14.3 Extension of time by consent

[1-73] Subject to the milestone dates introduced by the new rules, parties are entitled, by consent in writing, without an order of the court being made for that purpose, to extend the period within which a person is required by the Rules, or by any order or direction, to serve, file or amend any pleading or other document.[167]

14.4 Notice to proceed after a year's delay

[1-74] Where a year or more has elapsed since the last proceeding in a cause or matter, the party who desires to proceed must give to every other party not less than one month's notice of his intention to proceed.[168] In a case where there are joint parties involved, it is sufficient for there to have been proceedings in the last year in relation to any of the parties so as to avoid the need to give notice.[169]

the existence of such prejudice to be crucial and often decisive; likewise a rigid application of the second principle without exception might enable a wealthy litigant to flout the rules; the resolution of these two conflicting principles was to consider all the circumstances of the case and not confine the decision to the application of a universally applicable rule of thumb: see *Costellow v Somerset County Council* [1993] 1 WLR 256 at 263 (CA, Eng) per Sir Thomas Bingham MR; this approach had not been drastically changed by the introduction of the Civil Justice Reform; an expeditious disposal of a case had to be considered together with the equally salutary objective of ensuring fairness between the parties, per Cheung JA).

167 RHC and RDC O 3 r 5(3).

168 RHC and RDC O 3 r 6. The purpose of the month's notice is to allow the party on whom it is served time to apply to have the action dismissed for want of prosecution: see *Austin Securities Ltd v Northgate and English Stores Ltd* [1969] 2 All ER 753 at 755, [1969] 1 WLR 529 at 532–533 (CA, Eng) per Lord Denning MR.

169 See *Kung Wong Sau Hin v Sze To Chun Keung* [1996] 3 HKC 292 (CA) (a case where there were co-defendants and a step in the action had been taken in respect of some defendants but not all; held that it was sufficient if the step was taken against one defendant).

CHAPTER 2

JURISDICTION OF THE COURTS AND TRIBUNALS AND TRANSFER OF PROCEEDINGS

1. GENERAL PRINCIPLES AFFECTING JURISDICTION OF THE COURTS[1]

1.1 Introduction

[2-1] 'Jurisdiction' means the authority which a court has to decide matters that the parties wish to litigate before it. The Basic Law has confirmed that, subject to certain limitations, the courts of the Hong Kong Special Administrative Region have jurisdiction over all cases in the Region.[2] These limitations are found either in the Basic Law, in the statute constituting the particular court or have been recognised by the courts themselves. Limitations which might be imposed upon the courts' jurisdiction will either relate to: (a) the nature of the action or matter over which the particular court may exercise its jurisdiction; (b) the financial value of the action or matter; or (c) the territorial limits imposed upon the court's jurisdiction.

[2-2] In the absence of any financial limitation upon a court's jurisdiction, a court is said to enjoy unlimited jurisdiction.[3]

1 The jurisdiction of the Court of Final Appeal and Court of Appeal is dealt with in Chapter 20 'Appeals'.

2 Basic Law art 19.

3 See, for example, the High Court Ordinance (Cap 4) s 3(2) which confers unlimited jurisdiction upon the High Court.

2. Limitations upon Courts' Jurisdiction

2.1 No jurisdiction over acts of state

[2-3] The Basic Law provides that the courts of Hong Kong have no jurisdiction over acts of state such as defence and foreign affairs,[4] and, whenever questions arise in the adjudication of cases involving acts of state, the courts must obtain a certificate from the Chief Executive on questions of fact concerning acts of state and this certificate is binding upon the courts. Before issuing such a certificate, however, the Chief Executive must in turn obtain a certifying document from the Central People's Government.[5]

2.2 Limitation on jurisdiction in respect of civil wrongs committed by members of the Hong Kong Garrison

[2-4] The Law of the PRC on Garrisoning in the HKSAR[6] also imposes a limitation on the court's jurisdiction in respect of civil wrongs committed by members of the Hong Kong Garrison. Where any member of the Hong Kong Garrison, in contravention of the laws of Hong Kong, infringes the civil rights of any Hong Kong resident or other person not of the Garrison, the parties concerned may seek settlement through consultation or mediation. If, however, they are unwilling or fail to reach settlement, the infringed party may bring an action in the courts. Although cases of tort arising from acts committed by members of the Garrison when not performing their official duties are subject to the jurisdiction of the Hong Kong courts, torts committed by members of the Garrison whilst performing their official duties are subject to the jurisdiction of the Supreme People's Court of the People's Republic of China. Compensation for any loss or injury will, however, be governed by the laws of Hong Kong.

[2-5] In the case of breaches of a contract made between any organ or unit of the Garrison and any Hong Kong resident, the parties concerned may settle the issue through consultation or mediation. If the parties are, however, unwilling or fail to reach settlement, they may submit the dispute to arbitration if there is such a provision in the contract or by virtue of an arbitration agreement reached subsequently. In the absence of arbitration, the parties may institute proceedings in the Hong Kong courts.[7]

4 Basic Law art 19. See the Hong Kong Court of Final Appeal Ordinance (Cap 484) s 4(2), which repeats this exclusion of jurisdiction. The doctrine of act of state had been recognised by the common law and applied in Hong Kong long before the enactment of the Basic Law and this provision may simply have the effect of codifying the common law doctrine. Thus, for example, the courts have no jurisdiction over declarations of war and recognition of foreign Governments. The House of Lords has expressly left open the categories of acts which might constitute an act of state: see *Nissan v A-G* [1970] AC 179, [1969] 1 All ER 629 (HL).

5 Basic Law art 19.

6 ibid, art 23.

7 ibid, art 24.

2.3 Court of First Instance and District Court have no jurisdiction over actions exclusively within jurisdiction of Labour Tribunal or Small Claims Tribunal

[2-6] The Court of First Instance and District Court have no jurisdiction over actions which fall within the exclusive jurisdiction of the Small Claims Tribunal or the Labour Tribunal. The Small Claims Tribunal enjoys exclusive jurisdiction over monetary claims founded in contract or tort where the amount claimed does not exceed $50,000[8] and the Labour Tribunal enjoys exclusive jurisdiction, inter alia, over certain breaches of contracts of employment and certain breaches of the Employment Ordinance.[9]

2.4 The courts will not generally rule on hypothetical, academic or future issues

[2-7] The courts have long recognised that it is not their function to advise parties what their rights would be in hypothetical cases,[10] although they may do so

8 Small Claims Tribunal Ordinance (Cap 338) s 5(2) and Schedule para 1. For a detailed analysis of the jurisdiction of the Small Claims Tribunal, see *Halsbury's Laws of Hong Kong* Vol 8 'Courts and Judicial System' [125.292]–[125.294]. See also below.

9 Labour Tribunal Ordinance (Cap 25) s 7(2) provides that no claim within the jurisdiction of the Labour Tribunal is actionable in any other court. See *Chan Cheung Fong v Ng Wing Kwok* [1988] HKC 215 (CA) at 216 per Hunter JA, where the Court of Appeal held that, where a claim comes within the exclusive jurisdiction of the Labour Tribunal, a claimant has no election, choice or abandonment in the matter, subject to time limitations imposed by the Labour Tribunal Ordinance s 9. Section 9 was subsequently repealed by the Labour Tribunal (Amendment) Ordinance 1999. For a detailed analysis of the jurisdiction of the Labour Tribunal, see *Halsbury's Laws of Hong Kong* Vol 8 'Courts and Judicial System' [125.325] and below.

10 *Glasgow Navigation Co v Iron Ore Co* [1910] AC 293 (HL); *Re Kwun Tong Island Lot No 386* [1989] 1 HKC 411; *Wyko Group plc v Cooper Roller Bearings Co Ltd* (1995) Times, 4 December (where facts which could found a cause of action had not even come into existence, a declaration made in relation to them could only be made in answer to a theoretical question and would not be made); *Charter View Development Ltd v Golden Rich Enterprises Ltd* [2000] 2 HKC 77 (CA) (in relation to the sale and purchase of a flat, plaintiff sought declaration as to whether, if it chose to assert that the defendant had repudiated the agreement and if it accepted that repudiation, which it had not yet done, it could recover the deposit paid; held that declaratory judgment should not be granted where issue hypothetical or merely required advisory opinion). The court may, however, in special cases make a declaration as to future rights but this power is exercised with considerable reserve: *Mellstrom v Garner* [1970] 2 All ER 9, [1970] 1 WLR 603 (CA, Eng); *Koon Wing Yee v Securities and Futures Commission* [2008] 6 HKC 271 (CA) (application for judicial review of notice from respondent informing him that he was under investigation for certain criminal offences; held that application premature and hypothetical since applicant was not at the time facing any criminal charges).

where such course of action is considered to be in the public interest.[11] Similarly the court will decline to hear and determine a case where there is no issue left to be adjudicated between the parties and the issue has become academic.[12] Nor will the court rule on future acts unless the public interest so requires.[13]

3. Limits on Financial Jurisdiction of Certain Courts

[2-8] Although there is no financial limit on the jurisdiction of the High Court,[14] the District Court[15] and Small Claims Tribunal[16] enjoy only limited financial jurisdiction.

4. Limits of Courts' Territorial Jurisdiction

[2-9] In respect of the courts' territorial jurisdiction, the courts may exercise jurisdiction only over those parties on whom a writ can properly be served and there are detailed statutory provisions in respect of service upon persons both within and outside Hong Kong.

[2-10] In brief, the courts have jurisdiction over, and therefore process may be served upon, any person who is present in Hong Kong and this jurisdiction extends even to a foreigner who is only temporarily within the jurisdiction.[17] If, however, the person served wishes to maintain that Hong Kong is not the appropriate forum

11 See *R v Secretary of State for the Home Department, ex parte Salem* [1999] 1 AC 450 at 456, [1999] 2 All ER 42 at 47 (HL) per Lord Slynn of Hadley; *Chit Fai Motors Co Ltd v Commissioner for Transport* [2004] 1 HKC 465 (CA).

12 *Sun Life Assurance Co of Canada v Jervis* [1944] AC 111, [1944] 1 All ER 469 (HL); *Re Estate of Yu Leung Fong* [1991] 1 HKC 494 (court will not grant a declaration of death on an ex parte application where there is no present dispute between two parties as to their respective rights; proceedings in which an owner of property attempts ex parte to obtain a declaration in order to arm himself against some difficulty which may arise in the future are proceedings which fundamentally misconceive the function of the court in civil proceedings; it is not the function of the court to settle the doubts of owners of property about the state of their title in the absence of any other party interested in the property); *Right to Inherent Dignity Movement Association v Hong Kong SAR Government* [2008] HKCU 1692 (unreported, HCAL 104/2008, 31 October 2008).

13 See *Leung v Secretary for Justice* [2006] 4 HKLRD 211, [2006] HKCU 1585 (CA) (challenge to legislation criminalising certain homosexual acts); *Yao Man Fai George v Director of Social Welfare* [2010] HKCU 1344 (unreported, HCAL 69/2009, 21 June 2010); *FB v Director of Immigration* [2009] 2 HKLRD 346, [2009] 1 HKC 133.

14 High Court Ordinance s 3(2).

15 See section 6 below.

16 See section 8 below.

17 *Maharanee of Baroda v Wildenstein* [1972] 2 QB 283, [1972] 2 All ER 689 (CA, Eng). This jurisdiction does not apply, however, where the defendant was induced by fraud to enter the jurisdiction for the purpose of his being served with legal process: *Watkins v North American Land and Timber Co Ltd* (1904) 20 TLR 534 (HL).

for the action, he can apply for a stay of the Hong Kong action.[18] If the defendant is successful in obtaining a stay, the plaintiff will be compelled to commence or continue his action elsewhere in a more appropriate forum.

[2-11] In respect of jurisdiction over persons who are not present in Hong Kong, there are important statutory provisions for service of process on persons outside Hong Kong.[19] The effect of these provisions is to entitle the Hong Kong courts to exercise jurisdiction over persons who owe no allegiance to Hong Kong and the provisions prima facie constitute an infringement of the sovereignty of the other country in which service is effected. Nonetheless, the legislature has provided, in accordance with the principle of the comity that exists between nations, that each country is entitled, in circumstances permitted by its own laws, to exercise judicial power by the issue and service of judicial process in other countries.[20]

4.1 Where jurisdiction is lacking, parties cannot confer jurisdiction on courts

[2-12] The courts have made it clear that, where, by reason of any limitation imposed by statute, a court lacks jurisdiction to entertain any particular action or matter, neither the acquiescence nor the express consent of the parties can confer

18 The application for a stay may be made either on the grounds of 'forum non conveniens' (see *Spiliada Maritime Corpn v Cansulex Ltd (The Spiliada)* [1987] AC 460, [1986] 3 All ER 843 (HL)), 'lis alibi pendens' or by reason of an exclusive jurisdiction clause; see below.

19 See RHC and RDC O 11, discussed later in Chapter 5 'Service of Process and Acknowledgment of Service'.

20 Although the court's jurisdiction has on many occasions been described as an 'exorbitant jurisdiction' (see, eg, per Hunter JA in *Wo Fung Paper Making Factory Ltd v Sappi Kraft (Pty) Ltd* [1988] 2 HKLR 346 at 356, [1988] HKC 10 at 22 (CA)), more recently the court has stated that this view is no longer realistic in the present day where litigation between residents of different states is a routine incident of modern commercial life: see *Abela v Baadarani* [2013] 1 WLR 2043 (SCt) (the traditional characterisation of service out of the jurisdiction as the exercise of an exorbitant jurisdiction, based on the notion that service of proceedings abroad was an assertion of sovereign power over the defendant and a corresponding interference with the sovereignty of the state in which process was served, was not longer realistic; since in the overwhelming majority of cases where service out was authorised there would have been either a contractual submission to the jurisdiction of the English court or a substantial connection between the dispute and this country, and litigation between residents of different states was a routine incident of modern commercial life, the decision whether to permit service out of the jurisdiction was generally a pragmatic one in the interests of the efficient conduct of litigation in an appropriate forum; it should no longer be necessary to resort to the kind of muscular presumptions against service out which were implicit in adjectives like 'exorbitant'), applied in *Deutsche Bank AG, Hong Kong Branch v Zhang Hong Li* [2016] 3 HKLRD 303, [2016] 4 HKC 266 (CA).

jurisdiction upon that court.[21] Nor can jurisdiction be conferred upon a court by reason of estoppel.[22]

4.2 Ouster of court's jurisdiction by agreement

[2-13] An agreement purporting entirely to oust the jurisdiction of the courts is illegal and void on grounds of public policy.[23] For example, a provision in a testator's will which purports to empower the trustee to determine all questions and matters of doubt arising under the will and to make that determination conclusive and binding on all persons interested under the will is void on this ground.[24]

[2-14] On the other hand, an agreement that no right of action shall arise or for the postponement of the enforcement of a claim by action in the courts unless and until the parties' differences have been settled in some other way, for example by arbitration, is valid and may be enforced by way of a stay; and this may extend, not only to the question of the amount which is due, but also to the question of whether any liability has been incurred.[25]

4.3 Ouster of access to courts by statute

[2-15] Of course, the intending litigant's right of access to the courts (or a particular court) may be taken away or restricted by statute, but the language of any such statute will be jealously watched by the courts and will not be extended beyond its least onerous meaning unless clear words are used to justify such extension.[26] Where an issue arises upon proceedings before the court, the court's

21 *Green v Rutherforth* (1750) 1 Ves Sen 462 at 471, [1558–1774] All ER Rep 153 at 158 (Ch) per Lord Hardwicke LC.

22 *Ananda Non-Ferrous Metals Ltd v China Resources Metal and Minerals Co Ltd* [1994] 1 HKC 204 (CA) (no jurisdiction conferred upon court by way of estoppel); *SOL International Ltd v Guangzhou Dong-jun Real Estate Interest Co Ltd* [1998] 2 HKLRD 637, [1998] 3 HKC 493 (CA) ('For the future, I hope we shall never again be faced with an argument that a jurisdiction, which the court would not otherwise possess has been conferred upon it by estoppel or waiver; this is just as contrary to first principles as is the proposition that a jurisdiction which it would not otherwise possess can be conferred on the court by consent', per Godfrey JA).

23 See, for example, *Doleman and Sons v Osset Corp* [1912] 3 KB 257; *Baker v Jones* [1954] 2 All ER 553 at 559, [1954] 1 WLR 1005 at 1010 per Lynskey J.

24 *Re Wynn's Will Trusts, Public Trustee v Newborough* [1952] Ch 271, [1952] 1 All ER 341.

25 According to the Arbitration Ordinance (Cap 609) s 20, adopting the UNCITRAL Model Law art 8, a court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the matter to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

26 *Bennett and White (Calgary) Ltd v Municipal District of Sugar City* [1951] AC 786 at 808–809 (PC); *R v Lord Chancellor, ex p Witham* [1998] QB 575 at 586, [1997] 2 All ER 779 at 788, (1997) Times, 13 March ('access to the court is a constitutional right; it could only be denied by the government if it persuades Parliament to pass

jurisdiction to dispose of that issue can only, therefore, be ousted by the plain words of a statute.[27]

[2-16] There are many instances in Hong Kong where the Court of First Instance and District Court's jurisdiction has been ousted (or at least an attempt has been made to oust the court's jurisdiction) by statute.[28] The statutory provisions conferring exclusive jurisdiction upon the Small Claims Tribunal[29] and the Labour Tribunal[30] provide a clear illustration. The question whether or not the Lands Tribunal enjoys exclusive jurisdiction over matters falling within its statutory jurisdiction has been more controversial.[31]

legislation which specifically, in effect by express provision, permitted the executive to turn people away from the court's door', per Laws J).

