ORDER 7

ORIGINATING SUMMONS: GENERAL PROVISIONS

1. Application (O. 7 r. 1)

The provisions of this Order apply to all originating summonses subject, in the case of originating summonses of any particular class, to any special provisions relating to originating summonses of that class made by these rules or by or under any written law.

NOTES

[7.1.1] Originating summons procedure – cross references

Order 7 makes provision for the commencement of proceedings by way of originating summons. As to when it is appropriate to proceed by way of originating summons rather than writ, see Order 5 rule 4.

See Order 28 for originating summons procedure following commencement of proceedings.

2. Form of summons, etc. (O. 7 r. 2)

(1) Every originating summons (other than an ex parte summons) shall be in Form No. 8 or, if so authorised or required, in Form No. 10 in Appendix A, and every ex parte originating summons shall be in Form No. 11 in Appendix A.

(1A) Form No. 8 in Appendix A is to be used in all cases except where another form is prescribed under a written law or there is no party on whom the summons is to be served. (L.N. 152 of 2008)

(1B) Form No. 10 in Appendix A is to be used if it is prescribed under a written law. (L.N. 152 of 2008)

(1C) Form No. 11 in Appendix A is to be used if there is no party on whom the summons is to be served. (L.N. 152 of 2008)

(2) The party taking out an originating summons (other than an ex parte summons) shall be described as a plaintiff, and the other parties shall be described as defendants.

(3) This rule is subject to Order 53, rule 5(1), Order 54, rule 2(3) and Order 121, rule 2(1).

(L.N. 152 of 2008, L.N. 3 of 2016)

NOTES

[7.2.1] Types of originating summons

Order 7 rule 2 provides for three different types of originating summons, the prescribed forms for which are set out in appendix A to these rules. The forms are:

- Form No 8 – the 'general' or 'long form' of originating summons;
- Form No 10 – the 'expedited' or 'short form'; and

- Form No 11 – the form of ex parte originating summons.

Note that there is also the originating summons 'for possession' in form No. 11A, which is required to be used in summary proceedings for possession of land under Order 113 rule 2. Note also that applications for judicial review and habeas corpus have their own specific types of originating summons: this rule is specifically subject to Order 53, rule 5(1) and Order 54, rule 2(3) which prescribe the use of forms 86A and 87 for those types of application respectively. Specific forms of originating summons are also prescribed for use in child abduction cases: see Order 121 rule 2 as amended with effect from 5th April 2016.

The general form of originating summons must be used save where use of one of the other forms is mandated. Prior to the civil justice reforms implemented in 2009 the question of which type of originating summons to use was governed by Practice Direction 5.8. The effect of rule 2(1A), (1B) and (1C) is to give a legislative basis to the information set out in that practice direction. As to when one of the forms other than the general form should be used, see the discussion in the ensuing paragraphs.

We now turn to look at when it is appropriate to use the expedited and ex parte forms of originating summons.

[7.2.2] Use of the expedited form of originating summons

As its name suggests, the expedited form of originating summons will normally result in a speedier hearing. In this regard see Order 28 rule 2.

Order 7 rule 2(1) provides that the expedited form of originating summons may only be used where 'authorized or required'. As to the meaning of 'authorized' and 'required' in this context see *Hong Kong Ping Jeng Lau Co Ltd v IO United Centre* (HCMP 2971/1989; Godfrey J; 04.12.1989) (para 4). It was there held that it was improper, indeed an irregularity, to use the expedited form in an ordinary case. To do so would defeat the provisions of these rules setting out a timetable. As a consequence the defendant would be 'deprived of the time provided [O 28 r 1A] ... for the filing of evidence' (para 5–6). The position was fortified by the addition of r 2(1A) and (1B) with effect from April 2009, stating that the expedited form is only to be used where prescribed by written law.

Examples of provisions prescribing use of the expedited form of originating summons include the following:

- Order 24 rule 7A – application for discovery before action under section 41 of the High Court Ordinance.
- Order 73 rule 3(3) – application for leave to appeal against arbitration award.
- Order 102 rule 3(2) – application for rectification of register of members of a company.
- Order 118 rule 3 – application under section 84(3) of Cap 1 in relation to search and seizure of journalistic material.

In *A Co v B Co* [2002] 2 HKC 497, [2002] 3 HKLRD 111 (HCMP 336/2002; Ma J; 12.03.2002) (para 3), it was suggested that the expedited form should have been used on an application for *Norwich Pharmacal* discovery; however it is not clear from the judgment why this should be so.

It is not appropriate to use the expedited form in issuing a vendor and purchaser summons under section 12 of the Conveyancing and Property Ordinance (Cap 219): *Talent Hope Ltd v Magnificent Estates Ltd* [1995] 3 HKC 593. If the application is urgent, for example where a completion date is forthcoming, the applicant should use the general form and seek an expedited hearing: *Hingold Investments Ltd v Kadesy*

Development Ltd [1995] HKCU 148 (HCMP 1311/1995; Rogers J; 07.06.1995). Nor is it appropriate to use the expedited form in an application for a declaration: *International Automotive Components SRO v Xuke Trading Ltd & Anor* [2017] 3 HKC 137 (HCMP 546/2017; DHCJ Paul Lam SC; 19.04.2017) (para 2).

Improper use of the expedited form will not necessarily be fatal to the proceedings. In *Hong Kong Ping Jeng Lau Co Ltd* (above) the court, citing Order 2 rule 2(1), held it had 'power to do what is just to cure the matter'. See also *Hiew Fook Loi v Yau Wai Yin & Anor* [2002] HKCU 1662 (HCMP 4272/2002; DHCJ A Cheung; 22.11.2002) where the court took the same view, citing Order 2 rule 1. In *Talent Hope Ltd v Magnificent Estates Ltd* [1995] 3 HKC 593 the court allowed a party who had wrongly commenced proceedings by way of the expedited form to amend it into the general form.

[7.2.3] Use of ex parte originating summons

It is only rarely appropriate to make an ex parte originating application to the court. Paragraph 1 of Practice Direction 5.8 (which may be viewed on the judiciary website) provides that the ex parte originating summons should only be used where authorised or required by the Rules or other statutory provision. Examples of such provisions include the following:

- Applications under the Evidence Ordinance (Cap 8) for the taking of evidence in aid of a foreign court (Order 70 rule 2) or for letters of request to a foreign court (*AG v L* [1990] 1 HKLR 195, 197H–I, [1990] HKCU 0285) (notwithstanding the Bill of Rights: *AG v Osman* (HCMP 2793/1985; Jones J; 28.10.91)).
- Order 90 rule 3(2) under which the court may grant leave to issue an ex parte originating summons in wardship cases where there is no person other than the child who is a suitable defendant.
- Order 115A rule 4 – application for registration of an external confiscation order under the Mutual Legal Assistance in Criminal Matters Ordinance (Cap 525).
- Order 117 rule 4 – application for restraint order or charging order under the Organized and Serious Crimes Ordinance (Cap 455).
- Order 118 rule 4 – application for a warrant for search and seizure of journalistic material under the Interpretation and General Clauses Ordinance (Cap 1).

It has been held that use of the ex parte procedure may also be authorised or required by implication. See *Re Cheung Chi Wang & Anor* [2002] 1 HKC 326, 334I–335F where it was held that the procedure may be used in seeking relief under section 12A of the Conveyancing and Property Ordinance (Cap 219) (in relation to stale mortgages). See also *Director of Social Welfare v Official Solicitor* [2004] HKCU 283 (HCMP 44/2004; Lam J; 05.03.2004) where the same judge came to the same conclusion in relation to an application for appointment of a committee under the Mental Health Ordinance (Cap 136). There are examples of applications for vesting orders under section 45(e) of the Trustee Ordinance (Cap 29) (deceased trustee with no personal representative) being made by ex parte summons. See *Re Trustee Ordinance* (HCMP 2133/1987; Godfrey J; 02.11.1987) and *Re Trustee Ordinance section 45(e)* (HCMP 4522/2000; Kwan J; 16.11.2000).

It has been held that it is not appropriate to proceed by way of ex parte originating summons in the following cases:

- Application for declaration as to title to property: *Re Kwong Sin Tong* (HCMP 2797/1993; Godfrey J; 03.08.1993)
- Application for exemption from jury service: *Re Jury Ordinance* (HCMP 3270/1994; Yam J; 25.11.1994).
- Application for order that dissolution of a company be declared void: *Axa China Region Insurance Co Ltd v Maratz (HK) Ltd & Ors* [2001] HKCU 377 (HCMP 2166/2001; Yuen J; 04.05.2001).

[7.2.4] Parties and headings

Order 7 rule 2(2) provides that the parties to an *inter partes* originating summons shall be described as plaintiff and defendant, just as in a writ. The parties will be named accordingly in the heading to the originating summons.

It is common practice also to state in the heading that the application is brought 'in the matter of' a particular statute, parcel of land, contract or deed. This practice is catered for by the forms of originating summons in Appendix A. Lengthy descriptions of the matter in which an originating summons is brought were criticised in *Wong Shui Yun Bernadette v Lau Wai Pui* [1987] 3 HKC 513, 514H–I as a waste of time and money. In *Re Trustee Ordinance* (HCMP 2133/1987; Godfrey J; 02.11.1987) it was said:

> It is quite unnecessary to follow the archaic practice of referring to the subject matter of the proceedings by the use of unnecessary verbiage. A short description of the property affected is quite sufficient.

Where the application is *ex parte*, a short description of the matter or property affected is sufficient: *Re Trustee Ordinance* (above). Parties should not be named because there are no parties to *ex parte* proceedings: *AG v L* [1990] 1 HKLR 195, 197H–I; *Sham Wan Keung, deceased & Anor v Leung Suet Fan, deceased* (CACV 56/1994; Nazareth & Bokhary JJA; Barnett J; 29.06.1994).

[7.2.5] Originating summons procedure

See Order 28 and the commentary thereunder.

3. Contents of summons (O. 7 r. 3)

(1) Every originating summons must include a statement of the questions on which the plaintiff seeks the determination or direction of the Court of First Instance or, as the case may be, a concise statement of the relief or remedy claimed in the proceedings begun by the originating summons with sufficient particulars to identify the cause or causes of action in respect of which the plaintiff claims that relief or remedy.

(2) Order 6, rules 3 and 5, shall apply in relation to an originating summons as they apply in relation to a writ.

NOTES

[7.3.1] Concise statement

Order 7 rule 3 requires that every originating summons set out questions the court is being asked to determine, or the relief or remedy claimed with particulars to identify the cause of action. Reference can be made to the general form of originating summons

(Form No 8 in Appendix A to these rules) to see how this information is to be set out. Failure to comply renders the originating summons defective and the plaintiff may be barred from arguing an unpleaded case: *Re Wah Yan Mo Fan Heung* [2016] 2 HKC 188 (HCMP 3361/2014; DHCJ Kent Yee; 11.09.2015) (para 7–8).

4. Concurrent summons (O. 7 r. 4)

Order 6, rule 6, shall apply in relation to an originating summons as it applies in relation to a writ.

5. Issue of summons (O. 7 r. 5)

(1) An originating summons shall be issued out of the Registry.

(3) Order 6, rule 7 (except paragraph (2)), shall apply in relation to an originating summons as it applies in relation to a writ.

6. Duration and renewal of summons (O. 7 r. 6)

Order 6, rule 8, shall apply in relation to an originating summons as it applies in relation to a writ.

7. Ex parte originating summonses (O. 7 r. 7)

(1) Rules 2(1) and (1C), 3(1), and 5(1) shall, so far as applicable, apply to ex parte originating summonses; but, save as aforesaid, the foregoing rules of this Order shall not apply to ex parte originating summonses.

(L.N. 152 of 2008)

(2) Order 6, rule 7(3) and (5), shall, with the necessary modifications, apply in relation to an ex parte originating summons as they apply in relation to a writ.

(Enacted 1988)

ORDER 8

ORIGINATING AND OTHER MOTIONS: GENERAL PROVISIONS

1. Application (O. 8 r. 1)

The provisions of this Order apply to all motions required or authorised under a written law, subject to any provisions relating to any class of motion made by that written law or any other written law.

(L.N. 152 of 2008)

NOTES

[8.1.1] Limited use of motions

Order 8 rule 1 applies the provisions of the Order to motions required or authorised under a written law. The rule was amended with effect from 2009 along with the amendment to Order 5 rule 1 making it clear that proceedings under these rules are normally to be commenced by writ or originating summons. Appeals to the Court of Appeal continue to be brought by motion: Order 59 rule 3(1).

See the commentary under Order 5 rule 1.

2. Notice of motion (O. 8 r. 2)

(1) Except where an application by motion may properly be made ex parte, no motion shall be made without previous notice to the parties affected thereby, but the Court, if satisfied that the delay caused by proceeding in the ordinary way would or might entail irreparable or serious mischief, may make an order ex parte on such terms as to costs or otherwise, and subject to such undertaking, if any, as it thinks just; and any party affected by such order may apply to the Court to set it aside.

(2) Unless the Court gives leave to the contrary, there must be at least 2 clear days between the service of notice of a motion and the day named in the notice for hearing the motion.

NOTES

[8.2.1] Application by motion normally to be made inter partes

Order 8 rule 2 provides that an application by motion shall not normally be made *ex parte*. The court has inherent jurisdiction to set aside an order made on a motion without prior notice to affected parties: *Commissioner of Inland Revenue v Registrar of Companies* [1998] 1 HKLRD 875, 877D.

3. Form and issue of notice of motion (O. 8 r. 3)

(1) The notice of an originating motion must be in Form No. 13 in Appendix A and the notice of any other motion in Form No. 38 in that Appendix.

Where leave has been given under rule 2(2) to serve short notice of motion, that fact must be stated in the notice.

(2) The notice of a motion must include a concise statement of the nature of the claim made or the relief or remedy required.

(3) Order 6, rule 5, shall, with the necessary modifications, apply in relation to notice of an originating motion as it applies in relation to a writ.

(4) The notice of an originating motion by which proceedings are begun must be issued out of the Registry.

(6) Issue of the notice of an originating motion takes place upon its being sealed by an officer of the Registry.

NOTES

[8.3.1] Forms of Notice of Motion

Order 8 rule 3 prescribes the forms of Notice of Motion to be used High Court proceedings. They are Form No 13 for an originating motion, and Form No 38 for any other motion, meaning a motion to be made within existing proceedings (such as a motion of the type dealt with in rule 4). Both those forms are in Appendix A to these rules.

A form of Notice of Originating Motion which is different from Form No 13 is also available for reference in the Forms section of the judiciary website www.judiciary.gov.hk.

4. Service of notice of motion with writ, etc. (O. 8 r. 4)

Notice of a motion to be made in an action may be served by the plaintiff on the defendant with the writ of summons or originating summons or at any time after service of such writ or summons, whether or not the defendant has acknowledged service in the action.

5. Adjournment of hearing (O. 8 r. 5)

The hearing of any motion may be adjourned from time to time on such terms, if any, as the Court thinks fit.

6. Transitional provision relating to originating and other motions (O. 8 r. 6)

Where, immediately before the commencement of the Amendment Rules 2008, an application, request or appeal by motion or originating motion made under a provision amended by Part 5 of the Amendment Rules 2008 is pending, then the application, request or appeal is to be determined as if that provision had not been so amended.

(L.N. 152 of 2008)

(Enacted 1988)

NOTES

[8.6.1] Additional transitional provision for motions pending at time of 2009 reforms

Order 8 rule 6 is a transitional provision for motions and originating motions pending when the civil justice reforms were implemented in 2009. It preserves the pre-existing

rules for such motions. This transitional provision is in addition to that in Order 5 rule 7 which applies to proceedings which were commenced by originating motion prior to the implementation of the civil justice reforms in 2009.

ORDER 9

PETITIONS: GENERAL PROVISIONS

1. Application (O. 9 r. 1)

The provisions of this Order apply to all petitions required or authorised under a written law, subject to any provisions relating to any class of petition made by that written law or any other written law. (L.N. 152 of 2008)

NOTES

[9.1.1] Restricted use of petitions

Order 9 rule 1 applies the provisions of the Order to petitions required or authorised under a written law. The rule was amended to that effect in 2009 along with the amendment to Order 5 rule 1 limiting the use of types of originating process other than the writ or originating summons to proceedings governed by special rules. See the commentary under Order 5 rule 1.

2. Contents of petition (O. 9 r. 2)

(1) Every petition must include a concise statement of the nature of the claim made or the relief or remedy required in the proceedings begun thereby.

(2) Every petition must include at the end thereof a statement of the names of the persons, if any, required to be served therewith or, if no person is required to be served, a statement to that effect.

(3) Order 6, rule 5, shall, with the necessary modifications, apply in relation to a petition as it applies in relation to a writ.

3. Presentation of petition (O. 9 r. 3)

A petition may be presented by leaving it at the Registry.

4. Fixing time for hearing petition (O. 9 r. 4)

(1) A day and time for the hearing of a petition which is required to be heard shall be fixed by the Registrar.

(2) Unless the Court otherwise directs, a petition which is required to be served on any person must be served on him not less than seven days before the day fixed for the hearing of the petition.

5. Certain applications not to be made by petition (O. 9 r. 5)

No application in any cause or matter may be made by petition.

6. Right to defend in person (O. 9 r. 6)

(1) Subject to paragraph (2) and to Order 80, rule 2, a respondent to proceedings begun by petition may (whether or not he is sued as a trustee or personal representative or in any other

representative capacity) defend the proceedings by a solicitor or in person.

(2) Where the respondent to such proceedings is a body corporate, except as expressly provided by or under any enactment or where leave is given under paragraph (3) for such respondent to be represented by one of its directors, such respondent may not take any step in the proceedings otherwise than by a solicitor.

(3)

(a) An application by a body corporate for leave to be represented by one of its directors shall be made ex parte to a Registrar and supported by an affidavit, made by the director and filed with the application, stating and verifying the reasons why leave should be given for the body corporate to be represented by the director.

(b) The relevant resolution of the board of the body corporate authorizing the director to appear on its behalf if leave is granted shall be exhibited to the affidavit.

(4) No appeal shall lie from an order of the Registrar under paragraph (3) giving or refusing leave.

(5) The Court may at any time revoke the leave given by a Registrar under paragraph (3).

(6) No appeal shall lie from an order of the Court revoking leave given by a Registrar.

(Enacted 1988) (L.N. 108 of 2002)

NOTES

[9.6.1] Representation of body corporate responding to petition

Order 9 rule 6(2) provides that where a body corporate is a respondent to a petition, it must act through a solicitor unless leave is obtained under rule 6(3) for leave to be represented by one of its directors. This provision closely resembles Order 12 rule 1(2), which applies to companies acknowledging service of a writ. The commentary thereunder should be relevant here.

ORDER 10

SERVICE OF ORIGINATING PROCESS: GENERAL PROVISIONS

1. General provisions (O. 10 r. 1)

(1) A writ must be served personally on each defendant by the plaintiff or his agent.

(2) A writ for service on a defendant within the jurisdiction may, instead of being served personally on him, be served –

(a) by sending a copy of the writ by registered post to the defendant at his usual or last known address, or

(b) if there is a letter box for that address, by inserting through the letter box a copy of the writ enclosed in a sealed envelope addressed to the defendant.

(L.N. 404 of 1991)

(3) Where a writ is served in accordance with paragraph (2) –

(a) the date of service shall, unless the contrary is shown, be deemed to be the seventh day (ignoring Order 3, rule 2(5)) after the date on which the copy was sent to, or as the case may be, inserted through the letter box for, the address in question;

(b) any affidavit proving due service of the writ must contain a statement to the effect that –

(i) in the opinion of the deponent (or, if the deponent is the plaintiff's solicitor or an employee of that solicitor, in the opinion of the plaintiff) the copy of the writ, if sent to, or as the case may be, inserted through the letter box for, the address in question, will have come to the knowledge of the defendant within 7 days thereafter; and

(ii) in the case of service by post, the copy of the writ has not been returned to the plaintiff through the post undelivered to the addressee.

(4) Where a defendant's solicitor indorses on the writ a statement that he accepts service of the writ on behalf of that defendant, the writ shall be deemed to have been duly served on that defendant and to have been so served on the date on which the indorsement was made.

(5) Subject to Order 12, rule 7, where a writ is not duly served on a defendant but he acknowledges service of it, the writ shall be deemed, unless the contrary is shown, to have been duly served on him and to have been so served on the date on which he acknowledges service.

(6) Every copy of a writ for service on a defendant shall be sealed with the seal of the High Court and shall be accompanied by a form of acknowledgment of service in Form No. 14 in

Appendix A in which the title of the action and its number have been entered.

