworths Asia, 1998, pp 119 – 120 and footnotes thereto for further discussion on the procedure.

otherwise needs careful inspection before questions can be asked about it, the judgment creditor's representatives may apply for an adjournment. An adjournment may also be requested if, during the examination, further information is identified which the judgment debtor needs to locate. Where this is the case, care should be taken to ensure that the judgment debtor is served with an amended order, also bearing a penal notice, and the time of the adjourned appointment, otherwise he will not be in contempt of court if he fails to attend.[7] This is because there must be strict compliance with the rules of court before an order can be enforced by committal proceedings, as it is an extreme remedy concerning the liberty of the subject.[8] During the examination, the judgment debtor's statement is taken down in writing. It is then read out and he is asked to sign it. If the request is refused, it may be signed by the examiner who conducted the hearing.[9]

Oral examination of the judgment debtor: a comparison of O.48 and 49B

17.04 If the judgment debtor is a body corporate, the procedure in O.48 is used to order one of its officers to attend the court and be orally examined. As we have seen, O.48 may also be used where the judgment debtor is an individual. However, where individuals are concerned, there is also an alternative, more severe procedure available under O.49B. Both procedures are commenced in the same way, by an initial application made *ex parte*, on affidavit. The oral examination, at which the judgment debtor is ordered to bring all relevant documentation, is also conducted in open court, usually by a master. However there are also notable differences between the two orders, namely:

- Both orders require the judgment debtor to be served with an order endorsed with a penal notice ordering attendance at the court at an appointed time for the purpose of the examination, and this is discussed further below. However, unlike O.48, O.49B gives the court the additional power, where it sees fit to exercise it, to order the arrest of the debtor to ensure his attendance in court.[10] Similarly, if the order is served on the debtor in the usual way without the power of arrest having been exercised and the debtor fails to appear at the appointed time for the examination, the court has the power to order his arrest.[11]
- If an O.49B examination is adjourned, and the court is satisfied that there is a real risk that the debtor may not return for the adjourned hearing, it may order that he be imprisoned until the resumed hearing.[12]
- The court has the power under O.49B to prohibit the debtor from leaving Hong Kong prior to the examination and during an adjournment.[13]

17.05 Clearly O.49B gives the court draconian powers and it has been held that the criminal standard of proof is appropriate when the exercise of these powers is

7 *Beeston Shipping Ltd v Babanaft International SA, The Eastern Venture* [1985] 1 All ER 923 (CA).

8 *Beeston Shipping Ltd v Babanaft International SA*, n 7.

9 Order 48, r.3.

10 Order 49B, r.1(1)(b).

11 Order 49B, r.1(3). Note that when the debtor has been arrested either under r.1(1)(b) or (3) he must be brought to the court for the examination before the end of the day after his arrest.

12 Order 49B, r.1A(3)(b).

13 Order 49B, r.1(2) and O.49B, r.1A(3)(a).

being considered.[14] Although there is limited authority on the circumstances in which these powers may be exercised, not surprisingly the courts have tended towards a restrictive view.[15]

Example

In 1990 the Court of Appeal held that the power to send a debtor to prison should be exercised with "care and circumspection". The case concerned an appeal by the plaintiff against the master's refusal to commit the debtor to prison. The debtor, who had lost his money in a stock market crash, had been unable to continue supporting his daughter at university abroad. His wife, who had a small income, sent the daughter some funds. The plaintiff's argument, that the daughter had remained abroad and must have been supported out of the proceeds of undisclosed assets, was not accepted. It was held that unless the existence of other assets could be proved, it would be oppressive even to consider sending him to prison and this sort of appeal should be discouraged.[16]

Post examination considerations

17.06

- Costs – The usual costs rule applies in that they may be awarded at the discretion of the master before whom the oral examination took place.
- Order for imprisonment – Following the completion of an oral examination of an individual under either O.48 or O.49B, the court has the power to order the imprisonment of the debtor, for a period of up to 3 months, if it is satisfied that the debtor is able to satisfy the judgment, wholly or partly, but has deliberately disposed of assets to avoid satisfying the judgment or has wilfully failed to give full disclosure or answer any questions during the examination.[17]
- The next step – If, during the application, available assets of the debtor were identified, then the judgment creditor should proceed without delay to enforce the judgment against those assets using one or more of the procedures set out below.