27 *AG v Boden* [1912] 1 KB 539 at 561, [1911–13] All ER Rep Ext 1306 at 1322 per Hamilton J. There have been many cases in which ouster of the court's jurisdiction to grant judicial review has been considered by the courts: see, for example, *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147, [1969] 1 All ER 208 (HL); *Chan Yik Tung v Hong Kong Housing Authority* [1989] 2 HKC 394; *R v Director of Immigration and Refugee Status Review Board, ex p Do Giau* [1992] 1 HKLR 287, [1992] HKCU 343; *Wong Pei Chun v Hong Kong Housing Authority* [1996] 2 HKLR 293, [1996] HKCU 532 (decision of Housing Authority to issue notices to quit amenable to judicial review; *Refugee Status Review Board v Bui Van Ao* [1997] 3 HKC 641 (CA); *Thai Muoi v Hong Kong Housing Authority* [2000] HKCU 370 (unreported, HCAL 155/1999, 30 May 2000) (notice to quit issued by Housing Authority; Housing Ordinance (Cap 283) s 19(3) provided: 'No court shall have jurisdiction to hear any application for relief by or on behalf of a person whose lease has been terminated'; held that the section was not clear enough to override the presumption of the legislative intent that decisions of the executive, the tribunal or other officials are justiciable by way of judicial review).

28 District Court Ordinance (Cap 336) s 40 makes it clear that nothing in the Ordinance will affect the provisions of the Small Claims Tribunal Ordinance (Cap 338), the Landlord and Tenant (Consolidation) Ordinance (Cap 7) or the Labour Tribunal Ordinance (Cap 25) or any other Ordinance which confers exclusive jurisdiction on a court or tribunal other than the District Court.

29 Ie the Small Claims Tribunal Ordinance s 5(2).

30 Ie the Labour Tribunal Ordinance s 7(2).

31 It has been held in *Kong Hoa (Hong Kong) Ltd v Lau Hung Kwan* [1976] HKLR 62, [1976] HKCU 8, *Winbase Industrial Ltd v Mightyton Property Management Ltd* [1994] HKCU 141 (unreported, HCA 10232/1994, 25 October 1994) and *Mass Transit Railway Corp v Lam Kai Fai* [1995] HKCFI 319 (unreported, HCA 1796/1994, 21 July 1995) that the jurisdiction of the Lands Tribunal is exclusive. More recently, however, this view was rejected in *Ngan Chor Ying v Year Trend Development Ltd* [1995] 1 HKC 605, where Findlay J held that the jurisdiction of the Lands Tribunal in respect of the matters listed in the Tenth Schedule to the Building Management Ordinance (Cap 344) was not exclusive. He concluded that an Ordinance should not be interpreted so as to take away the jurisdiction of the superior courts, unless it did so by express words or necessary implication and there was nothing in the Ordinance which led to the conclusion that the legislature must have intended that the Lands Tribunal should have exclusive jurisdiction over all matters listed in the Tenth Schedule. The position now has been confirmed by the Court of Appeal in *Wong Hing Cheong v Wah E Investment Ltd* [2002] 2 HKLRD 175, [2002] 3 HKC 59

that all writs issued in the District Court must contain a plea that the relief sought falls within the jurisdiction of the District Court, specifying which section(s) of the District Court Ordinance apply.[45]

[2-26] Further, the District Court has jurisdiction to hear and determine any proceedings by way of interpleader in which the amount or value of the matter in dispute does not exceed $1,000,000.[46]

6.3 Money recoverable by enactment

[2-27] The District Court has jurisdiction to hear and determine any action (or counterclaim)[47] for the recovery of any penalty,[48] expenses, contribution or other like demand which is recoverable by virtue of any enactment for the time being in force and for the recovery of any sum which is declared by any enactment to be recoverable as a civil debt if: (a) it is not expressly provided by that or any other enactment that the demand is recoverable only in some other court; and (b) the amount claimed does not exceed $1,000,000.[49]

6.4 Abandonment of part of claim to give court jurisdiction

[2-28] If the plaintiff agrees to abandon the amount of his claim (or the defendant his counterclaim)[50] which is in excess of the District Court's jurisdiction and the action is one in which the District Court otherwise has jurisdiction, the District Court then does have jurisdiction to hear and determine the action.[51] The District Court cannot, however, award to the plaintiff in an action under this provision an amount exceeding its monetary jurisdiction limit for the action[52] and the judgment of the court in an action limited under this section is in full discharge of all demands in the cause of action.[53]

where the amount of damages claimed is left blank: *Upton v Farmer* (1930) 142 LT 526; *Legon v Count* [1945] KB 391, [1945] 1 All ER 710 (CA, Eng).

45 See District Court Practice Direction No 27 para 4. Failure to comply will not, however, be fatal to a plaintiff's claim so as to lead to the action being struck out: *Sunbeam Investment Ltd v Mannitop Investment Co Ltd* [2007] HKCU 1366 (unreported, DCCJ 1985/2006, 9 August 2007) at [6] per Dty Judge Abu B bin Wahab.

46 District Court Ordinance s 32(3).

47 See the District Court Ordinance s 39.

48 'Penalty' does not include a fine to which any person is liable on conviction on indictment or on summary conviction: District Court Ordinance s 33(2).

49 District Court Ordinance s 33(1)(a) and (b).

50 See the District Court Ordinance s 39.

51 ibid, s 34(1), as amended by the District Court (Amendment) Ordinance s 23.

52 District Court Ordinance s 34(2).

53 ibid, s 34(3).

6.5 Jurisdiction in respect of recovery of land

[2-29] The District Court has jurisdiction to hear and determine any action[54] for the recovery of land where the annual rent or the rateable value of the land, determined in accordance with the Rating Ordinance (Cap 116), or the annual value of the land, whichever is lower, does not exceed $240,000.[55]

6.6 Jurisdiction where title to land in question

[2-30] The jurisdiction of the District Court over actions where title to land is in issue depends upon the rateable value or annual value of the land. The District Court has jurisdiction to hear and determine any action[56] which would otherwise be within the jurisdiction of the District Court and in which the title to an interest in land comes into question if: (a) for an easement or licence, the rateable value, determined in accordance with the Rating Ordinance or the annual value, whichever is lower, of the land over which the easement or licence is claimed does not exceed $240,000; or (b) for any other case, the rateable value or the annual value, whichever is the less, of the land does not exceed $240,000.[57]

6.7 Equity jurisdiction

[2-31] The provisions relating to the District Court's equity jurisdiction are quite complex. Subject to the maximum limits in amount set out below, the District Court enjoys the same jurisdiction as the Court of First Instance to hear and determine any of the following proceedings:[58]

(a) proceedings relating to or for the administration of the estate of a deceased person;[59]

(b) proceedings for the execution of any trust or for a declaration that a trust subsists or proceedings under section 3 of the Variation of Trusts Ordinance (Cap 253);[60]

54 'Action' includes a counterclaim: District Court Ordinance s 39.

55 District Court Ordinance s 35.

56 'Action' includes a counterclaim: ibid, s 39.

57 ibid, s 36(a) and (b). The District Court has jurisdiction under this provision to hear and adjudicate upon 'pure title cases': see *Ng Cho Chu Judy v Chan Wing Hung* [2016] 1 HKLRD 1073, [2016] HKCU 124 (DCt) (court had jurisdiction to adjudicate upon an action involving the issue whether a claimant had an interest in land by way of resulting trust). The District Court also has jurisdiction to hear and adjudicate upon adverse possession cases under this provision: see *Lam Man Lau v Secretary for Justice* [2016] HKCU 1740 (unreported, DCCJ 1682/2012, 25 July 2016).

58 'Proceedings' includes a counterclaim: District Court Ordinance s 39.

59 The particulars of the claim need not include an averment that the value of the estate does not exceed this sum: *Cheesewright v Thorn* (1869) 38 LJ Ch 615.

60 See the Variation of Trusts Ordinance (Cap 253) s 3. Constructive trusts as well as express trusts are within the court's jurisdiction: *Clayton v Renton* (1867) LR 4 Eq 158. Where the defendant is alleged to hold a tenancy in trust for the plaintiff, the

(c) proceedings for the foreclosure or redemption of a mortgage or for enforcing a charge or lien;[61]

(d) proceedings for the specific performance, or for the rectification, rescission or delivery up or cancellation of an agreement for the sale, purchase or lease of property;[62]

(e) proceedings for the maintenance or advancement of an infant;

(f) proceedings for the dissolution or winding up of a partnership, whether or not the existence of the partnership is in dispute;[63] and

(g) proceedings for relief against fraud or mistake.[64]

[2-32] The maximum limit in amount or value in respect of (a) an estate of a deceased person; (b) an estate or fund subject or alleged to be subject to the trust; (c) the amount owing under the mortgage, charge or lien; (d) for an agreement for sale or purchase, the purchase money or, for an agreement for lease, the value of the property; (e) the property of the infant; (f) the assets of the partnership; and (g) the damage sustained or the estate or fund for which relief is sought is:

(a) $1,000,000 where the proceedings do not involve or relate to land;

(b) $1,000,000 where the proceedings partly involve or partly relate to land and the part that does not so involve or does not so relate exceeds $1,000,000 in amount or value;

(c) $3,000,000 where the proceedings wholly involve or wholly relate to land; and

(d) $3,000,000 where the proceedings partly involve or partly relate to land and the part that does not so involve or relate does not exceed $1,000,000 in amount or value.[65]

[2-33] In all these proceedings, a judge has, in addition to his other powers and authority, the powers and authorities of a judge of the Court of First Instance acting in the exercise of the equitable jurisdiction of the Court of First Instance.[66]

value of the estate is the value of the tenancy and not the value of the reversionary estate: *McDonald and Spratt v Barnes* (1951) 101 L Jo 667.

61 The limit of the court's jurisdiction depends upon the amount of the charge at the time the action is brought: *Shields, Whitley and District Amalgamated Model Building Society v Richards* (1901) 45 Sol Jo 537, 84 LT 587.

62 In the case of a sale, jurisdiction is determined by the actual amount of the purchase price and not by the value of the property: *R v Judge Whitehorne sub nom R v Birmingham County Court Judge and Humphreys* [1904] 1 KB 827 (property mortgaged).

63 An action in which the plaintiff claims a declaration of partnership and an account of his share of the profits is in substance an action for the dissolution or winding up of a partnership: *R v Judge Lailey, ex p Koffman* [1932] 1 KB 568 (CA, Eng).

64 District Court Ordinance s 37(1)(a)–(g). Under this provision the court may set aside a deed obtained by fraud releasing a judgment debt and costs: *Stephenson v Garnett* [1898] 1 QB 677 (CA, Eng).

65 District Court Ordinance s 37(2)(a)–(g) and (i)–(iv).

66 ibid, s 37(3).

[2-34] Nothing above, however, gives jurisdiction to the District Court in proceedings for the recovery of land or relating to the title to land where the annual rent or the rateable value, determined in accordance with the Rating Ordinance (Cap 116), or the annual value of the land, whichever is the least, exceeds $240,000.[67]

6.8 No splitting of causes of action to confer jurisdiction

[2-35] There is an important prohibition upon a plaintiff splitting a cause of action to bring it within the District Court's jurisdiction and statute provides that no cause of action (or counterclaim) may be split or divided so as to be made the ground of two or more actions.[68] What constitutes a cause of action for this purpose is a question of fact and can give rise to difficulty in construction. Clearly, if the defendant borrowed $1,200,000 from the plaintiff, the plaintiff cannot bring his suit within the jurisdiction of the District Court by commencing two actions for $600,000 each. The position is more complex where there has been a continuous course of dealings between the parties. The courts have held, for example, that where one item in a tradesman's bill is connected with another, in the sense that the dealing is not intended to terminate with one contract but to be continuous, so that one item, if not paid, is united with another, the whole bill forms one entire demand and consequently one cause of action,[69] but where a contract for the hire of goods provides for the payment of periodic sums by way of rent, each sum constitutes a separate cause of action.[70] On the breach of a hire-purchase agreement where the goods have been seized, it has been held that an action for arrears of hire before the termination of the agreement is an action for debt and a later action for damages for breach of contract is not brought on the same cause of action, and is not, therefore, barred.[71] Similarly, damage to goods and injury to the

67 ibid, s 37(4).

68 ibid, s 45.

69 See *Neale v Ellis* (1843) 1 Dow & L 163. See also *Yeung Shek Ming, t/a Yeung Luen Kee (a firm) v Loong Kwong Fai* [1963] 3 HKDCLR 167 (claim for goods sold and delivered in circumstances showing a running account which would reveal a balance due and owing at a given time; held that this gave rise to one cause of action and could not be split). But cf *Brunskill v Powell* (1850) 19 LJ Ex 362 where a plaintiff, who had supplied liquor and lent money to a defendant at different times, and who had marked down separate items but subsequently entered them in a book as one account and sent an account for the whole to the defendant, was allowed to sue in respect of separate causes of action, and *Lun Tai Insurance Co Ltd v Lee Ying-lin* [1965] HKLR 961, [1965] HKCU 85 (FC) where a plaintiff insurance company employed the defendant as broker and sued for money had and received on two separate occasions. There was no evidence that the parties had agreed to a running account. It was held that no weight could be attached to the fact that the plaintiff rendered accounts for the total sum due and separate causes of action existed.

70 *Rentit Ltd v Oaten* [1938] LJNCCCR 137.

71 *Overstone Ltd v Shipway* [1962] 1 All ER 52, [1962] 1 WLR 117 (CA, Eng).

person, although occasioned by one and the same wrongful act, are infringement of separate rights and, therefore, give rise to separate causes of action.[72]

[2-36] Objection to the alleged splitting should be taken at the first claim rather than at the claim for the residue.[73] Where the defendant alleges as a preliminary objection to the court's jurisdiction that a cause of action has been split, facts to substantiate this allegation must be shown on the face of the writ.[74]

[2-37] Where a claim has been split, the action must be dismissed and cannot be transferred to the Court of First Instance.[75]

6.9 Jurisdiction as to counterclaims and transfer of counterclaims to Court of First Instance

[2-38] In respect of the jurisdiction of the District Court, references to an action or proceeding are to be construed as including references to a counterclaim.[76] If, therefore, a party makes a claim and the defendant counterclaims, the question whether or not the District Court has jurisdiction to adjudicate upon the counterclaim must be resolved by application of the rules set out above.

[2-39] The effect of this is that, if a defendant in an action or proceeding within the jurisdiction of the District Court makes a counterclaim which is not within the jurisdiction of the District Court but is within the jurisdiction of the Court of First Instance, the District Court has three alternative courses of action open to it. It may, either of its own motion or on the application of any party, order that the whole proceedings be transferred to the Court of First Instance. Alternatively, it may order that the proceedings on the counterclaim be transferred to the Court of First Instance and the proceedings on the plaintiff's claim, except for a defence of set-off as to the whole or part of the subject matter of the counterclaim, be heard and determined by the District Court. The third alternative is that, where the court considers the whole proceedings should be heard and determined in the District Court, the matter must be reported to a judge of the Court of First Instance[77] and, on the receipt of the report, the judge may, as he thinks fit, order either that the whole proceedings be transferred to the Court of First Instance or that the whole proceedings be heard and determined by the District Court or that the proceedings on the counterclaim be transferred to the Court of First Instance and

72 *Brunsden v Humphrey* (1884) 14 QBD 141, [1881–5] All ER Rep 357 (CA, Eng).

73 *Vines v Arnold* (1849) 8 CB 632; *Adkin v Friend* (1878) 38 LT 393, [1874-80] All ER Rep Ext 1616; *Sanders v Hamilton* (1907) 96 LT 679. But see *Lun Tai Insurance Co Ltd v Lee Ying-lin* [1965] HKLR 961, [1965] HKCU 85 (FC).

74 *Wing Kwong Electrical Supplies v Chan Yin* [1959] HKDCLR 148, [1959] HKCU 84.

75 ibid.

76 District Court Ordinance s 39.

77 ibid, s 41(3)(a)–(c). See *Re Estate of Chow Nai Chee* [2010] 5 HKLRD 640, [2010] 6 HKC 515 (the District Court should make more use of its powers under s 41(3)(c), per Lam J); *Cecchetti Silvia Giada v Tsang Tak Yip* [2016] HKCU 1733 (unreported, DCCJ 300/2015, 22 July 2016) (matter reported to the Court of First Instance under s 41(3)(c), District Court Ordinance for determination of the appropriate forum for the trial).

the proceedings on the plaintiff's claim, except for a defence of set-off as to the whole or part of the subject matter of the counterclaim, be heard and determined by the District Court.[78] If no report is made or if on any such report it is ordered that the whole proceedings be heard and determined in the District Court, the District Court will have jurisdiction to hear and determine the whole proceedings notwithstanding any enactment to the contrary.[79]

[2-40] The Rules sensibly provide that, where an order is made that the proceedings on the counterclaim be transferred to the Court of First Instance but the claim be heard and determined in the District Court, and judgment on the claim is given for the plaintiff, execution of the judgment in the District Court must, unless the judge of the Court of First Instance orders otherwise, be stayed until the proceedings transferred to the Court of First Instance have been concluded.[80]

6.10 Matrimonial jurisdiction of the District Court

[2-41] The District Court enjoys considerable matrimonial jurisdiction in its capacity as the Family Court. In some cases this jurisdiction is shared with the Court of First Instance; in others the court has power in appropriate circumstances to transfer the case to the Court of First Instance for adjudication.

[2-42] The District Court's most significant matrimonial jurisdiction is as follows:

(a) Jurisdiction under the Matrimonial Causes Ordinance (Cap 179) to grant divorces,[81] nullity decrees,[82] judicial separations[83] and to make orders in respect of proceedings for presumption of death.[84] Proceedings under the Ordinance must be commenced in the District Court, but may be transferred to the Court of First Instance.[85] The District Court may make orders under the Matrimonial Causes Ordinance even though the amount claimed in the proceedings would, but for that Ordinance, normally be beyond the jurisdiction of the District Court.[86]

(b) Jurisdiction under the Matrimonial Proceedings and Property Ordinance (Cap 192) to grant ancillary and other relief in matrimonial

78 ibid, s 41(4)(a)–(c).