(7) This rule shall have effect subject to the provisions of any Ordinance and these rules and in particular to any enactment which provides for the manner in which documents may be served on bodies corporate.

NOTES

[10.1.1] Origin and scope of Order 10

Order 10 prescribes the methods by which originating process should be served. Previously the only prescribed method was personal service. If that proved impossible, it was necessary to apply for a substituted service order (see Order 65 rule 4). In 1979 Order 10 rule 1 was amended to permit service on a defendant in Hong Kong to be effected by registered post or delivery as alternatives to personal service. Those methods of service are now the norm, and personal service is comparatively rare, save in those instances where specifically required under the rules (for example, an application for committal for contempt: Order 52 rule 3).

Order 10 is based on the Order of the same number in the former English RSC. One important difference is that in Hong Kong postal service must be effected by registered post. According to commentary in *Supreme Court Practice 1999*, registered post was deliberately eschewed in England to avoid giving defendants the opportunity to refuse to accept. The equivalent provision in England is now CPR 6.2.

Order 10 also deals with service on agents (rule 2) and in accordance with agreement between the parties (rule 3). Rule 4 make special provision for applications for possession of land. With regard to service by electronic means, see the commentary under Order 65 rules 4 and 5.

[10.1.2] Application to writs, originating summonses, motions and petitions

Order 10 rule 1 is worded in such a way as to prescribe the method of service only of a writ. However, it applies also, with necessary modifications, to originating summonses, notice of originating motion and petitions: see O 10 r 5.

[10.1.3] Service of bodies corporate

Specific provision is made for service of bodies corporate, such as companies, elsewhere in the law of Hong Kong. See the discussion of that topic under Order 65 rule 3. As noted there, it appears that those specific provisions do not exclude application of Order 10, which may also be relied upon for service of bodies corporate.

[10.1.4] Personal service

Order 10 rule 1(1) provides that a writ 'must' be served personally. As to the manner in which personal service is effected, see Order 65 rule 2 and the commentary thereunder.

Despite the wording of rule 1(1), personal service of a writ is not mandatory. Rule 1(2) now permits service by registered post or delivery as alternatives. These alternative methods of service of originating process are discussed below.

[10.1.5] Defendant must be in Hong Kong

Order 10 applies only to defendants who are in Hong Kong at the time of service. If the defendant is outside Hong Kong, service must be effected in accordance with the provisions of Order 11.

So far as personal service is concerned, even a fleeting presence in Hong Kong is sufficient for valid personal service: see the discussion under Order 65 rule 2.

With regard to service by post or delivery, O 10 r 1(2) permits such service to be effected only on 'a defendant within the jurisdiction'. These words have been interpreted as meaning that service will not be valid unless the defendant is within the jurisdiction on the date of service: see *Desirable International Fashions Ltd (in liq) v Chiang Shi Chau* [1997] 3 HKC 170, 174B–C per Waung J citing *Barclays Bank of Swaziland Ltd v Hahn* [1989] 2 All ER 398; [1989] 1 WLR 506. See also *Honest Billion Investment Ltd v Wang Xian Chou* [1997] 3 HKC 161, *Wing Lung Bank Ltd v Ho Man Iam* [1999] 3 HKC 368, *Chu Kam Lun v Yap Lisa Susanto* [1999] 3 HKC 378 (CA); *Victor Chandler (Int'l) Ltd v Zhou Chu Jian He* [2006] 3 HKC 90 and *Cosec Nominees Ltd & Anor v Lau Hon Ming Alan* [2001] 3 HKC 290, 296A–B. Default judgment will be set aside as of right if it is obtained following service which is irregular in that the defendant is not within the jurisdiction at the time: *Shanghai Land Holdings Ltd (in receivership) v Chau Ching Ngai & Anor* [2004] 3 HKC 573, 577–79. This is the case even if the defendant had actual notice of the writ despite absence from Hong Kong: *Deng Minghui v Chau Shuk Ling Elaine* [2007] 2 HKC 414 (CA), holding that *Penrose Industries Ltd v Tam Yan Lung* HCA 5783/2000 (Yeung J; 10.05.2001) is incorrect in this regard.*Deng Minghui* was distinguished in *Christow Corp Trust v Asiacom Int'l Holdings Ltd & Anor* [2015] 4 HKC 449 (HCA 924/2009; Master Leong; 06.05.2015) (para 20) on the ground that whereas in *Deng* the defendant never returned to Hong Kong and only learned of the writ while out of the jurisdiction, in *Christow* the defendant returned to Hong Kong shortly after service of the writ and then acquired knowledge of the writ. In *Christow* it was held (para 30) that service was valid, and the date of service was the date of the defendant's return to Hong Kong.

In *Yongheng Nevada Int'l Co Ltd v Chan Mau Tak* [2000] 2 HKC 584 and again in *Haifa Int'l Finance Co Ltd v Concord Strategic Investments Ltd & Ors* HCA 2308/2006 (Deputy Judge Carlson; 16.07.2009) the defendant was not in Hong Kong on the actual date of service, but was present on the deemed date of service (as to which see the commentary a few paragraphs hence). In both cases it was argued that service was good. In *Yongheng* the court decided the matter before it on other grounds, and in *Haifa* the court rejected the argument, saying (para 9) that the position is well-settled, and that there was no warrant to interpret the rule in any way other than that once it is shown that the defendant was not in Hong Kong on the date when the writ was inserted into the letter-box of his address, service will be held to have been invalid.

As a result, proof of the actual date of service can be important, especially in a place like Hong Kong where travel outside the jurisdiction is so frequent. See the commentary below on rule 1(3) and the provision therein as to deemed date of service. Likewise proof of when a defendant was or was not present in Hong Kong can be crucial. This can be established definitively by obtaining a statement of travel records from the Immigration Department.

[10.1.6] Rule 1(2)(a) and (b) – service by post or insertion in letter box

Service by post under Order 10 rule 1(2)(a) is a permissible variant to personal service. It is not a second class variant, but an effective variant, given proper compliance with

the rules : *Honour Finance Co Ltd v Chui Mei-mei* [1989] 2 HKLR 146, 150G–H, [1989] HKCU 461 (CA). The same comment should apply to service by insertion into the defendant's letter box under rule 1(2)(b).

Service by post – Postal service of a document is deemed to be effected by properly addressing, pre-paying the postage thereon and dispatching it : see section 8 of the Interpretation and General Clauses Ordinance (Cap 1).

The 'registered post' requirement – In 1991 Order 10 rule 1(2)(a) was amended so as to require postal service to be effected by means of registered post. This differs from the equivalent rule in the former English RSC, and the current CPR 6.2, which provide for service by 'first class post'. Service by ordinary, as opposed to registered post in Hong Kong is defective and any judgment obtained is liable to be set aside as irregular: *Electronic Spider Technology Ltd & Anor v AM Cheong Tat & Ors* [2001] HKCU 1429 (DCCJ 17323/2000; Judge A Cheung; 20.07.2001).

'Usual or last known address' – Order 10 rule 1(2) provides that a document for service by post or insertion in a letter box should be directed to the defendant's 'usual or last known address'. The following points can be stated as to the meaning of those words:

- 'Usual' address means a place where a person may usually be reached, and although there is a habitual or frequent connotation, a person may have a number of usual addresses: *Hong Kong Mortgage Corp Ltd v Ching Kit Yu & Anor* [2002] HKCU 492 (HCMP 2226/2002; DHCJ To; 15.04.2003). In *Varsani v Relfo Ltd* [2010] EWCA Civ 560 (27.05.2010) it was held that service at an address in England occupied by a defendant's family members was valid as service at the defendant's 'usual' residence even though he was working abroad for most of each year.
- The word 'or' must be read disjunctively: *Hong Kong Mortgage Corp* (above) (para 10).
- 'Last known address' is an alternative to 'usual' address in cases where the plaintiff is unaware of a recent change of address: *Guangdong Int'l Trust & Investment Corp HK (Holdings) Ltd v Yuet Wah (HK) Wah Fat Ltd* [1997] 2 HKC 696, 701F, [1997] 1 HKLRD 489 (HCA 3503/1996; Keith J; 07.04.1997). In *HRA Investments Ltd v Lee Yik Kwong* [2007] HKCU 808 (DCCJ 1291/2005; Judge Marlene Ng; 14.05.2007) (para 41) the court rejected an argument that the plaintiff was not justified in relying on the address given in an 11-year old document as the defendant's last known address, especially when the defendant was unable to say how the plaintiff could have realised that the address had become stale or been superseded.
- 'Last known address' refers to the address last known to the plaintiff: *Guangdong Int'l Trust* (above) (citing *Austin Rover Group Ltd v Crouch Butler Savage Associates* [1986] 3 All ER 50); *Hong Kong Mortgage Corp Ltd* (above) (para 12). It does not matter that with further inquiry a different address might have been discovered by the plaintiff: *Law Kwok Hung v Tse Ping Man* [1999] 4 HKC 397 (HCA 15104/1998; Yuen J; 06.07.1999) (para 24), 403H–I, citing *National Westminster Bank v Betchworth Investments Ltd* (1975) 234 EG 675. However, where the plaintiff knew that the defendant had moved. However, where the plaintiff knew that the defendant had moved out of the 'last known address' 15 years earlier, but failed to make enquiries of the tenant living there or to telephone the defendant whose mobile number

was known, it was held that service was irregular: *Lau Ying Sau Sailing & Anor v Wan Kwan Cheung* [2012] HKCU 542 (DCCJ 1405/2010; Deputy Judge Grace Chan; 07.03.2012). The last known address may be known to the plaintiff from a source other than the defendant: *Phillip Securities (HK) Ltd v Lam Chi Bin Stanley* [2002] 1 HKC 432, 436G–H.

- 'Address' is not confined to a person's residence but extends to place of work and other places where the person can be found such as student hostel and work quarters: *Tang Yuk Lam v Lau Wong Fat & Anor* [1982] HKC 539; CACV 101/1982 (para 9); *Hong Kong Mortgage Corp Ltd* (above) (para 11); *UCO Bank v Grand Win Group Ltd* [2013] HKCU 949 (HCA 599/2011; Deputy Judge Seagroatt; 26.04.2013) (para 35).

Address must be complete – Service by post is not valid unless a complete address is given on the postal packet. In *Tang Yuk Lam* (above) the Court of Appeal held that a writ addressed to a village in the New Territories, with no further identification of where in the village the defendant was to be found, was not properly served. It was suggested that the same would be true of a postal packet addressed to the defendant at a large block of flats, without giving a flat number.

Consequence of non-receipt – The wording of Order 10 rule 1(2) and of section 8 of the Interpretation and General Clauses Ordinance (Cap 1) suggests that service is effective upon dispatch of the postal packet, or insertion into the letter box in compliance with the rules. As a result the Court of Appeal held in *Honour Finance Co Ltd v Chui Mei-mei* [1989] 2 HKLR 146, 150D–G, [1989] HKCU 461, that such service is effective even if the document does not come to the notice of the defendant. The Court of Appeal expressly doubted the earlier decision in *AG v Geoffrey Watson* [1989] 1 HKLR 386, [1989] HKCU 418. The decision in the *Honour Finance* case has since effectively been overruled insofar as it concerns the circumstances in which default judgments will be set aside (see the commentary under Order 13 rule 9). It has also been doubted on the question of what constitutes effective service by post or insertion: see *Cosec Nominees Ltd v Lau Hon Ming Alan* [2001] 3 HKC 290, 296C–F. There Deputy Judge Jeremy Poon, citing a number of other decisions, stated that on a true construction of Order 10 rule 1(2) service is effected when the proceedings are brought to the notice of the defendant and not merely by delivery of the writ to his last known address. See also *Phillip Securities (HK) Ltd v Lam Chi Bin Stanley* [2002] 1 HKC 432, citing the robust judgment of Sir Thomas Bingham MR in *Forward v West Sussex County Council* [1995] 1 WLR 1469. There the English Court of Appeal found that the requirement in rule 1(3)(b) for an affidavit of service stating the deponent's opinion that the particular mode of service will bring the writ to the attention of the defendant supports the view that service takes place when notice is actually received. With great respect the Editor of this work is of the view that the English Court of Appeal's decision is not applicable in this jurisdiction. In Hong Kong section 8 of the Interpretation and General Clauses Ordinance (Cap 1) expressly deems service to be effected upon dispatch by post. Being enacted in Ordinance, that section takes precedence over anything in these rules (see s 28(1)(b) of Cap 1). The practical difference between the two approaches arises on an application to set aside default judgment, as to which see the commentary under Order 13 rule 9.

Acceptance of postal packet by agent – It has been held that service by post is effective when the postal packet is received by an agent for the defendant: see *Hecny Transportation (Thailand) Ltd v Tam Suet Fong Amedeo* [1999] 1 HKC 833.

[10.1.7] Rule 1(3)(a) – deemed date of service

In order to facilitate the calculation of the time within which the defendant must acknowledge service, Order 10 rule 1(3)(a) deems service to have been effected on the seventh day after posting or insertion into the defendant's letter box, unless the contrary is shown. See also section 8 of the Interpretation and General Clauses Ordinance (Cap 1) which provides that service is deemed to be effected on the day the postal packet would reach the defendant 'in the ordinary course of post'.

To the extent that the two deeming provisions are in conflict, the provisions of the Ordinance should be treated as prevailing: under general principles and indeed section 28(1)(b) of Cap 1 an Ordinance prevails over subsidiary legislation such as these rules.

It is a question of fact when a postal packet will be delivered 'in the ordinary course of post': see *Treasure Land Property Consultants (a firm) v United Smart Development Ltd* [1995] 3 HKC 30, [1995] 2 HKLR 176(CA). There it was held that the judge below had been wrong to take judicial notice of what he believed to be the 'ordinary course of post'. With effect from 2nd October 2003, Practice Direction 19.2 seeks to inject some certainty into the question of when a postal packet is delivered 'in the ordinary course of post', but it does not apply to service of originating process. See the commentary under Order 65 rule 5.

'Unless the contrary is shown' – Both provisions deeming date of service are subject to the proviso 'unless the contrary is shown'. It is thus open to a party to seek to prove that the actual date of service was different from the deemed date. Subject to proof, the actual date of service is the date on which the defendant receives notice of the proceedings, not the date of insertion or postal delivery: see *Phillip Securities (HK) Ltd v Lam Chi Bin Stanley* [2002] 1 HKC 432, 437F–438I applying *Forward v West Sussex County Council* [1995] 1 WLR 1469. In *Honest Billion Investment Ltd v Wang Xian Chou* [1997] 3 HKC 161 immigration records were used to prove the presence of the defendant in Hong Kong and the court held that service had been effected on the actual date of insertion into his letter box.

[10.1.8] Service on defendant both personally and by post

Where a defendant is served personally, and also by post, the time within which he may give notice of intention to defend runs from the earlier date: see *Tindixs Services Ltd v Cheng Wing Chun* [1998] 4 HKC 194.

[10.1.9] Rule 1(3)(b) – affidavit of service

By whom affidavit of service to be made – Where service is by registered post, the appropriate person to make the affidavit of service is the person who caused the writ to be dispatched by post, not the postman who delivers it. This is because the service is effected by dispatching the document by post.

Where, however, service is under rule 1(2)(b), by delivery by a messenger or courier, then, it is submitted, the affidavit should be made by the person actually inserting the envelope containing the writ into the letter box. This is because it is the act of insertion rather than the act of sending the messenger on his way which constitutes service.

Contents of affidavit of service – O 10 r 1(3)(b)(i) provides that an affidavit of service must contain a statement of opinion that the copy of the writ served by post or insertion through a letter box at the address in question will have come to the knowledge of the defendant within 7 days. The stated opinion is required to be that of the deponent or that of the plaintiff if service is effected by a solicitor's firm. The opinion must be 'reasonably held', otherwise the service is irregular: *Law Kwok Hung v Tse Ping Man & Anor* [1999] 4 HKC 397, 404 (HCA 15104/1998; Yuen J; 06.07.1999) (para 30–31). See also *Hung Lai Wan v Ngo Sam* [2017] HKCU 278

(HCA 3189/2016; DHCJ Anson Wong SC; 02.02.2017) where it was held that the court had no jurisdiction to grant default judgment under O 13 r 6 or O 19 r 7 where the affidavit of service was irregular in this regard. By O 10 r 1(3)(b)(ii), in the case of service by post, the affidavit must also state that the writ had not been returned undelivered. In addition, an affidavit of service in support of an application for judgment in default of notice of intention to defend a money claim is required to depose to the fact that the relevant form for making an admission under O 13A was served with the writ: PD 24.1, para 8.

Cross-examination of process server – In *Kwan Kam Wah v Chan Wai Ming* [2000] 2 HKC 378 the defendant, on an application to set aside default judgment, sought leave to cross-examine the process server on his affirmation of service. The court has power to order any person making an affidavit or affirmation to be cross-examined thereon: see Order 38 rule 2. In the particular case the application was resolved in favour of the defendant without the need to cross-examine the process server. Deputy Judge Carlye Chu went on to observe, at 382F–H:

> I accept that in appropriate cases, a defendant is entitled to impeach the good faith of the opinion stated by a plaintiff in an affirmation of service. I also accept that if a defendant does take this course, the court has to find whether the plaintiff has reasonable ground for holding the opinion so asserted in the affirmation of service and, if not, the service will be irregular. However, that does not confer upon the defendant a right to cross-examine ... [i]t is still incumbent upon the defendant to provide a proper foundation for the exercise of the court's discretion.

Deputy Judge Chu held that there was no proper basis to cross-examine the process server because he had no actual knowledge as to the whereabouts of the defendant, and instead relied solely on what he had been informed by the plaintiff. See also:

- *Bank of Credit & Commerce HK Ltd v Mirchandani* [1998] HKCU 546 (HCA 3150/1997; Master Jones; 04.05.1998) where a process server was cross-examined by way of trial of a preliminary issue.
- *Leung Chi Kwan v Chan Chi Ko* [1998] HKCU 1997 (HCMP 4150/1997; Yuen J; 29.12.1998) where a process server was cross-examined in a mortgage action.
- *Wei Bingqing v Xie Diangrong* [2006] HKCU 588 (HCA 2654/2003; Chung J; 01.04.2006) where the court declined to order cross-examination on the plaintiff's affidavit of service, but nevertheless found that it lacked credibility.
- *Nelson Telecommunications Group (Asia) Ltd v United Land Network Technologies Ltd* [2009] HKCU 81 (DCCJ 5962/2005; Judge Lok; 24.11.2008) where a default judgment was set aside on the basis of evidence that it would have been impossible for the process server to have served the writ in the manner set out in the affidavit of service. It appears the process server was not cross-examined in this case.

Cross-examination of defendant who disputes service – See the commentary under Order 13 rule 9.

[10.1.10] Rule 1(4) – acceptance of service by solicitor

It is common practice for service to be 'accepted' by solicitors on behalf of a defendant. This can save time and costs. The practice is based on Order 10 rule 1(4).

It has been held that where solicitors accept service under this provision on behalf

of a defendant who is outside Hong Kong, the validity of the service *per se* may not later be challenged, though it is open to the defendant to dispute the court's jurisdiction under Order 12 rule 8. See *New Link Consultants Ltd v Air China* [2005] 2 HKC 260, 274B.

[10.1.11] Rule 1(5) – Voluntary acknowledgement of unserved writ

A defendant who has not been served but wishes to defend may give notice under Order 12 rule 8A requiring the plaintiff to serve the writ or discontinue the action. Alternatively the defendant may voluntarily acknowledge service: *Tucker v Walker & Ors* [1920] VLR 385. In the latter case due service is deemed by Order 10 rule 1(5) on the date of acknowledgement of service unless the contrary is shown. In *Wong Kim Fung & Anor v Wong Kwing Tung* (HCPI 454/1997; Godfrey JA; 06.08.1999) the defendant, despite having acknowledged service, succeeded in having the action dismissed on the ground the writ had not in fact been served, but merely sent to insurers for information.

[10.1.12] Failure to comply with requirements as to service

Where it is contended that service has not been validly effected, a defendant may acknowledge service and apply under Order 12 rule 8(1)(b) for a declaration to that effect. The acknowledgement of service is deemed, by Order 12 rule 7, not to be a waiver of any irregularity in service.

