CHAPTER 1

INTRODUCTION TO CIVIL PROCEDURE IN HONG KONG

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1. Overview of Civil Procedure

(a) Distinction Between Civil and Criminal Procedure

1.1 Most of the time, the distinction between civil and criminal procedure is clear. In very simple terms:

(1) Criminal procedure governs criminal proceedings the purpose of which is to assess whether a person is guilty of a criminal offence and if so, to impose the appropriate punishment, *e.g.* fine, imprisonment etc., on the guilty person;

(2) Civil procedure governs civil proceedings, which are mostly for the purpose of assessing whether a person should have civil (*i.e.* non-criminal) liability and if so, to award the appropriate form and amount of relief *e.g.* damages, injunction etc., to another person who has suffered or will suffer a loss.

1.2 The matters arising from civil and criminal proceedings are largely distinct, and civil procedural rules and criminal procedural rules are very different. However, there are areas of overlap between them, so that, for example, there are times when criminal matters arise out of or are relevant in a set of civil proceedings, *e.g.*:

(1) If a person disobeys a court order made in a civil action, *e.g.* an injunction, under certain circumstances, the Court may commit the party to *prison* as punishment;

(2) Under s.65(1) of the Evidence Ordinance (Cap.8), a person has a right in *non-criminal* proceedings to refuse to answer any question or produce any document if to do so "would tend to expose that person [or that person's husband or wife] to proceedings for an [criminal] offence or for the recovery of a penalty". This "privilege against self-incrimination" is relevant, for example, in applications for a certain type of injunction called the *Anton Piller* order (see Chapter 9).

(b) Which Courts Have Jurisdiction (*i.e.* Power) Over Civil Matters in Hong Kong?

1.3 These are the Court of Final Appeal (CFA), Court of Appeal (CA), Court of First Instance (CFI), District Court (DC), and various tribunals (such as the Labour Tribunal, Lands Tribunal and Small Claims Tribunal).

1.4 "High Court" technically includes both the CA and CFI.

(c) Where Do You Find Civil Procedure in Hong Kong?

1.5 The main sources of civil procedure in Hong Kong are:

(1) Statute (in Hong Kong—called an "Ordinance"; in the UK—called an "Act"), *e.g.* High Court Ordinance (Cap.4) (HCO) and District Court Ordinance (Cap.336) (DCO);

(2) Subsidiary legislation, in particular, Rules of the High Court (Cap.4A, Sub.Leg.) (RHC) (under the HCO) and Rules of the District Court (Cap.336H, Sub.Leg.) (RDC) (under the DCO);

(3) Practice Directions (PDs) issued by the Chief Justice from time to time;

(4) Case law; and

(5) Practice books, *e.g. Hong Kong Civil Procedure* (commonly referred to as "The Hong Kong White Book"), published each year.

1.6 How do these sources work together?

(1) Statutes provide the "big-picture" principles and are the "primary" source;

(2) Most of the detailed procedural rules and requirements are in the subsidiary legislation, in particular, the RHC (High Court) and RDC (District Court):

  (a) Most other courts and tribunals have their own sets of procedure, *e.g.* the CFA has the Hong Kong Court of Final Appeal Rules (Cap.484A, Sub.Leg.);

(3) PDs are generally more administrative in nature and deal with detailed practices (on which the RHC/RDC are silent) required by the Courts, *e.g.* detailed requirements for documents used in applications for injunctions;

(4) Case law:

  (a) Shows how the Courts have interpreted and/or applied the relevant principles and procedures in the past;

  (b) Contains the Court's comments on its inherent jurisdiction:

    (i) The Court has inherent powers which are not expressly set out in statute/subsidiary legislation;

    (ii) These inherent powers are residual powers, which exist independently of the Court's statutory and common law powers. They enable the Courts to fulfill their judicial roles properly and effectively as courts of law;

    (iii) Examples—the Court's powers to control its own procedure and to prevent an abuse of its process;

(5) Practice texts, in particular, *Hong Kong Civil Procedure* (The Hong Kong White Book), collect together the procedural rules and relevant cases and other commentary in a logical way:

  (a) The White Book is regarded as the practitioners'"Bible";

  (b) The White Book is so authoritative that Courts cite from it.