79 ibid, s 41(6).

80 ibid, s 41(5).

81 Matrimonial Causes Ordinance (Cap 179) s 3.

82 ibid, s 4.

83 ibid, s 5.

84 ibid, s 6.

85 ibid, s 10A. According to the Matrimonial Causes Rules (Cap 179A) r 32(1), the District Court may order that a cause or application pending in that court be transferred to the Court of First Instance where, having regard to all the circumstances including the difficulty or importance of the cause or application or of any issue arising therein, the court thinks it desirable that the cause or application should be heard in the Court of First Instance.

86 Matrimonial Causes Ordinance s 10A(3).

[6-159] Where judgment is given in favour of the defendant, he may not issue execution against the third party without the leave of the court until the judgment against him has been satisfied.[384]

9.4 Contribution notices against an existing party

[6-160] Specific provision is made in Order 16 rule 8 for a defendant to make a claim or obtain relief from someone who is already a party to the action (ie as opposed to someone who is not a party). This is done by serving what is commonly called a contribution notice on the other party.[385] Let us suppose, by way of example, that a plaintiff pedestrian, who is injured as a result of a crash between two drivers, commences proceedings against both drivers. Further, that one of the drivers has sustained damage to his vehicle caused by the other driver. In such a case, he may seek a contribution against his co-defendant in respect of his liability, if any, towards the plaintiff and for the damage suffered to his car.

[6-161] The person on whom the notice is served then has 14 days to issue a summons applying to the court for directions.[386]

[6-162] The Order 16 rule 8 procedure is not, however, applicable if the claim should be made by the defendant by way of counterclaim against the other party under Order 15 rule 3.

9.5 Claims by third and subsequent parties

[6-163] Order 16 rule 9 contains a procedure similar to that in third party proceedings whereby a third party may bring in a fourth party, and a fourth party a fifth party, and so on successively.[387] The claim by the third party or relief sought against the fourth party must be of the same kind as is specified in Order 16 rule 1(1).[388] The third party may serve a fourth party notice without leave provided the action was begun by writ and the notice is issued before the expiration of 14 days after the time limited for acknowledging service of the third party notice against him.[389] Thereafter, the rules relating to third party proceedings[390] apply with any necessary modifications as if the third party were a defendant.[391]

party) [1977] 1 All ER 806, [1977] 1 WLR 1458 (CA, Eng), where the successful third party was entitled to costs against the defendant, who himself was successful against the legally-aided plaintiff.

384 RHC and RDC O 16 r 7(2). Unless given at the trial, application for such leave is made ex parte to a master on affidavit.

385 RHC and RDC O 16 r 8.

386 RHC and RDC O 16 r 4(2), applied and modified by RHC and RDC O 16 r 8(4).

387 RHC and RDC O 16 r 9(1).

388 ibid.

389 RHC and RDC O 16 r 9(3). After the expiration of this time, or if the action was begun by originating summons, leave to issue a fourth party notice is required: RHC and RDC O 16 r 9(3). As to the application, see RHC and RDC O 16 r 2, applied by RHC and RDC O 16 r 9(1).

390 Ie RHC and RDC O 16 rr 1–8.

391 RHC and RDC O 16 r 9(1).

CHAPTER 7

CAUSES OF ACTION, JOINDER OF ACTIONS AND CONSOLIDATION OF ACTIONS

1. MEANING OF 'CAUSE OF ACTION'

[7-1] In *Letang v Cooper*[1] Lord Diplock defined a 'cause of action' as simply meaning a factual situation the existence of which entitles one person to obtain from the court a remedy against another person. The phrase has been held from the earliest time to include every fact which is material to be proved to entitle the plaintiff to succeed, and every fact which the defendant would have a right to traverse.[2] 'Cause of action' has also been described more broadly as being that particular act on the part of the defendant which gives the plaintiff his cause of complaint.[3]

2. JOINDER OF CAUSES OF ACTION AGAINST SAME DEFENDANT

2.1 Introduction

[7-2] Occasions will arise where a party wishes to join more than one cause of action against the same defendant. For example, the plaintiff might allege that he has been defamed by the defendant on two entirely separate occasions and it would clearly be a waste of time and costs to pursue two distinct actions.

1 [1965] 1 QB 232 at 242, [1964] 2 All ER 929 at 934 (CA, Eng) per Lord Diplock.

2 *Cooke v Gill* (1873) LR 8 CP 107 at 116 per Brett J. Lord Esher MR later defined the words as comprising every fact, though not every piece of evidence, which it would be necessary for the plaintiff to prove if traversed, to support his right to the judgment of the court: *Read v Brown* (1888) 22 QBD 128 at 131 (CA, Eng).

3 *Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 458, [1971] 1 All ER 694 (PC).

[7-3] Joinder of causes of action must be read together with joinder of parties[4] and third party proceedings.[5] If the plaintiff wishes to sue two or more defendants in the same action, this is not a case of joinder of causes of action but rather joinder of parties and the rules relating to joinder of parties will apply. The purpose of the rules relating to joinder of causes of action, joinder of parties and third party proceedings is, of course, the same; that is to avoid multiplicity of actions and reduce costs and delay.[6]

2.2 When can causes of action be joined?

[7-4] The power to join causes of action is very wide and the rules provide that the plaintiff may claim relief in one action against the same defendant in respect of more than one cause of action (a) if the plaintiff claims and the defendant is alleged to be liable in the same capacity in respect of all the causes of action;[7] or (b) if the plaintiff claims or the defendant is alleged to be liable in the capacity of executor or administrator of an estate in respect of one or more of the causes of action and in his personal capacity but with reference to the same estate in respect of all the others.[8]

[7-5] This power must be read, however, subject to the overriding discretion of the court to order separate trials where it appears to the court that joinder might embarrass or delay the trial.[9]

[7-6] In addition, the court has power to give the plaintiff leave to join several causes of action in the same action in whatever capacity the claims are made by or against a party.[10] The application for leave is made ex parte by affidavit

4 See Rules of the High Court (Cap 4A) (RHC) and Rules of the District Court (Cap 336H) (RDC) O 15 r 4(1) and see Chapter 6 'Parties'.

5 See RHC and RDC O 16 and Chapter 6 'Parties'.

6 These rules were intended to give effect to one of the great objectives of the Supreme Court of Judicature Acts 1873 and 1875 (UK), namely to bring all parties to disputes relating to one subject matter before the court at the same time so that the disputes might be determined without the delay, inconvenience and expense of separate actions and trials (see *Byrne v Brown (Diplock, third party)* (1889) 22 QBD 657 at 666–667 (CA, Eng) per Lord Esher MR) and so that, so far as possible, all matters in controversy between the parties might be completely and finally determined, and all multiplicity of legal proceedings concerning any of those matters avoided: see High Court Ordinance (Cap 4) s 16(2); District Court Ordinance (Cap 336) s 48(4). The modern practice is to construe RHC and RDC O 15 r 1, dealing with the joinder of causes of action, as liberally as RHC and RDC O 15 r 4, dealing with joinder of parties: see *Payne v British Time Recorder Co Ltd and WW Curtis Ltd* [1921] 2 KB 1, [1921] 2 All ER Rep 388 (CA, Eng).

7 RHC and RDC O 15 r 1(1)(a).

8 RHC and RDC O 15 r 1(1)(b).

9 Where the joinder of causes of action is permissible under the rule without leave, joinder is a matter of right, but the court is empowered under RHC O 15 r 5(1) to order separate trials or make such other order as may be expedient where it appears to the court that the joinder may embarrass or delay the trial.

10 RHC and RDC O 15 r 1(1)(c).

before the issue of the writ or originating summons and stating the grounds of the application.[11]

[7-7] Where the plaintiff unites in one action several distinct claims founded on distinct grounds, each claim must be stated and pleaded separately and distinctly.

3. Consolidation of Actions

3.1 The court's jurisdiction to order consolidation

[7-8] Consolidation is the process by which two or more causes or matters are by order of court combined or united and treated as one cause of action. The main purpose of consolidation is, therefore, just like joinder, to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action.

[7-9] The jurisdiction to consolidate arises where there are two or more causes or matters pending in the court and it appears to the court:

(a) that some common question of law or fact arises in both or all of them;
(b) that the rights to relief claimed in them are in respect of or arise out of the same transaction or series of transactions; or
(c) that for some other reason it is desirable to make an order consolidating them.[12]

[7-10] In these circumstances, the court may order those causes of action or matters to be consolidated on such terms as it thinks just.[13] The circumstances in

11 RHC and RDC O 15 r 1(2).

12 RHC and RDC O 4 r 9(1)(a)–(c).

13 RHC and RDC O 4 r 9(1). The power to make an order for consolidation is discretionary and the court has to consider whether such an order is desirable in all the circumstances: see *Payne v British Time Recorder Co Ltd and W W Curtis Ltd* [1921] 2 KB 1 (CA, Eng) at 16 per Scrutton LJ. See also *Sincere View International Ltd v Kenco Investments Ltd* [2006] HKCU 221 (unreported, HCA 301/2005, 3 February 2006) ('In deciding whether to order consolidation of actions, the court has an unfettered discretion. The power is to be exercised in a flexible way with regard to the particular circumstances of the situation. The objective of such an order is to save time and costs. There is no hard and fast rule that just because the parties are identical and some common question of fact or law is involved in both actions, it would be expedient and proper to order consolidation', per Kwan J); *Big Island Construction (HK) Ltd v Wu Yi Development Co Ltd* (unreported, HCA 1957/2005, 10 April 2008) ('The court has an unfettered discretion in deciding whether to order consolidation of two or more causes or matters. Even though the power is to be exercised with some degree of flexibility, a court must nevertheless be satisfied that it would be proper and expedient to make such an order, having regard to the particular circumstances of the situation, including, amongst other things, that the objective of such an order is to save time and costs, and that where there is a substantial overlapping of issues and parties, it is desirable to resolve the disputes in the different actions on one occasion by the same judge', per Chu J quoted in *Komal Patel & Ors v Chris Au & Ors* [2016] HKCU 105 (unreported, HCA 183/2014, HCA 2063/2015, 14 January 2016).

which actions may be consolidated are broadly similar to those in which parties may be joined in one action.[14] Accordingly, actions relating to the same subject matter between the same plaintiff and the same defendant, or between the same plaintiff and different defendants[15] or between different plaintiffs and different defendants, or between different plaintiffs and the same defendant, may be consolidated on the application of either a plaintiff or a defendant.

[7-11] On the other hand, there may be circumstances which render it undesirable or even impossible, or at least impracticable, to make an order for consolidation. Thus, two actions cannot be consolidated where the plaintiff in one action is the same person as the defendant in another action unless one action can be ordered to stand as a counterclaim in the consolidated action.[16] Again it is generally impossible to consolidate actions where the plaintiffs in two or more actions are represented by different solicitors.[17] Moreover, a consolidation order will as a matter of discretion be refused where it would be likely to cause embarrassment at the trial.[18] Consolidation has been refused on the grounds of the different stages of progress that the actions proposed to be consolidated have reached.[19] The court may also refuse an order for consolidation where the application is made late in the day and such an order would require the vacation of trial dates already fixed.[20]

14 As to joinder of parties, see RHC and RDC O 15 r 4 and Chapter 6 'Parties'.

15 For example, it may be appropriate for two actions to be consolidated where the plaintiff has sustained personal injuries in two separate incidents so that the court can determine the causation and extent of injuries caused by each accident: see *Lau Wing Yeung v Kowloon Cricket Club* [2014] HKCFI 703 (unreported, HCPI 955/2013, 16 April 2014) (plaintiff sued defendant claiming damages for personal injuries sustained as a result of a fall in the defendant's kitchen; he also commenced an action claiming damages for personal injuries sustained in a traffic accident some 18 months later; Master Leong observed that: 'right from the beginning the plaintiff and those advising him should have been aware that there was an overlap of injury . . . and both claims should have been consolidated so that, whilst liability could be determined separately against different defendants, the issues of causation and damages have to be investigated and apportioned, if needed, between the defendants'). See also *First Kind Ltd v Liu Keng Chor* [2016] 3 HKLRD 39, [2016] 4 HKC 90 (LT) (six applications under the Land (Compulsory Sale for Redevelopment) Ordinance (Cap 545) for compulsory sale of units in buildings on adjacent lots ordered to be consolidated and heard together).

16 See *Wing Yip Refrigeration Co Ltd v Jardine Engineering Corp Ltd* (unreported, HCA A3212/1989).

17 See *Lewis v Daily Telegraph Ltd (No 2)* [1964] 2 QB 601, [1964] 1 All ER 705 (CA, Eng). The plaintiffs could, however, agree that only one firm of solicitors should act on behalf of all of them, so as to pave the way to consolidation. That firm must then take steps to appear on the record as the sole solicitors for all the plaintiffs.

18 See *Daws v Daily Sketch and Sunday Graphic Ltd* [1960] 1 All ER 397, [1960] 1 WLR 126 (CA, Eng) (actions by different plaintiffs based on the same libel but where different defences were raised in respect of each of them).

19 *Wing Yip Refrigeration Co Ltd v Jardine Engineering Corp Ltd* (unreported, HCA A3212/1989).

20 See *Pannam Ltd v Gheorghe Nicolaescu* [2016] HKCU 2364 (unreported, HCMP 339/2015, 30 September 2016).

[7-12] In an appropriate case, the court has power to make an order for partial consolidation. A good illustration would be personal injury actions. Where several actions have been commenced by different plaintiffs, each of whom has a separate claim for damages for personal injuries, the actions may be consolidated on the issue of liability, but thereafter each plaintiff is left to pursue his separate claim for damages independently.[21]

3.2 Application for consolidation

[7-13] An application for consolidation is made by summons and should be made as soon as possible, although it may also be made on the case management summons.[22] A separate summons should be issued in each action proposed to be consolidated or one summons may be issued provided it sets out fully the titles of each such action. The principle is that all the actions to be consolidated should be before the court at the same time.[23]

3.3 Alternatives to consolidation

[7-14] Where the court considers that it is not desirable or appropriate to make an order for the consolidation of two or more causes or matters, it has power to order them to be tried at the same time, or one immediately after the other, or may order any of them to be stayed until after the determination of any other of them.[24] Orders of this nature are very useful in that, for example, they will save the

21 *Healey v A Waddington & Sons Ltd* [1954] 1 All ER 861, [1954] 1 WLR 688 (CA, Eng). Where the several plaintiffs are represented by different solicitors, it will be necessary for all of them to agree that the conduct of the action on the issue of liability would be placed in the hands of one solicitor. An alternative form of order is to treat the action nearest to the date of trial as a test action on the issue of liability, by which all the other parties agree to be bound, and to stay the other actions meanwhile: see *Amos v Chadwick* (1877) 4 Ch D 869.

22 As to the case management summons, see Chapter 10 'Case Management and Interlocutory Proceedings'.

23 See *Daws v Daily Sketch and Sunday Graphic Ltd* [1960] 1 All ER 397, [1960] 1 WLR 126 (CA, Eng).

24 RHC and RDC O 4 r 9(1). See, for example, *Ko Chi Keung v Lee Ping Yan Andrew* (unreported, HCA 18029/1999, 28 February 2001) (application for consolidation of two actions; held that consolidation not suitable since, although common questions of fact involved, the issues in one action were much narrower than the issues in the other; however, since there were common witnesses where their credibility was in issue, order made that one action be tried immediately following the other by the same judge, per Sakhrani J); *Re Prudential Enterprises Ltd* [2003] HKCU 989 (unreported, HCCW 594/1999, 19 August 2003) (substantial overlapping of issues in three actions; in making case management decisions, the court was primarily concerned with saving of time and cost and with the avoidance of unnecessary delay, undue complexity and overloading of issues; in the present context, the main merit of having the three actions tried together was that the common witnesses would be saved the inconvenience of having to repeat their testimony; this was of particular significance for those witnesses living overseas and for the common experts;

expense of two attendances by counsel, solicitors and witnesses and the trial judge will be able to try the several actions in such order as may be convenient or even at the same time and, with the consent of the parties, which will normally be readily given, to treat the evidence in one action as evidence in the other or others. Any party in the second action, who is not also a party to the first, will be permitted to take part in and to attend the trial of the first and cross-examine the witnesses.

3.4 Consolidation distinguished from joinder of causes of action

[7-15] It can be seen, therefore, that consolidation is wider in scope than joinder of causes of action. Whereas two or more actions can be consolidated in an appropriate case even when they involve different plaintiffs or different defendants, the right to join causes of action is restricted to the situation where the plaintiff wishes to pursue more than one cause of action against the same defendant.

however, the court was not confident that trying the three actions together would achieve a great saving in time and cost, as the evidence in each action would vary; held that the proper order was that each action should be tried one after the other, per Chu J); *Tsui Wai Kuen v Cheung King Chung Ray* [2007] HKCU 1984 (unreported, HCA 2405/2007, 26 November 2007) (plaintiff presented petition under the former Companies Ordinance (Cap 32) s 168A (now s 724 of Cap 622) and also commenced derivative action in circumstances where there was overlapping in the relief claimed; held that the two actions should be heard by the same judge who would decide, at the interlocutory stage, the order in which the actions would be tried and whether the evidence and fruits of discovery in the first action could stand in the second action, per Dty Judge Carlson); *Ironwood Capital Ltd v Du Wang* [2007] HKCU 1213 (unreported, CACV 34/2007, 13 July 2007) (order that actions be consolidated, but action for account be tried before action for recovery; both actions were to be heard by the same judge and the finding in the first action would stand as the finding in the second action, per Rogers VP).