Applications for a declaration that service has not been validly effected are not looked at favourably by the court where the alleged defect in service is purely technical. If the writ has actually come to the attention of the defendant, and no prejudice has been caused, the court may consider treating the defect as a mere irregularity under Order 2 rule 1. See the following cases as examples:

- *Transamerica Occidental Life Insurance Co v King Sound Industry Co Ltd & Anor* [2005] 1 HKLRD 125, 133, [2004] HKCU 1502 (HCCL 12/2004; Stone J; 23.12.2004) (para 44).
- *Bank of China (HK) Ltd v Chen Jianren* [2009] 3 HKLRD 163, [2007] HKCU 2104 (HCA 2844/2001; Deputy Judge Carlson; 18.12.2007) (para 23).
- *Hongkong & Shanghai Banking Corp Ltd v Ong Tong Sing Lawrence & Ors* [2008] 3 HKC 421.
- *3D-Gold Jewellery Holdings Ltd v PwC (a firm)* [2014] 4 HKC 528. In the *3D-Gold Jewellery* case the court later ordered costs against the defendant for challenging service when it was aware the plaintiffs intended to rely on Order 2 rule 1 to rectify the irregularity in service of the writ: see [2015] HKCU 854 (HCA 1192/2011; DHCJ Lok; 23.04.2015).

2. Service of writ on agent of overseas principal (O. 10 r. 2)

(1) Where the Court is satisfied on an ex parte application that–

(a) a contract has been entered into within the jurisdiction with or through an agent who is either an individual residing or carrying on business within the jurisdiction or a body corporate having a registered office or a place of business within the jurisdiction, and

(b) the principal for whom the agent was acting was at the time the contract was entered into and is at the time of

the application neither such an individual nor such a body corporate, and

(c) at the time of the application either the agent's authority has not been determined or he is still in business relations with his principal,

the Court may authorize service of a writ beginning an action relating to the contract to be effected on the agent instead of the principal.

(2) An order under this rule authorizing service of a writ on a defendant's agent must limit a time within which the defendant must acknowledge service.

(3) Where an order is made under this rule authorizing service of a writ on a defendant's agent, a copy of the order and of the writ must be sent by post to the defendant at his address out of the jurisdiction.

NOTES

[10.2.1] Service on agent

See the commentary under Order 65 rule 3.

3. Service of writ in pursuance of contract (O. 10 r. 3)

(1) Where–

(a) a contract contains a term to the effect that the Court of First Instance shall have jurisdiction to hear and determine any action in respect of a contract or, apart from any such term, the Court of First Instance has jurisdiction to hear and determine any such action, and

(b) the contract provides that, in the event of any action in respect of the contract being begun, the process by which it is begun may be served on the defendant, or on such other person on his behalf as may be specified in the contract, in such manner, or at such place (whether within or out of the jurisdiction), as may be so specified, then, if an action in respect of the contract is begun in the Court and the writ by which it is begun is served in accordance with the contract, the writ shall, subject to paragraph (2), be deemed to have been duly served on the defendant.

(2) A writ which is served out of the jurisdiction in accordance with a contract shall not be deemed to have been duly served on the defendant by virtue of paragraph (1) unless leave to serve the writ out of the jurisdiction has been granted under Order 11, rule 1(1) or service of the writ is permitted without leave under Order 11, rule 1(2).

NOTES

[10.3.1] Contractual provisions as to place and mode of service

It is common practice for commercial contracts to specify the place and manner in which service of court process may be effected in the event of a dispute arising. The legal basis for such clauses is Order 10 rule 3, by which a writ is deemed to have been duly served on the defendant if such an agreed term is followed. In *Hong Kong Mortgage Corp Ltd v Ching Kit Yu & Anor* [2002] HKCU 492 (HCMP 2226/2002; DHCJ To; 15.04.2003) it was argued that such a term may not prevail over the provisions of Order 10 rule 1 as to service. The argument was rejected because 'Order 10 rule 3 specifically permits such service' (para 19).

It is necessary that the action be one over which the court has jurisdiction, whether by agreement or otherwise: rule 3(1)(a). Such a clause may provide for service at a place outside Hong Kong, but in that event it is necessary to obtain leave under Order 11 rule 1 if it is a case where such leave is required: rule 3(2).

For service to be effective under Order 10 rule 3, the term of the agreement must be strictly complied with. In the *HK Mortgage Corp* case (above) it was held that valid service had not been effected because although the originating summons was sent to the agreed address, the agreed mode of service had not been followed. The originating summons had been inserted into the letter box at that address, rather than by being left or sent by pre-paid post as provided in the agreement.

[10.3.2] Ad hoc agreements as to manner of service

Apart from Order 10 rule 3, service may be permissible in accordance with an *ad hoc* arrangement between the parties. In *Kenneth Allison Ltd v AE Limehouse Co* [1991] 4 All ER 500, [1992] AC 105 (HL) it was held that service on a personal assistant was valid service of a partnership where the senior partner had authorised her to accept the writ. The Hong Kong Court of Appeal approved of such an arrangement in *AXA China Region Insurance Co Ltd v Leong Fong Cheng* [2016] 6 HKC 220 (CACV 113/2016; Lam VP & Kwan JA; 28.10.2016) (para 29). Although *AXA* concerned ordinary service in an appeal, the endorsement of the House of Lords' decision does not appear limited to that.

4. Service of writ in certain actions for possession of premises or land (O. 10 r. 4)

(1) Where a writ is indorsed with a claim for the recovery, or delivery of possession, of premises or land, the Court may–

(a) if satisfied on an ex parte application that no person appears to be in possession of the premises or land and that service cannot be otherwise effected on any defendant, authorize service on that defendant to be effected by affixing a copy of the writ to some conspicuous part of the premises or land;

(b) if satisfied on such an application that no person appears to be in possession of the premises or land and that service could not otherwise have been effected on any defendant, order that service already effected by affixing a copy of the writ to some conspicuous part of the premises or land shall be treated as good service on that defendant.

(2) Where a writ is indorsed with a claim for the recovery, or delivery of possession, of premises or land, in addition to, and not in substitution for any other mode of service, a copy of the writ shall be posted in a conspicuous place on or at the entrance to the premises or land recovery or possession of which is claimed.

NOTES

[10.4.1] Origin and scope of Order 10 rule 4

Order 10 rule 4(1) derives from the rule of the same number in the former English Rules of the Supreme Court. Rule 4(2) is unique to Hong Kong.

Rule 4(1) empowers the court to order an alternative method of service of a writ claiming possession of land where there appears to be no person in possession of the land who could be served in the normal way. Specifically the court may, under rule 4(1)(a) permit service of such a writ by affixing it to some conspicuous part of the premises, and by rule 4(1)(b) order that such service shall be treated as good.

Rule 4(2) imposes a secondary requirement when such a writ has been served in the usual way. That requirement is that a copy of the writ be posted in a conspicuous place on or at the entrance of the premises claimed.

[10.4.2] Cross-reference

Reference should also be made to Order 113 rule 4, which makes specific provision for service of an originating summons claiming summary possession of land under that Order. The summary possession procedure is only appropriate in cases such as where there is no triable issues of fact: see the commentary under Order 113 rule 1. In other cases, the application should be brought in the usual way rather than by summary application, and the relevant provision as to service will be Order 10 rule 4.

Like Order 10 rule 4, Order 113 rule 4 provides for affixing at a 'conspicuous' part of the premises in question. As to the 'conspicuous' requirement, see the commentary under Order 113 rule 4.

5. Service of originating summons, notice of motion, or petition (O. 10 r. 5)

(1) The foregoing rules of this Order shall apply, with any necessary modifications, in relation to an originating summons (other than ex parte originating summons or an originating summons under Order 113) as they apply in relation to a writ, except that an acknowledgement of service of an originating summons shall be in Form No. 15 or 15A in Appendix A, whichever is appropriate.

(L.N. 152 of 2008)

(2) Rule 1(1), (2), (3) and (4) shall apply, with any necessary modifications, in relation to a notice of an originating motion and a petition as they apply in relation to a writ.

(Enacted 1988)

NOTES

[10.5.1] Application of Order 10 to originating summonses, motions and petitions

Order 10 rule 5 has the effect of applying some of the provisions of the Order regarding service of writs to other types of originating process. Originating summonses which are *ex parte*, or invoke Order 113 (summary proceedings for possession of land) are outside the scope of the rule.

[10.5.2] Form of acknowledgement of service to be served with originating summons

The general form of acknowledgement of service is form No 14 in Appendix A, which must, according to Order 10 rule 1(6), accompany every writ. Order 10 rule 5(1) prescribes form No 15 as the appropriate form of acknowledgement of service in proceedings commenced by originating summons. The rule was amended with effect from 2009 as part of the civil justice reforms to prescribe, in addition, form 15 A in Appendix A for use in costs only proceedings under section 52B of the High Court Ordinance (as to which see Order 62 rule 11A and the commentary thereunder).

ORDER 11

SERVICE OF PROCESS, ETC., OUT OF THE JURISDICTION

1. Principal cases in which service of writ out of jurisdiction is permissible (O. 11 r. 1)

(1) Provided that the writ is not a writ to which paragraph (2) of this rule applies, service of a writ out of the jurisdiction is permissible with the leave of the Court if in the action begun by the writ–

(L.N. 363 of 1990)

(a) relief is sought against a person domiciled or ordinarily resident within the jurisdiction;

(b) an injunction is sought ordering the defendant to do or refrain from doing anything within the jurisdiction (whether or not damages are also claimed in respect of a failure to do or the doing of that thing);

(c) the claim is brought against a person duly served within or out of the jurisdiction and a person out of the jurisdiction is a necessary or proper party thereto;

(d) the claim is brought to enforce, rescind, dissolve, annul or otherwise affect a contract, or to recover damages or obtain other relief in respect of the breach of a contract, being (in either case) a contract which–

(i) was made within the jurisdiction, or

(ii) was made by or through an agent trading or residing within the jurisdiction on behalf of a principal trading or residing out of the jurisdiction, or

(iii) is by its terms, or by implication, governed by Hong Kong law, or

(iv) contains a term to the effect that the Court of First Instance shall have jurisdiction to hear and determine any action in respect of the contract;

(e) the claim is brought in respect of a breach committed within the jurisdiction of a contract made within or out of the jurisdiction, and irrespective of the fact, if such be the case, that the breach was preceded or accompanied by a breach committed out of the jurisdiction that rendered impossible the performance of so much of the contract as ought to have been performed within the jurisdiction;

(f) the claim is founded on a tort and the damage was sustained, or resulted from an act committed, within the jurisdiction;

(g) the whole subject-matter of the action is land situate within the jurisdiction (with or without rents or profits) or the perpetuation of testimony relating to land so situate;

(h) the claim is brought to construe, rectify, set aside or enforce an act, deed, will, contract, obligation or liability affecting land situate within the jurisdiction;

(i) the claim is made for a debt secured on immovable property or is made to assert, declare or determine proprietary or possessory rights, or rights of security, in or over movable property, or to obtain authority to dispose of movable property, situate within the jurisdiction;

(j) the claim is brought to execute the trusts of a written instrument being trusts that ought to be executed according to Hong Kong law and of which the person to be served with the writ is a trustee, or for any relief or remedy which might be obtained in any such action;

(k) the claim is made for the administration of the estate of a person who died domiciled within the jurisdiction or for any relief or remedy which might be obtained in any such action;

(l) the claim is brought in a probate action within the meaning of Order 76;

(m) the claim is brought to enforce any judgment or arbitral award;

(n) the claim is brought under the Carriage by Air Ordinance (Cap. 500);

(13 of 1997 s. 20)

(o) (Repealed by L.N. 296 of 1996)

(oa) the claim is made under the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525);

(87 of 1997 ss. 1(2) & 36)

(ob) the claim is for an order for the costs of and incidental to a dispute under section 52B(2) of the Ordinance;

(L.N. 152 of 2008)

(oc) the claim is for interim relief or appointment of a receiver under section 21M(1) of the Ordinance;

(L.N. 152 of 2008)

(od) the claim is for a costs order under section 52A(2) of the Ordinance against a person who is not a party to the relevant proceedings;

(L.N. 152 of 2008)

(p) the claim is brought for money had and received or for an account or other relief against the defendant as constructive trustee, and the defendant's alleged liability arises out of acts committed, whether by him or otherwise, within the jurisdiction.

(L.N. 404 of 1991)

(2) Service of a writ out of the jurisdiction is permissible without

the leave of the Court provided that each claim made by the writ is–

(b) a claim which by virtue of any written law the Court of First Instance has power to hear and determine notwithstanding that the person against whom the claim is made is not within the jurisdiction of the Court or that the wrongful act, neglect or default giving rise to the claim did not take place within its jurisdiction.

(3) Where a writ is to be served out of the jurisdiction under paragraph (2), the time to be inserted in the writ within which the defendant served therewith must acknowledge service shall–

(c) be limited in accordance with the practice adopted under rule 4(4).

(4) This rule shall not apply to a writ–

(a) to enforce a claim for damage, loss of life or personal injury arising out of–

(i) a collision between ships;

(ii) the carrying out of or omission to carry out a manoeuvre in the case of one or more of 2 or more ships; or

(iii) non-compliance, on the part of one or more of 2 or more ships, with the regulations made under section 93, 100 or 107 of the Merchant Shipping (Safety) Ordinance (Cap. 369);

(b) for the limitation of liability in a limitation action as defined in Order 75, rule 1(2); or

(c) to enforce a claim under section 1 of the Merchant Shipping (Oil Pollution) Act 1971 (1971 c. 59 ILK.) or section 4 of the Merchant Shipping Act 1974 (1974 c. 43 U.K.).

(L.N. 363 of 1990)

NOTES

[11.1.1] Origin and scope of Order 11 rule 1

Order 11 rule 1 provides that service of Hong Kong court process on defendants outside the jurisdiction is permissible only with leave of the court, and goes on to set out in lettered paragraphs the circumstances in which such leave may be granted. Leave to serve out is not required in cases which come within Order 11 rule 1(2). See the discussion (some paragraphs below) of the circumstances in which leave to serve out is not required. The manner in which service of a writ is to be effected out of the jurisdiction is dealt with separately, in Order 11 rule 5 and 5A, the latter rule concerning service in the Mainland of China. See those rules and the commentary thereunder.

Order 11 rule 1 of the Hong Kong rules was adopted from, and remains broadly similar to, the rule of the same number under the former English Supreme Court Rules. The equivalent provision in England is now found in CPR 6.30 and following.

Although the rule refers only to service of writs, it extends, by Order 11 rule 9, to originating summonses and other forms of originating process.

[11.1.2] Extra-territoriality

By permitting service outside Hong Kong, Order 11 has an extra-territorial effect. In the common law system the legislature and the courts have traditionally been reluctant to interfere in matters which are primarily the concern of other jurisdictions. This principle of common law finds expression in cases such as *Ex p Blain, Re Sawers* (1879) 12 Ch D 522 and *Colt Industries Inc v Sarlie* [1966] 1 All ER 673, [1966] 1 WLR 440. As a result Order 11 was designed so as to require leave to serve Hong Kong process out of the jurisdiction, and to limit the circumstances in which leave may be granted to cases where there is a connection with Hong Kong.

At one time the court regarded its jurisdiction under Order 11 as exceptional, even 'exorbitant': *The Siskina* [1979] AC 210, 254; *Tay Choo Wah v Singapore-Johore Express (Pte) Ltd* [1991] 2 HKC 180, 196 (CA). It was considered that the jurisdiction should be exercised with particular care. These common law concepts have now been replaced by 'a modern pragmatic approach': see *AXA China Region Insurance Co Ltd v Leong Fong Cheng* [2016] 6 HKC 220 (CACV 113/2016; Lam VP & Kwan JA; 28.10.2016) (para 19–20), adopting the UK Supreme Court's decision in *Abela v Baadarani* [2013] 4 All ER 119, [2013] 1 WLR 2043, [2013] UKSC 44. In *Abela* Lord Sumption JSC noted, in his concurring judgment (at para 53):

> ... in the overwhelming majority of cases where service out is authorised there will have been either a contractual submission to the jurisdiction ... or else a substantial connection between the dispute and this country. Moreover, there is now a far greater measure of practical reciprocity than there once was. Litigation between residents of different states is a routine incident of modern commercial life.

It followed in Lord Sumption's view, that:

> It should no longer be necessary to resort to muscular presumptions against service out which were implicit in adjectives like 'exorbitant'.

The Court of Appeal's adoption of *Abela* in *AXA* may technically be *obiter dicta*. However, the same court had earlier adopted *Abdela* in the context of service of Hong Kong process on a resident of Mainland China: *Deutsche Bank AG v Zhang Hong Li* [2016] 4 HKC 266, [2016] 3 HKLRD 303 (CACV 277/2015; Lam VP & Kwan JA; 19.05.2016). Before that *Abela* had been applied in the Court of First Instance: see *China Shanshui Employees Trust & Anor v Zhang Caikui & Anor* [2015] HKCU 1068 (HCA 1661/2014; G Lam J; 13.05.2015).

[11.1.3] Vires of Order 11

During the colonial era there were theoretical limitations on the legislature's competence to make laws having extra-territorial effect. See *Wesley-Smith 'Extraterritoriality and Hong Kong'* [1980] Public Law 150. Analogy with other jurisdictions having limited constitutional power suggests that the *vires* of Order 11 could be challenged on this basis. See *Cotter v Workman* (1972) 20 FLR 318 in relation to the Australian Capital Territory. On the other hand *Ashbury v Ellis* [1893] AC 339(PC from NZ) suggests Order 11 is supportable. In the unlikely event a court could

be persuaded that Order 11 was beyond the power of Hong Kong's colonial legislature (and hence its delegate, the rules committee, which enacted these rules in 1988) it should follow that the Order did not become part of the law of the HKSAR on reunification: *Solicitor v Law Society of HK & Secretary for Justice* (2003) 6 HKCFAR 570, [2003] HKCU 1411, [2004] 1 HKLRD 204 (FACV 7/2003; CFA; 19.12.2003).

[11.1.4] Leave requirement

Except as provided in rule 1(2) (see below), a plaintiff who wishes to serve a writ on a defendant outside Hong Kong must first obtain leave of the court under rule 1(1). As to the procedure for such application, see below.

To secure a grant of leave, the plaintiff must demonstrate on his application for leave, that his claim comes within one of the heads listed in rule 1(1). In addition, it must be made 'sufficiently to appear' to the court that the case is a 'proper one' for service out of the jurisdiction (Order 11 rule 4(2)). As stated in *Deak Perera Far East Ltd (in liquidation) v R Leslie Deak et al* [1988] HKC 649, 654, [1988] 2 HKLR 95, 100 (HCA 2951/1987; Barnes J; 05.02.1988):

> Under O 11 the Court is faced with two issues: a 'jurisdictional issue' as to whether the applicant's claim falls within any of the 'permissible' categories mentioned in r 1(1), and the 'discretion issue' raised by r 4(2).

The second issue as set out by Barnes J will necessarily include an examination of the merits of the plaintiff's claim.

Furthermore, it must be noted that the terms of Order 11 do not spell out the entirety of the court's jurisdiction to refuse leave *(Johnson v Taylor Brothers & Co Ltd* [1920] AC 144, at 154, per Lord Dunedin). Even where the case falls within the terms of Order 11 rule 1, leave may be refused on the ground of *lis alibi pendens* or *forum non conveniens,* and other factors which may be relevant to a grant or refusal of the order to stay or set aside the leave to serve out (*Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* [1991] 1 AC 187, at 212, per Lord Lowry). These considerations do not affect the existence of jurisdiction, but entitle the court to decline to exercise that jurisdiction. They are considered under rule 4(2) or, more often, will be raised after ex parte leave has been granted, and the defendant applies pursuant to Order 12 rule 8 to have that leave set aside.

[11.1.5] The principles on which leave to serve out of the jurisdiction may be granted

The principles which guide the court on an application under Order 11 for leave, or under Order 12 rule 8 to set aside such leave, were set out as follows by Hunter JA in *Wo Fung Paper Making Factory Ltd v Sappi Kraft (Pty) Ltd* [1988] HKC 10, 22-3;[1988] 2 HKLR 346, 356B-357H:

> I think it convenient at the outset to attempt to summarise what I see as the main relevant principles governing applications of this nature under Orders 11 and 12. I have drawn them principally, but not exclusively, from three decisions in the House of Lords; *The Brabo* [1949] AC 326; *Vitkovice Horni v Korner* [1951] AC 869, and *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460. They can be summarised in this way:
>
> (1) This is what has been called an exorbitant jurisdiction. The Court's basic jurisdiction is territorial. It is therefore a strong thing for the Court to go outside its territory and to compel the foreigner to come here to defend himself. It must therefore be exercised with great caution: see *Spiliada* [1987] AC 460 at p 481.