Mareva injunction

17.07 Mareva injunctions are discussed more fully in Chapter 9. In the context of enforcement, although an application for a Mareva injunction is usually made at the commencement of, or during the course of, proceedings, it may be a useful tool post-

14 *Bank of India v Murjani & Others* [1991] HKLY 819 (CA).

15 See the decision of the Court of Appeal in *Ferryhill International Ltd v Mahmoud Aziz* [1997] HKLRD 482 (CA) and also the High Court in *Luen Hing Fat Textile Ltd v Lam Shing-chin t/a New Cotton Trading Company* [1990] 1 HKLR 737.

16 *Honour Finance Co Ltd v Chan Mang*, [1990] HKLY 916 (CA).

17 Order 49B, r.1B(1)(a) – (c). In *Luen Hing Fat Textile Ltd v Lam Shing-chin*, n 15, the court considered whether a master has jurisdiction under r.1B(1)(c) to imprison the defendant before the examination was completed for failing to make disclosure as required by a specific order. It was held that a master did not have such jurisdiction – the power under (c) could only be exercised on completion of the examination, and the sanction was for failure to make disclosure as a whole rather than for disobedience of a specific order.

judgment, if the judgment creditor believes that the judgment debtor is attempting to avoid execution of the judgment by hiding, dissipating, or removing his assets from the jurisdiction.[18] The freezing of assets sufficient to meet the judgment sum, both within and outside the jurisdiction, coupled with the requirement that the defendant make and file an affidavit of assets, is generally regarded as the modern alternative to procedures such as oral examinations and prohibition orders.

Prohibition order after judgment

Order 44A provides a procedure enabling the plaintiff after judgment to apply for an order prohibiting the judgment debtor from leaving Hong Kong.[19] We have seen that the court is granted a similar power under O.49B in the context of an oral examination. The application is made to a master but may be made to judge *ex parte* if the Court Registry is closed and the need for the order is urgent. At the time of applying for the prohibition order, a draft order should be submitted – see form No 106, Appendix A.[20] Applications should be supported by an affidavit explaining the reasons for the plaintiff's belief that the judgment debtor is about to leave Hong Kong, with the result that the enforcement of the judgment is likely to be obstructed or delayed. In one case,[21] a prohibition order was discharged where the defendant, who lived in Hong Kong, had been prevented by the order from making his regular daily trip to China to supervise a factory. The Court of First Instance found no evidence on the facts that enforcement of the judgment would be impeded if no prohibition order were made[22] and specific reference was made to a person's freedom to leave Hong Kong, guaranteed by Article 31 of the Basic Law. 17.08

There is a specific procedure for the discharge of a prohibition order in O.44A, r.4. The exercise of the court's power to discharge is a matter of discretion.[23] The court also has the power to award compensation to a judgment debtor where the order was applied for on insufficient grounds or was not allowed to lapse as soon as reasonably possible after it was no longer required.[24] If a defendant breaches a prohibition order, the plaintiff should apply for leave to bring contempt proceedings. The prohibition order (form 106) states that "It is ordered that [the defendant] is prohibited from leaving Hong Kong". In a recent case, the Court of Final Appeal was asked to consider what conduct amounts to "leaving Hong Kong" so as to constitute breach of a prohibition order and therefore contempt of court. The circumstances were that the defendant, after being served with a prohibition order endorsed with a penal notice, immediately went to the ferry terminal and bought a ticket for Macau. When she produced her HKID card at the immigration counter in the restricted area, an immigration officer told her about the prohibition order. Evidence from the Immigration Department was that at that point, she "chose to refrain from leaving". Was she in breach of the 17.09

18 See HKCP 2008 marginal note 29/1/77.

19 Indeed, the court is also empowered to make this order before judgment (r.2) and even before the commencement of proceedings (r.1) – see the marginal notes to O.44A in HKCP 2008. The jurisdiction of the court to make the Order is derived from HCO s.21B.