CHAPTER 8

PLEADINGS

1. THE NATURE AND PURPOSE OF PLEADINGS

1.1 Introduction; the meaning of 'pleadings'

[8-1] In early times in England, pleadings were oral and not written and, upon appearance each party made in open court a verbal statement of the facts on which he relied. It was the duty of the judges to moderate this oral controversy so as to reach a point where a specific matter was affirmed by one side and denied by the other. When this point was reached, the parties were said to be 'at issue' (ie at the end of their pleading). If an issue thus arrived at was a question of law, it was decided by the judge; if it was a question of fact, it was tried according to one of the modes of trial then in vogue. During the oral contention by which the issues were ascertained, entries were made on a parchment roll by an officer of the court of the allegations made by each party in turn. On this roll was also entered a short notice of the nature of the action and of the acts of the court itself. This parchment roll, called 'the record', was the official register of the pleadings. It was preserved as a perpetual, intrinsic, and exclusively admissible testimony of all the proceedings to which it referred. These oral pleadings were delivered either by the party himself, or by his pleader (called 'narrator' or 'advocatus'). In very early times, it was established that none but a regular advocate, or barrister, could be a pleader in a case not his own. Gradually, it became the practice for the pleader to enter his statement in the first instance on the parchment roll, to which his opponent was allowed to have access in preparing his answer. Then, to lessen inconvenience, a practice arose by which the pleader delivered his pleading already written, and its entry on the roll was deferred until later in the action. However, the abandonment of oral pleading did not change the form of the allegation to be made. The same principles continued to govern the practice of pleaders, and the parties came to an issue in their written pleadings as in former times they had done when they disputed orally at the bar of the court. The last surviving relic of the oral pleading is the defendant's plea of 'guilty' or 'not guilty' in a criminal trial.

[8-2] Nowadays, the term 'pleading' is used in civil litigation to denote a document in which a party to proceedings in court is required by law to formulate in writing his case or part of his case in preparation for the hearing. Pleadings include the statement of claim,[1] the defence, any counterclaim and any reply and

1 This is the case whether the statement of claim is indorsed on the writ or served separately.

defence to counterclaim. They also include any subsequent documents used to express the party's case.[2] For certain purposes, further and better particulars are also pleadings.[3] A concise statement of the nature of the claim indorsed on the writ is not, however, a pleading,[4] nor is a notice of appeal.[5] Further, for the purposes of the Rules, a 'pleading' does not include a petition, summons or preliminary act.[6]

1.2 The purpose of pleadings

[8-3] The purpose of pleadings is to give fair notice of the case which has to be met and to define the issues on which the court will have to adjudicate in order to determine the matters in dispute between the parties.[7] Thus, a party is bound by his pleadings and his case is confined to the issues raised on the pleadings unless and until they are amended.[8] The fact that a particular cause of action is not mentioned specifically in the statement of claim will not necessarily mean that the plaintiff will not succeed on that cause of action provided the facts as pleaded

2 Under the rules of procedure now in force, the pleadings seldom go beyond reply or a defence to counterclaim, but in a proper case leave may be given by the court to serve a subsequent pleading: RHC and RDC O 18 r 4. For example, the defendant may, with leave, in response to the plaintiff's reply, deliver a rejoinder, and the plaintiff in answer to this might deliver a surrejoinder. The pleadings might be continued by means of a rebutter delivered by the defendant, in answer to which the plaintiff might deliver a surrebutter.

3 Further and better particulars of a statement in a pleading are part of the pleadings for the purposes of the rule as to striking out: *Davey v Bentinck* [1893] 1 QB 185, [1891–4] All ER Rep 691 (CA, Eng). They are also required to be verified by a statement of truth: see RHC and RDC O 18 r 20A(1) and (2). See section 3 below

4 A generally indorsed writ of summons by which an action is begun is not a pleading: *Murray v Stephenson* (1887) 19 QBD 60; *Edward Butler Vintners Ltd v Grange Seymour Internationale Ltd* (1987) Times, 9 June (CA, Eng) per Kerr LJ.

5 See *Chung Fai Engineering Co Ltd v Maxwell Engineering Co Ltd* [2003] 3 HKC 24 (CA) per Keith JA.

6 RHC and RDC O 1 r 4(1).

7 *Thorp v Holdsworth* (1876) 3 Ch D 637 at 639 per Jessel MR; *Esso Petroleum Co Ltd v Southport Corpn* [1956] AC 218 at 238, [1955] 3 All ER 864 at 868 (HL) per Earl Jowitt. In *Aktieselskabet Dansk Skibsfinansiering v Wheelock Marden & Co Ltd* [1994] 2 HKC 264 (CA) at 269–270, Bokhary JA adopted the purposes of pleadings identified in The *Supreme Court Practice 1993* para 18/12/2, namely (1) to inform the other side of the nature of the case they have to meet as distinguished from the mode in which the case is to be proved; (2) to prevent the other side from being taken by surprise at the trial; (3) to enable the other side to know what evidence they ought to be prepared with and to prepare for trial; (4) to limit the generality of the pleadings, the claim and the evidence; (5) to limit and define the issues to be tried and as to which discovery is required; and (6) to tie the hands of the party so that he cannot without leave go into any matters not included.

8 See, for example, *Wong Chi Shing v Argos Engineering & Heavy Industries Co Ltd* [1993] 1 HKC 598 (failure to raise tax implications for assessment of damages). Failure to raise an issue at the pleading stage may also prevent its being raised on appeal: see, for example, *Qualcast (Wolverhampton) Ltd v Haynes* [1959] AC 743 at 758, [1959] 2 All ER 38 at 44 (HL) per Lord Somervell of Harrow.

sufficiently identify that cause of action.[9] A plaintiff who at the trial radically departs from his case as pleaded, however, is likely to fail,[10] although it has been held by the Court of Final Appeal that the court may decide a case in favour of the plaintiff on facts pleaded by the defendant provided that the defendant has pleaded and advanced those facts during the trial and provided that no unfairness will result to the defendant.[11] It follows that the pleadings enable the parties to decide in advance of the trial what evidence will be needed. From the pleadings, the appropriate method of trial can be determined. They also form a record which will be available if the issues are sought to be litigated again.[12] The matters in issue are determined by the state of pleadings at their close.[13]

1.3 Close of pleadings and joinder of issue

[8-4] The pleadings in an action are deemed to be closed at the expiration of 14 days after service of the reply[14] or, if there is no reply but only a defence to counterclaim, after the service of the defence to counterclaim.[15] If neither a reply nor a defence to counterclaim is served, the pleadings are deemed to be closed at the expiration of 28 days after the service of the defence.[16] Where there are several defendants, the pleadings are only deemed to be closed when the time stipulated has expired in respect of all the defendants and there is no separate deemed close of pleadings in respect of each individual defendant.[17] The pleadings are deemed to be closed at the time specified above notwithstanding that any request or order for further and better particulars[18] has been made but not complied with at that time.[19]

9 See, for example, *Yeung Wah James v Alfa Sea Ltd* [1993] 1 HKC 440 (breach of covenant for quiet enjoyment pleaded; damages for trespass awarded).

10 *Bell v Lever Bros Ltd* [1932] AC 161, [1931] All ER Rep 1 (HL); *Clarke v Sun Hung Kai Investment Services Ltd* [1991] HKCU 71 (unreported, CACV 196/1990, 26 March 1991) (CA).

11 *Poon Hau Kei v Hsin Chong Construction Co Ltd* (2004) 7 HKCFAR 148, [2004] 2 HKLRD 442, [2004] 2 HKC 235 (CFA) (plaintiff injured during employment as scaffolding contractor sued employer pleading that he had been injured whilst falling from ladder; defence pleaded that he had fallen from light trough; at first instance, the court concluded that plaintiff had fallen from light trough and damages awarded to plaintiff; decision reversed by Court of Appeal on grounds that plaintiff had not pleaded this case; on further appeal, Court of Final Appeal held that the court was entitled to decide in favour of a party on the basis of a scenario that had been pleaded by his opponent).

12 See *Henderson v Henderson* (1843) 3 Hare 100; *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581, [1973–76] HKC 194 (PC); *Tam Lam Hong Ltd v Gridway Knitters Ltd* [1988] HKC 184 (CA). See further Chapter 12 'Disposal of Actions without Trial'.

13 As to the close of pleadings, see section 1.3 below.

14 As to the service of a reply, see section 6.2 below.

15 RHC and RDC O 18 r 20(1)(a).

16 RHC and RDC O 18 r 20(1)(b).

17 *Hongkew Holdings Ltd v Hongson Securities Ltd* [1992] HKCA 212 (unreported, CACV 115/1992, 10 September 1992) (CA) (extension of time granted to one defendant to serve his reply and defence to counterclaim).

18 As to further and better particulars, see section 7 below.

19 RHC and RDC O 18 r 20(2).

[8-5] At the close of pleadings, if there is no reply to a defence, there is an implied joinder of issue on that defence[20] and, in general, at the close of pleadings there is an implied joinder of issue on the pleading last served,[21] although a party may in his pleading expressly join issue on the next preceding pleading.[22] However, it is important to bear in mind that there can be no joinder of issue, implied or express, on a statement of claim or on a counterclaim.[23] Hence, if the defendant does not serve any defence, the plaintiff will be entitled to enter judgment in default of defence. A joinder of issue operates as a non-admission of every material allegation of fact made in the pleading on which there is an implied or express joinder, unless, in the case of an express joinder of issue, any allegation is excepted from the joinder and is stated to be admitted, in which case the express joinder operates as a non-admission of all but the admitted allegations.[24]

2. The Form of Pleadings

2.1 Formalities of pleadings

[8-6] Every pleading prepared by a party for use in the High Court and District Court must be either printed, hand-written (provided it is clear and legible), or typewritten otherwise than by means of a carbon.[25] A pleading may be partly printed, partly typed and partly written by hand; or any combination of these three methods may be employed.[26]

[8-7] Pleadings may be drafted in either English or Chinese.[27] Every pleading must bear on its face: (a) the year in which the writ in the action was issued and the number of the action;[28] (b) the heading 'In the High Court of Hong Kong' or 'in

20 RHC and RDC O 18 r 14(1).
21 RHC and RDC O 18 r 14(2)(a).
22 RHC and RDC O 18 r 14(2)(b).
23 RHC and RDC O 18 r 14(3).
24 RHC and RDC O 18 r 14(4).
25 RHC and RDC O 66 r 2(1).
26 RHC and RDC O 66 r 2(1). Pleadings must be on paper of durable quality with a margin not less than 35 mm wide on the left side of the face and on the right side of the reverse: RHC and RDC O 66 r 1.
27 The Official Languages Ordinance (Cap 5) s 5(3) provides that a party to any proceedings or a part of any proceedings may use either or both English or Chinese. Proceedings have been construed as including interlocutory hearings: *Gammon Building Construction Ltd v Cho Hing Yiu (t/a Cho Yiu Kee Construction and Wooden Works)* [1988] HKC 611 (defence in Chinese). A pleader may not, however, mix both languages in the same pleading: *Cheung Kong (Holdings) Ltd v Chan Wai Yip Albert* [2000] 4 HKC 591; *Chan Kong v Chan Li Chai Medical Factory (Hong Kong) Ltd* [2009] 2 HKLRD 455, [2008] HKCU 1407 (CA).
28 RHC and RDC O 18 r 6(1)(a). Thus, it must state the year and number entered in the Cause Book at the High Court or District Court Registry and marked on the writ by which the action is begun when the plaintiff applies for the writ to be sealed. For example, in the Court of Final Appeal, Civil Appeals are prefixed 'FACV' and Miscellaneous Proceedings 'FAMV'. In the Court of Appeal, Civil Appeals are prefixed 'CACV'. In the Court of First Instance, Civil Actions are prefixed 'HCA', Constitutional and Administrative

the District Court of Hong Kong'; (c) the title of the action;[29] (d) the description of the pleading;[30] (e) on a statement of claim served separately from the writ, the date on which the writ was issued;[31] (f) the date on which the pleading was served;[32] and (g) at the end of the pleading, a signature.[33] Pleadings must also be indorsed, where the party sues or defends in person, with his name and address or, in any other case, with the name of firm and business address of his solicitor.[34] Following the Civil Justice Reform, pleadings must also be verified by a statement of truth.[35]

[8-8] A backsheet should be placed round the pleading and the telephone and fax number of the firm of solicitors should be marked on the backsheet.

[8-9] Every pleading must, if necessary, be divided into paragraphs numbered consecutively, each allegation being so far as convenient contained in a separate paragraph.[36] Dates, sums and other numbers must be expressed in figures and not in words.[37]

2.2 Title of the pleadings: names and capacity of the parties

[8-10] The persons named on the writ as plaintiffs and defendants respectively are the only persons who may be named as plaintiffs or defendants, as the case

Proceedings 'HCAL', Admiralty Actions 'HCAD', Bankruptcy Proceedings 'HCB', Commercial Actions 'HCCL', Companies Winding Up Proceedings 'HCCW', Construction and Arbitration Proceedings 'HCCT', Matrimonial Proceedings 'HCMC', Miscellaneous Proceedings 'HCMP' and Personal Injury Actions 'HCPI'. In the District Court, Civil Actions are prefixed 'DCCJ', Miscellaneous Proceedings 'DCMP', Personal Injury Actions 'DCPI' and Employee's Compensation Cases 'DCEC'.
29 RHC and RDC O 18 r 6(1)(b). The title of the action normally means the names of the parties and, where necessary, their description. Thus, the heading to a pleading is in the same form as the heading of the writ of summons by which the action is begun.
30 RHC and RDC O 18 r 6(1)(d). Pleadings are described as 'Statement of Claim', 'Defence', 'Reply', etc. Separate parts of a pleading must have separate headings, for example, a defence and counterclaim must be headed 'Defence and Counterclaim', and the two parts must also be headed respectively 'Defence' and 'Counterclaim'. The pleadings in an action in a particular list may be in the form of 'Points of Claim' and 'Points of Defence', etc: RHC and RDC O 72 r 7(1).
31 RHC and RDC O 18 r 15(3).
32 RHC and RDC O 18 r 6(1)(e). Any pleading which is required to be served on every other party must, when it is presented for filing in the Court Registry, bear the date or dates on which it was served: Practice Direction No 19.1 'Pleadings', applied to the District Court by Practice Direction No 27 'Civil Proceedings in the District Court' para 3.
33 RHC and RDC O 18 r 6(5). As to the signature, see section 2.3 below.
34 RHC and RDC O 18 r 6(4)(a) and (b).
35 See RHC and RDC O 18 r 20A, discussed section 3 below.
36 RHC and RDC O 18 r 6(2). Where a defendant sets up a set-off or counterclaim, the set-off or counterclaim is set out in the same document as the defence, and the paragraphs of the set-off or counterclaim should be numbered in continuation of the numbers of the paragraphs of the defence.
37 RHC and RDC O 18 r 6(3).

may be, in the statement of claim and, if it is sought to name as a plaintiff or as a defendant in the statement of claim a person not so named on the writ, an order adding that person as a party must be obtained,[38] and the writ must be amended by adding that person as a party.[39]

[8-11] It is good practice to describe the capacity in which a party sues or is sued in the title of the pleading. For example, if the true legal description of a corporate or other body is not apparent from its name, the description must be stated, example 'a company limited by guarantee'. Where a company goes into liquidation after the writ has been issued, the title of the action and the statement of claim should be amended to reflect the fact that the company is now in liquidation.[40]

[8-12] A plaintiff who is a minor is described in the title as 'AB, a minor, by BB, his [father and] next friend', and the fact that he is a minor so suing should also be pleaded in the statement of claim. A plaintiff who is a mentally incapacitated person is described in the title as 'AB by BB his next friend' and the statement of claim should plead that the plaintiff is a mentally incapacitated person suing by his next friend. A defendant who is under a disability is described in the title simply by his name until service has been acknowledged on his behalf; thereafter he is described in the title as 'CD by DD his guardian ad litem'.

[8-13] If the name of a limited company or that of a female party in consequence of marriage or remarriage, is changed, a written notice of the change of name should be filed in the Registry and a copy served on all other parties; the new name is thereafter substituted in the title of the proceedings and the former name mentioned in brackets.

2.3 Signature of pleadings

[8-14] The only signature which is permitted to appear on pleadings is that of counsel, a solicitor or a litigant in person. Although there is no rule requiring pleadings to be settled by counsel, where a pleading is settled by counsel it must be signed by him.[41] If a pleading has been settled otherwise than by counsel, it must be signed by the solicitor of the party by whom it is served, or by the party himself if he sues or defends in person.[42]

38 RHC and RDC O 15 r 6(2)(b).

39 See RHC and RDC O 15 r 8(1).

40 *Akira Sugiyama v Kosei Securities Co (Asia) Ltd* [1992] 1 HKC 261.

41 RHC and RDC O 18 r 6(5). Amended pleadings must also be signed by counsel if settled by him: *Ho Ka Huen, alias Ho Hin v Lam Kwok Ying* [1961] HKLR 669, [1961] HKCU 75 (no penalty imposed where amended pleading only stamped with counsel's name). Pleadings settled by counsel need not be actually signed by counsel provided that counsel has signed the draft pleading and his printed name appears on the final pleading: *Max Share Ltd v Ng Yat Chi (No 1)* [1998] 1 HKLRD 237, [1998] 1 HKC 123 (CFA) (this was a case construing the meaning of 'signed' in the Hong Kong Court of Final Appeal Rules (Cap 484A) r 27(2)).

42 RHC and RDC O 18 r 6(5). Notwithstanding that a statement of truth (see below) has been signed by a party or his solicitor personally, the pleading must also be signed in accordance with RHC and RDC O 18 r 6(5): Practice Direction No 19.3 'Statements of Truth'.