> (2) There are two safeguards for the foreigner. First the applicant has to bring himself within one of the sub-paragraphs in Order 11 rule 1. Secondly the applicant has to satisfy Order 11 rule 4(2) and 'make [it] sufficiently to appear to the court that the case is a proper one for service out'. That as Lord Radcliffe pointed out in *Vitkovice* [1951] AC 869 is really the heart of the rule.
>
> (3) In contract, the question whether a case is a proper one for service out falls to be answered by the tests in *Spiliada* [1987] AC 460. There are two ways, it seems to me, of expressing substantially the same concept. The first is Lord Keith's formulation of 'natural forum' in the *The Abidin Daver* [1984] AC 398 at p 415 where he defines the natural forum as being 'that with which the action has the most real and substantial connection'. The second is what Lord Goff called the basic principle and in his paraphrase of Lord Kinnear's test in *Sim v Robinow* (1892) 19 R 665. It is expressed by Lord Goff in these words at p 476: 'the appropriate forum for the trial of the action *ie* in which the case may be tried more suitably for the interests of all the parties and the ends of justice.' The onus of establishing that falls upon the plaintiff applicant.
>
> (4) The phrase 'sufficiently to appear' in Order 11 rule 4(2) is a guarded one, and is carefully chosen, I think, to cover the two very different positions of the court, on an application like this, in relation to the law and the facts. As far as the law is concerned, if the facts are clear the court can readily decide that for itself. That conclusion may be decisive, directly or indirectly: see *The Brabo* [1949] AC 326. Equally, and this is one of the court's primary functions under this rule, it can decide whether the facts alleged are sufficient in law to support the cause of the action alleged. But on pure fact, and particularly upon disputed fact, it is in a very different position. It cannot make any finding for the simple reason that it cannot conduct a mini pre-trial in order to decide whether a proper trial is to take place. It therefore has basically to act upon asserted fact.
>
> (5) There are two stages to the enquiry. The first is the ex parte stage under Order 11. I emphasise that it is ex parte on documents. The practice does not envisage oral submissions ever being made except at specific request. Order 11 rule 4(1) specifies what the supporting affidavit has to show. At that stage it seems to me that the court has to come to a provisional view (it being an ex parte application) on three matters. The first is whether the applicant shows a prima facie case. I read the speeches in *Vitkovice* [1951] AC 869 as accepting that that is the burden of that stage, it may be for the simple reason that when the court has only got one party's version before it, it can do very little more. That is how I read the speeches of Lord Simonds at p 876, Lord Radcliffe at p 884, Lord Tucker at p 891. Secondly it has to consider the sufficiency in law of the facts alleged: for example whether the applicant brings himself within any of the sub-rules and whether the facts alleged are sufficient prima facie to establish the cause of action alleged. Thirdly the court has to consider the facts within the limited scope available. This really comes down to considering whether the facts are sufficiently asserted in an apparently credible manner. The manner was put in this way in a case in contract by Lord Buckmaster giving the opinion of the Privy Council in *Hemelryck v William Lyall Shipbuilding* [1921] 1 AC 698 at p 701. He said:
>
> For the purpose of exercising the discretion which is conferred by

the rules to be exercised (that is Order 11) it is sufficient if there appears reasonable evidence that a contract has been made.

(6) The second stage which may or may not be reached, follows a proper application under Order 12 rule 8. Then the court has to consider all the evidence before it, and to determine in the light of that whether the plaintiff shows a good arguable case. That is the test laid down in *Vitkovice* [1951] AC 869 at that stage. But the court's position on fact and law is the same as it was at the ex parte stage. It cannot make any findings of fact. It can certainly consider the legal sufficiency of the facts, and whether there are legal holes or obvious failings in the plaintiff's case. It can in the words of Lord Goddard CJ in *Malik v National Bank of Czechoslovakia* 176 LT 136 cited in *Vitkovice* [1951] AC 869 at p 888, 'if it can see by what appears on the affidavits that the case put up is a perfectly groundless one and one in which there is no substance at all, the court can refuse to give leave'. Similarly if the case is demurrable or nearly so. But that is about the limit of the court's power and function on disputed facts under this jurisdiction. It follows that the existence of disputed facts is normally quite irrelevant to the question as to whether or not a good arguable case has to be shown. Putting it in another way, the showing of a good arguable case does not postulate an Order 14 case, and is not negatived by the fact that good arguable defences may exist. The relevance of the dispute goes really to little more than the question of the suitability of the forum evidentially and it may be a factor to be brought in there. Otherwise normally speaking factual disputes are quite irrelevant.

See also *Deak & Anor v Deak Perera FE Ltd (in liq)* [1991] 1 HKLR 551 554C–I (CA), [1990] 2 HKC 198 and *National Union Fire Insurance Co of Pittsburgh v Grand Union Insurance Co Ltd* [1993] HKCU 110 (CACV 105/1992; Kempster, Penlington & Litton JJA; 24.03.1993).

In *Hargreaves v Taian Insurance Co Ltd* [2006] 3 HKLRD 70, [2006] HKCU 913 (HCCL 27/2005; Stone J; 06.06.2006) (para 24) the court summarised the above principles as a burden on the plaintiff to show:

(i) that there is a good arguable case that the facts fall within one of the relevant heads of Order 11 rule 1(1);

(ii) that in terms of the dispute itself there is a serious issue to be tried; and

(iii) that the case is one which falls within the rubric of Order 11 rule 4(2), namely that 'No such leave shall be granted unless it shall be made sufficiently to appear to the Court that the case is a proper one for service out of the jurisdiction under this Order'.

[11.1.6] The merits – standard of proof

A line of cases emanating from *The Brabo* (1949) 82 Lloyd LR 251, [1949] AC 326 and *Vitkovice Horni A Hutni Tezirstvo v Korner* [1951] AC 869 suggests that the plaintiff must show a 'good arguable case on the merits'. For a Hong Kong case, see *Komala Deccof & Co SA & Ors v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina)* [1981] HKLR 116, especially at 118, [1981] HKCU 19. In considering whether there is a 'good arguable case' the court does not exercise a discretion but makes a 'judgment of fact': *Continental Mark Ltd v Verkehrs-Club De Schweiz* [2001] 4 HKC 469, 481B (affirmed on appeal: see [2002] 2 HKC 513).

The English cases in this line of authority include *Metall und Rohstoff v Donaldson Lufkin & Jenrette Inc & Anor* [1990] 1 QB 391; *Attock Cement Co v Romanian Bank for Foreign Trade* [1989] 1 Lloyd's Rep 572, [1989] 1 WLR 1147; *Hutton (EF) (London) Ltd & Co v Mofarrij* [1989] 2 Lloyd's Rep 348, [1989] 1 WLR 488; *Société Commerciale de Reassurance v Eras International Ltd* [1992] 1 Lloyd's Rep 570; *Overseas Union Insurance Ltd v Incorporated General Insurance Ltd* [1992] 1 Lloyd's Rep 439; *Banque Paribas v Cargill International SA* [1992] 2 Lloyd's Rep 19; and *Seaconsar (Far East) Ltd v Bank Markazi Jomhouri Islami Iran* [1993] 4 All ER 456, [1994] 1 AC 438 (HL).

In the lengthy extract from the judgment of Hunter JA in *Wo Fung Paper Making Factory Ltd v Sappi Kraft (Pty) Ltd* [1988] 2 HKLR 346, set out above, his Lordship interpreted the leading English cases as stipulating that on the ex parte application for leave the court need be satisfied that the plaintiff has shown a prima facie case, whereas in the event of a subsequent *inter partes* application under Order 12 rule 8 to set aside leave, the appropriate test was 'good arguable case'.

In *Tay Choo Wah v Singapore-Johore Express (Pte) Ltd* [1991] 2 HKC 180, at 196, Clough JA expressed the required standard of proof as follows:

> It is well settled that the exercise of the exorbitant jurisdiction of the Court under Order 11 rule 1 is not lightly to be exercised. However, the plaintiff is not required to discharge the standard of proof which must be attained at the trial or to prove the matter beyond all reasonable doubt, but he must show a good arguable case, something better than a prima facie case assessed by looking primarily at the plaintiff's case and not attempting to try the disputed facts on affidavit.

Different terminology has been used in other cases to describe the plaintiff's burden with regard to the merits. Some examples are:

- 'good chance of succeeding' on the merits – *National Union Fire Insurance Co of Pittsburgh v Grand Union Insurance Co Ltd* [1993] HKCU 110 (CACV 105/1992; Kempster, Penlington & Litton JJA; 24.03.1993) (para 10)
- 'serious question to be tried' – *Seaconsar* (above)
- 'misconceived' proceedings, disclosing 'no cause of action' against the defendants ought not be the subject of a grant of leave – *Hague & Anor v Nam Tai Electronics Inc* [2008] UKPC 13, [2008] 2 HKC 315
- 'in essence the court must reach a provisional conclusion that the plaintiff is probably right' where there is a disputed question of fact –*Yee Sang Metal & Building Supplies Co Ltd v Taiyo Maritime SA* [1991] 2 HKC 291 (CA); *Continental Mark Ltd* (above)
- 'a case against the ... defendant which merits consideration at trial' – *Inchcape JDH Ltd v Baltrans Exhibition & Removal Ltd & Anor* [1997] 3 HKC 314, 325, [1997] HKLRD 1278 (HCCL 257/1996; Stone J; 27.10.1997) (para 30)

It is not necessary for the plaintiff to show that he would succeed on an application for Order 14 summary judgment but the evidence he puts forward must be consistent and complete. See *Continental Mark Ltd v Verkehrs-Club de Schweiz* [2001] 4 HKC 469, 482A–B (affirmed on appeal: see [2002] 2 HKC 513), citing *Chetan v Jhaveri Shailain Hirachand* [1990] 2 HKC 170(CA). In both those cases, it was held that the plaintiff had failed to show a good arguable case when its evidence was inconsistent. In *Continental Mark*, Deputy Judge McCoy said that while the court should not 'attempt to try disputes of fact on the affidavits' it is open to a defendant to try to

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APPLICATIONS FOR WRIT OF HABEAS CORPUS?

NOTES

[54.0.1] References

For accounts of the substantive law of *habeas corpus* see: Sharpe, *The Law of Habeas Corpus* (Oxford: Clarendon Press, 2nd edn, 1989); Clark, *'Liberty and Security of the Person: Habeas Corpus'* in Wacks (ed) *Human Rights in Hong Kong* (HK: OUP, 1992); Clark & McCoy, *The Most Fundamental Legal Right: Habeas Corpus in the Commonwealth* (Oxford: Clarendon Press, 2000); Clark & McCoy, *Habeas Corpus: Australia, New Zealand and South Pacific* (Sydney: Federation Press, 2000). See also Gordon, *Crown Office Proceedings* (London: Sweet & Maxwell, looseleaf).

[54.0.2] Sources of law of habeas corpus

The law and procedure relating to *habeas corpus* in Hong Kong derives from the Basic Law, local legislation including this Order, the common law and practice direction.

(1)*The Basic Law*

The Basic Law not only applies the common law to the Hong Kong SAR (article 8) but also contains specific provision against arbitrary or unlawful arrest, detention or imprisonment (article 28).

(2)*Local statutory provisions*

The principal statutory provision touching on *habeas corpus* in Hong Kong is section 22A of the High Court Ordinance (Cap 4). Section 22A 'contains detailed *habeas corpus* provisions faithful to the "freedom of the person" and "no arbitrary or unlawful detention" guarantees extended to all persons in Hong Kong' under the Basic Law: *Thang Thieu Quyen v Director of Immigration* [1998] 3 HKC 247, 274F–G(CFA) (per Bokhary PJ, dissenting partly in result).

See also sections 23 (repeated applications) and 24 (appeals) of the High Court Ordinance. These are discussed below.

In practice *habeas corpus* applications often arise in extradition cases. See for example *Cheung Ying-lun v Government of Australia* [1990] 1 WLR 1497(PC); *Chong Bing Keung Peter v USA* [2000] 1 HKC 256(CA). Section 12 of the Fugitive Offenders Ordinance (Cap 503) expressly requires that the alleged fugitive be informed in ordinary language of the right to apply for *habeas corpus*.

Section 13D(1C) of the Immigration Ordinance (Cap 115) touches on *habeas corpus* in that it permits the Director of Immigration to ask persons detained under that Ordinance but released by way of *habeas corpus* to enter into recognizances.

(3)*Common law*

Habeas corpus exists at common law (*Re Lo Tsun Man & Ors* (1910) 5 HKLR166, 172, [1910] HKCU 11; *Thongchai Sanguandikul v USA* [1993] 2 HKLR 475, 476 (CA)).The common law right to obtain a writ of *habeas corpus* is expresslypreserved by section 22A(14) of the High Court Ordinance (Cap 4), butsubject to the relevant statutory provisions.

(4)*Practice directions*

Applications for *habeas corpus* are placed on the Constitutional and Administrative Law List and are subject to the practice direction governing that list (No 26.1) as well as the directions made by the judge in the charge of the list pursuant to Order 72 rule 2(3) (SL 3).

[54.0.3] History

Habeas corpus is a remedy which traces back to at least the 13th century (*AG v Chiu Tat-cheong David* [1992] 2 HKLR 84, 107(CA)) and attained its modern form in the latter part of the 17th century. During the colonial era the Application of English Law Ordinance (Cap 88) applied the English law of *habeas corpus* to Hong Kong both through adoption of English common law and by specific application of the Habeas Corpus Acts of 1679 and 1816.

The Application of English Law Ordinance (Cap 88) did not survive the resumption of Chinese sovereignty over Hong Kong. In its place article 8 of the Basic Law of the HKSAR applies the common law, and local Ordinances have been enacted to replace UK statutes which previously applied. For a discussion of this process and its legal consequences see *HKSAR v Ma Wai Kwan David & Ors* [1997] 2 HKC 315, 328H–329D(CA).

So far as *habeas corpus* is concerned, article 28(2) of the Basic Law now provides that no Hong Kong resident shall be subjected to arbitrary or unlawful arrest, detention or imprisonment. In addition, section 22A of the High Court Ordinance (Cap 4) was enacted to replace the UK Habeas Corpus Acts. One year after the resumption of Chinese sovereignty it was said of these changes that 'the substance of *habeas corpus* in Hong Kong is the same now as it was then': *Thang Thieu Quyen v Director of Immigration* [1998] 3 HKC 247, 274E–F(CFA) (per Bokhary PJ, dissenting partly in result). The transition was sufficiently smooth that fugitives arrested before 1 July 1997 could lawfully be detained after that date even though the new arrangements for extradition were not complete. See *Yang Chung Chun Robert v USA & Anor* [1997] 3 HKC 338.

[54.0.4] Types of habeas corpus

Originally there were many types of writ of *habeas corpus*. According to section 46 and the Schedule to the High Court Ordinance (Cap 4) all are abolished in Hong Kong save the writ of *habeas corpusad subjiciendum* (to produce the detained person to the court). However, other types of writ of *habeas corpus* continue to be mentioned in other legislation.

Order 54 rule 9 mentions the writ of *habeas corpusad testificandum* (to bring a prisoner to court to give evidence) and the writ of *habeas corpusad respondendum* (to bring up a prisoner to face action by a creditor or other claimant). See the commentary under rule 9.

The other types of *habeas corpus* which originally existed, such as *habeas corpuscum causa*, habeas corpus *ad prosequendum*, *habeas corpussatisfaciendum*, *habeas corpusad deliberendum* and *habeas corpusrecipias* appear to have no existence in current Hong Kong law.

[54.0.5] Comparison with English Order

Since the implementation of the Woolf reforms in England, Order 54 in that jurisdiction is found in Schedule 1 to the Civil Procedure Rules.

Hong Kong's Order 54 is largely the same as its English equivalent. However, rule 11 is omitted in Hong Kong and there are some differences in wording.

[54.0.6] The future of habeas corpus – merger with judicial review?

There is a significant trend of suggestion in the cases to the effect that *habeas corpus* will ultimately conflate with judicial review. See Simon Brown LJ 'Habeas Corpus – A New Chapter' [2000] Public Law 31, reviewing *Ex p Cheblak* [1991] 1 WLR 890; *Ex p Muboyana* [1991] 4 All ER 72 and *MB v The Managers of Warley Hospital* (English Court of Appeal, 30.07.1998). *habeas corpus* and judicial review are historically distinct and are governed by different statutory provisions (*Ex parte Khawaja* [1984] AC 74, 99E) but it has been said, with reference to that authority, that there is 'no substantive distinction' between the 'ancient remedy' of *habeas corpus* and 'the modern approach of judicial review': *Re Pham Van Ngo & Ors* [1991] 1 HKLR 499, 506.

1. Application for writ of habeas corpus ad subjiciendum (O. 54 r. 1)

(1) An application for a writ of habeas corpus ad subjiciendum shall be made to a single judge in court, except that–

(b) at any time when no judge is sitting in court, it may be made to a judge otherwise than in court; and

(c) any application on behalf of a minor must be made in the first instance to a judge otherwise than in court.

(2) An application for such writ may be made ex parte and, subject to paragraph (3), must be supported by an affidavit by the person restrained showing that it is made at his instance and setting out the nature of the restraint.

(3) Where the person restrained is unable for any reason to make the affidavit required by paragraph (2), the affidavit may be made by some other person on his behalf and that affidavit must state that the person restrained is unable to make the affidavit himself and for what reason.

NOTES

[54.1.1] Application for habeas corpus – two-stage process

Applications for *habeas corpus* are dealt with in a two-stage process. It is said that the writ is a writ of right and not a writ of course, meaning that there is an initial stage at which the court considers whether to proceed further to a full hearing on the merits: *In re Corke* [1954] 1 WLR 899. Order 54 rule 1 deals with the first stage (which may be *ex parte*) at which a judge may order the issue of a writ of *habeas corpus*. If the writ is issued there will be a second stage where the substantive issue is heard in full as between the parties pursuant to Order 54 rule 8.

[54.1.2] Jurisdiction reposes in judges of CFI

Habeas corpus jurisdiction reposes in the judges of the Court of First Instance and not the Court of Appeal. The jurisdiction of judges of the CFI is express in section 22A(1) of the High Court Ordinance (Cap 4) and is reflected in sections 23(1) and 24 thereof. The Court of Appeal is a creature of statute and has no jurisdiction to hear an original application for a writ of *habeas corpus*. See *In re Carroll (No 1)* [1931] 1 KB 104; *Chung Tse Ching & Anor v Commissioner of Correctional Services* [1988] HKC 251(CA) and *Re Meng Ching Hai* [1990] 1 HKC 185(CA). However, an appeal

lies as of right to the Court of Appeal from any decision on an application for *habeas corpus*: High Court Ordinance, section 24.

[54.1.3] Jurisdiction – territorial considerations

The writ of *habeas corpus* runs to any place within the Hong Kong SAR, including its territorial waters, save diplomatically protected premises (*Re Sun Yat Sen* (26.10.1896) in Short & Mellor, *The Practice on the Crown Side of the KBD* (2nd edn), (London: Stevens, 1908) p 318). The writ does not extend outside the Hong Kong SAR: *Re Ning Yi-ching* (1939) 56 TLR 3, 6. It follows that the detainor must be inside Hong Kong when the writ is issued.

[54.1.4] Form of application

An *ex parte* application for issue of a writ of *habeas corpus* may be made on affidavit without any originating process. For the *inter partes* stage, form 87 in appendix A, a special type of originating summons, should be used. In the event an *ex parte* application is adjourned to enable the respondent to be heard at the initial stage, form 88 is used.

[54.1.5] Who may apply?

Section 22A(2) of the Ordinance provides that the application may be made by the person detained, by another person on that person's behalf or by a person who claims to be legally entitled to the custody of another person. The identity of the applicant must be made clear: *Re W* [2006] 1 HKC 468, 474D–I.

A number of issues arise in this context, as discussed below.

(1) Persons on bail or recognizance

The prevailing view appears to be that any person in detention, whether the detention is actual or notional, may apply for *habeas corpus*. Thus persons who are on bail or recognizance may apply. See *Re Cheung Kam Ping* HCMP 634/1978 (Li J; 19.12.1978) and *Re Lee Ka MingÂ* [1991] 1 HKLR 307, 313I (reversed on other grounds at [1991] 1 HKC 153(CA)) and *USA v Jennings* [1983] 1 AC 624, 627. However, the question is not free from doubt. In *Li Hong Mi* (1917) 12 HKLR 54, 55 the court proceeded on the basis of a concession that *habeas corpus* did not lie. In *AG v Chiu Tat-cheong, David & Anor* [1992] 2 HKLR 84, 107(CA) Fuad JA doubted that a person on bail could apply for *habeas corpus*, pointing to a lack of examples. In *Re Chung Tu Quan & Ors* [1995] 1 HKC 566, 582D, Keith J said that *habeas corpus* is an inappropriate remedy for a person released on his own recognizance.

