

COMMENCEMENT AND PROGRESS OF PROCEEDINGS

ORDER 4

ASSIGNMENT, TRANSFER AND CONSOLIDATION OF PROCEEDINGS

NOTES

[4.0.1] Comparison with English rule

It will be noted that O 4 in the Hong Kong rules contains only two rules whereas the equivalent in the former English Rules of the Supreme Court contained nine. The balance of the English rules was omitted in Hong Kong because they dealt with administrative and other matters which are inapplicable in this jurisdiction.

2. Companies (O. 4 r. 2)

Where an order has been made by the Court for the winding-up of a company, all proceedings in chambers in any action against that company at the instance or on behalf of debenture holders shall be dealt with by an officer of the Court of First Instance who is a registrar within the meaning of any rules for the time being in force relating to the winding-up of companies.

9. Consolidation, etc., of causes or matters (O. 4 r. 3)

(1) Where two or more causes or matters are pending, then, if it appears to the Court –

- (a) that some common question of law or fact arises in both or all of them, or
- (b) that the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transactions, or
- (c) that for some other reason it is desirable to make an order under this rule,

the Court may order those causes or matters to be consolidated on such terms as it thinks just or may order them to be tried at the same time, or one immediately after another, or may order any of them to be stayed until after the determination of any other of them.

(2) Where the Court makes an order under para (1) that two or more causes or matters are to be tried at the same time but no order is made for those causes or matters to be consolidated, then, a party to one of those causes or matters may be treated as if it were a party to any of those other causes or matters for the purpose of making an order for costs against him or in his favour.

NOTES

[4.9.1] Consolidation and joint trial of proceedings

Order 4 rule 9(1) gives the court a discretion to order that pending actions be consolidated, or to regulate the order in which they will be tried. The discretion is engaged where there is some commonality among the actions or other good reason, as set out in r 9(1)(a), (b) and (c):

- (a) common question of law or fact
- (b) relief claimed in respect of the same transaction or series of transactions, or
- (c) some other reason making it desirable to make an order under this rule

The discretion is ‘unfettered’; its main purpose is to save costs and time: *Sincere View Int’l Ltd v Kenco Investments Ltd* [2006] HKCU 221 (HCA 301/2005; Kwan J; 03.02.2006) (para 4);

Yong Li Investments Ltd v Lee Sing Leung Robin [2018] HKCU 2733, [2018] HKCFI 1711 (para 17). The types of order envisioned by r 9(1) are:

- consolidation
- trial at the same time
- trial one immediately after another
- stay of any of the actions pending determination of any other of them

See *Wong Yuen Shun Kwong Wah Hong Ltd v Siu Siu Kam* [2006] HKCU 550 (HCA 3205/2000; Chung J; 30.03.2006) (para 37). The power is to be exercised in a 'flexible way', having regard to the particular circumstances; there is no 'hard and fast rule that just because the parties are identical and some common question or fact or law is involved ... it would be expedient to order consolidation': *Sincere View* (above) (para 4).

In addition to saving time and costs, the court will be concerned with avoidance of delay, undue complexity and overloading of issues: *Re Prudential Enterprises Ltd* [2003] HKCU 989 (HCCW 594/1999; Chu J; 19.08.2003) (para 8).

An application for consolidation should be made 'at the earliest convenient moment' in order to avoid waste of expense and effort: *Re Shui On Construction Co Ltd & Schindler Lifts (HK) Ltd* [1986] HKLR 1177, 11851-J. In *Comtech Engineering & Consultant Co Ltd v Thorn Security (HK) Ltd* (HCCT 53/1999; Ma J; 20.06.2002) the court refused to consolidate two actions which were at different stages, where to do so would result in having to vacate trial dates which had already been fixed for one.

Consolidation results in a single action in which there should be a single set of pleadings. By contrast an order for joint trial leaves the actions and their pleadings distinct. Thus consolidation may be appropriate where two actions can proceed as claim and counterclaim. On the other hand joint trial, or trial one after the other may be preferable where the parties are not identical in the separate actions: *Kader Industrial Co Ltd v Ngai Hing Hong Plastics Materials Ltd* (HCA 1534/2003; Deputy Judge Saunders; 23.02.2004).