20 See HKCP 2008 Volume 3, Court Forms.

21 *Avco Financial Services (Asia) Ltd v Topma Electronics Ltd & Others* [1999] 4 HKC 193 (CFI).

22 At 196C – D.

23 *Questnet Ltd v Kurt Georg Rocco Rinck* [2008] HKEC 322 (CFI).

24 Order 44A, r.5 (and marginal notes in HKCP 2008).

prohibition order? At first instance, the judge found that her actions amounted to leaving Hong Kong. His decision was reversed on appeal but the Court of Final Appeal found that the defendant "was undoubtedly in the course of "leaving Hong Kong" in breach of the prohibition against her doing so".[25]

The forms of enforcement of monetary judgments and orders

17.10 The Rules of the High Court provide a range of procedures to assist a judgment creditor in enforcing a monetary judgment:

- writ of *fieri facias*;
- garnishee proceedings;
- a charging order;
- stop orders and stop notices;
- the appointment of a receiver;
- in certain circumstances, an order for committal, coupled with a writ of sequestration;
- an order of imprisonment made under O.49B (discussed above);
- bankruptcy; or
- the winding up of companies.[26]

17.11 A plaintiff's judgment may be divided into separate elements, for example, an order that the defendant pay the plaintiff a quantified sum, a sum for damages to be assessed, and costs. The plaintiff is entitled to enforce each element separately, for example by proceeding immediately in respect of the quantified sum while waiting for the assessment of damages to be completed. If, at the time of commencing the chosen method or methods of enforcement, costs have been agreed or taxed, they may be recovered at the same time. If, as is often the case, there is some delay in finalising costs, they should be made the subject of separate enforcement proceedings.[27]

Writ of Fieri Facias ("Fi Fa")

17.12 A Writ of *Fi Fa* is one of the writs of execution specified in O.46.[28] The court bailiff carries out the execution by seizing the judgment debtor's goods and chattels up to a value that includes the judgment debt plus interest, and the costs of execution. The property is then sold, usually by public auction. However, this will not always be the best method of selling the goods, for example where more money may be raised if the sale is conducted within a specialist market. Then either the bailiff, or one of the parties, may apply to the court under O.47, r.6 for an order to permit the sale by an alternative method. For example, if the sale is of a stamp collection, a higher

[25] *Sino Wood Investment Ltd v Wong Kam Yin* [2006] 1 HKLRD 176 (CFA).
[26] Order 45, r.1(1) so provides.
[27] Order 47, r.3. If costs are the only remaining part of the judgment to be enforced, the plaintiff may proceed by writ of *fi fa* pursuant to O.47, r.3.
[28] For the form of the writ see O.45, r.12 and Forms 53 to 63 in Appendix A, which may be amended as appropriate.

price may be achieved if it is advertised in a specialist periodical. Certain goods are specifically exempted from seizure – a judgment debtor is entitled to keep the tools of his trade, and clothing and bedding belonging to him and his family, up to a value of HK$10,000.[29]

17.13 The writ of *fi fa* may be issued as soon as the payment becomes due, in the prescribed form.[30] Leave of the court is not required except in the cases specified in O.46, r.2, namely where:

- six or more years have elapsed since the date of the judgment;
- there has been a change to either or both parties, for example because one of them has died;
- the assets against which the writ is to be executed passed to a deceased person's executors or administrators after the date of the judgment;
- under the judgment any person is entitled to relief, subject to a condition it is alleged has been fulfilled;[31] or
- the goods the plaintiff intends to seize are with a court appointed receiver or a sequestrator.