(2) Participants in witness protection programme

In *Re W* [2006] 1 HKC 468 the court rejected a submission that a person cloistered under the Witness Protection Ordinance (Cap 564) is *per se* in a form of custody. It was held that under the Ordinance a witness enters the programme voluntarily and may leave at any time. As a result, participation in the programme 'does not constitute any form of detention'.

(3) Persons released prior to hearing

If the person is released before the conclusion of a *habeas corpus* application the court will proceed no further: *Barnardo v Ford* [1892] AC 326, 333; *Sestan v Director of Area Mental Health Services* [2007] NZSC 5. *Habeas corpus* does not lie in respect of a prior detention, even if it was illegal: *Re Ogunade* HCAL 155/2005 (Chu J; 09.12.2005). However, the released person could still seek damages for false imprisonment by ordinary civil action.

(4) Application by third party

Section 22A(2) of the High Court Ordinance expressly provides that an application for *habeas corpus* may be made by another person on behalf of the person who is alleged to be unlawfully detained. This reflects a jurisdiction tracing back at least as far as *The Hottentot Venus* (1810) 13 East 195, 104 ER 344.

Order 54 rule 1(3) provides that the affidavit in support may be made by that other person if the detained person cannot do so.

The person making the application must have a degree of 'standing', not be a 'mere stranger or perhaps vexatious volunteer'. For this reason, and to establish responsibility for matters such as costs, the identity of the applicant must be made clear. See *Re W* [2006] 1 HKC 468, 474, citing *Ex parte Child* (1854) 15 CB 237, 238.

The court must be satisfied that the detained person could not make the application personally because of mental state (including infancy) or because of being held *in communicado* without access to a lawyer: *Li Kui Yu v Superintendent of Labourers* [1906] SALR (TS) 181, 184 (Transvaal SCt). Where the evidence is that the person on whose behalf the application is made chose to remain in custody the case will not be heard: *Re Winara Parata* (1880) 1 Oliver, Bell's & Fitzgerald's Reports 31 (NZFC) (prisoner indicated that he did not want the application made); *Ex parte Mughal* [1973] 1 WLR 1133, 1136F.

(5) Nationality and status of applicant

Any person detained in Hong Kong may apply for *habeas corpus*, regardless of nationality and residence status: *AG v Kwok-A-Sing* (1873) LR 5 PC 179; [1842-1910] HKC 73 (PC from Hong Kong). The remedy is available to illegal immigrants as well as lawful residents: *Re Lo Tsun Man & Ors* (1910) 5 HKLR 166, 172, [1910] HKCU 11; *Re Lam Yuk Kuen* [1990] 2 HKLR 38, 42H, [1990] HKCU 0354.

(6) Children

Age is not a barrier to an application for *habeas corpus*. See *Re Lam Yuk-kuen & Anor* [1990] 2 HKLR 38 (2 year old girl); *Re Lee Ka Ming* [1991] 1 HKLR 307 (7 year old boy); *Re Pham Van Ngo & Ors* [1991] 1 HKLR 499 where 111 people including 4 children were freed). An application on behalf of a child must be made by another person (see for example *Re Liu Chak-lai* HCMP 2586/1993 (Bewley J; 09.07.1993) (SCMP 10 & 22.07.1993)) and the initial hearing will be in chambers: Order 54 rule 1(1)(c).

(7) Persons imprisoned for debt

Habeas corpus may issue in cases where debtors are detained: *Re an Application by the Official Solicitor (No 1)* [1983] 2 HKC 259 (Full Bench). Orders 48 and 49B provide for detention of debtors in certain circumstances.

(8) Joinder of multiple applicants

In *Chieng A Lac v Director of Immigration* [1997] HKLRD 271 the respondent objected to the joinder of a large number of applicants in a single application for *habeas corpus*, but the court held that it was appropriate.

[54.1.6] Against whom may habeas corpus be sought?

The writ runs in both civil and criminal matters and against public officials as well as private individuals. It is said that the sovereign has an interest in any unlawful detention. See *Re Sung Man Cho* (1931) 25 HKLR 62, 76 and *R v Jackson* [1891] 1 QB 671. Examples may best illustrate the extent to which the writ may lie.

(1) Public officials

Habeas corpus is most frequently sought in cases of detention by public officials such as the Commissioner for Correctional Services and the Director of Immigration. The test is not actual physical custody or control but whether the person to whom the writ is directed has the legal right to control the applicant. Hence the writ will lie against a senior official although it is actually subordinate officers who have physical custody: *Ex p O'Brien* [1923] 2 KB 361, 398. Thus, in *Secretary for State v Rahmatullah* [2012] UKSC 48; [2012] All ER (D) 333 (Oct) the writ was issued against the UK government in respect of a military prisoner transferred to the custody of the US authorities. There existed a non-binding memorandum of agreement under which the prisoner could be returned. The UK's response that the Americans refused to transfer the prisoner was considered a sufficient response to the writ.

(2) Private individuals

The writ lies in cases of private detention, such as child custody disputes: *EH v DH* [1962] HKLR 559(FC).

(3) Corporations

In principle the writ may lie against a body corporate but it is preferable to name the responsible officer thereof otherwise difficulty arises in enforcement by way of contempt proceedings. See *In re JM Carroll (an infant)* [1931] 1 KB 317(CA)at 363–64 per Sleesser LJ.

(4) Where uncertainty as to identity of person detaining

In *Jones v Skelton* [2007] 2 NZLR 178(NZSC) there was a degree of uncertainty as to which of 6 persons might be detaining a child who had been abducted. The court ordered each of the 6 to bring the child before the court, with the rider that any of them unable to do so should file and serve an affidavit containing information as to their knowledge of the whereabouts of the child, details of any contact they had had with him, what efforts they had made to locate him and the location of the person thought to have physical custody.

[54.1.7] Respondent to habeas corpus application

The person against whom *habeas corpus* is sought will obviously be named as a respondent to the application. In addition, the Secretary for Justice may intervene and appear as a party: *Lam Ngok Yeung v Director of Immigration & Anor* [1985] 2 HKC 725, 727D–F. It is established practice for the requesting country to be joined as a respondent where the application arises from extradition proceedings: *Chan Hok Shek v Superintendent of Lai Chi Kok Reception Centre & Gov't of the USA* [2010] 3 HKC 94.

[54.1.8] Scope of habeas corpus

On a *habeas corpus* application the court may examine not only whether there exists a warrant, order or other legal authority authorising the detention, but may look behind any such authority to make sure it has a sound legal basis.

No person has inherent power to detain or to authorise detention: either the power is conferred by law or it does not exist. Detention cannot be justified on the basis of state necessity: *Entick v Carrington* (1765) 19 St Tr 1029, 1073. High office of itself does not confer power to order detention: *Re Iu Ki Shing* (1908) 3 HKLR 20, 34.

Detention under legislation which is no longer in force is without jurisdiction and unlawful: *Eng Sui Hang v USA* HCMP 3484/1990 (Jones J; 22.06.1990) (referred to in the subsequent case of *Re Eng Sui Hang* [1991] 1 HKLR 606, 608B–C).

Specific issues as to the scope of *habeas corpus* are discussed below:

(1) Procedural or technical error

The court is careful to ensure that all prescribed procedures are followed in the process leading up to a person's detention. Procedural protections are matters that go to jurisdiction and must be complied with: *Leung Afu v Superintendent of Victoria Gaol* The Daily Press, 15.06.1887; *Re Chan Kum Cheun* (1892) 5 HKLR 182, 183. Failure to follow prescribed procedures may render the detention unlawful. The court will insist that procedures are complied with and that powers are not used for ulterior purposes: *Re Luong Bat Kien* [1973]–[1976] HKC 71, 74. Procedural requirements are not necessarily only those laid down by statute.

However, the court will be slow to release a detained person on the ground of a purely technical procedural error which has nothing to do with the merits. See *Mayuret Tankanchophat v USA* [1992] 1 HKLR 401, 406(CA) and *Fung Chuen-kan & Anor v USA* [1994] 1 HKLR 163, 168(CA) (joint warrant in extradition case erroneous but a mere technical defect).

(2) Natural justice

In *Chu Wing Hei v AG* [1946]–[1972] HKC 536, 542H–I, it was held that an order for detention was unlawful on the ground the person had not been told the grounds alleged to justify his detention. In *Re Lam Yuk-kuen & Anor* [1990] 2 HKLR 38, 42, [1990] HKCU 0354 it was held an order for detention of an illegal immigrant under section 32(4)(b) of the Immigration Ordinance was unlawful because it had been obtained in breach of natural justice in that the illegal immigrant had not been given notice.

(3) Reasonableness

In *Fidelis Emem v Superintendent of Victoria Prison* [1998] 2 HKLRD 448, 453D the court proceeded on the basis that reasonableness in the '*Wednesbury*' sense or otherwise is not a matter to be taken into account in *habeas corpus* proceedings. However, the court acknowledged that such an issue would be relevant on judicial review.

(4) Detention ordered by superior court of record

The writ is not available to test the lawfulness of detention ordered by a superior court of record (in Hong Kong the Court of First Instance and the Court of Appeal). The Court of First Instance 'cannot test the validity of its own decisions': *Chung Tse Chung v Commissioner of Correctional Services* [1988] HKC 251, 255B(CA), citing *Re Kray* [1965] Ch 736, 745A and *Re Hastings (No 3)* [1959] Ch 368, 377. See also *Re Seven Witnesses* (1906) 2 HKLR 179, 182 (overruled on another point in *Chung Hang Kiu v Piggott* [1909] AC 312).

(5) Detention ordered by judge sitting as commissioner

Although the writ of *habeas corpus* does not lie against the High Court itself, it is available to test the legality of detention ordered by a High Court judge sitting in another capacity such as under the Commissions of Inquiry Ordinance (Cap 86). See *Re So Sau-chung* [1966] HKLR 523, 552.

(6) Detention ordered by district judge or magistrate

The writ will lie to test the lawfulness of a sentence imposed by an inferior court such as the District Court. See for example *Cheung Yuk-ha v R* [1979] HKLR 95, 96. Further, where a magistrate is required to have evidence of certain matters (as in extradition cases), the absence of evidence goes to jurisdiction and vitiates the order for detention: *Re A-Kam & 12 Ors, The China Mail* 18.11.1881; *Re Wong Cheong Wai* [1989] 2 HKC 226. In extradition proceedings, the existence or adequacy of evidence is tested with reference to the time the magistrate orders committal:

Thongchai Sanguandikul v USA [1993] 2 HKLR 475, 483, 484.

(7) Detention for a limited purpose

Where detention is for a limited purpose, it may be construed as being subject also to a reasonable time limitation after which continued detention is unlawful. On application for *habeas corpus* the lawfulness of detention is judged as at the date of the hearing, not the date of taking the person into custody: *Re Pham Van Ngo & Ors* [1991] 1 HKLR 499, 507G. Hence the writ lies to test the continued lawfulness of detention which, though unimpeachable on the date it began, has, by effluxion of time, become unlawful.

The leading authorities in this context are: *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97(PC); *Director of Immigration & Anor v Long Quoc Tuong & Ors* [1998] 1 HKC 290(CA); and *Thang Thieu Quyen v Director of Immigration* [1998] 3 HKC 247(CFA).

Unlimited detention is frowned upon by the courts. See *Re Liew Kar-seng v Governor in Council* [1989] 1 HKLR 607; *R v Director of Immigration ex p Santiago* [1989] 1 HKC 293; *Pham Van Ngo & Ors* [1991] 1 HKLR 499, 507I; *Re Chung Tu Quan* [1995] 1 HKC 566; *Cong Siu Lay v Superintendent of Whitehead Detention Centre* [1995] 2 HKC 822, 823G.

(8) Challenge to prison conditions

Prison conditions *per se* cannot be challenged by *habeas corpus*: *Chieng A Lac v Director of Immigration* [1997] HKLRD 271, 293B–295H. However, the writ is available to challenge the particular part of the institution a prisoner is detained in, if there are legal rules governing such things: *Re Sakchai Suwannapeng* [1990] 2 HKLR 231, 236.

(9) Threat of re-arrest

The threat of re-arrest in the event of release will not deter the court from granting relief. Section 22A(12) restricts re-detention following release to cases where there is a material change in circumstances.

(10) Embarrassment to executive

The court will not be impressed by concerns that release will cause embarrassment or inconvenience to the executive branch of government: *Re Pham Van Ngo & Ors* [1991] 1 HKLR 499, 510B.

(11) Extradition cases

An application for *habeas corpus* in the context of extradition proceedings is not confined to the formal validity of the detention order. The court is entitled to examine the merits. See *Gibson v USA* [2007] UKPC 52 (para 18), referring to *Knowles v USA* [2006] UKPC 38.

[54.1.9] The affidavit in support

An application for issue of a writ of *habeas corpus* must normally be supported by an affidavit setting out the relevant facts. The purpose of the affidavit is to show 'some ground on which the court can see that the applicant may be unlawfully detained': *In re Corke* [1954] 1 WLR 899.

In exceptional circumstances the court may dispense with the affidavit requirement: *Re Sakchai Suwannapeng* [1990] 2 HKLR 231. This might be allowed where the applicant is held *in communicado* and is not able to make an affidavit: *Re Parker & Ors (Canadian Prisoners' Case)* (1839) 5 M&W 32; 151 ER 15. However, the

application might not be heard if the applicant fails to file an affidavit without reasonable explanation: *Re Copeland's Application* [1990] NI 301, 304.

A number of issues arise with respect to the content of the affidavit in support, as set out below.

(1) Full and frank disclosure

Full and frank disclosure is required in an affidavit in support of an application for issue of a writ of *habeas corpus*. Failure to disclose parallel proceedings or the exact status of the applicant may result in the application being dismissed: *Re Bhagwan Singh* (1914) 17 DLR 63(BCSC) (failure to disclose that applicant on bail at time of application). In *Re W* [2006] 1 HKC 468 the court expressed disapproval of the failure to disclose the fact the person allegedly detained (under the Witness Protection Ordinance) was connected with another who was a suspect in ICAC corruption investigations.

(2) Hearsay

An affidavit in *habeas corpus* proceedings may contain hearsay if it is not practical for the relevant facts to be demonstrated by direct evidence. See *Chieng A Lac & Ors v Director of Immigration & Ors (No 1)* (1997) 7 HKPLR 233 citing *Ex parte Rahman* [1996] 4 All ER 945(QB), affirmed at [1998] QB 136(CA).

(3) Legal matters

An affidavit is normally confined to matters of fact. See the commentary under Order 41. However, in *habeas corpus* proceedings an affidavit may be used to demonstrate defects in jurisdiction: see *Poon Yuk Sim* (1956) 40 HKLR 12.

(4) Further affidavits

If the court finds that the affidavit in support is inadequate it may order that a further affidavit be filed: *Kek Peng-teng* [1969] HKLR 564, 568.

[54.1.10] Listing priority

Applications for *habeas corpus* are accorded priority over all other business of the court: *Re Tse Sun-miu* [1994] 2 HKLR 78, 83(CA), citing *Ex parte Cheblak* [1991] 1 WLR 890, 894. In *Re Liu Chak-lai* HCMP 2586/1993 (Bewley J; 09.07.1993) (SCMP 10 & 22.07.1993) a murder trial was adjourned in order that the judge could hear a *habeas corpus* application. The emphasis in *habeas corpus* is on provision of a speedy and efficient remedy since unlawful detention cannot be tolerated. See *Re Poon Yuk Sim* (1956) 40 HKLR 12, 15.

[54.1.11] Urgent cases

An urgent application for *habeas corpus* can be made at any time of day or night. Outside of court hours such applications can be entertained at the residence of a judge. The power to hear such applications outside court is express in Order 54 rule 1(1)(b). See the discussion below concerning hearings in open court or *in camera*.

See for example *Tolentino v Custodian of Victoria Immigration Centre* [1993] 1 HKC 19 where the application was made at the Chief Justice's official residence at 10.00 pm on the eve of Chinese New Year. See also *Yoo Soon-nam v AG* [1976] HKLR 702, 703: application at 12.30 a.m.

In case of a need to make an urgent application outside of court hours, practitioners should telephone the clerk to the duty judge on the mobile telephone number provided in Law Society circulars from time to time.

[54.1.12] Ex parte hearing

Section 22A(3) of the High Court Ordinance (Cap 4) and Order 54 rule 1(2) expressly provide that an application for a writ of *habeas corpus* may be made *ex parte*.

In *Cheng Chui Ping v Superintendent of Tai Lam Centre for Women & Anor* [2000] 3 HKC 777, 780F–G Stock J said that in his experience the application is normally heard *ex parte* at the initial stage. He described the case before him as 'unusual' in that it came on for hearing at the initial stage inter partes. Earlier, in *Thongchai Sanguandikul v USA* [1993] 2 HKLR 475, 482(CA) Litton J A had suggested that to avoid delay in extradition cases the court should be more ready to use its power under Order 54 rule 2 to direct an *inter partes* hearing at the initial stage.

[54.1.13] Hearing in open court or in camera

As a general rule an application for a writ of *habeas corpus* and the return will be heard in open court although section 22A(4) of the High Court Ordinance (Cap 4) makes provision for applications to be heard *in camera* in exceptional circumstances. Two such exceptional circumstances are dealt with in Order 54 rule 1. First, rule 1(l)(b) provides that when no judge is sitting in court an application for *habeas corpus* may be made 'otherwise than in court'. This would apply outside of court hours: see the discussion of urgent cases above. Secondly, rule 1(1)(c) provides that an application on behalf of a minor must in the first instance be made to a judge otherwise than in court. See *EH v DH* [1962] HKLR 559, 562 (child custody case heard in chambers).

Where an application for *habeas corpus* is heard *in camera* the court's decision and reasons must nevertheless be announced in open court: High Court Ordinance (Cap 4), section 22A(4).

[54.1.14] The test at the initial stage

At the initial stage the applicant 'need not convince the court of the merits of his case but should raise an arguable case which deserves further consideration': *Cheng Chui Ping v Superintendent of Tai Lam Centre for Women & Anor* [2000] 3 HKC 777, 781D–E citing Sharpe (2nd edn) (above). Or as stated in *Chong Bing Keung Peter v USA* [2000] 1 HKC 256, 259G–H(CA) (also citing Sharpe):

> It is probably enough that a doubt is raised in the mind of the judge regarding the validity of the detention and an arguable case be shown which deserves further consideration.

[54.1.15] Availability of alternative remedy

Where there is an alternative and equally effective remedy the court may decline to issue the writ. The availability of another remedy does not remove the right to apply for *habeas corpus*; rather the court in its discretion leaves it to the applicant to pursue the other remedy. See *Re Tse Sun-miu* [1994] 2 HKLR 78 at 82–83(CA) per Bokhary JA, citing *Ex Parte Azam* [1974] AC 18, 31F–H.

Judicial review is frequently an alternative to *habeas corpus*. See *Re Vonchai Tumtonkitkul* [1982] HKC 181 where the court permitted an applicant to seek judicial review as an alternative to *habeas corpus*. In *Re Sakchai Suwannapeng* [1990] 2 HKLR 231, 232 the court adjourned an application for *habeas corpus* on the ground it had sufficient power within the ambit of judicial review to do justice.

Habeas corpus is not appropriate where the prisoner has an avenue of appeal against detention: *Re Corke* [1954] 1 WLR 899; *Re Yu Kin Chun Philip* [1987] HKLR 123; *Re Tse Sun-miu* [1994] 2 HKLR 78(CA). This will be the case where the prisoner

is detained under a sentence of imprisonment following conviction for an offence, as in *Re Pearce* HCAL 20/2007 (Hartmann J; 23.02.2007).

Matters such as delay in inferior courts are best dealt with by *mandamus* (*Re McAleenan's Application* [1985] NI 496, 506; or by the abuse of process doctrine: *Jago v District Court of NSW* (1989) 168 CLR 23(HCA).

[54.1.16] Order to be made at initial stage

If at the initial stage the court is satisfied the application has substance it must, according to section 22A(5) of the High Court Ordinance (Cap 4), either:

(a) order the issue of a writ of *habeas corpus* directing the detainor to bring the applicant before the court and to certify the grounds for the applicant's detention; or

(b) order the detainor to appear before the court to justify the lawfulness of the detention.