3. Verification of Pleadings by Statements of Truth

[8-15] Following the Civil Justice Reforms in 2009, all pleadings (including inconsistent pleadings and amended pleadings) and further and better particulars of pleadings must be verified by a statement of truth unless exempted by the court or by a Practice Direction.[43] Rogers V-P has explained that the requirement of a statement of truth is important:

> ... its purpose is to focus the mind of the relevant party and to deter sloppy or speculative pleadings and prevent dishonest cases being put forward. ... the requirement serves to help the court and the parties to achieve the underlying objectives which are set out in Order 1A Rule 1 of the Rules of the High Court.[44]

[8-16] The statement of truth must be signed by the person putting forward the verified pleading or, where appropriate, his next friend or guardian ad litem or the legal representative of the party or next friend or guardian ad litem.[45] Parties should be careful to identify and select the most appropriate person to verify their pleadings. The most appropriate person will be that person who is truly able to speak to the truth of what is pleaded and this will usually be the party himself rather than his solicitor.[46] Where the party is a body of persons, corporate or unincorporate, the statement of truth must be signed by a person holding a senior position in the body.[47] Where the party is a public officer, the statement of truth must be signed by the public officer or a person holding a senior position in the public body or

43 RHC and RDC O 18 r 20A(1) and (2) and RHC and RDC O 41A r 2(1)–(4). If a document verified by a statement of truth is amended, the previous statement of truth must not be deleted, but a new statement of truth underlined in the proper colour in accordance with the version of the amendment must be made: Practice Direction No 19.3 'Statements of Truth' para 2.

44 *Tong Kin Hing v Autron Mauritius Corpn* [2010] 1 HKLRD 77, [2009] HKCU 1557.

45 RHC and RDC O 41A r 3(1).

46 See *UES International (HK) Ltd v Maritima Maruba SA* [2013] HKCU 2668 (unreported, HCA 632/2011, 19 November 2013) (plaintiff's reply verified by its solicitor; Anthony Chan J observed that it was extraordinary for a professional adviser to be performing such a task for his client; solicitors were plainly not the appropriate persons to verify the pleadings of their clients).

47 RHC and RDC O 41A r 3(2). Each of the following persons is a person holding a senior position: (a) in respect of a corporation that is neither a public body nor a public authority, any director, manager, secretary or other similar officer of the corporation; (b) in respect of an unincorporated association that is neither a public body nor a public authority, any corresponding person appropriate to that unincorporated association; and (c) in respect of a public body or public authority, a person duly authorised by the public body or public authority for this purpose: RHC and RDC O 41A r 3(4). Where a statement of truth is signed by a person holding a senior position, that person must state in the statement of truth the office or position he holds: RHC and RDC O 41A r 3(5). The person making the verification should state the position he holds in the statement of truth itself and not below the statement of truth: *Grandee Model & Casting Co Ltd v Grey Advertising Hong Kong Ltd* [2012] 3 HKC 155.

public authority to which the proceedings relate.[48] Where the party is a partnership, the statement of truth must be signed by one of the partners or a person having the control or management of the partnership business.[49] An insurer or the Motor Insurers' Bureau of Hong Kong may sign a statement of truth in or in relation to a pleading on behalf of a party where the insurer or the Bureau has a financial interest in the result of proceedings brought wholly or partially by or against that party.[50] Where a legal representative signs a statement of truth, he must sign in his own name and must not sign only in the name of the firm to which he belongs.[51]

[8-17] Subject to what is provided below, a statement of truth is a statement that the party putting forward the pleading believes that the facts stated in the pleading are true.[52] In the case where a party is conducting proceedings with a next friend or guardian ad litem, the statement of truth in or in relation to a pleading is a statement that the next friend or guardian ad litem believes the facts stated in the pleading being verified are true.[53] Where a legal representative or insurer has signed a statement of truth on behalf of a party, the court must treat his signature as his statement that: (a) the party on whose behalf he has signed had authorised him to do so; (b) before signing he had explained to the party that in signing the statement of truth he would be confirming the party's belief that the facts stated in the pleading were true; and (c) before signing he had informed the party of the possible consequences to the party if it should subsequently appear that the party did not have an honest belief in the truth of those facts.[54] The statement of truth shall state:

> I believe [or the plaintiff believes] that the facts stated in this [name the pleading being verified] are true.[55]

Where the statement of truth is not contained in the pleading that it verifies: (a) the document containing the statement of truth must be headed with the title of the proceedings and the action number; and (b) the document being verified must be identified in the statement of truth as follows: (i) pleading: 'the [statement of claim or as may be] served on [name of party] on [date]'; (ii) particulars of pleading: 'the particulars of pleading issued on [date]'.[56] The court may strike out a pleading that has not been verified by a statement of truth.[57]

[8-18] Proceedings for contempt of court may be brought against a person if he makes, or causes to be made, a false statement in a pleading verified by a statement of truth without an honest belief in its truth.[58] Such proceedings for contempt may be brought by the Secretary for Justice or a person aggrieved by a false

48 RHC and RDC O 41A r 3(3). For the meaning of 'a person holding a senior position', see above.
49 RHC and RDC O 41A r 3(6).
50 RHC and RDC O 41A r 3(8).
51 RHC and RDC O 41A r 3(10).
52 RHC and RDC O 41A r 4(1).
53 RHC and RDC O 41A r 4(2).
54 RHC and RDC O 41A r 4(3).
55 RHC and RDC O 41A r 5(1).
56 RHC and RDC O 41A r 5(3).
57 RHC and RDC O 41A r 6(1).
58 RHC and RDC O 41A r 9(1).

statement, but only with the leave of the court.[59] The court must not grant leave unless it is satisfied that the punishment for contempt of court is proportionate and appropriate in relation to the false statement.[60] A sentence of imprisonment will usually be an appropriate punishment.[61] Alternatively, the court may decide to strike out a pleading where a false verification has been made.[62]

4. The Principles Governing the Drafting of Pleadings

4.1 General principles of good pleading

[8-19] It is very important that pleadings are drafted with proper care and attention and the following advice given by Cons JA in *Advance Finance Ltd v Pang Sze Mui, Loretta*[63] should be heeded:

> It is … only an extreme illustration of a common tendency to lengthen and complicate pleadings by the inclusion of a whole range of matters that has no place in them. I find myself frequently led to the feeling that a great deal of the litigation which passes through these courts could be disposed of more easily and more economically if only those responsible for drawing the necessary pleadings would go back from time to time to their books and remind themselves of the basic principles.

[8-20] Further trenchant criticism of the draftsman's skill was made by Rogers VP in *Kaisilk Development Ltd v Urban Renewal Authority*:[64]

> By amendment the statement of claim was expanded to 59 pages; it now contains allegations which are irrelevant, in parts incomprehensible and, for the most part, contains a recitation of the history of dealings between the parties which have no place in a pleading and are contrary to the established rules of pleading enshrined in the rules of the High Court … the way the pleading has been framed is tantamount to an affront to the court.

[8-21] Sadly, more recently, Anthony Chan J has confirmed that the problem of prolix pleadings has not gone away. In *Liu Hsiao Cheng v Wong Shu Wai*[65] the learned judge observed:

> 52. Regrettably, unhelpfully lengthy pleadings remain a common feature in litigation in this jurisdiction. It is the duty of the court to exercise control over its process and to weed out costs wasting practices.

59 RHC and RDC O 41A r 9(2).
60 RHC and RDC O 41A r 9(3).
61 See *Kinform Ltd v Tsui Loi (No 1)* [2011] 5 HKLRD 57, [2011] 5 HKC 426 (witness statement contained false statement that defendant had sent a letter on a particular date; statement of truth signed by solicitor; defendant found guilty of contempt of court); *Kinform Ltd v Tsui Loi (No 2)* [2011] 5 HKLRD 80, [2011] 5 HKC 426 (sentence of imprisonment imposed on defendant).
62 See *Tong Kin Hing v Autron Mauritius Corpn* [2010] 1 HKLRD 77, [2009] HKCU 1557.
63 [1986] HKLR 523 at 540, [1986] HKCU 262 (CA) per Cons JA.
64 [2004] 1 HKLRD 907, [2004] 1 HKC 62 (CA) per Rogers VP.
65 [2015] 4 HKLRD 766, [2015] HKCU 1957.

53. Pleadings are meant to be succinct documents which readily inform the readers of the issues in the case. In order to produce such a document, the drafter is required to have fully digested the facts of his case, researched the applicable law and properly conceptualized his case. Only when the groundwork has been done, the material facts can be identified.

54. It cannot be over-emphasized that pleadings are the roadmaps for the litigation. Unless they fulfil the function of identifying the issues, much time and costs would be wasted. As an example, pleadings are usually the first set of documents which the court will consider in an interlocutory application for the purpose of understanding the issues in the case. Unhelpfully lengthy pleadings would take up a great deal more of the court's time without serving much useful purpose. Bluntly put, reading such a document is often a waste of time.

55. On the part of the party at the receiving end of an unhelpful pleading, he should not regard himself as entirely free from responsibility if he fails to take reasonable measure to avoid the waste of resources. Answering prolixity with prolixity is not reasonable. He can raise the issue with the offending party and, if that falls upon deaf ears, may apply to strike out the pleading in question.

56. There is a duty on the court to further the underlying objectives enshrined in RHC O 1A, r 1, and to actively manage cases for such purpose: RHC O 1A, r 4). Where there is a need to enforce the rules of pleadings and to prevent waste of resources, the court would not hesitate in taking the appropriate actions.

[8-22] The requisites of a good pleading are that it should contain a statement of (a) material facts only; (b) facts as distinct from evidence; and (c) facts in a summary form.

4.1.1 Pleadings must contain a statement of all the material facts

[8-23] Every pleading must contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved.[66] The rules as to what a pleading should or should not contain are not absolute, but lay down the guiding principles according to which pleadings should be framed. If they are not observed, the court may order that the pleading be amended or even struck out.[67]

[8-24] All facts which must be proved in order to establish the ground of claim or defence are material,[68] but the fact that a particular cause of action is not mentioned specifically in the statement of claim will not necessarily mean that the plaintiff will not succeed on that cause of action provided the material facts as pleaded sufficiently identify that cause of action.[69] In any pleading subsequent to

66 RHC and RDC O 18 r 7(1), which is expressed to be subject to O 18 rr 7A, 10–12.

67 See RHC and RDC O 18 r 19(1) (striking out pleadings as disclosing no reasonable cause of action, being frivolous, vexatious, etc).

68 *Phillipps v Phillipps* (1878) 4 QBD 127 at 133–134, [1874–80] All ER Rep Ext 1684 at 1686 (CA, Eng) per Brett LJ.

69 See *Yeung Wah James v Alfa Sea Ltd* [1993] 1 HKC 440 (breach of covenant for quiet enjoyment pleaded; damages for trespass awarded); *Kaiser Garments Ltd (formerly known as Nanyang Garment Pty) v Lai Shum Co* [1980] HKLR 224, [1980] HKC 245 (CA) (statement of claim only averred breach of condition implied by the Sale

a statement of claim, a party must specifically plead any matter[70] which he alleges makes any claim or defence of his opponent not maintainable,[71] or which, if not specifically pleaded, might take his opponent by surprise,[72] or which raises issues of fact not arising out of the preceding pleading.[73] Of course, a fact which was not material in the initial stages of a case may become material at a later stage.

[8-25] Certain material allegations are required to be expressly pleaded. Thus, for example, the rules require that the effect of any document or the purport of any conversation referred to in a pleading must be briefly stated.[74] Further, an allegation of contributory negligence must be distinctly pleaded and will not be found by the court of its own motion.[75]

[8-26] The requirement of materiality is taken further since, in deciding whether or not to order a party to furnish his opponent with particulars of any claim, defence or other matter, the court has regard to the question of whether or not those particulars are material facts.[76]

[8-27] It is not generally necessary to plead in the statement of claim facts in anticipation that a particular defence will be raised,[77] although such a course of action might be advisable in certain situations.[78]

4.1.2 Facts should be pleaded, not evidence

[8-28] The general rule is that a pleading must contain only a statement of the material facts on which the party pleading relies, but not the evidence by which those facts are to be proved.[79] Consequently, information which constitutes merely

of Goods Ordinance (Cap 26) s 15; court could make award for breach of warranty in breach of s 13 since the facts averred constituted a breach of both sections).

70 For example, any relevant statute of limitation, fraud or any fact showing illegality: see RHC and RDC O 18 r 8(1).

71 See RHC and RDC O 18 r 8(1)(a).

72 See RHC and RDC O 18 r 8(1)(b).

73 See RHC and RDC O 18 r 8(1)(c).

74 See RHC and RDC O 18 r 7(2).

75 See *Wakelin v London and South Western Rly Co* (1886) 12 App Cas 41 (HL) at 52 per Lord Fitzgerald.

76 See RHC and RDC O 18 r 12; and see section 4.1.3 below.

77 A plaintiff should not 'leap before the stile', ie he should not plead facts merely in anticipation that a certain contention will be raised in the defence which he will seek to rebut. Until the contention is raised these facts are not material; if the contention is raised in the defence, they then become material and should be pleaded in the reply: *Hall v Eve* (1876) 4 Ch D 341 (CA, Eng) at 345–346 per James LJ.

78 See, for example, *Busch v Stevens* [1963] 1 QB 1, [1962] 1 All ER 412 (claim for money due under a statute-barred agreement; proper for plaintiff to plead acknowledgment in statement of claim as affecting limitation period: see the Limitation Ordinance (Cap 347) s 23(3)).

79 RHC and RDC O 18 r 7(1). See the criticisms of the pleading in *Brooks v Richard Ellis (a firm)* (1986) Times, 22 January, where the statement of claim was 'a mass of evidence' and *Ng Kam Chuen v A-G* [1991] 2 HKC 560; affirmed as to amendment

evidence of material facts should not be pleaded.[80] It is, however, sometimes difficult to distinguish between these two categories. If there is any doubt about the category to which a fact belongs, it should be pleaded.

4.1.3 Material facts should be pleaded in summary form

[8-29] The material facts should be pleaded as a statement in a summary form, the statement being as brief as the nature of the case admits.[81] The facts should preferably be stated in chronological order.

[8-30] As we have seen above, several judges have expressed grave concern about prolixity in pleadings being all too common and have exhorted those drafting pleadings to strive for conciseness and brevity. Indeed, a pleading may be struck out as embarrassing where it is excessively prolix or repetitive.[82]

4.1.4 Pleading points of law

[8-31] In a proper case, a party may raise any point of law in his pleading,[83] but he must refrain from arguing those points of law in his pleadings. It used to be the case that, as a general rule, inferences of law should not be pleaded, but only the facts from which those inferences were sought to be drawn.[84] However, in accordance with present good practice, it might be useful on occasion to state the legal conclusion sought to be drawn from the facts, or the nature of the legal provision on which the party pleading intends to rely, either by way of emphasis or to prevent any doubt in the mind of the other party as to the nature of the case alleged against him. It is, however, bad pleading to state an inference of law without setting out the facts by

at [1992] 1 HKC 51 (CA), where Dty Judge Patrick Chan criticised the fact that the contents of documents had been set out at length in the pleadings.

80 See *North-Western Salt Co Ltd v Electrolytic Alkali Co Ltd* [1913] 3 KB 422 (CA, Eng) at 425 per Farwell LJ, reversed on another point [1914] AC 461 (HL). If a party relies on a fact, and will fail in his claim or defence unless at the trial that fact is proved, that fact will be a 'material fact' or '*factum probandum*'. However, where the fact relied on is such that, if the party fails to prove it at the trial, he may nevertheless succeed on his claim or defence, that fact will in general not be a material fact, but only evidence of a material fact. Facts of this kind are known as '*facta probantia*', and should not be pleaded.

81 RHC and RDC O 18 r 7(1).

82 See *Wallbanck Brothers Securities (Hong Kong) Ltd v Emily Tse* [2015] HKCU 714 (unreported, DCCJ 2422/2013, 31 March 2015).

83 RHC O 18 r 11. Thus, for example, a defendant should, in an appropriate case, raise the defence of contributory negligence (*Wakelin v London and South Western Rly Co* (1886) 12 App Cas 41 (HL) at 52 per Lord Fitzgerald; *Liu Jianhui v Mayho Graham* [1996] 3 HKC 383 (CA) any relevant statute of limitation and any act showing illegality (see *Chao San San v Worldpart Industrial Ltd* [2003] HKCU 300 (unreported, CACV 158/2002, 21 March 2003) (CA) (where a contract is objected to on grounds of illegality, the court would only pronounce the contract to be void where the defence of illegality has been expressly pleaded or the contract and its setting had been fully set out before the court). See section 5.2.2 below.

84 *Lord Hanner v Flight* (1876) 24 WR 346 at 347 per Brett J.

which the conclusion or inference of law is to be supported and a pleading which offends in this way might be struck out as bad.[85] Where a party states the legal consequences inaccurately or incompletely in his pleadings, he will nonetheless not be prevented from arguing points of law which arise on the pleaded facts, assuming that the facts have been correctly pleaded.[86] Moreover, where a party has set out in his pleadings not only the material facts on which he seeks to rely but also the legal consequences which he seeks to draw from those facts, he is not precluded at the trial from seeking to draw different legal consequences from the facts pleaded.[87]

4.1.5 Pleading distinct claims and defences

[8-32] Where the plaintiff seeks relief in respect of several distinct claims or causes of complaint founded upon separate and distinct grounds, it is good practice to state each ground, so far as possible, separately and distinctly. The same rule applies where the defendant seeks to rely upon several distinct grounds of defence or to raise several distinct matters by way of counterclaim or set-off. As we will see below, the fact that different averments in a pleading are inconsistent with each other does not ipso facto make the pleading either embarrassing or defective.[88]

4.1.6 Inconsistent pleadings

[8-33] Pleadings put forward by the same party must not be inconsistent with one another. Just as a party may not plead in his statement of claim an averment which is inconsistent with what has been stated in the concise statement of the nature of the claim indorsed on the writ,[89] a party may not in any pleading make any allegation of fact, or raise any new ground of claim, which is inconsistent with a previous pleading of his.[90]

4.2 Inconsistency within pleadings; pleading inconsistent alternatives

[8-34] A party may however in any pleading make an allegation of fact which is inconsistent with another allegation in the same pleading if (a) the party has

85 *Gautret v Egerton* (1867) LR 2 CP 371.