O.46, r.4 contains the procedure to be followed on an application for leave to issue the writ, which is usually made *ex parte,* supported by affidavit. If leave is granted, then the plaintiff is ready to move to the next stage, when the writ is filed with the Registry for issue.[32] It must be accompanied by a praecipe, the judgment (or a sealed copy) to which it relates, the order granting leave to issue where appropriate, and a solicitor's undertaking to pay the bailiff's fees and expenses. Once issued, a sealed copy of the writ should be delivered to the bailiff's office, together with details of the assets against which the writ is to be executed. To ensure an expeditious execution and to minimise the bailiff's costs, it is important to provide the bailiff with as much information as possible concerning the goods. After the sale, the bailiff's fees and expenses are deducted from the proceeds and the balance is remitted to the plaintiff in satisfaction of the judgment debt. If there is a shortfall, the plaintiff is free to pursue another avenue of enforcement in respect of the balance. If there is a surplus, it is returned to the judgment debtor.

17.14 As a general rule, the bailiff is not entitled to use force during execution. A bailiff, the judgment creditor (if he wishes), and a security guard visit the premises of the judgment debtor. If there are sufficient goods and chattels to justify a seizure, the bailiff will do so up to the amount endorsed on the writ plus the estimated costs of the execution. There are some exceptions to the rule that a bailiff may not use force, for example in the situation where the bailiff has entered the judgment debtor's premises without force, but is subsequently locked in. The bailiff may then use force, if necessary, to remove

[29] High Court Ordinance, s.21D. For further information and authority on seizure, see the marginal notes to O.45, r.1 in HKCP 2008.
[30] See Appendix A, Forms 53 – 57.
[31] For an example, see HKCP 2008 marginal note 46/2/9.
[32] See O.46, r.6. For a precedent of the praecipe required by O.46, r.6(2) and (3), see *Enforcement of Judgments in Hong Kong*, n 6, precedent Nos 10 and 11.

the goods seized from the premises.[33] What is the position in respect of goods that are possessed, but not necessarily owned, by the judgment debtor? Goods that are subject to a hire-purchase agreement cannot be seized. Property that is jointly owned may be seized and sold, but only the portion of the proceeds that belonged to the judgment debtor may be used for the purposes of enforcement. The portion representing the co-owner's interest must be returned to the co-owner. If there is any real doubt as to the ownership of the goods, the bailiff will seek further instructions before seizing them, and if a third party claims the goods, then the bailiff may ask the court to decide who owns them, by commencing interpleader proceedings pursuant to O.17.

17.15 A writ of *fi fa* (and other writs of execution also the subject of O.46) is valid for 12 months commencing on the date of issue. If necessary, its validity may be extended, for example because it has only been partly executed. Otherwise a fresh writ should be issued and this will require a solicitor's certificate stating that there has been no execution.[34]

Garnishee proceedings

17.16 If a third party owes money to a judgment debtor, the judgment creditor may attach that money, or debt, by obtaining a garnishee order absolute, which orders the third party to pay the money forthwith to the judgment creditor instead. The third party is known as the garnishee, and the judgment creditor is the garnishor. The procedure is available where the amount of the judgment debt is at least HK$1,000.[35] The garnishee must be within the jurisdiction.[36] It matters not whether the debt the subject of the garnishee proceedings is sufficient to satisfy the judgment debt – if it is less, then any balance still remaining may be recoverable by other methods of enforcement. One of the most common forms of attachable debt is money held in a bank account in the name of the judgment debtor,[37] but as a general rule, as long as there is a debt due or accruing to the judgment debtor, it is capable of attachment. If the debt is owned jointly by the judgment debtor and another however, then it cannot be attached.[38] Money held by a solicitor on behalf of a client may also become the subject of garnishee proceedings.[39] The court has a discretion however to refuse to make a garnishee order absolute where the judgment debtor becomes insolvent.[40]