(d) Rules of the High Court versus Rules of the District Court

1.7 Especially after the Civil Justice Reform came into effect on 2 April 2009, the RDC (for use in the DC) are essentially identical in most respects to the RHC (for use in the CA and CFI), *e.g.* most of the Order and Rule numbers are the same in both.

However, there are some important differences between them, including the following: **1.8**

(1) Companies may start and continue civil proceedings in the DC without legal representation. However, in the CFI, under the RHC, the general rule is that a body corporate must use a solicitor (in particular, if it wishes to defend the action);

(2) Parties have a right to serve two sets of "interrogatories" (which are essentially questions, but put in a prescribed format) before trial in the CFI without the Court's leave (*i.e.* permission). However, in the DC, the service of interrogatories requires the DC's leave;

(3) The RHC provide that the "Summer Vacation" (the month of August each year) is to be excluded in calculating any period for serving, filing or amending any pleading. However, there is no equivalent rule in the RDC. In practice, this means that sometimes there may be more time to perform some tasks in the CFI.

2. Pre-Action Considerations

When a new client comes to you with a new piece of litigation, there are some matters which you must consider: **1.9**

(1) *Before even accepting* the instructions, matters to consider include:

  (a) Competence:

    (i) In short, do you know and have enough experience of the law and practice in the area of the instruction? If you are "incompetent" but still act on the matter, this may well be professional misconduct. There is also a real risk that you will get things wrong and be sued for negligence;

  (b) Conflict of interests:

    (i) For example, a solicitor cannot act for both the plaintiff and the defendant in a legal action;

    (ii) Beware also of a potential conflict of interests which may mean you have to stop acting later on in the matter—if there is a real risk of this, you should seriously consider not taking on the matter in the first place;

    (iii) There can also be a "commercial" conflict—*i.e.* no actual conflict of interest in a technical sense, but a conflict in terms of *relationships* with clients, for example, acting for two companies that compete with each other heavily in the same industry;

    (iv) To consider whether there is any actual or potential conflict of interests, you will need to identify precisely *who is the client* (*e.g.* the person giving you the instructions may only be the real client's agent), as well as the other possible parties to the action and the subject matter of the dispute;

(2) After accepting the instructions, but *before starting any legal action*, there are many matters to consider:

(a) *This is probably the most important—the objectives of the client—what does the client want to achieve?*

(i) Depending on the client's objectives, litigation may not be the best way to achieve them;

(ii) Confirm instructions with the client, ideally in writing, before starting an action:

- For example, if the client is a company, you should normally get a board resolution to instruct you and to confirm that the action should be started;

(b) Alternative ways to resolve the dispute (also known as "alternative dispute resolution" or "ADR"), *e.g.* settlement negotiations, arbitration, mediation, expert determination?

(i) A settlement on reasonable terms is generally the best result for the client (and cheapest);

(ii) Mediation is increasingly recognized as an effective way to help parties come to a settlement:

- There are different formats for a mediation;
- In very general terms, the parties appoint a neutral middle-person, the mediator. Through discussions with the parties (usually in meetings but sometimes through telephone conversations or in writing), the mediator tries to understand each party's interests and position and to help the parties come to some common ground:
  - There may be times when the mediator speaks with each party *separately* (with each party in a separate room) to find out that party's positions and desires. This arrangement is commonly used where the parties may have something that they only wish to disclose to the mediator privately, or where the parties may become emotional (and therefore probably less rational) if they are in each other's presence;
  - Once an agreement in principle has been reached, the mediator may help the parties conduct face-to-face negotiation in respect of the detailed terms of the settlement;
- Note that the mediator does not make any decisions for the parties. It is up to the parties, through discussions with the mediator (and sometimes also face-to-face negotiation with each other), to decide whether to settle and if so, on what terms;

- Mediation is a *confidential* process and evidence of matters discussed during the mediation is generally *not* admissible at the trial in Court (if the mediation fails):[1]
  - The confidentiality and inadmissibility of evidence of matters discussed are seen to be necessary to encourage parties to negotiate in earnest—as they need not fear that statements/offers made in the course of the mediation would (if the mediation fails) be used against them in Court later;
- The use of mediation is actively encouraged by the Court;

(iii) Under the Civil Justice Reform, the Court has been much more pro-active in encouraging parties to use methods of alternative dispute resolution (in particular, mediation) to settle matters, *e.g.* see the new PD 31 on Mediation (see para.3.6);

(c) Are the Hong Kong Courts an appropriate forum for deciding this dispute?