86 *Karsales (Harrow) Ltd v Wallis* [1956] 2 All ER 866 at 869, [1956] 1 WLR 936 at 941 (CA, Eng) per Denning LJ.

87 *Konskier v B Goodman Ltd* [1928] 1 KB 421, [1927] All ER Rep 187 (CA, Eng); *Drane v Evangelou* [1978] 2 All ER 437, [1978] 1 WLR 455 (CA, Eng).

88 *Re Morgan, Owen v Morgan* (1887) 35 Ch D 492 (CA, Eng). See further RHC and RDC O 18 r 12A discussed below.

89 As for inconsistency between the writ and statement of claim, see below.

90 RHC and RDC O 18 r 10(1). Thus, a party's second pleading must not contradict his first. The effect of this rule is, for example, to prevent a plaintiff from setting up in his reply a new claim which is inconsistent with the cause of action alleged in the statement of claim: see *Earp v Henderson* (1876) 3 Ch D 254; *Williamson v London and North Western Rly Co* (1879) 12 Ch D 787. The proper course is to amend the statement of claim: *Herbert v Vaughan* [1972] 3 All ER 122, [1972] 1 WLR 1128. Similarly, a plaintiff must not contradict his statement of claim in a subsequent defence to counterclaim.

[12-226] If it is the plaintiff who chooses to commence concurrent proceedings in different jurisdictions, the court may[424] put the plaintiff to his election with which action he will proceed, unless there is some personal or juridical advantage which the plaintiff would derive from proceeding with both actions so that to deny the plaintiff that advantage would amount to a positive injustice.[425]

424 In *Australian Commercial Research and Development Ltd v ANZ McCaughan Merchant Bank Ltd* [1989] 3 All ER 65, Browne-Wilkinson VC held that the party which commenced identical proceedings in different jurisdiction must elect to continue on one set of proceedings. His Lordship quoted from the passage in Dicey and Morris, *Conflict of Laws*, dealing with lis alibi pendens, the final sentence of which read: 'The court would put plaintiff to his election, and stay the English proceedings or enjoin to the foreign proceedings.' After that quotation, Browne-Wilkinson VC said: 'In my judgment that reflects the position, save that in my view it is not a question simply of a plaintiff applying for a stay of its own action: the action must go.' The *Australian Commercial Research* was cited with approval by Cheung J in *Chandra & Anor v Johnson* [1997] 1 HKC 209. However, it was doubted and not followed by Barnett J in *Merrill Lynch International Bank Ltd v Wallace* [1997] 3 HKC 776, citing with approval the English case *Kuwait Oil Tanker Company SAK & Anor v Al Bader & Ors* (unreported, 27 November 1995 (CA, Eng). Barnett J said: '… in my view [Browne-Wilkinson VC] was not laying down a rule of universal application. There was nothing in the argument before him nor was there any authority before him to justify it, that is to say that, where there are parallel proceedings, one of them must be discontinued or dismissed … The correct approach, I am satisfied, is to consider whether allowing both sets of proceedings to continue is oppressive to the Defendant, an oppression not outweighed by any legitimate interest the Plaintiff might have in having both proceedings continue. Into that consideration will come the Plaintiff's concerns about the risk of proceedings in Singapore, but those concerns will be a factor not a test.'

425 *The Abidin Daver* (above) and *Hing Fat Plastic Manufacturing Co Ltd v Advanced Technology Products (HK) Ltd* [1992] 2 HKLR 350, [1992] HKCU 476 (Keith J).

CHAPTER 13

SETTLEMENT

1. INTRODUCTION

[13-1] The vast majority of civil claims are concluded without a trial. Settlement or compromise of claims is the primary means of concluding most civil actions. If a dispute is to be resolved by the court, there will inevitably be a loser. But settlement allows the parties to conclude the dispute on terms to which they all agree, thereby resulting in a win-win outcome for both parties. In adjudicating the claim, the court focuses on the rights, obligations and remedies, and can only grant judgment within the confines of issues raised in the pleadings. But in settlement, the parties may focus on their broader interests and can agree on terms which fall outside the bounds of their dispute (for example, agreeing to continue to do business together on revised terms). Court hearings and judgments are generally open to the public, but the parties can agree to keep the settlement terms confidential. Other advantages of settlement in lieu of a trial include the saving of huge legal costs and valuable time of the parties and of the court, and avoidance of emotional stress associated with the litigation. Hence, settlement is seen as an object worthy of promotion, and one of the important underlying objectives introduced under the Civil Justice Reform is to 'facilitate the settlement of disputes'.[1] Negotiation for settlement of claims is, therefore, a central feature of a litigation lawyer's life.

[13-2] Negotiation for settlement may be conducted by the parties or their legal representatives with or without the assistance of a third party (such as a mediator or conciliator). It is a complex process, and it requires one to engage in complex forms of interaction with another person. It is case-sensitive, party-sensitive, lawyer-sensitive and stage-sensitive. Different styles, strategies and methods may need to be adopted in different cases or at difference stages of a case.

[13-3] In order to be an effective negotiator, one should acquire five 'Skills or Mentalities', namely, analytical skill, communication skill, influencing skill, flexibility and creativity. Moreover, one needs to bear in mind five 'Knows', namely, know the problems and issues involved; know the strength and weakness of one's case; know the client's needs, interests and constraints; know the

1 RHC and RDC O 1A r 1(e).

other party's needs, interests and constraints; and know the law and procedure governing negotiation or settlement. On top of that, one must not overlook the preparation required. In particular, before the settlement negotiation one must first explore different plausible options available; establish goals and set targets; formulate plans and strategies; and in the course of settlement negotiation, one must constantly review and, if necessary, revise the same.

[13-4] This chapter will focus on the procedural aspects of settlement.

2. Procedural Safeguards

2.1 Ostensible authority to compromise

[13-5] If the negotiations are conducted through lawyers, in general one need not enquire whether the opponent's lawyer is authorised to settle on behalf of his client. This is because the solicitor (or the counsel) retained in an action has ostensible authority to compromise the suit so long as the compromise does not involve matters collateral to the suit.[2] However, the implied authority of the lawyer as between himself and his client is not necessarily as extensive as the ostensible authority of the lawyer vis-a-vis the opposing litigant.[3] The lawyer should, therefore, in general avoid compromising an action on behalf of his client without the latter's express consent.

2 *Waugh v HB Clifford & Son Ltd* [1982] Ch 374, [1982] 1 All ER 1095, [1982] 2 WLR 679 (CA, Eng). A compromise does not involve 'collateral matter' merely because it contains terms which the court could not have ordered by way of judgment in the action. The matter is not collateral to the action unless it involves extraneous subject matter.

3 Brightman LJ gave the following example in *Waugh v HB Clifford & Son Ltd* (above): 'Suppose that a defamation action is on foot; that terms of compromise are discussed; and that the defendant's solicitor writes to the plaintiff's solicitor offering to compromise at a figure of £100,000, which the plaintiff desires to accept. It would in my view be officious on the part of the plaintiff's solicitor to demand to be satisfied as to the authority of the defendant's solicitor to make the offer. It is perfectly clear that the defendant's solicitor has ostensible authority to compromise on behalf of his client, notwithstanding the large sum involved. It is not incumbent on the plaintiff to seek the signature of the defendant, if an individual, or the seal of the defendant if a corporation, or the signature of a director. But it does not follow that the defendant's solicitor would have implied authority to agree damages on that scale without the agreement of his client. In the light of the solicitor's knowledge of his client's cash position it might be quite unreasonable and indeed grossly negligent for the solicitor to commit his client to such a burden without first inquiring if it were acceptable. But that does not affect the ostensible authority of the solicitor to compromise, so as to place the plaintiff at risk if he fails to satisfy himself that the defendant's solicitor has sought the agreement of his client. Such a limitation on the ostensible authority of the solicitor would be unworkable.'

2.2 Without prejudice rule

[13-6] There is a recognised public policy of encouraging litigants to settle their differences rather than litigate them to a finish. To facilitate settlement, the litigants are encouraged fully and frankly to put their cards on the table during negotiations, without fear that anything that is said[4] in the course of such negotiations may be used to their prejudice in the future. The 'without prejudice' rule has, therefore, been developed by the court to exclude all negotiations genuinely aimed at settlement, whether oral or in writing, from being admissible evidence at the current trial or in any subsequent litigation connected with the same subject matter. Any admissions made to reach settlement with a different party within the same litigation are also inadmissible whether or not settlement can be reached with that party. The application of the rule is not dependent upon the use of the phrase 'without prejudice' and if it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of those negotiations will, as a general rule, be inadmissible at the trial and cannot be used to establish an admission or partial admission.[5] However, a competent solicitor should always caption any negotiating correspondence 'without prejudice' to make the intention clear beyond doubt.

[13-7] Whilst legal professional privilege can be waived by the party having the privilege, without prejudice protection cannot be waived unilaterally.

4 Including the failure to reply to an offer or an assertion made by the other party.

5 For an authoritative modern statement of the principles, see Lord Griffiths' speech in *Rush & Tompkins Ltd v Greater London Council* [1988] 3 All ER 737, [1988] 3 WLR 939, [1989] 1 AC 1280 (HL). The rule was also held to apply to protect those negotiations from being disclosed to third parties (see also *Info Allied Ltd v Leung Tze Ching* [2010] HKCU 2817 (unreported, HCA 774/2007, 20 December 2010) per Fok J). The general rule as stated above is, however, subject to well-recognised exceptions. In *Unilever plc v The Procter and Gamble Co* [2001] 1 All ER 783, [2000] 1 WLR 2436 (CA, Eng), Robert Walker LJ took the opportunity to set out some of the more important exceptions to the general rule in which it would be permissible to refer to without prejudice correspondence. For example, without prejudice communications may be admissible for deciding whether a compromise was concluded (see also *Oceanbulk Shipping and Trading SA v TMT Asia Ltd* [2011] 1 AC 662 (SC)); whether to set aside a concluded compromise on the ground of fraud or misrepresentation; whether there is an estoppel by a clear statement made in the negotiation; whether the delay was excusable in an application to stay the action for want of prosecution; whether there is any abuse in the use of without prejudice negotiation as a cloak for perjury, blackmail or other 'unambiguous impropriety'. As explained in *Family Housing Association v Michael Hyde & Partners* [1993] 1 WLR 354 (CA, Eng), the willingness of parties to discuss the merits of their case with a view to settlement, without fear of any concessions made being used later as admission of liability, which underlay the policy excluding the use of without prejudice correspondence at trial or during post-trial proceedings, would not be inhibited by the disclosure of such evidence on an application to strike out for want of prosecution, since the correspondence would not be available at any subsequent trial and that the prevailing need on applications to strike out is for evidence relevant to the question of delay and the conduct of the parties to be available.

The protection afforded by without prejudice correspondence is not just to the author of the relevant document but also extends to the recipient.[6] Whether mediation communication could be disclosed to the court used to be governed by the common law principles on without prejudice communication.[7] With the introduction of the Mediation Ordinance (Cap 620) on 1 January 2013, whether mediation communication can be disclosed to the court is now governed by sections 8–10 of the Ordinance.[8]

2.3 Subject to contract rule

[13-8] The 'without prejudice' rule serves to prevent the negotiation communication from being admissible in the litigation in case no settlement is reached, but it does not prevent the conclusion of a compromise through the 'without prejudice' correspondence, nor does it prevent the other party from adducing such correspondence to the court to prove the existence of a concluded settlement. Hence, if one does not wish to have any settlement concluded without the parties' signing an agreement covering all the details, one should make it

6 See, for example, *Rush & Tompkins Ltd v Greater London Council* (above) and *Cutts v Head* [1984] Ch 290, [1984] 1 All ER 597, [1984] 2 WLR 349 (CA, Eng).

7 In *Wu Wei v Liu Yi Ping* [2009] HKCU 126 (unreported, HCA 1452/2004, 30 January 2009), the court allowed the admission of and took into account what the plaintiff had said at the mediation meetings and the impact that it might have had on the defendant's state of mind in assessing the defendant's breaches of an injunction order, though it also recognised that the contents of mediation are normally covered by the without prejudice rule. See also *S v T* [2011] 1 HKLRD 534, [2010] 4 HKC 501 (CA); and *Chu Chung Ming v Lam Wai Dan* [2012] 4 HKLRD 897, [2012] 3 HKC 418 (Deputy Judge Au-Yeung).

8 The Mediation Ordinance provides generally for two different broad categories of permitted disclosure of mediation communications: (a) Section 8(2) provides for permissible disclosure without leave of the court; and (b) Section 8(3) provides for disclosure with the leave of the court. Under s 10(2), in considering whether leave should be granted, the court must have regard to the matters set out in that sub-section. In *Crane World Asia Pte Ltd v Hontreal Engineering Ltd* [2016] 3 HKLRD 640, [2016] 5 HKC 573 (CA), Lam VP explained that in deciding whether it is in the public interest or the interests of the administration of justice for the mediation communication to be disclosed or admitted in evidence under s 10(2)(b), the court must have regard to the public policy considerations pertaining to without prejudice privilege. Like the without prejudice rule, the court will not permit mediation confidentiality to be used as a cloak for unambiguous impropriety when it is clear that the cloak of confidentiality was abused. At the same time, the court must exercise caution and leave should only be granted in the clearest type of cases so that the primary policy of upholding confidentiality will not be undermined. In that case, the Court of Appeal ruled that the defendant's attempt to preclude someone from giving a witness statement to the plaintiff in the subject proceedings in consideration of the settlement an earlier action is an unambiguous impropriety, and so allowed evidence of the defendant's earlier offer to be admitted. See also *Lincoln Air Conditioning & Engineering Co Ltd & Anor v Chan Ping Fai Ricky & Ors* [2013] HKCU 170 (unreported, HCA 527/2010, 21 January 2013) (Poon J).

clear that all negotiations are conducted 'subject to contract'.[9] Making negotiation *'subject to contract'* has the advantage of avoiding unnecessary disputes arising from conflicting recollection/assertions between the parties as to whether any binding settlement has been concluded and the terms thereof.[10] In particular, if one has a strong case against a defendant, one may not wish to end up facing a defence that somehow the parties have discussed and eventually reached an agreement to settle the action.[11]

[13-9] A party who is *sui juris* may himself compromise an action without the knowledge or intervention of his solicitor on record.[12] Hence, if the lay client wishes to negotiate in the absence of lawyers but does not wish to conclude any settlement without first seeking his lawyer's advice on the terms thereof,[13] what the

9 As Jessel MR said in *Winn v Bull* (1877) 7 Ch D 29 at 32: 'It comes therefore, to this, that where you have a proposal or agreement made in writing expressed to be subject to a formal contract being prepared, it means what it says; it is subject to and is dependent on a formal contract being prepared.' (quoted with approval in, for example, *Darton Ltd v Hong Kong Island Development Ltd* [2001] 3 HKLRD 479, [2001] 1 HKC 575 (CA), affirmed by the Appeal Committee of the Court of Final Appeal which refused leave to appeal: see (2001) 4 HKCFAR 376, [2002] 1 HKLRD 145, [2001] HKCU 1183 (CFA)). In *Hong Kong Housing Authority v Hung Pui* [1987] 3 HKC 495, Godfrey J (applying *Michael Richards Properties Ltd v Wardens of St Saviour's Parish, Southwark* [1975] 3 All ER 416 and *Sherbrooke v Dipple* [1980] 255 EG 1203) explained: 'The words "subject to contract" are not lightly to be ignored; but where the court is satisfied on the evidence that they had no meaning, it is entitled to ignore them. It is also entitled to ignore them where the parties by their words or conduct have unequivocally demonstrated that they have agreed that the words may be treated as expunged from the instrument which contains them.' See also *Banco Del Austro, S A v Regal Prosper Trading Ltd & Ors* [2016] HKCU 767 (unreported, HCA 477/2015, 1 April 2016) for a good summary of principles by Recorder Linda Chan SC.

10 For example, in *Orient Bright International Ltd v Hiang Kie Hong Kong Ltd* [2004] HKCU 658 (unreported, HCA 10411/2000, 10 June 2004) (upheld on appeal in [2005] 2 HKC 663 (CA)), the court had to consider the conflicting recollection of the solicitors for the parties and construe the 'without prejudice' correspondence in order to decide whether a binding settlement was reached. The court also had to decide whether the form and manner as to how the settlement could be enforced was a material term which had to be agreed by the parties before a binding settlement could be formed.

11 In *Kwan Siu Man Joshua v Yaacov Ozer* (1997–98) 1 HKCFAR 343, [1999] 1 HKLRD 216, [1999] 1 HKC 150 (CFA), the existence of an agreement alleged to have been orally made by the parties at a 10 minutes' chance meeting outside the lift lobby to settle the proceedings and other related matter was accepted by the trial judge and confirmed by the Court of Appeal. The appellant (defendant) in that case was only vindicated when the Court of Final Appeal eventually allowed his appeal and ruled that no such agreement existed.

12 *The Hope* (1883) 8 P D 144 (CA, Eng).

13 In *Lui Che Woo v Wong Si Ling* (unreported, HCA 13805/1997, 8 March 2000), on the first day of the trial, the defendant applied for a trial of the issue regarding the existence of an alleged settlement agreement and for an interim stay of the action pending the trial of the said issue. The defendant alleged that the settlement was

lawyer should do is to put on record to the other side that all such negotiations are 'without prejudice and subject to contract'.