17.17 The court's power to make a garnishee order is derived from s.21 of the High Court Ordinance (Cap.4) and the procedure is contained in O.49. Obtaining a garnishee

33 There is a helpful discussion of the bailiff's rights of entry and seizure in *Enforcement of Judgments in Hong Kong*, Heilbronn, n 6, commencing at p 60.
34 See O.46, r.8.
35 Order 49, r.1.
36 Order 49, r.1 so provides. See also *S.C.F. Finance Co Ltd v Masri (No 3)* [1987] 1 All ER 194 (CA) and the discussion at HKCP 2008 marginal note 49/1/8.
37 But note that only the existing credit balance is attached – a new order is required if further sums are deposited in the account after the order to show cause is served. See *Heppenstall v Jackson and Barclays Bank Ltd (Garnishees)* [1939] 1 KB 585 (CA) referred to in HKCP 2008 marginal note 49/1/20.
38 This is the general rule but see the discussion in *Enforcement of Judgments in Hong Kong*, n 6, commencing at p 229, of the position regarding jointly held bank accounts.
39 There is a considerable body of authority on the subject of what may constitute an attachable debt, and the reader is referred to the detailed marginal notes to O.49, r.1 in HKCP 2008 for particular examples of the numerous categories of debt within and outside the ambit of the order.
40 *CCIC Finance Ltd v Guangdong International Trust & Investment Corp Hong Kong (Holdings) Ltd* [2005] HKEC 1180.

order is a two-stage process, commenced by applying for an order nisi, and subsequently by applying for that order to be made absolute. The initial application is made *ex parte* supported by an affidavit[41] and a draft order to show cause.[42] These documents are lodged at the Registry. If approved, the order to show cause is issued, specifying the time and place for further consideration of the matter. On service, the order becomes binding on the garnishee, immediately attaching the debt until the hearing date specified in the order to show cause. The order must be served personally on the garnishee at least 15 days before the hearing. It must be served personally on the judgment debtor, at least 7 days after it has been served on the garnishee (to prevent the debtor from frustrating the proceeding by, for example, assigning the debt) and at least 7 days before the date of the hearing. If the garnishee is a bank, the order should be served on the head office (although it is prudent also to notify the branch at which the bank account is held if known, simultaneously or shortly after service on the head office).[43] The affidavit in support of the application should give the branch details and account number if known.

17.18 If the judgment the subject of the garnishee proceedings is expressed in a foreign currency, then the affidavit in support of the application pursuant to O.49, r.1 must comply with Practice Direction 16.2 and contain words to the following effect:

> "The rate current in Hong Kong for the purchase of (state the amount of the Judgment in foreign currency) at the close of business on the [ ] day of [ ] 20 [ ], [ ] was to [ ] $ Hong Kong and at this rate the said sum amounts to $ [ ]. I have ascertained the above information (state source) and believe the same to be true".[44]

17.19 The hearing takes place before a master on the specified date. The possible out-comes include:

- An order nisi. Where further time is needed, for example by the garnishee to quantify the amount of the debt, then an order nisi is made.
- An order absolute. This may take place if (i) the garnishee does not attend; (ii) the garnishee not disputes the debt due;[45] or (iii) the garnishee disputes his liability to pay the debt due but the court summarily determines the issue in favour of the garnishor.[46]
- If the garnishee disputes liability, referral of the matter (with directions) for trial before a judge or a master.[47] (The usual requirement for the parties' consent to trial before a master is waived in the case of O.45, r.5).[48]
- If the garnishee disputes liability, the matter may be transferred to the District Court.[49]

41 As to the contents of the affidavit, see O.49, r.2.
42 For the form of the draft order see Appendix A, Form No 72.
43 See O.49, r.3 and the marginal notes thereto in HKCP 2008.
44 PD 16.2 paragraph 8(a).
45 Order 49, r.4(1).
46 Order 49, r.5.
47 Order 49, r.5.
48 See HKCP 2008 marginal note 49/5/1.
49 See PD 16.2 paragraph 3.