(i) The technical phrase is whether the Hong Kong Courts are the *forum conveniens*. This will be discussed in para.5.29(2);

(d) In which Court should proceedings be commenced?

(i) CFI or DC or a specialist tribunal, *e.g.* Labour Tribunal, Lands Tribunal, Small Claims Tribunal?

- Check the legislation regarding relevant tribunals carefully, as these will set out the types of actions that should go through the tribunal;
- If the action should go through the CFI or the DC (see Chapter 2), you may still need to choose which "Court List" to start the action in—apart from the "general list", there are specialist lists for, *e.g.* personal injury actions;
  - A specialist list will usually have its own (sometimes very detailed) procedure, *e.g.* see PD 18.1 in respect of the Personal Injuries List;
  - A party should be careful in choosing the *correct* specialist list (if applicable), as a mistake may lead to the party being penalised in legal costs.[2]

(e) If money is in dispute, does the intended defendant have enough assets to make it worth suing?

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1 *S v T (Mediation: Privilege)* [2011] 1 HKLRD 534.

2 *Rondabosh International Ltd v China Ping An Insurance (Hong Kong) Co Ltd* (HCA 581/2009, [2009] HKEC 2103).

(f) Does the client, as the intended plaintiff, have the (financial) ability to carry through a legal action lasting a long time (some actions take a few years)?

(i) Is the client eligible for Legal Aid? In summary:

- Legal Aid is available to a *natural* person (*i.e.* an *individual* and *not, e.g.* a company) in Hong Kong;
- There are two schemes—the Ordinary Legal Aid Scheme and the Supplementary Legal Aid Scheme, with different coverage and eligibility criteria;
  - For matters within (and outside) the Ordinary Legal Aid Scheme, see Schedule 2 of the Legal Aid Ordinance (Cap.91) (LAO). Under this scheme, legal aid is generally available for actions in the DC, CFI, CA and CFA and some other matters. Matters outside this scheme include certain types of defamation actions, partnership disputes, and actions in the Labour Tribunal and Small Claims Tribunal;
  - For matters within (and outside) the Supplementary Legal Aid Scheme, see Schedule 3 of the LAO;
  - The Director of Legal Aid has confirmed that legal aid also covers mediation in civil proceedings;[3]
- Applications are made directly to the Legal Aid Department;
- The applicant must pass both:
  - A merits test (strength of claim)—in general, the applicant must show that he/she "has reasonable grounds for taking, defending, opposing or continuing [the action in question] or being a party thereto";[4] and
  - A means test (applicant's financial resources)—the relevant financial limits are reviewed and revised periodically;[5]
- Depending on the applicant's means, an offer of legal aid may be conditional upon the applicant paying a contribution (*i.e.* a sum of money up front);[6]
- In respect of legal costs in actions involving a legally aided person, see the LAO, in particular, ss.16C and 19. Broadly speaking:

[3] See Law Society Circular 09-521 (PA), 6 July 2009.
[4] Legal Aid Ordinance s.10(3).
[5] Updated figures may be found in the LAO/related subsidiary legislation or at the Legal Aid Department's website.
[6] Again, details may be found in the LAO/related subsidiary legislation or at the Legal Aid Department's website.

  - Where the legally aided person *starts* an action/claim and loses, and is ordered to pay legal costs to the winning (non-legally aided) party, the Director of Legal Aid will pay those costs;
  - On the other hand, where the legally aided person *defends* an action and loses, and is ordered to pay costs to the winning (non-legally aided) party, the Director of Legal Aid will only pay costs to the winning party *if* (and to the extent) the legally aided party had paid a contribution to the Director of Legal Aid *and* the contribution exceeds the legal costs spent by the Director on behalf of the legally aided party;
  - Where appropriate, the Court may of course also order a non-legally aided party to pay the legally aided party's costs, *e.g.* where the legally aided party is the winner of the action;
- Director of Legal Aid's "First Charge"—in general terms, under the Ordinary Legal Aid Scheme, if the legally aided party wins in the action and is paid legal costs by the other party, these recovered costs (and if necessary, the contribution) will be taken by the Director of Legal Aid to repay legal costs spent on the legally aided party's behalf. However, if there is still a shortfall after this, the legally aided person will have to repay the Director of Legal Aid out of the money or property recovered or preserved:
  - In this regard, where the property recovered is real property, the Director of Legal Aid's First Charge may be registered against the property in the Land Registry;
  - In a sense, legal aid is a little like a loan by the Director of Legal Aid to the legally aided party—to the extent that the party will have to repay the Director if he/she wins in the action and recovers or preserves money or property;