2.4 Settlement by person under disability

[13-10] Order 80 rule 10[14] provides that where in any proceedings money is claimed by or on behalf of a person under disability (ie an infant or a mentally incapacitated person),[15] no settlement, compromise or payment and acceptance of money paid into court shall be valid without the approval of the court. This requirement applies to a claim under the Fatal Accidents Ordinance (Cap 22) which involves a dependant who is under disability.[16] For settlement with a mentally incapacitated person, one must also note and follow the procedural guidelines and the duties of lawyers as set out in Practice Direction No 18.1 Parts Y and Z, and the cases referred to therein.[17]

reached between the parties in the absence of their lawyers at various meetings and discussions in the Mainland, but the defendant's version of events was hotly disputed by the plaintiff. Deputy Judge Chu allowed the defendant's application and vacated the original trial dates to cater for the defendant's key witness to testify on the issue of settlement: 'Before deciding whether to exercise the discretion of staying the proceedings, the court has to be satisfied beyond all reasonable doubt that there is in existence a binding settlement agreement: *King Prosper Trading Ltd v Tenbase Trading Ltd* [1997] HKCU 738 (unreported, CACV 244/1996, 28 February 1997) (CA). Where one party disputes the existence of a binding settlement agreement, the court may direct for the issue to be tried [and if appropriate order an interim stay of the main action pending the trial of the issue].'

14 RHC and RDC O 80 r 12.

15 A mentally incapacitated person ('MIP') means a mentally disordered or mentally handicapped person (within the meaning of the Mental Health Ordinance (Cap 136)) who, by reason of mental disorder or mental handicap, as the case may be, is incapable of managing and administering his property and affairs: RHC and RDC O 80 r 1. In *Ng Hong Ki v Leung Fong Kiu* [2012] 1 HKLRD 435, [2011] 6 HKC 124 (CA), the Court of Appeal held that the test of mental incapacity under O 80 was issue-specific. The test was 'whether the party to legal proceedings is capable of understanding, with the assistance of such proper explanation from legal advisors ... the issues on which his consent or decision is likely to be necessary in the course of the proceedings'. The focus of inquiry should be on the litigation under consideration rather than on the whole of that person's property and affairs. Complete incapacity was not required to be established (see also *Ever Long Finance Ltd v Yeung Wah Lung by his guardian ad litem* [2017] 1 HKLRD 500, [2017] 4 HKC 92 (Deputy District Judge Simon Ho). For the proper approach to appointing a guardian ad litem in respect of a mentally incapacitated person, see the Court of Final Appeal judgment in *Cheung Kwai Yin v Moral Luck Finance Ltd* (2015) 18 HKCFAR 343, [2015] 5 HKC 532 (CFA).

16 See Practice Direction No 18.1 para 184.

17 *Re CK* [2006] HKCU 1317 (unreported, HCMP 1150/2006, 4 August 2006); *Re YWK* [2007] HKCU 1982 (unreported, HCMP 2467/2006, 21 November 2007) and *Re YPC* [2008] 2 HKC 359. See also *Re YCK* [2006] HKCU 274 (HCMP 2878/2004, 9 February 2006, unreported) and the Law Society Circular 17-258 (PA) dated 3 April 2017.

[13-11] The purposes of this rule are to protect infants and patients from any lack of skill or experience on the part of their legal advisers; to ensure that any settlement entered into with the person's next friend will be binding when that person ceases to be under disability, as well as to enable the court to give the necessary directions regarding investment and use of the settlement payment.[18]

[13-12] If a claim for money or a claim made on behalf of a person under a disability is settled before the proceedings are commenced and it is desired to obtain the court's approval, then the claimant may issue an originating summons for the claim against the other party so as to obtain the approval and directions of the court.[19]

[13-13] Counsel's advice on the adequacy of the settlement is usually required by the court before granting the approval. See the judgment of Seagroatt J in *Grace Pandan Ablan v Skanska Shui On Balfour Beatty Joint Venture*[20] for a summary of the procedure involved and the lawyers' duty in the situation where a compromise has been reached shortly before the trial.[21] See also the practice note given by District Judge M Ng in *So Long Him v Ho Kai Lun Ricky*[22] for the practice and procedure of seeking approval under Order 80.

3. Procedural Devices for Encouraging Settlement

3.1 Sanctioned offer and sanctioned payment under new Order 22

3.1.1 Introduction

[13-14] As a general rule, the loser of an action will be ordered to pay the winner's legal costs incurred in the proceedings.[23] If at trial a plaintiff obtains judgment in his favour, he will be regarded as the 'winner' even if the judgment

18 See, for example, *Black v Yates* [1992] QB 526, [1991] 4 All ER 722, [1991] 3 WLR 90.

19 RHC and RDC O 80 r 11(1).

20 [2000] 1 HKLRD 491, [1999] HKCU 1239.

21 See also the detailed requirements set out in Practice Direction No 18.1 Part X, governing settlement of personal injuries claim of a person under a disability (eg the proper order for costs in respect of such compromised proceedings is usually on a common fund basis; in the event of the solicitor seeking to recover costs and disbursements from the plaintiff which will not be recoverable from the defendant, he must produce at the hearing for approval a statement of the maximum amount of such costs and disbursements and will be required to justify them).

22 [2009] 2 HKC 506. See also *Ma Hoi Ki (Mentally Incapacitated Person) v Li Chi Chuen* [2009] 2 HKC 488.

23 This is known as the 'costs to follow the event' principle. Note, however, that under the Civil Justice Reform, the court is given more flexibility to depart from this principle by reference to the matters set out in RHC and RDC O 62 r 5: see further discussions in Chapter 19.

award is much less favourable than the amount claimed or the relief sought in his pleadings.[24] For example, if a plaintiff claims for $1m but is awarded only $100,000, he will generally be awarded the costs of the proceedings, which can be very substantial and may even exceed the claim of $1m in some cases. It would have been unfair to require a defendant who has offered to pay the plaintiff, say, $150,000, to bear the costs of the plaintiff who chooses not to accept the offer but proceeds with the claim to trial. Moreover, if the plaintiff is exposed to a risk as to costs for refusing a reasonable offer, he is more likely to accept it and put an end to the litigation.

[13-15] Accordingly, procedural devices such as payments into court and Calderbank offers (ie offers made on a 'without prejudice save as to costs' basis) have long been introduced to enable a defendant to put pressure on the plaintiff to accept a reasonable offer of settlement, thereby bringing the litigation to an early end, or alternatively to protect the defendant's position on costs. A payment into court should be used for monetary claims (whether the claim is for a liquidated debt or unliquidated damages), while Calderbank offers should be used where protection could not be achieved by a payment into court.[25] The plaintiff then had to decide whether to accept the money paid into court or the Calderbank offer in satisfaction of his claim. If he refused, the proceedings would continue. If after trial, the plaintiff, though successful on liability, was awarded less favourably than the amount of the payment-in or the offer, he would be regarded as the 'loser' as from the payment-in or offer and would generally be ordered to bear the costs of the defendant as from that date.

[13-16] However, the devices of payments into court and Calderbank offers were not applicable to the plaintiff. As mentioned above, a plaintiff who succeeded at trial would generally be awarded the costs of the proceedings. Hence, there might be little financial incentive for the plaintiff to make any reasonable offer to settle and for the defendant to accept such an offer. To address this problem, the innovative machinery of Part 36 offers was first introduced in the Civil Procedure Rules 1998 in England, which soon proved to be one of the most, if not the most, successful features of the Woolf reforms.

[13-17] As a result of the successful experience in England, Order 22 was completely redrafted under the Hong Kong Civil Justice Reform to follow largely Part 36 of the English Civil Procedure Rules 1998.[26] The key features of our new Order 22 are as follows:

(a) For the first time, a plaintiff may make a sanctioned offer of settlement, putting the defendant who rejects that offer at risk of paying part or all of the judgment award at an enhanced interest rate of up to 10% above the judgment rate, and legal costs on an indemnity basis plus enhanced interest thereon.

(b) A defendant may make a sanctioned payment or a sanctioned offer, which is similar to the earlier regime of payment into court and Calderbank offer. The key difference is that in case the plaintiff cannot obtain a judgment more favourable than the sanctioned payment or offer, he will now face more severe consequences. Instead of paying the defendant's costs on a party-and-party basis, under the new regime the plaintiff is at risk of paying the defendant's costs on an indemnity basis plus enhanced interest thereon, and of being disallowed part or all of the discretionary interest which would otherwise be awarded on the judgment award.[27]

(c) Where an offer by a defendant involves a payment of money to the plaintiff, the offer must be made by way of a sanctioned payment instead of a sanctioned offer[28] (which is similar to the earlier regime where the court could not take into account any Calderbank offer if the defendant could have protected his position on costs by way of a payment into court[29]).

[13-18] More detailed discussions on the sanctioned offer and sanctioned payment procedures under the new Order 22 are set out in section 3.2 below.[30]

3.1.2 Time for making sanctioned offer or sanctioned payment

[13-19] A sanctioned offer or sanctioned payment may be made at any time after the commencement of the proceedings but may not be made before such commencement.[31] Although a sanctioned offer or sanctioned payment can be

24 See, however, further discussions in Chapter 19 for the exceptions to the general rule.

25 See the earlier version of RHC and RDC O 22. For more detailed discussions, please see pp 564–573 of the second edition of this Book.

26 It should be noted that Pt 36 of the English Civil Procedure Rules 1998 was recently amended substantially by Civil Procedure (Amendment No 3) Rules 2006, which came into effect in April 2007.

27 Ie pursuant to the High Court Ordinance (Cap 4) s 48 or District Court Ordinance (Cap 336) s 49.

28 RHC and RDC O 22 r 3(1) and (2). Note, however, the English courts' approach as explained below in this Chapter.

29 See the earlier version of RHC and RDC O 22 r 14(2).

30 It should be noted that similar sanctioned payment and offer procedures are introduced at the same time under RHC and RDC O 62A for encouraging settlement of a party's entitlement to legal costs in lieu of taxation.

31 RHC and RDC O 22 r 3(3) and O 22 r 5(6). Unlike in England where the Pt 36 offer can be made before commencement of proceedings, the Hong Kong rules provide that a sanctioned offer or payment cannot be made before commencement. In the Final Report of the Working Party on the Civil Justice Reform, it is explained at para 301: 'In the light of the resistance shown in the consultation against the general adoption of pre-action protocols and against the court assuming powers to penalise the parties' pre-commencement conduct, primarily on the ground that such rules would result in unnecessary front-loaded costs (as previously discussed), the Working Party recommends that only sanctioned offers and payments made at the time of or after service of the Writ should be taken into account for the purposes of the sanctioned consequences, save to the extent that a pre-action protocol which has been adopted in relation to particular specialist list proceedings provides otherwise in respect of such specialist list proceedings.' It, however, appears that no exception relating to specialist list proceedings has been made. A party may however make a

made at any time before trial or judgment, in general, it should be made not less than 28 days before the commencement of the trial. Otherwise, it may not carry the stipulated sanctions of indemnity costs and enhanced interest.[32]

[13-20] The regime of sanctioned offer or sanctioned payment under Order 22 does not extend to appeal proceedings, although it was open to a party to protect his costs position on appeal by way of Calderbank offer.[33]

[13-21] It is important to note that a sanctioned offer or sanctioned payment is considered to be made when the offer or the payment notice is served on the offeree.[34] Hence, in order to meet the 28-day requirement, one should take into account the time for effecting service on the other party.[35]

Calderbank offer before the commencement of proceedings: see further discussions below on Calderbank offer.

As to how sanctioned payments and offers should be made in fatal accident claims when persons claiming to have been dependent on the deceased are in conflict with each other, see *Bushra Bibi v Method Building & Engineering Works Ltd (in liq)* [2014] 4 HKLRD 21, [2014] 3 HKC 114.

32 See the discussions on 'The latest date on which the offeree could have accepted the offer without leave' at section 3.1.13 below.

33 See the Court of Appeal's decisions in *CEP Ltd v Wuxi Solar Energy Technology Co Ltd* [2016] 1 HKLRD 960, [2016] 2 HKC 264 (CA); and *Li Man Chi v Or Chun Kit* [2017] 2 HKC 1 (CA) (NB In some earlier decisions, the Court of Appeal proceeded without analysis that sanctioned offer or payment could be made in appeal proceedings: see *Tjang Siu Thu v Profield Construction Engineering Ltd & Anor* [2015] 5 HKC 22 (CA); *Wong Tang Keung v Lee Wai Engineering Co Ltd (No 2)* [2014] 1 HKLRD 404 at 409, [2013] HKCU 2077 (CA); and *Chan Kwing Chiu v Chan Chi Kau* [2013] HKCU 2306 (unreported, CACV 209/2012, 3 October 2013)). In *Hung Sau Fung v Lai Ping Wai & Anor* [2016] HKCU 462 (unreported, CACV 240/2011, 1 March 2016); and *Ryder Industries Ltd (Formerly Saitek Ltd) v Chan Shui Woo* [2015] 2 HKC 582 (CA), the Court of Appeal held that, although the sanctioned offer made in the court below could not be relied on to invoke the provisions of O 22 in respect of the costs of the appeal, the sanctioned offer could, and should in appropriate cases, be taken into account in dealing with the costs of the appeal. See also *Dah Sing Insurance Services Ltd v Gill Gurbux Singh* [2015] HKCU 901 (unreported, CACV 255/2012, 27 April 2015), noting that the CA's judgment on the substantive issues was reversed by the Court of Final Appeal in (2016) 19 HKCFAR 454, [2016] 6 HKC 1 (CFA)).

34 RHC and RDC O 22 r 12.

35 Service need not be personal but can be effected by any of the methods set out in RHC and RDC O 65 r 5. However, the advantage of choosing personal service is that the sanctioned offer or payment may take effect immediately, particularly if it is made close to the expiry of the 28-day period before trial. Note however that under O 65 r 7, any sanctioned offer or payment served after 1 pm on Saturday or after 4 pm on any other weekday shall, for the purpose of computing any period of time after service, be deemed to have been served on the following Monday or on the following weekday, as the case may be.

3.1.3 Procedure for making a sanctioned offer

[13-22] Both a plaintiff and a defendant may make a sanctioned offer, but a defendant must make an offer by way of a sanctioned payment instead of a sanctioned offer if the offer involves a payment of money to the plaintiff.[36] A defendant may make a sanctioned offer limited to accepting liability up to a specified proportion.[37] Where the defendant's offer involves both payment of money and other non-monetary terms, the defendant should make a sanctioned payment for the monetary term together with a sanctioned offer for the non-monetary terms.[38]

[13-23] There is no prescribed form for making a sanctioned offer, but it must be made in writing.[39] The sanctioned offer must:[40]

(a) state whether it relates to the whole claim or to part of it or to an issue arising from it (and if so to which part or issue);

(b) state whether it takes into account any counterclaim or set-off;[41] and

(c) if it is expressed not to be inclusive of interest,[42] state whether interest is offered, and if so, the amount offered, the rate offered and the period for which it is offered.[43]

[13-24] There are conflicting decisions as to whether a written offer which includes a term on the costs consequence of acceptance (eg no order on costs upon acceptance) is a valid sanctioned offer under Order 22.[44] The author takes

36 RHC and RDC O 22 rr 3 and 4.

37 RHC and RDC O 22 r 5(4).

38 If the defendant does not wish to allow the plaintiff to accept only part of the offer, he should make clear in his sanctioned offer document that the sanctioned payment is part of the terms of a sanctioned offer, and check the following box in the prescribed form of Notice of Sanctioned Payment (Form 23): 'It is part of the terms of a sanctioned offer set out in (identify the document). If you give notice of acceptance of this sanctioned payment, you will be treated as also accepting the sanctioned offer by accepting the sanctioned payment.'

39 RHC and RDC O 22 r 5(1).

40 However, if there is any technical omission or non-compliance with the requirements set out in the rules, the court may waive any such defect: RHC and RDC O 22 r 2(4).

41 In *Ng Pok Leung v Ng Pok Man & Anor* [2016] 3 HKC 236, Deputy District Judge M Lam held that the defendant's set-off or counterclaim newly added to the Defence subsequent to the sanctioned offer made by the plaintiff should not be taken into account when assessing whether the plaintiff had bettered the offer.

42 If it is not so expressed, then the offer is to be treated as inclusive of interest until the last day on which it can be accepted without leave: RHC and RDC O 22 r 26.

43 RHC and RDC O 22 r 5(3)(a)–(c).

44 In two Court of Appeal decisions in *Central Management Ltd v Light Field Investment Ltd & Ors* [2011] 2 HKLRD 34, [2010] HKCU 2742 (CA), and *Chan Kwing Chiu & Anor v Chan Chi Kau* [2013] HKCU 2306 (unreported, CACV 209/2012, 3 October 2013), the Court of Appeal allowed sanctions under O 22 to be imposed for failure to accept a sanctioned offer which included a proposal of no order as to costs, though it did not specifically address the issue as to whether such an offer was a valid offer

the view that as a matter of principle, any such offer which effectively precludes the specified costs consequences provided under Order 22 should not be regarded as a valid sanctioned offer because of its irreconcilable conflict with the costs consequences stipulated in the Order.[45]

[13-25] A sanctioned offer made not less than 28 days before the commencement of the trial must provide that after the expiry of 28 days from the date the sanctioned offer is made, the offeree may only accept it if (a) the parties agree on the liability for costs; or (b) the court grants leave to accept it.[46] A sanctioned offer made less than 28 days before the commencement of the trial must similarly provide that the offeree may only accept it if either the above-mentioned condition (a) or condition (b) is satisfied.[47]

[13-26] The offeror must serve the sanctioned offer (a) on the offeree and (b) where the offeree is an aided person, on the Director of Legal Aid.[48]

under O 22. In *Chen Tek Yee & Ors v Chan Moon Shing & Anor* [2015] 3 HKC 622 (CFI), Deputy Judge Marlene Ng accepted that *Central Management Ltd* as binding and hence, despite her previous decision to the contrary in *Lin Yanjin v Smart Billion Engineering Ltd* [2011] HKCU 1571 (unreported, HCPI 739/2009, 10 August 2011) (CFI), she held that a sanctioned offer could include a term as to costs.