person interested in the subject-matter of the charge" to apply before or after the order nisi is made absolute, for the order to be varied or discharged.[65]

17.25 At the hearing of the order to show cause, the court will either make the order absolute (if necessary, with modifications),[66] or discharge it.[67] In deciding whether to exercise its discretion to make absolute the order nisi, the court will be guided by the following general principles:

- the burden of showing cause why a charging order nisi should not be made absolute is on the judgment debtor;
- there is, in general, no material difference between the making absolute of a charging order nisi and a garnishee order nisi;
- the court has both the right and the duty to take into account all the circumstances of a particular case, whether such circumstances arose before or after the making of the order nisi;
- the court should so exercise its discretion as to do equity, so far as possible, to all the various parties involved, that is to say, the judgment creditor, the judgment debtor and all other unsecured creditors;[68] and
- if a company goes into liquidation after the making of the charging order nisi and before the order is made absolute, the court may decline to make the order absolute.[69]

17.26 When the order is made absolute, interest[70] and costs[71] may be added to the judgment sum. The judgment debt is now secured, but the security may be long-term. To convert the security into money to satisfy the judgment debt, the judgment creditor must bring further proceedings for the enforcement of the charging order by sale. These proceedings must be commenced by originating summons.[72] There are particular requirements if the order for sale is in respect of land, where O.88 also applies, r.5A of which sets out the matters that must be addressed in the supporting affidavit.

Stop orders and stop notices

17.27 Order 50, r.10 grants the court power to make an order prohibiting the transfer, sale, delivery out, payment or other dealing with funds held in court. For example, a judgment creditor may apply for a stop order where the judgment debtor has funds in court. Essentially, the effect of a Stop Order granted in the judgment creditor's favour is that

65 The court's power to vary or discharge the charging order is derived from the High Court Ordinance, s.20B(4).
66 See Appendix A, Form No 76 for the form of a charging order absolute.
67 Order 50, r.3.
68 See *Roberts Petroleum Ltd v Bernard Kenny Ltd* [1982] 1 All ER 685 at 690 (HL).
69 See HKCP 2008 marginal note 50/9A/23 referring to *Roberts Petroleum Ltd v Bernard Kenny Ltd* [1982] 1 All ER 685 at 690 (HL). This is because of the statutory scheme for dealing with a company's assets that comes into operation when a company goes into liquidation. The comment is made in the note that presumably the same principle will apply where the bankruptcy of an individual is concerned.
70 Provision is made in Form No 76 for the inclusion of interest. See also *Ezekiel v Orakpo* [1996] CLY 684 (CA) discussed in *Enforcement of Judgments in Hong Kong*, n 6, at pp 258 – 259 and HKCP 2008 marginal note 50/9A/40.
71 Fixed costs pursuant to O.62, and any significant disbursements.
72 Pursuant to O.50, r.9A(1).

he will receive notice if any attempt is made by the judgment debtor to remove the funds held in court. A Stop Order does not decide the rights of the parties but does protect the funds in question from their untimely removal. A judgment creditor may apply for a Stop Order over funds in court before or after obtaining a Charging Order.

17.28 Order 50 rr.11 to 14 provide the court with a similar power in respect of securities that are not held in court. For example, a judgment creditor may apply for a stop notice in respect of the judgment debtor's shares, preventing him from selling them before the judgment creditor is able to use them to enforce the judgment. Like a stop order, a stop notice is temporary, preventing the disposal of funds until the person in whose favour it is granted is able to enforce his right to them.[73]