In the usual course of events the result will be a second stage hearing, pursuant to rule 8, at a later date. However, in *Cheng Chui Ping v Superintendent of Tai Lam Centre for Women & Anor* [2000] 3 HKC 777, where the application was heard *inter partes* at the initial stage, the court proceeded to the second stage hearing immediately.

At the initial stage the court may also order release of the applicant under Order 54 rule 4. See the commentary thereunder.

Where at the initial stage the court is satisfied that the application has no substance it may dismiss it: section 22A(5) High Court Ordinance (Cap 4). Alternatively the court may direct an *inter partes* hearing under Order 54 rule 2.

[54.1.17] Restriction on repeat applications

It was once considered possible in England for an applicant to go from court to court and judge to judge making repeated applications for *habeas corpus*. Upon the enactment of the Judicature Act 1873 there were no longer separate courts of law and equity so the first possibility ceased. See *Eshugbayi Eleko v Officer Administering the Government of Nigeria* [1928] AC 459(PC). And note that in Hong Kong law and equity have all along been administered in the same courts.

In *Eshugbayi* the Privy Council left open the possibility of repeat applications to different judges within the court, but this was doubted in *Re Hastings (No 3)* [1959] Ch 368, 378.

In Hong Kong today section 23(1) of the High Court Ordinance (Cap 4) expressly prohibits fresh applications on the same ground unless fresh evidence is adduced. Fresh evidence does not include evidence which was available at the time of the original application and could have been used by the applicant but was not. See *Re Law Kin Man* (1992) HKPLR 332(CA) confirming [1993] 1 HKLR 83; and *Thongchai Sanguandikul v USA* [1993] 2 HKLR 475(CA) confirming HCMP 287/1993 (Jones J; 19.05.1993).

However, if a ground of application was not relied on due to inadvertence, error of judgment or incompetence, 'it cannot be said that such ground was fairly available' and it may be raised in a fresh application: *Re Yeung Yan Chi* [1996] 2 HKLR 309.

2. Power of Court to whom ex parte application made (O. 54 r. 2)

(1) The judge to whom an application under rule 1 is made ex parte may make an order forthwith for the writ to issue, or may –

(See App. A, Forms 87, 88)

(a) where the application is made otherwise than in court, direct that an originating summons for the writ be issued, or that an application therefor be made by originating summons to a judge in court; (L.N. 152 of 2008)

(b) where the application is made to a judge in court, adjourn the application so that notice thereof may be given, or direct that an application be made by originating summons. (L.N. 152 of 2008)

(2) The summons must be served on the person against whom the issue of the writ is sought and on such other persons as the judge may direct, and, unless the judge otherwise directs, there must be at least 8 clear days between the service of the summons and the date named therein for the hearing of the application. (26 of 2012 s. 67)

(3) An originating summons under this rule must be in Form No. 87 in Appendix A. (L.N. 152 of 2008)

(L.N. 152 of 2008)

NOTES

[54.2.1] Comparison with English rule

There are several differences between the wording of Order 54 rule 2 and its English counterpart. These largely reflect the different manner in which the courts are organised in the two jurisdictions. Note that the English rule 2(l)(c) is omitted in Hong Kong.

[54.2.2] Purpose and scope of Order 54 rule 2

Order 54 rule 2 provides that the court may, when an application is made *ex parte* at the initial stage, give directions for the application to be heard on notice to the opposing party. In *Thongchai Sanguandikul v USA* [1993] 2 HKLR 475, 482(CA) Litton JA suggested that to avoid delay in extradition cases the court should be more ready to use its power under this rule.

Where the application is *prima facie* strong, the practice is to issue the writ immediately. See Order 54 rule 4 and the commentary thereunder, and see *Re Liu Chak-lai* HCMP 2586/1993 (Bewley J; 09.07.1993) (SCMP 10 & 22.07.1993).

3. Copies of affidavits to be supplied (O. 54 r. 3)

Every party to an application under rule 1 must supply to every other party on demand copies of the affidavits which he proposes to use at the hearing of the application.

4. Power to order release of person restrained (O. 54 r. 4)

Without prejudice to rule 2(1), the judge hearing an application for a writ of habeas corpus ad subjiciendum may in his discretion order that the person restrained be released, and such order shall be a sufficient warrant to any superintendent of a prison, constable or other person for the release of the person under restraint.

NOTES

[54.4.1] Immediate release at initial stage

Order 54 rule 4 provides that on an application for *habeas corpus* the court may order the immediate release of the applicant. See *Re Lee Ka-ming* [1991] 1 HKLR 307, 309C and *Cong Siu Lay & Ors v Superintendent of Whitehead Detention Centre* [1995] 2 HKC 822 as examples.

5. Directions as to return to writ (O. 54 r. 5)

Where a writ of habeas corpus ad subjiciendum is ordered to issue, the judge by whom the order is made shall give directions as to the judge before whom, and the date on which, the writ is returnable.

NOTES

[54.5.1] Directions on issue of writ

Order 54 rule 5 provides that on issuing a writ of *habeas corpus* the court may make directions as to which judge, and when, the substantive hearing shall take place. Section 22A(7) of the Ordinance provides that the person to whom the writ is directed must no later than the time specified by way of such direction, produce the detained person and make a formal return to the writ. Extension of time is possible for 'good reason'.

Any such direction as to the particular judge before whom the substantive application shall be heard does not go to jurisdiction: *Law Kin Man v Commissioner of Correctional Services* (1992) 2 HKPLR 332(CA). There a notice which stated that the return was to be made before a particular judge did not deprive the court of jurisdiction when the matter came on for hearing before another judge.

[54.5.2] Discovery

There is power to order discovery in *habeas corpus* proceedings. However, the circumstances in which discovery is necessary will be rare. In *Vo Thi Do v Director of Immigration & Anor* [1998] 1 HKLRD 729, 749C–J (CA) an order for discovery in *habeas corpus* proceedings was set aside on appeal on the ground it amounted to a fishing expedition and did not meet the requirements of Order 24 rule 13(1).

[54.5.3] Security for costs

Given that *habeas corpus* concerns the fundamental right of liberty of the person it would be wrong in principle for the court to order security for costs against an applicant.

Different considerations may apply on appeal, depending on whether the *habeas corpus* application arises in a civil or criminal context. In *Thongchai Sanguandikul v USA* [1992] HKLY 12; CACV 123/1992 (Litton JA; 28.10.1992) it was held that where a *habeas corpus* appeal arises in a criminal context there is no jurisdiction to order security for costs. However, in *In re Carroll* [1931] 1 KB 104(CA) security for costs was ordered against an appellant who had failed to obtain relief (in a civil context) below. Scrutton LJ said (at 109): 'the fact that the appeal relates to an application for *habeas corpus* is of itself no ground for preventing the court ordering security'.

6. Service of writ and notice (O. 54 r. 6)

(1) Subject to paragraphs (2) and (3), a writ of habeas corpus ad subjiciendum must be served personally on the person to whom it is directed.

(2) If it is not possible to serve such writ personally, or if it is directed to a superintendent of a prison or other public official, it must be served by leaving it with a servant or agent of the person to whom the writ is directed at the place where the person restrained is confined or restrained.

(3) If the writ is directed to more than one person, the writ must be served in manner provided by this rule on the person first named in the writ, and copies must be served on each of the other persons in the same manner as the writ.

(4) There must be served with the writ a notice (in Form No. 90 in Appendix A) stating the judge before whom and the date on which the person restrained is to be brought and that in default of obedience proceedings for committal of the party disobeying will be taken.

NOTES

[54.6.1] Form of writ of habeas corpus

See Order 54 rule 10 and the commentary thereunder.

[54.6.2] Service of writ

Order 54 rule 6 provides that a writ of *habeas corpus* must be served personally unless personal service is not possible or the writ is directed to a public official. In those cases the writ must be served by leaving it with a servant or agent at the place of detention: rule 6(2).

Failure to serve a writ properly or at all may be fatal to the proceedings since in that event the court has no jurisdiction to proceed: *Re Meng Ching Hai* [1990] 1 HKC 185, 187A. In *R v Rowe* (1894) 11 TLR 29 copies were served rather than the original. It was held that the respondents could not be punished for contempt for non-compliance even though they had initially appeared in court in response to the copies they received. However, rule 6(3) now expressly provides for service of copies in cases where there are multiple parties.

[54.6.3] Notice to be served with writ

Order 54 rule 6(4) provides that a form of penal notice must be served with the writ of *habeas corpus*, expressly informing the person to whom the writ is directed that disobedience may result in committal for contempt. The notice must be in form No 90 in Appendix A.

The contents of the notice under this rule do not go to jurisdiction: *Law Kin Man v Commissioner of Correctional Services* (1992) 2 HKPLR 332(CA) confirming [1993] 1 HKLR 83. There a notice which stated that the return was to be made before a particular judge did not deprive the court of jurisdiction when the matter came on for hearing before another judge.

7. Return to the writ (O. 54 r. 7)

(1) The return to a writ of habeas corpus ad subjiciendum must

be indorsed on or annexed to the writ and must state all the causes of the detainer of the person restrained.

(2) The return may be amended, or another return substituted therefor, by leave of the judge before whom the writ is returnable.

NOTES

[54.7.1] The return

The return is the respondent's answer to the writ of *habeas corpus*. Its purpose is to state the respondent's justification for detaining the applicant. In *Chan Cho Tei v AG* HCMP 463/1980 (Roberts CJ & Zimmern J; 03.06.1980) it was held that in the return the custodian under a warrant ought to show the following:

(1) that the warrant was issued under a valid power;
(2) that the person who issued the warrant had proper authority to do so;
(3) that the subject was one of a class of persons subject to warrants issued under that power; and
(4) the evidence relied on to reach the factual conclusions.

Where it is not possible to comply with the writ the respondent must nevertheless make a return stating why it is not possible to comply: section 22A(8) High Court Ordinance. For example, if the subject of the application is not detained (any longer or at all) so that it is not possible for the respondent to bring that person before the court in obedience to the writ, these facts should be stated in a 'nil' return. See for example *Re W* [2006] 1 HKC 468.

The return need not be accompanied by affidavit evidence, but if it is ambiguous and the ambiguities are not clarified by affidavit, the return may be held bad: *R v Roberts* (1869) 2 F&F 272; 175 ER 1056.

The return is a jurisdictional document and becomes part of the court record: *Bushell's Case* (1670) Vaughan 135, 137; 124 ER 1006, 1007; *Re Meng Ching Hai* [1990] 1 HKC 185, 187A(CA).

[54.7.2] Failure to provide any or any proper return

If the detainor makes no reply or no adequate reply the court may extend the time for compliance (section 22A(7), High Court Ordinance) and adjourn to a new hearing date: *Archer's Case* (1701) Fort 196 92 ER 816. In *Cheung Ying-kui v Australia* [1990] 2 HKLR 99, 103 the court expressed strong disapproval of failure to comply in a timely fashion.

If ultimately there is still non-compliance the detainor may be fined or imprisoned for contempt: High Court Ordinance, section 22A(13), and see *R v Woodward* (1889) 5 TLR 565.

In the absence of a proper return the court has no discretion to refuse the remedy, but must grant it to the applicant as a matter of right. See the commentary under Order 54 rule 8, below.

8. Procedure at hearing of writ (O. 54 r. 8)

When a return to a writ of habeas corpus ad subjiciendum is made, the return shall first be read, and motion then made for discharging or remanding the person restrained or amending or quashing the return, and where that person is brought up in accordance with the writ, his

counsel shall be heard first, then counsel for the Crown, and then one counsel for the person restrained in reply.

NOTES

[54.8.1] Interpretation of Order 54 rule 8 after 01.07.1997

The term 'the Crown' in Order 54 rule 8 should be construed as meaning the HKSAR government by virtue of the Reunification Ordinance and Schedule 8 to the Interpretation and General Clauses Ordinance (Cap 1).

[54.8.2] Procedure at substantive hearing

At the substantive hearing the reading of the return is the first order of business. Even a nil return must be read into the record to show that the writ has been complied with. If the return on its face provides legal justification for deprivation of liberty the court 'must immediately inquire into the circumstances surrounding the detention' (High Court Ordinance, Cap 4, section 22A(9)). The judge examines the truth of the facts alleged in the return: *Re Meng Ching Hai* [1990] 1 HKC 185, 186H–I(CA). The judge does so in accordance with the order of hearing laid down by Order 54 rule 8.

Unless the court is satisfied the detention is lawful the court must order release of the person: High Court Ordinance (Cap 4), section 22A(9) and (10).

[54.8.3] Burden of proof

At the substantive hearing the initial burden is on the applicant to produce evidence to put the legality of the detention in issue: *Superintendent of Tai A Chau Detention Centre v Tan Te Lam & Ors* [1995] 3 HKC 339, 353D–F(CA). In *Re W* [2006] 1 HKC 468 Hartmann J described this as a burden to demonstrate a *prima facie* case. If the applicant is able to put the lawfulness of the detention in issue, the burden shifts to the respondent. See *Re Pham Van Ngo & Ors* [1991] 1 HKLR 499, 506I citing *Liversidge v Anderson* [1942] AC 206 ('every imprisonment is *prima facie* unlawful and it is for the person directing imprisonment to justify it'). See also *Chung Tu Quan* [1995] 1 HKC 566, 583B–F and *Chan Cho Tei v AG* HCMP 463/1980 (Roberts CJ & Zimmern J; 03.06.1980).

[54.8.4] Standard of proof

Habeas corpus proceedings are civil in nature and the standard of proof is the balance of probabilities: *Lee Yu Ying v Lee Yip Tang & Anor* [1983] 1 HKC 434, 437F; *Re an Application by the Official Solicitor (No 1)* [1983] 2 HKC 259; 274F–G. Once the burden has shifted to the respondent 'clear and cogent' evidence that a detention is lawful or that there is no detention is required: *Re W* [2006] 1 HKC 468, citing *Truong* (1994) 31 ALD 729, 731.

[54.8.5] Order to be made on substantive hearing

Section 22A(9) of the High Court Ordinance provides that after inquiry into the circumstances the court 'must' order release of the applicant 'unless satisfied that the detention is lawful'. However, this does not cater to all circumstances. In *Re Vonchai Tumtonkitkul* [1982] HKC 181 the court did not order the release of the applicant, but varied the order of a magistrate committing the applicant to detention pending extradition. This had the effect of reducing the scope of the charges for which the applicant could be extradited and tried abroad. In *Re W* [2006] 1 HKC 468 it was found that the person on whose behalf the application was brought was not detained

at all and the application was dismissed. In *Re Tse Sun-miu* [1994] 2 HKLR 78, 83(CA) Bokhary JA said that release is not a 'matter of course':

> If in any instance it is by no means clear that the detention is unlawful, so that the lawfulness or otherwise of the reason given for the detention constitutes a substantial issue: if such issue would most appropriately be dealt with in a criminal appeal; and if the detainee's bid for freedom would, all things considered and looked at realistically in the round, be best served by leaving him to pursue such appeal: then the High Court has the power to leave him to do so.

In *Ex p Santiago* [1989] 1 HKC 293 the court adjourned the proceedings generally with liberty to restore where it was satisfied the detention was currently lawful, but might later become unlawful if it became apparent the purpose of the detention (removal from Hong Kong) had no reasonable prospect of success.

The court also has power to allow applications for *habeas corpus* to be withdrawn: *Chieng A Lac v Director of Immigration* [1997] HKLRD 271, 284F.

[54.8.6] Damages

The purpose of *habeas corpus* is remedial, not punitive or compensatory. Thus the court will not award damages for an illegal detention on a *habeas corpus* application but will leave it to the successful applicant to seek damages for false imprisonment in separate proceedings. See *Yoo Soon-nam v AG* [1976] HKLR 702; *Pham Van Ngo & Ors v AG* HCA 4895/1990 (Patrick Chan J: 30.07.1993).

[54.8.7] Costs

In contested *habeas corpus* proceedings arising in a civil context, costs will invariably follow the event. See *Chun Lun v Acting Superintendent of Victoria Gaol* (Hong Kong Daily Press; 20.05.1897); *Leung Kun Yau v F H May* (Hong Kong Daily Press 13.09.1901); *Re Poon Yuk Sim* (1956) 40 HKLR 12, 25; and *Chen Chong Gui v Senior Superintendent of Lai Chi Kok Reception Centre & Anor* [1997] 3 HKC 210, 227H(CFI), [1998] 1 HKC 522, 544H(CA). If the parties compromise and the application is withdrawn they must bear their own costs (*Re Leung Toi Sam* [1959] HKLR 342, 354) in the absence of agreement to the contrary.

Where a *habeas corpus* application arises in a criminal context the modern practice in Hong Kong appears to be that costs will similarly follow the event. Although the Costs in Criminal Cases Ordinance (Cap 492) has no application, this practice is supported by the fact that *habeas corpus* proceedings (in whatever context they arise) are civil in nature. There is some earlier authority in Hong Kong to the effect that costs will not be awarded against the government in these cases: see *Re Lo Tsun Man* (1910) 5 HKLR 166, 179, [1910] HKCU 11; *Re Li Sam* (1931) 25 HKLR 58, 61 and *Re Sun Ah Wan* (1910) 5 HKLR 72, 82. And this continues to be the case in other jurisdictions: see *USA v Bowe* [1990] 1 AC 500, 535E–F.

[54.8.8] Restriction on re-detention after release

Section 22A(12) of the High Court Ordinance provides that a person released on a *habeas corpus* application may not be re-detained on the same or similar ground unless there has been a material change in circumstances. This rule traces back to the Habeas Corpus Act 1679 and older cases continue to be of authority. See *AG v Kwok-A-Sing* (1873) LR 5 PC 179, 202 [1842–1910] HKC 73 (PC from HK); *Ng Hung-yiu v USA* [1992] 2 HKLR 383 and *Re Sung Man Cho* (1931) 25 HKLR 62, 71.

In *Vincente Sotto v Welch* (1914) 9 HKLR 1, 8, 14, it was held that the prohibition on re-detention applies only after a full hearing on the merits.

[54.8.9] Appeals

Section 24 of the High Court Ordinance (Cap 4) makes express provision for an appeal as of right to the Court of Appeal from any decision of the Court of First Instance on an application for *habeas corpus*, whether or not the CFI ordered release of the person detained. Absent such an express statutory power, an appellate court has no jurisdiction to entertain an appeal by a detainer against an order discharging the detained person: *Superintendent of HM Foxhill Prison & Anor v Kozeny* [2012] UKPC 10. In that case the Privy Council held that it did not have jurisdiction in such a case on appeal from the Bahamas. It appears that the situation should be the same with Hong Kong's Court of Final Appeal.

9. Bringing up prisoner to give evidence, etc. (O. 54 r. 9)

(1) An application for a writ of habeas corpus ad testificandum or of habeas corpus ad respondendum must be made on affidavit to a judge in chambers.

NOTES

[54.9.1] Comparison with English rule

Rule 9(2) in England has no equivalent in Hong Kong. That rule deals with the bringing up of prisoners, otherwise than by a writ of *habeas corpus*, to give evidence in any cause or matter, civil or criminal, before any court, tribunal or justice.

In Hong Kong see section 12 of the Prisons Ordinance (Cap 234) and section 81 of the Evidence Ordinance (Cap 8).

[54.9.2] Order 54 rule 9 – applications for habeas corpus ad testificandum and habeas corpus ad respondendum

Order 54 rule 9 provides that applications for the writs of *habeas corpus ad testificandum* (to bring up a prisoner to testify) and of *habeas corpus ad respondendum* (to bring up a prisoner to face action by a creditor or other claimant) should be made on affidavit to a judge in chambers.

According to section 46 of the High Court Ordinance and the Schedule to that Ordinance both those types of writ have been abolished in Hong Kong. The Schedule was amended by Ordinance 95/1997 so as to delete those types of writ of *habeas corpus* from the list of writs which exist in this jurisdiction. See also the definition section of the High Court Ordinance which confines the term 'writ of *habeas corpus*' to the writ of *habeas corpus ad subjiciendum*.

The writ of *habeas corpus ad testificandum* is replaced by section 81 of the Evidence Ordinance (Cap 8) and by the 'body order': see the commentary under Order 38 rule 14.

The writ of *habeas corpus ad respondendum* may be considered obsolete in light of the procedure for arrest and examination of debtors under Orders 44A, 48 and 49B of these rules.

10. Form of writ (O. 54 r. 10)

A writ of habeas corpus must be in Form No. 89, 91 or 92 in Appendix A, whichever is appropriate.