(g) Fact gathering—as much as possible, but in particular:

(i) Background documents;

(ii) Background facts;

(h) Apart from Hong Kong law, is there any other law that is relevant and/or applicable to the dispute?

(i) If so, you may need to help the client get advice on foreign law;

(i) What claims does the client have?

(i) In other words, what causes of action does the client have against the intended defendant, *e.g.* breach of contract, negligence etc.? What remedies is the client claiming for, *e.g.* damages, specific performance etc.?

(j) What counterclaims might the client face?

(i) Counterclaims are essentially claims by a defendant back against the plaintiff in the same action;

(k) Is there any limitation of action issue (*i.e.* what is the deadline by which the action has to be started)? (See below for further discussion);

(l) Does the client need any immediate or urgent remedy, *e.g.* an "injunction" (a type of Court order) to stop the intended defendant from moving its assets out of the jurisdiction or to stop an ongoing breach of contract?

(m) Are "costs-only proceedings" appropriate?

(i) The new s.52B of the HCO and new s.53A of the DCO provide for "costs-only proceedings":

- This is available where the parties have reached agreement (on a settlement) on all issues, including who is to pay costs and the only issue that the parties have not agreed is the *amount* of those costs;
- Either party can commence "costs only proceedings" to request the Court to determine the amount of costs;
- The detailed procedure is set out in the new RHC and RDC O.62 r.11A;

(n) Are there any insurance issues?

(i) For example, if the client is covered by insurance, there will almost certainly be terms in the insurance policy relating to notification of claims to the insurer and conduct of any legal proceedings. These terms must be strictly complied with; otherwise the client runs a real risk of the insurer refusing to pay under the policy.

3. Civil Justice Reform

1.10 Over the last 20 years or so, there has been in various jurisdictions around the world a general recognition of the increasing inadequacies of existing civil justice systems. For example, they have been criticised as being too complex, too slow and too expensive. After a detailed review, England and Wales comprehensively reformed its civil procedural rules starting in 1998/1999 (known as the "Woolf Reforms").

1.11 In Hong Kong, the Chief Justice appointed a Working Party (the Working Party) to review the civil rules and procedure of the CFI in February 2000.

1.12 On 21 November 2001, the Working Party published an Interim Report and Consultative Paper. On 3 March 2004, the Working Party published its Final Report (the Final Report), which set out 150 recommendations for reforms to the Hong Kong civil justice system. In the same month, the Chief Justice appointed a Steering Committee to oversee the implementation of the recommendations in the Final Report.

1.13 In December 2005, the Chief Justice directed that the Civil Justice Reforms should apply to both the CFI and the DC, and that an assessment be made on the impact of the proposed reforms to Lands Tribunal and Employees' Compensation proceedings.

1.14 On 12 April 2006, the Steering Committee published a consultation paper in respect of proposed legislative amendments together with a draft Civil Justice (Miscellaneous Amendments) Bill. The three-month consultation period ended on 12 July 2006. A further consultation paper was published on 18 October 2007.

1.15 The Civil Justice (Miscellaneous Amendments) Ordinance was gazetted on 6 February 2008. This amended various pieces of primary legislation including the HCO and DCO. The amended RHC and RDC (as well as other related amended subsidiary legislation) were gazetted on 6 June 2008.

1.16 *The reforms came into effect on 2 April 2009.* In the words of the Chief Justice in *Wing Fai Construction Co Ltd v Yip Kwong Robert* (2011) 14 HKCFAR 935, "…the main purpose of the [Civil Justice Reform] was the intention to *bring about a* ***change in litigation culture***. Broadly speaking, the principal themes of the [Civil Justice Reform] are:

(1) To ensure that parties to litigation are brought as expeditiously as possible to a resolution of their disputes, whether by way of adjudication or by settlement.