Appointment of a receiver

17.29 The Court of First Instance has the discretion to order that a receiver be appointed where it is just and convenient to do so, conditionally or unconditionally.[74] Nowadays this method of enforcement of a money judgment is used only in limited circumstances, one of the alternative methods discussed above usually being more appropriate in terms of efficiency and cost. Appointed by way of equitable execution, essentially the receiver's task is to receive rents, profits, and moneys due to the judgment debtor from property in which he has an interest, and then to apply the funds in the manner specified in the order, including payment of the judgment debt, until the debt has been paid off. Examples of such property include execution against life interests in trust funds or in land and periodic payments under insurance policies.[75] In deciding whether to make the appointment, the court will consider the amount claimed by the judgment creditor, the amount likely to be obtained by the receiver and the probable costs of his appointment. If necessary the court may direct an inquiry into any of these matters before making the appointment.[76] It seems generally agreed amongst commentators that receivership by way of equitable execution will only be ordered where there is some impediment to execution by other methods.[77] A master has the power to order the appointment of a receiver by way of equitable execution, and may also grant an injunction ancillary to such an order.[78] The procedure that should be followed is the same as the procedure for the appointment of receivers generally.[79]

Contempt of court

17.30 The court has an inherent jurisdiction to find a party in contempt of court. An underlying rationale is that contempt of court may impede the administration of justice.

73 See HKCP 2008, marginal notes to O.50, for further information on stop orders and stop notices, their effect an how to apply for them.
74 High Court Ordinance s.21L(1) and (2) and see *Karaha Bodas Co LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina) (No 3)*, n 60.
75 HKCP 2008 marginal note 51/1/1.
76 Order 51, r.1 so provides.
77 *Enforcement of Judgments in Hong Kong*, n 6, pp 25 – 26; HKCP 2008 marginal note 51/1/2.
78 Order 51, r.2.
79 See O.30 and O.51. It is beyond the scope of this chapter to discuss in detail the procedure for this method of enforcement, but the reader is referred to HKCP 2008 marginal note 51/3/1 for further information, including the modifications that may be needed to Appendix A Form 84 (Order appointing receiver by way of equitable execution).

If a judgment debtor is found in contempt of court, often for failing to comply with a court order or for frustrating its execution, the court has power to impose a range of punitive measures. These include a period of imprisonment, a fine, and sequestration of the judgment debtor's assets until such time as the contempt has been purged. A finding of contempt is necessary before an order of committal can be sought or a writ of sequestration issued and these procedures are discussed below.

An order of committal

17.31 An order of committal is punitive in nature, whereby the party in contempt (known as the contemnor) may be imprisoned for breaching an order of the court.[80] This is civil contempt, and may be distinguished from criminal contempt, which arises where "a stranger to the litigation" aids and abets, or otherwise assists, with the breach of the order.[81] While included here as a method of enforcement, its effectiveness in terms of recovering the debt due is, in practice, limited to the deterrent effect of a penal notice. Infrequently encountered in practice, committal proceedings are perhaps most commonly found where an injunction, personally served and indorsed with the requisite penal notice, has been disobeyed committal proceedings may be begun for breach of judgments or orders which are either positive or negative in nature. In the case of the former, it is essential that a time for doing the act was specified (even if subsequently altered by, for example, an order extending time),[82] and in either case, it is a prerequisite that a copy of the order was served personally on the defendant.[83]

17.32 We have seen that under O.49B, r.1B, the court has the power to commit a debtor to prison and that this may be done without formal committal proceedings. In addition, the Court of First Instance (and the Court of Appeal) may make an order of committal of its own motion against a person guilty of contempt of court.[84] Otherwise, proceedings must be commenced under O.52, but leave must first be obtained before the application for committal can be made.[85] The application for leave is made *ex parte* to a judge, supported by a statement of grounds and a verifying affidavit,[86] both of which must be filed before the application is made. A hearing is sometimes, but not always, required and the judge has the power to impose terms regarding costs and the giving of security if the court thinks fit.[87] Once leave has been granted, the application for an order of committal is made pursuant to O.52, r.3, by motion to a judge. Usually the notice of motion, statement of grounds, and verifying affidavit must be personally served on the contemnor, and this may of course encourage compliance and avoid

80 Committal orders are remedies of last resort and the case against a contemnor must be proved to the criminal standard of beyond reasonable doubt; *RACP Pharmaceutical Holdings Ltd v Li Xiaobo* [2008] HKEC 627.