(Enacted 1988)

NOTES

[54.10.1] Order 54 rule 10 – form of writ of habeas corpus

The form of writ of *habeas corpus ad subjiciendum* is No 89 in Appendix A to these rules. The other two prescribed forms mentioned in rule 10 (forms 91 and 92) were in fact repealed in 1997. They were forms of writ of *habeas corpus* of types which were abolished that year – see the commentary under rule 9 above.

Section 22A(7) of the Ordinance suggests that the writ itself must specify the time and date for the person to whom it is directed to produce the person alleged to be detained and to make the formal return. Form No 89 does not cater to this requirement, though the prescribed form of Notice to be served with the writ (Form No 90) does. In *Re W* [2006] 1 HKC 468 it was argued that a writ in Form No 89 was 'invalid' in this regard but no ruling was made on the point.

ORDER 55

APPEALS TO THE HIGH COURT FROM COURT, TRIBUNAL OR PERSON: GENERAL

1. Application (O. 55 r. 1)

(1) Subject to paragraphs (2), (3) and (4), this Order shall apply to every appeal which by or under any enactment lies to the Court of First Instance from any court, tribunal or person.

(2) This Order shall not apply to –

(a) an appeal by case stated,

(b) an appeal under the Magistrates Ordinance (Cap. 227), or

(c) any appeal to which Order 73 applies.

(L.N. 363 of 1990)

(4) The following rules of this Order shall, in relation to an appeal to which this Order applies, have effect subject to any provision made in relation to that appeal by any other provision of these rules or by or under any enactment.

(5) In this Order references to a Tribunal shall be construed as references to any Tribunal constituted by or under any enactment other than any of the ordinary courts of law.

NOTES

[55.1.1] Numbering

There is no subrule (3) in O 55 r 1. O 55 r 1(4) follows immediately after O 55 r 1(2). The subrule of the same number in the former English Rules of the Supreme Court dealt with appeals in certain insolvency matters and was not adopted in the 1988 revision of the Hong Kong rules.

[55.1.2] Scope of order

Order 55 governs appeals to the Court of First Instance from lower courts, tribunals and decision-makers, where such appeals are provided for by specific legislation. Although the heading to the Order continues to refer to appeals to the 'High Court', it is clear from rule 1(1) that the Order concerns only appeals to the Court of First Instance, and not those which lie to the Court of Appeal. Appeals to the Court of Appeal are dealt with in O 59. When dealing an appeal to which O 55 applies, the starting point must be the Ordinance or subsidiary legislation which establishes the tribunal to be appealed from. It will usually be there that provision is made as to the circumstances in which an appeal may lie. The provisions of O 55 are general for all appeals within its scope; there may in addition be specific rules for particular appeals which will take precedence: see rule 1(4).

[55.1.3] Examples of the appellate jurisdiction of the Court of First Instance

(1) *Appeals from the Small Claims Tribunal*

Appeal lies under section 28 of the Small Claims Tribunal Ordinance (Cap

338) from decisions of the Small Claims Tribunal to the Court of First Instance. Appeal may be made on any ground involving a question of law alone or on the ground that the claim was outside the jurisdiction of the tribunal. Leave to appeal must be sought from the Court of First Instance.

(2) *Appeals from the Labour Tribunal*
Appeal lies under section 32(1) of the Labour Tribunal Ordinance (Cap 25) from decisions of the Labour Tribunal to the Court of First Instance on the grounds that the award, order or determination was erroneous in point of law or outside the jurisdiction of the tribunal. Leave of the Court of First Instance is required.

(3) *Appeals under the Buildings Ordinance*
Appeal lies under section 7(4) of the Buildings Ordinance (Cap 123) from a decision of the disciplinary board to a judge of the Court of First Instance, from a decision of the board finding that an authorised person or registered structural engineer has been guilty of negligence or misconduct.

(4) *Appeals under the Pilotage Ordinance*
Appeal lies under section 20 of the Pilotage Ordinance (Cap 84) from a decision of the Board of Investigation (established under section 19 of the Ordinance) to the Court of First Instance. A further appeal lies to the Court of Appeal (*Chan Chung-fai v The Pilotage Authority* [1979] HKLR 562, [1979] HKCU 63(CA)).

(5) *Appeals from the Obscene Articles Tribunal*
Appeal lies under section 30 of the Control of Obscene and Indecent Articles Ordinance (Cap 390) to the Court of First Instance from decisions of the Obscene Articles Tribunal on points of law. Such appeals are assigned to the Constitutional and Administrative Law List but are governed by Order 55. See practice direction 26.1 and para 2.1 of the directions thereunder (known as PD SL3).

(6) *Appeals under the Estate Duty Ordinance*
Section 22 of the Estate Duty Ordinance (Cap 111) provides for appeals to the Court of First Instance from decisions of the Commissioner in respect of property alleged by the Commissioner to be worth more than $200,000. Where the alleged value is a lower figure, appeal lies to the District Court. Such appeals will become increasingly rare, since estate duty was abolished with prospective effect for persons who die on or after 11 February 2006 (Estate Duty Ordinance, section 2).

(7) *Appeals under the Copyright Ordinance*
Section 176 of the Copyright Ordinance (Cap 528) provides for appeals from the Copyright Tribunal to the Court of First Instance on any point of law.

(8) *Appeals under the Chinese Medicine Ordinance*
Section 141(1) of the Chinese Medicine Ordinance (Cap 549) provides for appeals to the Court of First Instance from any decision of the Medicines Board under that Ordinance.

(9) *Appeals from the licensing court*
Section 16 of the Money Lenders Ordinance (Cap 163) provides for appeals to the Court of First Instance from a magistrate sitting as the 'licensing court' under that Ordinance.

[55.1.4] Appeals to the Court of First Instance which are not governed by Order 55

Order 55 rule 1(2) lists certain types of appeal to the Court of First Instance which are *not* governed by this Order. They are:

- *Appeal by case stated* – for example appeals under section 69 of the Inland Revenue Ordinance (Cap 112). See the discussion below.
- *Appeals from magistrates* – appeals from magistrates in criminal matters are generally governed by Part VII of the Magistrates Ordinance (Cap 227) and these rules do not apply. However, this Order does apply to appeals from a magistrate under section 4(2) of the Costs in Criminal Cases Rules (Cap 492): *HKSAR v Wai Sau Cheong* [2003] 1 HKC 640. Further, it applies to appeals from a magistrate sitting as the 'licensing court' under s 16 of the Money Lenders Ordinance (Cap 163): *Hang Hing Finance Ltd v Commissioner of Police* [2017] HKCU 2442 (HCMP 955/2017; Lisa Wong J; 25.09.2017).
- *Order 73 appeals* – Order 73 makes provision for arbitration proceedings and any appeal to which that Order applies is not subject to Order 55.

[55.1.5] Appeals under the Trade Marks Ordinance

For appeals to the Court of First Instance from the Registrar of Trade Marks, see Order 100.

[55.1.6] Appeals from the Inland Revenue Board of Review

Appeal lies to the Court of First Instance from the Inland Revenue Board of Review under section 69(1) of the Inland Revenue Ordinance (Cap 112). It is there provided that either the taxpayer or the Commissioner of Inland Revenue may apply for the Board to state a case on a question of law for the opinion of the CFI. Order 55 does not apply to such appeals: Order 55 rule 1(2)(a). For the procedure to be followed in preparing the case stated, see *Commissioner of Inland Revenue v Inland Revenue Board of Review* [1989] 2 HKC 66 (CA).

Such an appeal lies on a point of law only; an appeal on a question of fact will not be entertained: *Shun Lee Investment Co Ltd v CIR* [1967] HKLR 712, [1967] HKCU 45. A finding or inference of fact may nevertheless be set aside on appeal if there was no evidence to justify it, or if it is based on a view of the facts which could not reasonably be entertained: *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14, [1955] 3 All ER 48 (HL) applied in *Hong Kong Whampoa Dock Co Ltd v CIR (No 2)* [1960] HKLR 166, 199–200, [1960] HKCU 30 and *Commissioner of Inland Revenue v Aspiration Land Investment Ltd* [1991] 1 HKLR 409, [1991] HKCU 363 (HCIA 10/1989; Kaplan J; 31.10.1990).

The fact that a case stated does not include a specific question of law raised in the appellate court is not fatal: *Rico Internationale Ltd v CIR* [1965] HKLR 493.

2. Court to hear appeal (O. 55 r. 2)

Except where it is otherwise provided by these rules or under any

enactment, an appeal to which this Order applies shall be heard and determined by a single judge.

(L.N. 363 of 1990)

NOTES

[55.2.1] Appeal to be heard by a single judge

In *Re CHM Finance (HK) Ltd* [1990] 1 HKLR 248, [1990] HKCU 313 it was held that an appeal under Order 55 should be heard and determined by two or more judges. As a result of amendments to Order 55 rule 2 in 1988 and 1990, that decision should no longer be followed.

3. Bringing of appeal (O. 55 r. 3)

(1) An appeal to which this Order applies shall be by way of rehearing and must be brought by originating motion.

(2) Every notice of the motion by which such an appeal is brought must state the grounds of the appeal and, if the appeal is against a judgment, order or other decision of a court, must state whether the appeal is against the whole or a part of that decision and, if against a part only, must specify the part.

(3) The bringing of such an appeal shall not operate as a stay of proceedings on the judgment, determination or other decision against which the appeal is brought unless the Court by which the appeal is to be heard or the court, tribunal or person by which or by whom the decision was given so orders.

NOTES

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

Order 55 rule 3(1) provides that an appeal under this Order is by way of rehearing. This means the court will consider the evidence and submissions afresh without the witnesses being recalled: see the commentary under Order 59 rule 3. However, there is express power to receive fresh evidence whether by affidavit or otherwise – see Order 55 rule 7(2).

It has been suggested that that an appeal under Order 55 is not a rehearing in the full sense. See *Licoman Herbal Research Lab Ltd v Chinese Medicines Board* [2010] HKCU 2588 (HCMP 2420/2009; Chung J; 29.11.2010). There the court was referred to authorities concerning appeals from the Registrar of Trade Marks to the effect that great weight should be attached to the decision below; that the Registrar being an expert his decision should only be disturbed unless for mistake of law or having clearly come to a wrong conclusion. Note that appeals from the Registrar of Trade Marks are governed not only by this Order, but also by Order 100: see *Geok Eng Co Ltd v Hoe Hin Pak Fah Yeow Manufactory Ltd* [2017] HKCU 559 (HCMP 2115/2016; DHCJ Kent Yee; 06.03.2017).

[55.3.2] Form of Notice of Appeal

Order 55 rule 3(1) also provides that an appeal under this Order shall be made by notice of originating motion. This is an exception to the general rule in Order 5 rule 1 that civil proceedings should ordinarily be commenced by writ or originating

summons. The appropriate form of notice of originating motion for an appeal under Order 55 is Form No 13 in Appendix A to these rules. See also the general provisions as to originating motions under Order 8.

[55.3.3] Rule 3(2) – grounds of appeal

The notice of originating motion by which an appeal is brought under this Order is required to state the grounds of appeal: O 55 r 3(2). In *Geok Eng Co Ltd v Hoe Hin Pak Fah Yeow Manufactory Ltd* [2017] HKCU 559 (HCMP 2115/2016; DHCJ Kent Yee; 06.03.2017) a notice of motion which failed to state the grounds of appeal was struck out, despite the fact that the appellant later filed (without leave) a separate document stating the grounds.

4. Service of notice of motion and entry of appeal (O. 55 r. 4)

(1) The persons to be served with notice of the motion by which an appeal to which this Order applies is brought are the following–

(a) if the appeal is against a judgment, order or other decision of a court, the registrar or clerk of the court and any party to the proceedings in which the decision was given who is directly affected by the appeal;

(b) if the appeal is against an order, determination, award or other decision of a tribunal, government department or other person, the chairman of the tribunal, government department or person, as the case may be, and every party to the proceedings (other than the appellant) in which the decision appealed against was given.

(2) The notice must be served, and the appeal entered, within 28 days after the date of the judgment, order, determination or other decision against which the appeal is brought.

(3) In the case of an appeal against a judgment, order or decision of a court, the period specified in paragraph (2) shall be calculated from the date of the judgment or order or the date on which the decision was given.

(4) In the case of an appeal against an order, determination, award or other decision of a tribunal, government department or other person, the period specified in paragraph (2) shall be calculated from the date on which notice of the decision was given to the appellant by the person who made the decision or by a person authorized in that behalf to do so.

NOTES

[55.4.1] Parties to an appeal

By virtue of rule 4(1)(b) the tribunal whose decision is appealed against must be served with the appeal papers. However, it is incorrect to name the tribunal as the respondent to the appeal. The parties to the appeal are the same parties who appeared in the proceedings before the tribunal. In *East Touch Publisher Ltd v TELA* [1996] 3 HKC

to the Court to be sufficient.

Except where the Court otherwise directs, an affidavit or note by a person present at the proceedings shall not be used in evidence under this paragraph unless it was previously submitted to the person presiding at the proceedings for his comments.

(5) The Court may give any judgment or decision or make any order which ought to have been given or made by the court, tribunal or person and make such further or other order as the case may require or may remit the matter with the opinion of the Court for rehearing and determination by it or him.

(6) The Court may, in special circumstances, order that such security shall be given for the costs of the appeal as may be just.

(7) The Court shall not be bound to allow the appeal on the ground merely of misdirection, or of the improper admission or rejection of evidence, unless in the opinion of the Court substantial wrong or miscarriage has been thereby occasioned.

NOTES

[55.7.1] Powers of court on appeal – constitutional considerations

The powers of the court on appeal under this Order are sufficiently broad to cure any defect in the composition of the tribunal below with regard to the right to an independent and impartial tribunal under article 10 of the Hong Kong Bill of Rights. See *R v Lift Contractors' Disciplinary Board, ex p Otis Elevator Co (HK) Ltd* (1995) 5 HKPLR 78. On the other hand see *Leary v National Union of Vehicle Builders* [1971] Ch 34, 49 where it was said that 'failure of natural justice in the trial body cannot be cured by a sufficiency of natural justice in an appellate body'.

[55.7.2] Power to admit fresh evidence

On an appeal under Order 55, the court has power to admit fresh evidence, that is evidence which was not before the decision-maker at first instance, whether by affidavit or otherwise. The power is found in O 55 r 7(2). It differs from that conferred on the Court of Appeal by Order 59 rule 10(2) in that there is no 'special grounds' requirement. As a result the strict approach in *Ladd v Marshall* [1954] 1 WLR 1489, [1954] 3 All ER 745, which applies in the Court of Appeal, and on appeals from a Master to a single judge under Order 58, does not apply in its full vigour to Order 55 appeals, though it may be relevant. See *Re Hunt-Wesson Inc* [1996] RPC 233, which concerned a trade mark appeal under O 55. In that case (at 241-2) the English court held that on an application for leave to adduce fresh evidence on an Order 55 appeal, the appropriate course is to look at all the circumstances, including the factors set out in *Ladd v Marshall*. The English court went on to set out the following non-exhaustive list of matters which may be relevant:

(1) Whether the evidence could have been filed earlier and, if so, how much earlier.

(2) If it could have been, what explanation for the late filing has been offered to explain the delay.

(3) The nature of the mark.

(4) The nature of the objections to it.

(5) The potential significance of the new evidence.

(6) Whether or not the other side will be significantly prejudiced by the admission of the evidence in a way which cannot be compensated, *eg* by an order for costs.

(7) The desirability of avoiding multiplicity of proceedings.

(8) The public interest in not admitting into the register invalid marks.

In *Re Julian Higgins' trade mark application* [2000] RPC 321, 327 the English court expressed the view that *Ladd v Marshall* was not of any assistance.

The onus is on the applicant seeking to adduce fresh evidence: *Dualit Ltd v Rowlett Catering Appliances Ltd* [1999] FSR 465.

Both *Hunt-Wesson* and *Dualit* were relied upon by the Hong Kong court in *Gemology Headquarters International LLC v Gemological Institute of America Inc* [2014] HKCU 1707 (HCMP 1456/2014; Au-Yeung J 15.07.2014).

[55.7.3] Power to draw inferences of fact

On an appeal to which Order 55 applies, the court may draw inferences of fact which might have been drawn below: rule 7(3). With regard to appeals from the Labour Tribunal, see also section 35(2)(a) of the Labour Tribunal Ordinance (Cap 25). An example of a case where such an inference was drawn see *Lui Lin Kam & Ors v Nice Creation Development Ltd* [2003] HKCU 812 (HCLA 106/2002; DHCJ Lam; 09.07.2003) (para 21). See also the commentary on the similar power of the Court of Appeal to draw inferences of fact, in the commentary concerning O 59 r 10(3).

[55.7.4] Power to remit for rehearing

Under Order 55 rule 7(5), the court has power to remit a matter to the tribunal below or grant other relief. In the unusual case of *Curtis v Chairman of London Rent Assessment Committee* [1999] QB 92, the court remitted the matter to the tribunal for fresh consideration on the appeal of the party which had been successful below. The successful party objected to the reasoning of the tribunal below.

[55.7.5] Security for costs of appeal

Order 55 rule 7(6) gives the court power to order security for the costs of an appeal 'in special circumstances'. This power cannot be used to order security for the costs of an appeal from a master to a single judge since those appeals are governed by Order 58, not Order 55: *Mo Chi Man v Young Wai Yi* (HCMP 7402/1999; Cheung J; 01.02.2000) and *Perennial Cable (HK) Ltd v Popbridge Industrial Ltd* [2000] 1 HKC 564.

[55.7.6] Appeals on points of misdirection or admissibility of evidence

Order 55 rule 7(7) provides that where the tribunal below misdirected itself or erred on a point of admissibility of evidence, the court is not bound to allow the appeal unless the result is a 'substantial wrong or miscarriage'. The effect of the rule is 'to provide guidance on the exercise of the judicial discretion' as to what order to make: *Ip Wah v Cheung Chun Chiu* [2007] HKCU 1067 (HCMP 251/2007; Yuen JA & Chu J; 22.06.2007), concerning section 35(1) of the Labour Tribunal Ordinance, which provides that on an appeal to the CFI the court may (a) allow the appeal, (b) dismiss the appeal, or (c) remit the matter to the tribunal. In result the court may dismiss an appeal where it is satisfied that even without the error below, the result would be the same: *Knight v Dorset CC* [1997] EWCA Civ 1496. Thus, it has been observed,

appeals to which rule 7(7) applies are 'difficult to sustain': *Re Selleys Pty Ltd* [2006] HKCU 1228 (HCMP 82/2006; Deputy Judge Carlson; 21.07.2006). However, in the case of misdirection, particularly misdirection on a point of law, it is only where the decision is 'plainly and unarguably right notwithstanding the misdirection' that it can be allowed to stand; if the conclusion was 'wrong or might have been wrong', it should be remitted to the tribunal. See *Wong Yin Fong & Ors v ISS HK Services Ltd* [2005] 2 HKLRD 648, [2005] HKCU 843 (HCLA 56/2003; Lam J; 28.06.2005) (para 74) and *Supremacy Trading Co Ltd v Asian Property Investment Ltd* [2015] HKCU 609 (HCSA 56 & 57/2014; Au-Yeung J; 20.03.2015) (para 29), both applying *Dobie v Burns International Security Services* [1985] 1 WLR 43. See, however, *Chok Kin Ming v EOC* [2017] HKCU 688 (HCLA 42/2015; G Lam J; 17.03.2017) (para 63–67) where it was suggested that *Dobie* must now be read as subject to the qualification that the appellate court may substitute its own view, rather than remitting the case, where satisfied that the facts do not require further amplification or reinvestigation.

In *Ip Wah* (above) the Court of Appeal dismissed an argument that rule 7(7) does not apply to appeals from the Labour Tribunal.

Rule 7(7) applies only in cases of misdirection or wrongful admission or rejection of evidence. See *Winning Co v Director of Fire Services* (HCMP 4459/1999; Deputy Judge To; 29.02.2000) where it was found the rule did not apply to an appeal based on failure to discharge the burden of proof.

8. Right of government department to appear and be heard (O. 55 r. 8)

Where an appeal to which this Order applies is against any order, determination or other decision of a government department, the department shall be entitled to appear and be heard in the proceedings on the appeal.

(Enacted 1988)

NOTES

[55.8.1] Orders 56 and 57 omitted

Orders 56 and 57 have been omitted from the Hong Kong rules. Under the previous English RSC those Orders dealt with appeals by way of case stated and Divisional Court proceedings.

ORDER 58

APPEALS FROM MASTERS

1. Appeals from certain decisions of masters to a judge in chambers (O. 58 r. 1)

(1) Except as provided by rule 2, Order 5, rule 6, and Order 12, rule 1, an appeal shall lie to a judge in chambers from any judgment, order or decision of a master, irrespective of whether the judgment, order or decision was given or made on the basis of written submissions only or after hearing.