(2) To increase the cost effectiveness of the system of the civil procedure and to try to eliminate delays in litigation.

(3) To promote active case management by the courts and in doing so, not only facilitating the expeditious resolution of disputes, but also bearing in mind the position of other litigants and the courts' own resources.

(4) To inculcate a culture among litigants and their legal representatives that there exists a duty to assist the court in furthering the principal themes of the [Civil Justice Reform].

(5) To reduce, if not eliminate, those steps in proceedings, particularly interlocutory applications, which serve little purpose other than to prolong or render more costly civil proceedings." (Emphasis added.)

The above cannot be over-emphasised. The experience of the last 8 years or so since the reforms came into effect have shown the Court's unwavering determination to bring about this culture change. Students entering the profession will do well to always bear this in mind—***this is how you will be expected to behave in all that you do in civil litigation***.

1.17 Unlike the Woolf Reforms in England and Wales, in Hong Kong there is not a completely new code replacing the old body of rules. Instead, a large part of the old Hong Kong rules remain, although certain parts of the rules have been changed. In a small number of areas, the new rules introduce completely new regimes.

1.18 This text sets out the main current rules in the areas covered in the text. The current rules are made up of pre-2 April 2009 rules (which remain unchanged by the Civil Justice Reform) and where relevant, new/amended rules introduced by the Civil Justice Reform. To allow these to be differentiated, descriptions of the new/amended rules introduced by the Civil Justice Reform are in text boxes or underlined.

1.19 *Some new/amended Orders of the RHC and RDC contain transitional provisions, in particular, RHC O.5, RDC O.24, RHC and RDC O.12, O.13A, O.18, O.22, O.25, O.41A and O.62* (usually at the back of the new/amended Order). Depending on the precise facts of a case, sometimes the old rule was still applicable after the implementation of the civil justice reform. There were also instances where the transitional provision adapted the new rules to a case started under the old rules, *e.g.* by providing for a step taken under the old regime to be treated as a step in the new regime. It is likely that, for some time, civil litigation lawyers will need to be familiar with (some of) the old rules alongside the new/amended rules (if nothing else, in order to understand the context in which some of the older decisions were made). For ease of reference, where it may be helpful to have an understanding of the old version of a rule, this text also contains a description of the old rule, highlighted in grey boxes.

1.20 As part of the Civil Justice Reform, some new and revised *PDs* (almost all of which took effect on 2 April 2009) have been issued (and many of these have since been further amended). These are designed to work alongside the new rules and are directed towards, among other things, narrowing the issues in dispute, sharing information between prospective parties to litigation and encouraging settlement and mediation. Descriptions of the new and revised PDs introduced by the Civil Justice Reform are also in text boxes or underlined.

1.21 Cases decided by the Hong Kong Courts *before* the Civil Justice Reform came into effect (Pre-Civil Justice Reform Cases) would of course *not* have applied the new/amended rules (although some judgments given shortly before 2 April 2009 did "take account" of the new/revised rules). In general, the following general comments may be made (although these are of course subject to any guidance from the Court):

(1) Pre-Civil Justice Reform Cases relating to specific areas of procedure the rules of which have *not* been changed by the Civil Justice Reform should generally remain applicable. However, caution should still be exercised because, for example, those cases would not have been decided by the Court expressly with the "Underlying Objectives" (see Chapter 3) in mind. There is therefore a possibility that, after 2 April 2009, for example, with the "Underlying Objectives" in mind, the Court may make a particular decision differently;

(2) In respect of Pre-Civil Justice Reform Cases relating to specific areas of procedure which *have* been changed by the Civil Justice Reform, their continued applicability will depend on, in particular, the extent to which that area of procedure has been reformed;

(3) All Hong Kong Court decisions cited in this text should be read with the above qualifications in mind.

4. Introduction to Limitation of Actions

(a) General

1.22 Civil actions must be started within a certain period of time (in most cases, from the time when the "cause of action", *e.g.* breach of contract, negligence etc., first "accrues", *i.e.* comes into being).