81 *Attorney General v Times Newspapers Ltd* [1991] 2 WLR 994 at p 1014 (HL), discussed in *Enforcement of Judgments in Hong Kong*, n 6, at p 163.

82 Order 45, r.5.

83 Order 45, r.7, The court does however have the discretion to dispense with personal service in the interests of justice and when not prejudicial to the contemnor; *Axa China Region Insurance Co Ltd v Li Yu Ping Ellen* [2002] 3 HKC 339; See also *Excel Noble Development Ltd v Wah Nam Group Ltd* [2001] HKEC 612 and *Aqua-Leisure Industries Ltd v Aqua Splash Ltd* [2003] 1 HKC 1 for liability to committal of a director of a company held to be in contempt of court.

84 Order 52, r.5.

85 Order 52, r.2(1).

86 See O.52, r.2(2) for the requirements of the statement of grounds and verifying affidavit.

87 Order 52, r.2(7).

the need to continue with the hearing. Otherwise, the court will proceed to hear the application pursuant to the provisions of O.52, r.6, in open court or privately in certain specified cases, such as where the contemnor may be suffering from a mental disorder. In all cases, if an order for committal is made, the court will state in open court the name of the person being committed, the nature of the contempt, and the period of the committal. There is authority that a judgment with short reasons should be given.[88] The court also has the power to suspend the committal order, with or without conditions, so that the period of imprisonment commences on a later date, giving the contemnor another opportunity to purge his contempt. Otherwise the contemnor will be imprisoned for the period provided in the order. Order 52, r.8 gives the court the power to discharge the contemnor on his application, and the court will normally exercise its discretion to do so in the case of a civil contempt where the contemnor has purged his contempt and offered an apology. It seems that the court's discretion under O.52, r.8 does not extend to cases of criminal contempt.[89]

Enforcement of judgment against a body corporate pursuant to O.45, r.5

17.33 If the party in breach of an injunction, either mandatory or prohibitory in nature, is a body corporate, then the order may be enforced by an order of committal against any director or other officer. It may also be enforced by a writ of sequestration (see below) against either the corporate property of the body concerned or against the personal property of any of its directors or other officers. However, a director or officer will only be liable in respect of either committal or sequestration if the necessary *mens* rea can be demonstrated.[90]

Writ of sequestration

17.34 Seldom encountered, sequestration is a procedure that may be used to enforce a judgment or order that is mandatory (provided a time is specified for doing the act) or prohibitory in nature, and is also available to enforce money judgments.[91] A writ of sequestration is one of the writs of execution specified in O.46. The first step in sequestration proceedings is to apply to a judge by motion for leave to issue a writ of sequestration.[92] The notice of motion must be supported by an affidavit stating the grounds of the application, and both must be served personally on the contemnor, although the court does have a discretion to dispense with service if it is just to do so. The application is usually heard in open court.[93] If the court is satisfied that a contempt has been committed and grants leave, then the writ may be issued in the

88 See *Manchester City Council v Worthington* [2000] 1 FLR 411 (CA) referred to in HKCP 2008 marginal note 52/6/1.

89 See *Attorney-General v James* [1962] 2 QB 637, referred to in HKCP 2008 marginal note 52/8/3, the latter containing a discussion of the principles governing the court's discretion to discharge.

90 Eg *Cedar Base Electronic Ltd v Kam Yuen Electronics Plastic Limited & Wong Chak Ka* (unrep, HCA 755/1999, 7 April 2000) (CFI), in which a director was found to have the required *mens rea* for breach by the company of an Anton Piller order and was committed to prison for one month.

91 Order 45, r.1(1)(f).

92 Order 46, r.5(1).

93 Unless one of the exceptions provided for in O.52, r.6 applies.