(L.N. 152 of 2008)

(2) The appeal shall be brought by serving on every other party to the proceedings in which the judgment, order or decision was given or made a notice to attend before the judge on a day specified in the notice or as on such other day as may be directed.

(3) Unless the Court otherwise orders, the notice must be issued within 14 days after the judgment, order or decision appealed against was given or made and must be served within 5 days after issue and an appeal to which this rule applies shall not be heard sooner than 2 clear days after such service.

(L.N. 404 of 1991; L.N. 129 of 2000)

(4) Except so far as the Court may otherwise direct, an appeal under this rule shall not operate as a stay of the proceedings in which the appeal is brought.

(5) No further evidence (other than evidence as to matters which have occurred after the date on which the judgment, order or decision was given or made) may be received on the hearing of an appeal under this rule except on special grounds.

(L.N. 152 of 2008)

NOTES

[58.1.1] Scope of Order 58 rule 1 – appeal as of right from master to single judge

Order 58 rule 1 provides that most decisions of a master may be appealed to a single judge of the Court of First Instance sitting in chambers. The exceptions are:

- decisions of a final rather than interlocutory character which by rule 2 must be appealed to the Court of Appeal, and
- decisions under Order 5 rule 6 and Order 12 rule 1 giving or refusing leave for a company to be represented by director, which are deemed to be final.

In addition, it is inappropriate to use this Order to appeal a master's decision on taxation of costs: the review procedures under O 62 rr 33-35 should be used instead: *Tin Wan Tung v Wong See Yin* [2017] HKCU 137 (HCA 167/2011; Wilson Chan J; 17.01.2017) (para 9).

With regard to applications for probate, see rule 62(1) of the Non-Contentious Probate Rules (Cap 10A) which makes similar provision for appeal from the Registrar to a judge, and see *Law Hau Yu v Master J Wong* [2016] 4 HKLRD 539, [2016] HKCU 1916 (HCAL 46/2016; Chung J; 12.08.2016).

An appeal to a single judge under this rule lies as of right, unlike interlocutory appeals to the Court of Appeal, which generally require leave to appeal. The Chief Justice's working party on civil justice reform, which recommended the leave requirement for interlocutory appeals to the Court of Appeal (implemented by section 14AA of the High Court Ordinance, in force in 2009), decided that the pre-existing position whereby appeals from a master to a single judge lay as of right should continue (final report, recommendation 109). However, a further appeal to the Court of Appeal will require leave if the decision is of the type which comes within section 14AA of the High Court Ordinance. Likewise the leave requirement in section 14(3)(e) of the High Court Ordinance for appeals relating only to costs applies only to appeals to the Court of Appeal, and not appeals under this Order from a master to a single judge: *Honnin Development Ltd v Ho Ming & Anor* (HCA 16376/1999; Poon J; 14.12.2000).

Masters have power to determine interlocutory applications with or without an oral hearing: see Order 32 rule 11A. That provision came into force as part of the civil justice reforms in 2009, and at the same time Order 58 rule 1(1) was amended to make clear that an appeal lies to a single judge whether the master's decision was made after an oral hearing or on the basis of written submissions.

In *Official Receiver v Chan Hing To* [2007] 2 HKC 43(CA) it was suggested that the procedure under Order 58 for appeals from a master to a single judge could theoretically be bypassed by an appeal direct to the Court of Appeal. However, in that case such an appeal was struck out on the ground there were good reasons why the Order 58 procedure should be followed instead. Since that decision was handed down, section 14AA of the High Court Ordinance has come into force, whereby leave to appeal to the Court of Appeal is required in respect of most interlocutory decisions (see Order 59 rules 2A, 2B and 21 and the commentary thereunder). It seems highly unlikely that leave to appeal would be granted where the avenue of an appeal as of right to a single judge is available.

[58.1.2] Time

Notice of an appeal from a master to a single judge must be 'issued' within 14 days of the judgment, order or decision to be appealed: Order 58 rule 1(3). Note that time runs from the date the decision 'was given or made', not from the later date on which the order is sealed by the court. It would appear that the notice is 'issued' when presented to the court for filing. The notice must be served on every other party to the proceedings with 14 days of being issued, leaving at least 2 clear days between service and the hearing: rule 1(2) & (3).

[58.1.3] Extension of time to appeal

The court's general power under Order 3 rule 5 to extend time applies to appeals from a master to a single judge under Order 58.

The factors relevant to the exercise of the court's discretion in this context are well established. In *Lai Yuen Wah v Hoi Kwong Printing Co Ltd* [2003] 1 HKC 447, 450F–G Deputy Judge Saunders enumerated them as follows:

(a) the length of the delay
(b) the reasons for the delay

(c) the chances of the appeal being successful, and
(d) the degree of prejudice to the defendant

See also *Wong Kam Hong v Triangle Motors Ltd* [1998] 2 HKC 219, 224D–E and *Hsiao Hsiu Yang v Chu Wai Ting* [2003] HKCU 1351 (HCA 5909/1999; Chu J; 05.12.2003).

The reasons for delay should be explained on affidavit to the satisfaction of the court: *Postwell Ltd v Cheng Kap Sang* [2004] 2 HKLRD 355. In the absence of such an affidavit there is no basis on which the court can exercise its discretion to grant an extension: *Chan Kong v Chan Li Chai Medical Fty (HK) Ltd & Ors* HCA 4101/2001 (Deputy Judge Saunders; 10.03.2006).

After the implementation of the civil justice reforms in 2009, the court should also take into account the underlying objectives in Order 1A, whilst recognising the primary aim to secure the just resolution of disputes (Order 1A, rule 2): *Hartanto Hady v Radnaabazar Bazar* [2012] 3 HKLRD 29, [2012] HKCU 964 (HCA 89/2008; DHCJ Ng SC; 04.05.2012) (para 46); *Weng Chi Cheong v Barclays Capital Asia Ltd* (HCA 741/2016, DHCJ Marlene Ng, 06.12.2016) (para 18).

Other factors may be relevant in individual cases. See *Chiu Sin-chung v Yu Yan-yan Angela & Anor* [1993] 1 HKLR 225, 227–8, elaborating on the above list. In *Wong Tsz Yuk v Commissioner of Police & Anor* HCA 1699/2008 (Chung J; 29.04.2010) the court took the view that waiting for the master's reasons for the decision to be appealed is not a valid reason for delay. This was because an appeal under Order 58 rule 1 is by way of fresh hearing, so the master's reasons for decision are of little use on such an appeal.

A development in the law after delivery of the judgment to be appealed is not of itself considered a justifiable reason to extend the time for an appeal. See *Leung Yiu & Ors v Birkenhead Properties and Investments Ltd* [1998] 1 HKC 561; *Lam Yun Wah Dominic & Anor v Chan Kan Hei & Anor* [2000] 4 HKC 500, 504I(CA).

The court's approach in evaluating the relevant factors was considered in *Lai Yuen Wah* (above). Deputy Judge Saunders doubted the strict approach taken in some earlier cases such as *Tong Yi Sang & Anor v Fung Law & Ng & Ors* [1993] 2 HKC 665. He said that the 'modern approach' is not 'mechanistic', but reflects the fact the 'court has the widest measure of discretion in which the merits of a potential appeal and the prejudice to the other side are more relevant factors'. The deputy judge referred to *Finnegan v Parkside Health Authority* [1998] 1 WLR 411(CA).

[58.1.4] Jurisdiction

The court has jurisdiction to hear an appeal under this order notwithstanding that the proceedings have been stayed by virtue of the order which is the subject of the appeal. See *Lam Fei Hong v Wong Kam Fong & Ors* [1999] 2 HKC 781 per Keith J. Otherwise 'there could never be an appeal from an order for a stay unless the order expressly permitted it' (per Keith J at 783G–H).

A single judge on appeal from a master under this order has power in appropriate circumstances to set aside the master's order on the basis that the appealing party was absent at the hearing below: see *Pak Tim Chun v Tung Yung Metals Factory* [1998] 3 HKC 691(CA).

It has been suggested that no appeal lies as to the sufficiency of security ordered by a master as a condition of leave to defend under Order 14. See Hong Kong Civil Procedure 2001 citing *Hoare v Morshead* [1903] 2 KB 359(CA). However, in *Wong Hung Yu Richard v Wu Ming Fat Simon* [2002] 2 HKC 687 Ma J held (at 689H) that *Hoare v Morshead* 'is not authority for this proposition at all'. The learned judge held that if that case remains good law at all, it is confined to the *form* of security rather

than the *quantum* of security. Further, since it is now invariable to order that the security be paid into court the rule would not now have much application anyway.

[58.1.5] Power to strike out appeal

The court has an inherent jurisdiction to strike out a notice of appeal from a master to a judge in chambers under this Order, in clear and obvious cases: *Ling Daihong v Wong* HCA 1007/2011 (Deputy Judge Sakhrani; 02.11.2012). In that case a second notice of appeal from a master's decision, issued after an appeal against that decision had already been dismissed, was struck out.

[58.1.6] Form of Notice of Appeal under Order 58

No form of application or notice is prescribed by these rules or other legislation for an appeal under Order 58. However a form has been made available for reference in the Forms section of the judiciary's website www.judiciary.gov.hk. The form is entitled 'Notice of Appeal to Judge in Chambers (Order 58) – Appeal Against Master's Decision'.

[58.1.7] On appeal the application is heard afresh

An appeal under Order 58 from a master to a judge in chambers is an actual rehearing in the sense that the judge hears the application afresh. This differs from appeals to the Court of Appeal, where there is only nominally a rehearing. In *Wai Cheong Co Ltd v Kiu May Construction Co Ltd* [1983] 2 HKC 403, 409C–E (HCA 5829/1983; Clough J; 11.11.1983) (para 24), the court referred to *Evans v Bartlam* [1937] 2 All ER 646, [1937] AC 473, 478 and said:

> It is settled practice that an appeal from the Master to the Judge in Chambers is by way of an actual re-hearing of the application which led to the order under appeal. It is for that reason that the judge treats the matter as if it came before him for the first time, although the appellant always has to open the appeal. The judge exercises the same discretion as that previously exercised by the Master with due respect to the Master's decision but the judge is unfettered by it.

See also *Killenny Ltd & Ors v AG* [1996] 1 HKC 30, 37 (CACV 157/1995; Litton VP, Godfrey & Liu JJA; 20.10.1995) where it was noted that this practice exists despite the fact that Order 58 is silent in this regard.

As a result, on an appeal against an exercise of a master's discretion, the judge in chambers may exercise the discretion afresh. See *Kung Wong Sau-hin v CP Lin & Co* [1988] 2 HKLR 209, [1988] HKCU 372 (CACV 148/1987; Cons VP, Fuad & Power JJA; 11.03.1988). This is unlike the situation in the Court of Appeal where the usual rule is that discretionary decisions should only be interfered with if clearly wrong. However, on an appeal to a single judge from a master's exercise of discretion as to costs, the situation is different, and the rule applied in the Court of Appeal is normally followed. See the discussion below on appeals as to costs.

In *El Vince Ltd v Wu Wen Sheng* [2001] 4 HKC 107, 112H; [2001] 3 HKLRD 445 (HCA 14607/1999; Kwan J; 01.06.2001) (para 10) it was observed that an appeal under Order 58 rule 1 being an appeal by way of rehearing 'it is very common for new points to be taken'. However, after implementation of the civil justice reforms in 2009 the court might take a stricter view. This would be justified if the fresh point is fact-sensitive. By Order 58 rule 1(5), introduced as part of the civil justice reforms, special grounds are now required if it is sought to rely on further evidence, not relied upon before the master. See the discussion on further evidence below. See also the

discussion under Order 59 rule 10 concerning the power to allow new points to be argued on appeals to the Court of Appeal, which could be of some relevance under Order 58.

[58.1.8] Respondent's Notice and Notice of Cross-appeal

In view of the fact that an appeal under Order 58 proceeds by way of fresh hearing it is not strictly necessary for a respondent to give formal notice of any point he would wish to take by way of cross-appeal. However, the court has observed that whatever the technical position, it is sensible and courteous to give such notice where appropriate: *Chinakong Manufactory Ltd v Uniden Hong Kong* [1992] 1 HKC 481, 484A–B.

There is no procedure under Order 58 for the filing of a Respondent's Notice seeking to affirm a master's decision on other reasons. Further, it is not appropriate to adapt the procedure for such notice found in Order 59 rule 6 for appeals to the Court of Appeal: see *Morigood Development Ltd v Sunny Trading Co (a firm)* [1999] 2 HKC 710, 718A–D. In that case Keith J held that there was no need for a Respondent's Notice procedure under Order 58, as masters are not required to give reasons.

[58.1.9] Appeals as to costs

Leave is not required for an appeal on costs from a master to a single judge under Order 58. See the commentary under rule 1 on the scope of Order 58 and appeals as of right.

A judge in chambers should not allow an appeal against a costs order made by a master unless it can be shown that the order made is unreasonable or erroneous in law or the master either failed to take into account proper matters or took into account matters that should not have been taken into account: *China Venturetechno Int'l Co Ltd v New Century Chain Development* [1996] 2 HKC 68(CFI) (CACV 20/1996; Nazareth VP; Bokhary & Liu JJA; 03.07.1996); *Wong Chi Keung v Farspeed Int'l Ltd & Ors* HCPI 262/2003 (Deputy Judge Gill; 21.11.2005), citing *Hoddle v CCF Construction Ltd* [1992] 2 All ER 550. The burden which the appellant carries on such an appeal 'is not an easy one': *Lam Sik Shi v Lam Sik Ying* HCMP 1464/2004 (Deputy Judge Carlson; 16.02.2006); but where it is demonstrated that the master has not exercised the discretion correctly, the single judge on appeal may look at the question afresh: *Paul Y-ITC Construction Ltd v Kin Shing Co Ltd* [1999] 1 HKC 511, 515G–H. See also *Tin Wan Tung v Wong See Yin & Ors* [2016] HKCU 1024 (HCA 167/2011; DHCJ Kent Yee; 29.04.2016).

[58.1.10] Appeals as to pre-judgment interest rate

As with an appeal against costs, a single judge should be reluctant to interfere with a master's discretion in fixing the rate of pre-judgment interest payable on a judgment: *Tago Ltd v Process Automation Int'l Ltd* HCA 1133/2006 (Deputy Judge Muttrie; 18.05.2006). Different considerations will apply where interest is awarded not as a matter of discretion but as part of the plaintiff's cause of action: see the commentary under Order 42 rule 1.

[58.1.11] Further evidence on appeal from master to single judge

Order 58 rule 1(5) expressly provides for further evidence which was not before the master to be placed before the single judge on appeal. There is no restriction on such further evidence if it relates to matters which occurred after the date of the master's

decision being appealed. However, 'special grounds' are required if the evidence could have been, but was not, adduced before the master.

Rule 1(5) was introduced as part of the civil justice reforms which came into force on 2 April 2009. In *Aggressive Construction Co Ltd v Yick Wai Cheong* [2009] HKCU 960 (HCA 1889/2008; Deputy Judge Au; 29.06.2009) (para 24) the court rejected an argument that it applies only to proceedings issued after that date. It was sufficient that the application to adduce new evidence had been taken out after 2 April 2009. Previously there was no express power by which the court could admit new evidence on appeal to a single judge, though it was accepted that there was a discretion to do so: *Core Resources (FE) Ltd v Sky Finders Ltd* [1992] 1 HKLR 193, [1992] HKCU 394. At that time, because of the nature of such an appeal as a rehearing 'as though the matter was before the judge for the first time', the court was 'much more ready to admit further evidence ... than on appeal to the Court of Appeal': *Wong Hung Yu Richard v Wu Ming Fat Simon* [2002] 2 HKC 687, 690H, per Ma J. As a result of the 'special grounds' requirement in rule 1(5), that should no longer be the case. The 'special grounds' requirement is the same as that which has long applied in the Court of Appeal: see Order 59 rule 10(2). Moreover, the Chief Justice's working party on civil justice reform, in recommending this change, specifically referred to *Ladd v Marshall* [1954] 1 WLR 1489, [1954] 3 All ER 745 which set out the criteria applied under the 'special grounds' test in the Court of Appeal (final report, para 645, n 534).

Shortly after rule 1(5) came into force the court adopted the *Ladd v Marshall* criteria on an application for leave under the new provision. See *Chan Yau v Chan Calvin & Anor* [2009] HKCU 699 (HCA 666/2007; Sakhrani J; 15.05.2009) (para 19); and see *Fortis Insurance Co (Asia) Ltd v Lam Hau Wah Inneo* [2010] HKCU 716 (HCA 1840/2009; Fok J; 30.03.2010) (paras 15–17). For discussion of those criteria, see the commentary under Order 59 rule 10(2). In addition, certain aspects of the approach taken by the court on Order 58 appeals prior to the introduction of rule 1(5) appear to remain valid. They include:

- Leave may be refused if the new evidence entails a radical change of the party's case or raises matters which should have been dealt with before: *Core Resources* (above) (198).
- Leave may be refused where the party, despite being given the opportunity to do so, failed to adduce further evidence below: *Wong Hung Yu Richard* (above) (690F).

[58.1.12] Procedure on application for leave to adduce further evidence

An application for leave to adduce further evidence on appeal to a single judge should be made by summons. In most cases it will be appropriate for the summons to be returnable at the appeal hearing itself. See *So Kam Wing & Anor v Seapower Resources Int'l Ltd* [2000] 2 HKC 50. An earlier hearing of the leave application could result in disproportionate costs being incurred. However, an earlier hearing may be necessary if, should the application be successful, the other party will require time to prepare evidence in response, as in *Wong Hung Yu Richard* (above) (691C–F).

Where the application for leave to adduce further evidence was initially made to the master, but refused, it is not appropriate to make a fresh application by summons before the single judge. Rather the master's refusal should itself be made the subject of an appeal to the single judge from the master: *Jindal Exports Ltd v Waco Trading Co Ltd* [2000] 2 HKC 46, 47I. However, the judge should consider the appeal with regard to the fresh evidence on the basis of the facts and circumstances as they exist at the time of the appeal, rather than as they were before the master: *Ip Yin Ping & Ors v Ip Anne* [2003] 2 HKC 595, 599G–H. *Jindal* continues to apply after the implementation of the civil justice reforms in 2009: *Gannon Vietnam Co Ltd & Anor v Greene* [2013] HKCU 2380 (HCA 584/2012; Deputy Judge Lok; 11.10.2013) (paras 22–26).

[58.1.13] Practice direction

Practice direction 5.4 gives guidance as to preparation of bundles, *dramatis personae*, chronology of events, skeleton arguments and lists of authorities for appeals under Order 58 from a master to a single judge. Revisions to this practice direction took effect in 2009 along with the civil justice reforms coming into force. It is now provided that the written decision of the master, if any, should be included in the hearing bundle. The updated text of the practice direction may be viewed on the judiciary website www.judiciary.gov.hk or that of the Hong Kong Legal Information Institute www.hklii.org, both of which are accessible by the general public free-of-charge.

This practice direction also governs interlocutory summonses set down for hearing before a judge, or for 30 minutes or more before a master, under Order 32 rule 1. See the commentary under that rule for reference to cases in which the court has criticised the failure of parties to comply with the practice direction and warned of possible costs consequences.

[58.1.14] No security for costs

The court has no jurisdiction to order security for costs of an appeal to a single judge under O 58. See *Brand Farrar Buxbaum LLP v Samuel-Rozenbaum Diamond Ltd & Anor (No 2)* [2003] 1 HKLRD 600, 609, [2002] HKCU 1206 (para 20), where Ma J (as he then was) held that the absence of an express power is deliberate, and cannot be filled by reliance on inherent jurisdiction.

2. Appeals from certain decisions of masters to Court of Appeal (O. 58 r. 2)

An appeal shall lie to the Court of Appeal from any judgment, order or decision (other than an interlocutory judgment, order or decision) of a master, given or made –

(a) on the hearing or determination of any cause, matter, question or issue tried before him under Order 14, rule 6(2) and Order 36, rule 1;

(b) on an assessment of damages under Order 37 or otherwise; or

(c) on the hearing or determination of an application under Order 84A, rule 3; or

(L.N. 127 of 1995)

(d) on the hearing or determination of an application under Order 49B; or

(e) on the hearing of a petition for winding-up or bankruptcy; or

(L.N. 404 of 1991; L.N. 99 of 2014)

(f) on the trial of an issue under Order 17, rule 11(2).

(L.N. 99 of 2014)