(1) If this deadline is missed, the claim is "time-barred"—if the plaintiff starts an action to sue the defendant on this claim, the time-bar is a *total defence* for the defendant;

(2) Limitation periods for different causes of action are mainly set out in the Limitation Ordinance (Cap.347);

  (a) However, there are other Ordinances which provide for limitation periods for other causes of action, *e.g.* Merchant Shipping (Collision Damage Liability and Salvage) Ordinance (Cap.508);

  (b) Further, some contracts (*e.g.* some shipping contracts) also provide for limitation periods;

(3) Limitation periods only apply to *commencement of proceedings, not service* of proceedings—*e.g.* in an action started by writ, the limitation period is only the deadline for *issuing* the writ, not service of it;

(4) In theory, the limitation legislation only bars the *remedy*, not the *right*[7]—*i.e.* the time-bar prevents a plaintiff from suing (as a matter of procedure), but does *not* extinguish the plaintiff's cause of action.

  (a) In other words, if party A's cause of action against party B is time-barred, A is not allowed to sue B on that cause of action any more (so if A starts an action against B on that cause of action, B can rely on the time-bar and have a total defence). However, if B takes the initiative to sue A, even if A's claim is time-barred, arguably A can still, where appropriate, use it as a defence against B's claim;

  (b) Some *contractual* limitation periods do extinguish the cause of action altogether—check the wording of the limitation clauses in contracts carefully.

1.23 As mentioned above, limitation periods generally start running from the time when a cause of action, *e.g.* in breach of contract, negligence etc., accrues:

(1) What is a "cause of action"? This has been defined as comprising "those facts which a plaintiff must prove to support his right to judgment in court":[8]

  (a) The facts to be proved would obviously be different for different causes of action, *e.g.* for breach of contract, the facts that need to be proved to get

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[7] *Ronex Properties Ltd v J Laing Construction Ltd* [1982] 3 WLR 875.

[8] *Bank of East Asia Ltd v Tsien Wui Marble Factory Ltd* (1999) 2 HKCFAR 349.

judgment are, generally, the existence of the contract, the existence of the relevant terms of the contract and the breach of those terms;

(2) When does a cause of action "accrue"? The cause of action "accrues" on the date when all the facts needed for judgment have happened:

(a) Using the above example of a cause of action in breach of contract, the cause of action accrues on the date of the breach (as, by that date, the contract, containing the relevant terms, has come into existence and the breach of those terms has occurred).

1.24 A limitation period expires, however many years later, on the same date as the date on which it started running, *e.g.* a six-year limitation period that started running on 3 January 2006 will expire on 3 January 2012.[9]

1.25 Limitation is a complex area (and it is vital to get it right). Whenever a limitation issue arises in practice, the relevant legislation and case law must be considered very carefully (and a specialist text book should be consulted).

1.26 Some of the more common limitation periods are discussed below.

(b) Contract

1.27 Actions founded on simple contract "shall not be brought after the expiration of six years from the date on which the cause of action accrued".[10]

(1) For contracts *under seal* (*e.g.* a contract executed as a deed, *i.e.* signed, sealed and delivered), the limitation period is 12 years from the date of accrual of the cause of action.[11]

1.28 When does the cause of action arise? The limitation period starts running from the date of *breach* (regardless of whether loss is sustained at that time):[12]

(1) When does a breach occur? This would depend on the term(s) of the contract and nature of obligation(s) breached;

(2) For example, where solicitors act contrary to the terms of their contract with their client, the time for bringing proceedings for the claim for breach of contract begins running on the date of that act;[13]

(3) What happens when solicitors *omit* to do something which is required by the contract, *e.g.* register a sale and purchase agreement at the Land Registry? Different courts have expressed different views in the past:

[9] Interpretation and General Clauses Ordinance (Cap.1) s.71(1)(a).
[10] Limitation Ordinance s.4(1)(a).
[11] *Ibid.*, s.4(3).
[12] *Yeung Shu v Alfred Lau & Co* [1996] 1 HKLR 119.
[13] *Ibid.*

(a) For example, in an English case—on the basis that the solicitors' obligation was a continuing one, the Court held that the limitation period begins running on the date on which it became impossible to do what needed to be done;[14]

(b) The position in Hong Kong: Time starts running from the date on which the act in question *should have been done*:[15]

(i) One practical difficulty with this approach is where a contract does not say specifically *when* the act in question should be done.