However, in *Leung Lai Kwan v Lo Kai Wing & Anor* [2015] HKCU 1940 (unreported, HCMP 1554/2015, 20 August 2015), Lam VP expressed the view *obiter* that 'All the offers were made on the basis of no order as to costs, which cannot be accommodated in the sanctioned payment or sanctioned offer regime in view of O 22 r 20(1)'. In *Wong Yim Man Anthea v Wong Ho Ming Felix* [2016] 3 HKLRD 249, [2016] 4 HKC 243, Deputy High Court Judge Kent Yee took the view that the Court of Appeal's decisions in *Central Management Ltd* and *Chan Kwing Chiu* were not binding decisions to the effect that a sanctioned offer can contain terms as to costs, and decided that any offer made on the basis of no order as to costs could not be accommodated in the O 22 regime by reason of irreconcilable conflict with O 22 r 20(1). See also *Yim Wai Ling v Yuen Chik Wah* [2017] HKCU 368 (unreported, DCCJ 663/2013, 14 February 2017), where District Court Judge Angela Kot followed *Wong Yim Man Anthea*.

45 See the explanations by Peter Gibson LJ in *Mitchell & Ors v James & Ors* [2003] 2 All ER 1064 (CA, Eng) and by Deputy High Court Judge Kent Yee in *Wong Yim Man Anthea v Wong Ho Ming Felix* [2016] 3 HKLRD 249, [2016] 4 HKC 243, with which the author agrees.

46 RHC and RDC O 22 r 5(7). A failure to set out in the offer letter the specific contents required under O 22 r 5(7) has been held to render any purported sanctioned offer not being a sanctioned offer within the new Order 22: see *Kwok Chun Wing v 21 Holdings Ltd* [2011] 3 HKC 542; *Montrio Ltd v Tse Ping Shun David* [2012] 2 HKC 392; and *Limbu Dharamaraj v ISS Adams Secuforce Ltd* [2013] HKCU 803 (unreported, DCPI 1568/2011, 12 April 2013)

47 RHC and RDC O 22 r 5(8).

48 RHC and RDC O 22 r 6.

3.1.4 Procedure for making sanctioned payment

[13-27] Sanctioned payment may only be made by a defendant.[49] It has to be made by making a payment into court and completing the prescribed form[50] that:

(a) states the amount of the payment;
(b) states whether the payment relates to the whole claim or to part of it or to an issue arising from it (and if so to which part or issue it relates);
(c) states whether it takes into account any counterclaim or set-off;
(d) if an interim payment has been made, states that the interim payment has been taken into account;
(e) if it is expressed not to be inclusive of interest,[51] state whether interest is offered, and if so, the amount offered, the rate offered and the period for which it is offered; and
(f) if a sum of money has been paid into court (other than as security for costs), states whether the sanctioned payment has taken into account that sum of money.[52]

[13-28] The defendant must serve the sanctioned payment notice (a) on the plaintiff and (b) where the plaintiff is an aided person, on the Director of Legal Aid. He must also file with the court a certificate of service of the notice.[53]

3.1.5 Clarification of sanctioned offer or sanctioned payment notice

[13-29] The offeree may, within seven days of a sanctioned offer or a sanctioned payment being made, request the offeror to clarify the offer or payment notice.[54] If the offeror does not give the clarification requested within seven days of service of the request, the offeree may, unless the trial has commenced, apply for an order that the offeror does so.[55] If the court makes an order pursuant to an application made, it shall specify the date when the sanctioned offer or sanctioned payment is to be treated as having been made.[56]

[13-30] A plaintiff, however, is not entitled to request the defendant to make an apportionment of the sanctioned payment between the causes of action under the Fatal Accidents Ordinance (Cap 22) and under Part IV or IVA of the Law Amendment and Reform (Consolidation) Ordinance (Cap 23).[57]

49 This includes a plaintiff against whom a counterclaim has been made: RHC and RDC O 22 r 1(1). A defendant may also make a sanctioned payment in respect of a claim that includes a claim for provisional damages, in which case the requirements set out in RHC and RDC O 22 r 11 must be followed.

50 Ie RHC and RDC App A Form 23.

51 If it is not so expressed, then the offer is to be treated as inclusive of interest until the last day on which it can be accepted without leave: RHC and RDC O 22 r 26.

52 RHC and RDC O 22 r 8(2).

53 RHC and RDC O 22 r 9.

54 RHC and RDC O 22 r 14(1).

55 RHC and RDC O 22 r 14(2).

56 RHC and RDC O 22 r 14(3).

57 RHC and RDC O 22 r 14(4).

3.1.6 Time for acceptance

[13-31] If the sanctioned offer or sanctioned payment is made 28 days or more before trial, it will remain open for 28 days, and will be capable of acceptance at any time within that period without leave of the court.[58] If this 28-day period for acceptance has expired, it can still be accepted without leave if the parties can agree on liability for costs.[59] Failing such an agreement, leave of the court is required, and the court shall make an order on costs if leave is granted.[60] Unless there are special circumstances, the usual costs order for late acceptance is for the offeror to pay the offeree's costs on a party and party basis before the expiry of the 28-day period, and *vice versa* thereafter.[61] The discretion of the court whether to grant leave is very wide and the court may take into account all relevant factors so as to advance the overriding objective to do justice to the parties concerned, but normally the main criterion is whether there has been such a change of circumstances as would render it unjust to allow the offeree to benefit from the offer, eg the discovery of further evidence, which puts a wholly different complexion on the case, or a change in the legal outlook brought about by new judicial decision. The court may also take into account other relevant factors such as the offeree's delay in making the application,[62], the substantiality of the offer to accept, the conduct of the parties and any interest of a third party being affected.[63]

58 RHC and RDC O 22 rr 7(1), 10(1), 15(1) and 16(1).

59 RHC and RDC O 22 rr 15(2) and 16(2).

60 RHC and RDC O 22 rr 15(3) and 16(3).

61 See *Wong Ching Wan v AS Watson & Co Ltd* [2007] 4 HKLRD 362, [2007] HKCU 1083 and *Or Siu Lung, appointed to represent the estate of Lam Choi Ching, deceased v Fu Hong Home for the Elderly Co Ltd* [2017] 1 HKLRD 308, [2016] HKCU 2771. But the court can also take into account the conduct of the parties and other relevant factors to depart from this normal rule: see *Yuen Chi Lok v i-Cable Telecom Ltd* [2014] 2 HKC 539.

62 For example, in *Polyever Holdings Ltd v Savills (Hong Kong) Ltd* [2014] 5 HKC 588 (Anthony Chan J), the court refused to grant leave for late acceptance even though there was no material change in circumstances, primarily because of the serious and unjustifiable delay in the application, which was made just over one month before trial.

63 See *Rai Rana Magar Pabitra v Pacific Construction (HK) Ltd* [2011] 3 HKLRD 469, [2011] 3 HKC 550; *Polyever Holdings Ltd v Savills (Hong Kong) Ltd* [2014] 5 HKC 588 (Anthony Chan J); and *ICICI Bank Ltd v Diamart Ltd & Ors* [2014] HKCU 2089 (unreported, HCA 618/2014, 4 September 2014).

In *Capital Bank plc v Stickland* [2004] EWCA Civ 1677, [2005] 2 All ER 544 (CA, Eng), the English Court of Appeal held that the court had a complete discretion as to whether permission to accept a Pt 36 offer out of time should be given, and that discretion was not limited to determining the incidence of costs, nor was it conditional upon the withdrawal of the offer or payment (because if the offer or payment was withdrawn, it would no longer carry the specified sanctions). The timing of the application to accept, the ready availability of the defendant's money to satisfy the terms of the plaintiff's offer, and a change in circumstance might well be relevant considerations. It should be noted that the amended Pt 36 operative from April 2007 now provides that in normal cases the offeree may accept the Pt 36 offer at any time without leave unless notice of withdrawal has been served by the offeror.

[13-32] If the sanctioned offer or sanctioned payment is made less than 28 days before trial, it can be accepted without leave, provided the parties can agree on liability for costs.[64] Otherwise, leave of the court is required, and the court shall make an order on costs if leave is granted.

[13-33] Where the proceedings involve a claim by or on behalf of a person under disability (ie an infant or a mentally incapacitated person), the offer or payment may be accepted only with the leave of the court and the money in court may not be paid out except in pursuance of an order of the court.[65]

3.1.7 Withdrawal or diminution of a sanctioned offer or payment

[13-34] A sanctioned offer made not less than 28 days before trial may not be withdrawn or diminished before the expiry of 28 days from the date the sanctioned offer is made unless leave is granted by the court.[66] Leave is also required if one wishes to withdraw or diminish a sanctioned offer made less than 28 days before trial.[67] Similarly, a sanctioned payment may not be withdrawn or diminished within the 28-day period unless leave is granted by the court.[68]

[13-35] If there is subsisting an application to withdraw or diminish a sanctioned offer or payment, it may not be accepted unless the court grants leave to accept it.[69] If the court dismisses an application to withdraw or diminish a sanctioned offer or payment or grants leave to diminish it, it may by order specify the period within which the offer or payment may be accepted.[70] If a sanctioned offer or payment is withdrawn, it does not have the specified consequences of indemnity costs and enhanced interest.[71]

64 RHC and RDC O 22 rr 15(2)(a) and 16(2)(a).

65 RHC and RDC O 22 r 19 and note the other situations where a court order is required for acceptance.

66 RHC and RDC O 22 r 7(1). This provision is added to overcome the effect of the English Court of Appeal decision in *Scammell v Dicker* [2001] 1 WLR 631, which held that a Pt 36 offer, being a contractual offer, could be withdrawn at any time before acceptance without leave notwithstanding that it was expressed to be open for acceptance within 21 days as required by the rule. See para 312 of the Final Report of the Working Party on Civil Justice Reform. The test for granting leave to withdraw is similar to that for deciding whether to allow the offeree to accept out of time: see discussions at footnote 63; see also *Lam Wai Ling Mayme v Hutchison Telecommunications (Hong Kong) Ltd* [2017] HKCU 692 (unreported, HCPI 461/2015, 17 March 2017) where Master Leong affirmed that the general test is 'whether there is sufficient change of circumstances since the money was paid in to make it just that the defendant should have an opportunity of withdrawing or reducing his payment'.

67 RHC and RDC O 22 r 7(2).

68 RHC and RDC O 22 r 10(1).

69 RHC and RDC O 22 rr 7(2) and 10(2).

70 RHC and RDC O 22 rr 7(4) and 10(3).

71 RHC and RDC O 22 rr 7(5) and 10(4). See *Rai Rana Magar Pabitra v Pacific Construction (HK) Ltd* [2011] 3 HKLRD 469, [2011] 3 HKC 550 (Bharwaney J).

[13-36] The rules are silent as to what constitutes a withdrawal of a sanctioned offer or payment. So does a subsequent offer (whether by way of without prejudice offer or by way of sanctioned offer or payment) have the effect of nullifying the effect of an earlier sanctioned offer or payment? This question has not yet been authoritatively settled by any decision in the higher courts, but there are conflicting decisions in the District Court and the Court of First Instance.[72]

[13-37] It is the author's view that the operation of a sanctioned offer or payment is governed largely by the procedures laid down in Order 22, and so it is not subject to all the normal rules of offer and acceptance in the law of contract, particularly the rule that an offer is deemed revoked by a subsequent counter-offer or revised offer. Hence, the making of any subsequent offer, without more, should not automatically revoke an earlier sanctioned offer or payment as in the law of contract.[73] Moreover, the rules stipulate only that if a sanctioned offer or payment is 'withdrawn', it does not have the consequences specified in Order 22.[74] Hence, even if the sanctioned offer or payment is deemed revoked by operation of the contract law, it should not be deemed 'withdrawn' for the purpose of the rules and so should still be able to trigger the stipulated sanctions under Order 22 if it beats the judgment award (unless the terms of the subsequent offer are such that it evinces an intention of the offeror to withdraw the earlier sanctioned offer or payment.) The author's views are consistent with the objective of the Civil Justice Reform to encourage settlement, as otherwise the offeror would be reluctant to make a further sanctioned offer or payment to attempt settlement for fear of losing the protection of the sanctions arising from the original sanctioned offer or payment.

3.1.8 Acceptance by the plaintiff

[13-38] To accept a sanctioned offer or payment made by the defendant, the plaintiff has to file with the court and serve on the defendant a written notice of

72 For decisions that the original sanctioned offer or payment be superseded by any subsequent offer or payment, see *Cheng Kai Kit v Kwong Kam Tim Marble Co Ltd* [2009] HKCU 1780 (unreported, DCPI 2627/2008, 16 November 2009); *Power Color Scanning & Lithographics Co Ltd v Kam Kong Food Factory (A Firm)* [2010] HKCU 2386 (unreported, DCCJ 3902/2007, 9 November 2010); *Maysun Engineering Co Ltd v International Education and Academic Exchanges Foundation Co Ltd t/a Hong Kong Institute of Technology* [2011] 2 HKLRD 844, [2011] 3 HKC 65; and *Rai Pabitdara v Vegetable Marketing Organization* [2011] HKCU 855 (unreported, DCPI 2473/2009, 6 May 2011). For decisions that the original offer or payment would survive the subsequent offer or payment unless expressly withdrawn, see *Wealthy Century Investment Ltd v DBS Bank (HK) Ltd* [2010] 6 HKC 130; *Rai Rana Magar Pabitra v Pacific Construction (HK) Ltd* [2011] 3 HKLRD 469, [2011] 3 HKC 550; and *Cheung Shuk Han v Chik Wai Yin* [2013] 4 HKC 311. For reasons explained in the next paragraph, the author agrees with the second line of cases.

73 Echoing the views expressed by Deputy District Judge Alfred Chan in *Wealthy Century Investment Ltd* (above).

74 RHC and RDC O 22 rr 7(5) and 10(4).

acceptance.[75] The consequences of acceptance depend on whether the sanctioned offer or payment covers the whole or part of the claim.

[13-39] If a sanctioned offer or a sanctioned payment relates to the whole claim, the plaintiff's claim is stayed upon his acceptance, and the plaintiff is entitled to his costs of the proceedings up to the date of acceptance, unless the court otherwise orders.[76] It should be noted that unlike the previous rules which gave the offeree an automatic right to his taxed costs of the whole proceedings upon his acceptance of the offeror's payment into court,[77] the rules now allow the court a discretion to make a different costs order under the Otherwise Proviso. However, the *prima facie* rule that the offeree be entitled to his costs up to the date of acceptance should apply unless the offeror has given a prior warning to the offeree that he will apply to invoke the Otherwise Proviso upon acceptance of the sanctioned payment or sanctioned offer, and is able to discharge the burden of showing exceptional circumstances that justify a departure.[78] If the plaintiff in a High Court action

75 A notice of acceptance of a sanctioned payment must be in the prescribed Form No 24 in Appendix A of the RHC and RDC: O 22 r 15(4).

76 RHC and RDC O 22 r 20. The plaintiff's costs include any costs attributable to the defendant's counterclaim or set-off if the sanctioned offer or the sanctioned payment notice states that it takes into account the counterclaim or set-off: O 22 r 20(3). In *Golden Tonn Industrial Ltd v Hong Kong Cyberport (Ancillary Development) Ltd* [2015] 3 HKC 226 (CA), the Court of Appeal accepted that there was strength in the argument that costs ordered to be reserved in earlier interlocutory proceedings do not form part of the general costs of the action within the purview of O 22 r 20(1), and so reserved costs (and any other outstanding questions as to costs) may be dealt with by the court after the acceptance of the sanctioned payment because of O 22 r 22(5)(b). However, the fact that the court had jurisdiction to deal with outstanding reserved costs did not mean it was bound to embark upon the exercise of determining the application. Leave to appeal was refused because the lower court judge was clearly correct in taking the view that it was unrealistic to expect a court with no previous involvement in the matter to come to a view on which party would ultimately have prevailed without hearing the whole of the argument, and so it would not be appropriate to embark on an attempt to determine which way the reserved costs would have gone.

77 See the previous RHC and RDC O 62 r 10(2) and *Hudson v Elmbridge Borough Council* [1991] 4 All ER 55, [1991] 1 WLR 880 (CA, Eng) quoted with approval in *Associated Engineers Ltd v Lo Chee Pui* [2003] 2 HKLRD 76, [2003] 2 HKC 316 (CA). Both the English and Hong Kong courts criticised the unsatisfactory aspect of the old O 62 r 10(2) which entitled the plaintiff to the automatic right of taxation. They suggested that in order to balance the interest of having a case compromised by payment-in and the prejudice that a party might suffer in terms of costs, the retention of the court's discretion on costs was a safeguard which could easily be implemented by a change of the Rules. See also *Cho Ho Kuen v Yu Kwok Wah* [2001] 3 HKC 566 (CA).

78 *Etratech Asia-Pacific Ltd v Leader Printed Circuit Boards Ltd* [2013] 2 HKLRD 1184, [2013] 4 HKC 282, approving Master Marlene Ng's views in *Lin Yanjin v Smart Billion Engineering Ltd* [2011] HKCU 1571 (unreported, HCPI 739/2009, 10 August 2011) and refusing to follow Master KK Pang's views in *Cheung Mei Po v Chan Yu Ching Alexs* [2011] HKCU 1195 (unreported, HCPI 71/2010, 24 June 2011). The basic reason is that fairness dictates that the offeree, who is considering