See also O 1B r 1(2)(g).

[4.9.2] Costs of application under Order 4 rule 9

The costs of an application under O 4 r 9, including the costs of a contested hearing of the application, will normally be ordered to be costs in the cause. See *Wong Luen Hang v Chan Yuk Lung* (HCA 1382/2011; Registrar Lung; 25.11.2016) (para 36).

[4.9.3] Costs of actions tried at same time

Order 4 rule 9(2) provides that where actions are tried at the same time, but not consolidated, the court may order a party to one of the actions to pay costs of the other action. There was previously some doubt in Hong Kong as to the *vires* of this provision as it conflicted with s 52A(2) of the High Court Ordinance which prohibited costs orders against non-parties in the absence of specific primary legislation. Thus it was arguable that *Aiden Shipping Co Ltd v Interbulk Ltd* [1986] 1 AC 965, 982 (HL), so far as it dismissed the suggestion that the English equivalent of this rule was *ultra vires*, was not applicable in Hong Kong. However, s 52A(2) was replaced with effect from 2009 with an express power to order costs against a non-party. Thus there should no longer be any doubt about the validity of the power expressed in this rule. See the commentary on costs against non-parties under O 62 r 6A.

[4.9.4] Consolidation of arbitration proceedings

Consolidation of arbitrations is governed by section 2, Schedule 2, of the Arbitration Ordinance (Cap 609). Prior to 1 June 2011 the relevant provision was section 6B of the former Arbitration Ordinance (Cap 341). The previous provision was said to have been based on Order 4 rule 9, and similar, though not identical factors applied: *Shui On Constructions Ltd v Moon Yik Co & Ors* (HCMP 1275/1987; Deputy Judge Cruden; 31.07.1987); *Linfield Ltd v Brooke Hillier Parker (a firm)* (HCA 7693/2000; Ma J; 19.08.2002). The same may be said with regard to the current provision.

ORDER 5**MODE OF BEGINNING CIVIL PROCEEDINGS IN THE COURT OF FIRST INSTANCE****1. Mode of beginning civil proceedings (O. 5 r. 1)**

Subject to the provisions of any written law and of these rules, civil proceedings in the Court of First Instance may be begun by writ or originating summons.

(25 of 1998 s. 2) (L.N. 152 of 2008)

NOTES**[5.1.1] Court of First Instance or District Court?**

Certain types of claim may be pursued in either the Court of First Instance or the District Court. Money claims above the Small Claims Tribunal's exclusive jurisdiction and up to the upward limit of the District Court's general civil jurisdiction may be brought in either the CFI or the District Court. Note that the Small Claims Tribunal's jurisdiction was raised to \$75,000 (LN 132/2018) and that of the District Court to \$3 million (LN 132/2018) with effect from 03.12.2018 (LN 138/2018 and LN 139/2018). Note also that in the District Court different limits apply to particular types of proceedings such as those relating to land. See the commentary on the District Court Ordinance in volume 2 of the loose-leaf edition of this work.

However, actions which are within the jurisdiction of the District Court should not be commenced in the CFI without good reason. Section 43 of the District Court Ordinance (Cap 336) provides that in the absence of good reason such as importance or complexity of any issue in the action, the CFI is required to transfer such an action to the District Court. It may do so either on application or of its own motion: section 43(1). See the commentary under Order 25 rule 3. There were once procedural differences between the two courts which might lead plaintiffs to choose the CFI over the District Court. See, for example, *Diners Club International (HK) Ltd v Wilson Cheung Wing-yim* (1981) 11 HKLJ 247; *Kwangtung Provincial Bank v Tang Chik Leung* [1985] 1 HKC 93. However, the District Court rules were amended in 2000 so as to largely bring them into line with the High Court rules.