(c) Tort

1.29 General rule: Actions founded on tort "shall not be brought after the expiration of six years from the date on which the cause of action accrued".[16]

(1) When does a tortious cause of action accrue? "[I]n an action for tortious liability the cause of action accrues the moment the wrongful act or omission *causes damage*". (Emphasis added.)[17]

(a) "Damage"—"[a] cause of action in tort accrues when the *damage* which results from the tortious conduct is *real*, as distinct from minimal or negligible and is *actual*, as opposed to purely contingent. The concept of 'damage' is given a *broad meaning*. It encompasses damage consisting of '*any detriment, liability or loss capable of assessment in money terms*.' Where economic loss is involved, it includes loss suffered 'by payment of money, by transfer of property, by diminution in the value of an asset or by the incurring of a liability.' Whether damage has been incurred in any particular case is a question of fact. Its precise quantification may only be possible at a later date, by which time it may have become more serious, but that does not detract from the earlier accrual of the cause of action. The damage must, however, be recoverable as falling within the measure of damages applicable to the defendant's wrong in question". (Emphasis added.)[18]

1.30 There are some variations and exceptions to the general rule above, *e.g.*:

(1) Negligence[19]

(a) General rule: The cause of action accrues (and therefore time begins to run) on the date on which the plaintiff sustains actual damage;[20]

(b) Applying the above to cases of latent damage to buildings (*i.e.* damage done without anyone knowing about it at the time it was

[14] *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp* [1979] Ch 384. However, this case was distinguished and not followed by the English Court of Appeal in *Bell v Peter Browne & Co* [1990] 2 QB 495.
[15] *Yeung Shu v Alfred Lau & Co*—the fact that the solicitors could have corrected the breach later merely meant that they could mitigate the consequences of the breach which had already happened.
[16] Limitation Ordinance s.4(1)(a).
[17] *Bank of East Asia Ltd v Tsien Wui Marble Factory Ltd.*
[18] *Kensland Realty Ltd v Tai, Tang & Chong* (2008) 11 HKCFAR 237.
[19] Limitation Ordinance s.31.
[20] *Yeung Shu v Alfred Lau & Co.*

CHAPTER 8

DEFAULT JUDGMENT, SUMMARY JUDGMENT AND APPLICATION UNDER O.14A

PARA.

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1. Default Judgment

(a) General

Default judgment is administrative in nature. In short, this refers to judgment that may be entered against the defendant where it has *not*, within the relevant time limits: **8.1**

(1) Given notice of intention to defend (generally, this is where the defendant failed to file AOS in time);[1] or

(2) Served the defence.[2]

Where the *plaintiff* misses the deadline for serving a statement of claim, the defendant can also apply to the Court to dismiss the action:[3] **8.2**

(1) On such an application, the Court has the power to dismiss the action "for want of prosecution" (see para.9.27 onwards).[4]

(b) In Default of Giving Notice of Intention to Defend

(i) General

As mentioned previously, in respect of a writ served in Hong Kong, the defendant must file an AOS in Court within 14 days after service of the writ (*including the day of service of the writ*).[5] **8.3**

If the defendant fails to file an AOS giving notice of intention to defend by the above deadline (or files an AOS stating it will not contest the proceedings), the plaintiff may be able to enter "default judgment" against the defendant in accordance with RHC and RDC O.13. **8.4**

To enter default judgment under RHC and RDC O.13, the Court needs to be satisfied that the writ has been properly served on the defendant. Therefore, the Court requires one of the following as a *prerequisite* to entering judgment:[6] **8.5**

(1) The defendant has acknowledged service of the writ; or

(2) An affidavit/affirmation filed by the plaintiff proving proper service of the writ; or

> (a) Under the amended PD 24.1, for a writ (issued on or after 2 April 2009) claiming for money, this affidavit/affirmation should also confirm that the relevant admission form under the new RHC and RDC O.13A (see, *e.g.* para.10.6) has been served with the writ and AOS form on the defendant;

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1 RHC and RDC O.13.
2 Amended RHC O.19 and RDC O.19.
3 RHC and RDC O.19 r.1.
4 *Clough v Clough* [1968] 1 WLR 525.
5 RHC and RDC O.12 r.5(a).
6 *Ibid.*, O.13 r.7(1).

(3) The plaintiff produces the writ containing a statement by the defendant's solicitor confirming acceptance of service of the writ for the defendant.

8.6 Whether or not the plaintiff can enter default judgment depends on the type(s) of claim made by the plaintiff (see below).