[5.1.2] Types of originating process

Order 5 rule 1 provides that civil proceedings may be begun by writ or originating summons. The rule previously listed the originating motion and petition as additional modes of commencing proceedings. The Chief Justice's working party on civil justice reform concluded that the previous system was unnecessarily complex (final report, para 151 *et seq*) and recommended that originating motions and petitions should be abolished save where prescribed for excluded proceedings (recommendation 14). They are preserved by Order 5 rule 5 for proceedings where their use is required or authorised by written law. Thus winding-up and matrimonial proceedings, which are governed by their own rules, continue to be initiated by petitions. However, Orders 53 and 54 have been amended so that applications for judicial review and habeas corpus are no longer brought by motion, but by special types of originating summons.

Petitions and motions also continue to exist for some proceedings governed by these rules. Order 102 rule 5 continues to prescribe the petition for certain applications under the Companies Ordinance (Cap 622), and Order 59 rule 3(1) continues to provide that appeals to the Court of Appeal must be brought by a type of motion known as notice of appeal.

See Order 5 rule 7 for transitional provisions concerning petitions and originating motions pending at the time this Order was amended as part of the 2009 civil justice reforms.

In choosing between writ and originating summons reference should be made to rule 4 of this Order. Note also Order 2 rule 1(3) which provides that the court shall not set aside proceedings commenced with the wrong originating process, but give directions for continuation of the proceedings in an appropriate manner.

[5.1.3] Originating process to be indorsed as to nature of claim

By Practice Direction 24.1 a writ or originating summons must be indorsed, at the top of the front page, as to (a) whether the claim is monetary only, non-monetary only, or mixed; and (b) as to the nature of the claim *eg* commercial, land, tort, *etc.* A list of categories of 'nature' of claim is annexed to the practice direction.

[5.1.4] Date of issue of originating process

The date on which originating process is issued can be important, especially where a limitation point may be taken. See the commentary under Order 63 rule 3.

[5.1.5] Court fees on issue of originating process

A fee is payable upon sealing (issuing) originating process by the court. Court fees are prescribed by the High Court Fees Rules (Cap 4D) and set out in the schedules thereto. Schedule 1 prescribes the fee payable upon sealing of originating process. The fee was HK\$1,045 in 1997 and as of late 2016 had not been adjusted.

No court fee is payable on issue of proceedings pursuant to leave granted under s 27A of the High Court Ordinance (Cap 4) to a vexatious litigant: High Court Fees Rules, Schedule 1, item 1, marginal note.

Where the party issuing the originating process is legally aided, the legal aid certificate must be filed and no court fee is payable: Legal Aid Ordinance (Cap 91), ss 14, 16B(c). However, by the latter provision, in the event of an order or agreement for costs in favour of an aided person, court fees are deemed to have been paid. As a result such fees will be recoverable against the paying party and when recovered will be paid by the Director of Legal Aid to the court.

Failure to pay the required court fee is an irregularity and does not nullify the proceedings or any step taken in them. The irregularity may be cured by ordering the party in default to pay the prescribed fee. See *Secretary for Justice v Chau Wan Ying* [2016] 5 HKC 303 (HCMP 774/2015; Chow J; 08.03.2016) (para 53).

2. (Repealed – L.N. 152 of 2008)

NOTES

[5.2.1] Repeal of Order 5 rule 2

Order 5 rule 2 previously provided that certain types of civil proceedings were required to be commenced by writ of summons. These included claims in tort (other than trespass to land), claims based on fraud and personal injury actions. Now see rule 4 of this Order. The Chief Justice's working party on civil justice reform considered that there was no need to require certain actions to be commenced in a particular way and that O 5 r 4(2) was sufficient guidance for choosing between writ of summons and originating summons as the means of commencing an action (final report, para 154). As a result O 5 r 2 was repealed and O 5 r 4(2) retained in the civil justice reform amendments implemented in 2009.

3. (Repealed – L.N. 152 of 2008)

NOTES

[5.3.1] Repeal of Order 5 rule 3

Order 5 rule 3 previously provided that an originating application to the court under written law was to be made by originating summons. An example is the vendor purchaser application under s 12 of the Conveyancing and Property Ordinance (Cap 219). The rule was repealed as part of the civil justice reforms which took effect in 2009, for the same reasons as the former O 5 r 2, as to which see the commentary above.

4. Proceedings which may be begun by writ or originating summons (O. 5 r. 4)