(ii) *Liquidated Claim Only*

8.7 Where the writ contains a *liquidated claim only*, the plaintiff can enter final judgment for an amount not more than the claim in the writ and for costs:[7]

(1) A "liquidated" claim means, in essence, a claim for a certain or ascertainable (*e.g.* by arithmetic calculation) sum (which does *not need to be assessed* by the Court):

(a) Most commonly, these are certain or ascertainable sums which the Court can see the Plaintiff's entitlement to under a contractual document. The best examples are therefore a *debt* (the Court simply has to look at, *e.g.* the loan agreement's clauses to see the exact amount outstanding) and an *unpaid purchase price* (again, the Court can simply look at, *e.g.* the price clause in the sale of goods contract to see the exact amount outstanding).

8.8 S.48 of the HCO and s.49 of the DCO give the Court a wide power to award interest on a claim for debt (or damages) for the *pre*-judgment period:

(1) For the period from the cause of action arising to the date of the judgment, the Court can decide the interest rate(s), the part(s) of the debt (or damages) on which interest is given and the period(s) of time for which interest is given;

(2) Therefore, strictly speaking, a claim for pre-judgment interest is not liquidated—the amount of this interest is not yet certain because it depends on what the Court orders;

(3) However, RHC and RDC O.13 r.1(2) provides that a claim which is otherwise a liquidated claim will not stop being one simply because it includes a claim for pre-judgment interest (at a rate not higher than the "judgment rate" of interest):

(a) What is the "judgment rate"? If the CFI/DC does not order otherwise, the "judgment rate" is the rate applicable to interest that accrues on unpaid judgment sums (*i.e. post*-judgment) under s.49 of the HCO and s.50 of the DCO. This rate is decided by the Chief Justice from time to time.

(iii) *Unliquidated Claim Only*

8.9 Where the writ contains a claim for *unliquidated damages only*, the plaintiff can enter interlocutory judgment (on liability) for damages to be assessed and costs:[8]

[7] RHC and RDC O.13 r.1(1).
[8] *Ibid.*, r.2.

(1) By contrast to the liquidated claim, an "unliquidated" claim is, in essence, a claim of an amount that *does* need to be *assessed by the Court*, *e.g.* a claim for damages for negligence or for breach of contract where the loss suffered by the plaintiff has to be assessed by the Court;

(a) Note that a claim of damages (an *unliquidated* claim) does *not* become liquidated just because the amount of damages sought is *presented as a specific figure* (*e.g.* "damages in the amount of HK$300,000")—the Court still needs to assess whether the amount of loss is in that amount;

(2) The default judgment, initially, is only *interlocutory* as it only relates to the defendant's *liability*—the amount of damages the plaintiff is entitled to still has to be assessed by the Court (for the procedures for such an assessment, see mainly the amended RHC and RDC O.37). Once the Court has carried out further procedures to assess the plaintiff's loss and ruled on the appropriate amount of damages, a *final* judgment can be entered.

(iv) *Claims for Detention of Goods or for Possession of Land*

8.10 There are special rules for claims for detention of goods or for possession of land—see RHC and RDC O.13 rr.3 and 4.

(v) *Mixed Claims*

8.11 Where the writ contains a mixture of the above types of claims (*i.e.* liquidated, unliquidated, detention of goods and possession of land), *but no other types of claim*, the plaintiff can enter judgment in respect of *each* type of claim in accordance with the relevant rule:[9]

(1) In other words, for a liquidated claim, the plaintiff should follow the rules under the "liquidated claim only" procedure and so on.

(vi) *"Other" Claims*

8.12 Where the writ contains a claim which is *not* within the above categories (*i.e.* not liquidated, unliquidated, for detention of goods or for possession of land), the plaintiff can:

(1) Upon filing an affidavit/affirmation proving proper service of the writ; and

(2) Where the statement of claim was not indorsed on or served with the writ, upon serving the statement of claim,

proceed with the action "as if that defendant had given notice of intention to defend",[10] *i.e.* carry on with the action and wait for the defendant to serve the defence. If the defendant fails to serve the defence on time, the plaintiff can then apply to the Court for default judgment under O.19 (see below).

[9] RHC and amended RDC O.13 r.5.
[10] RHC and RDC O.13 r.6(1).

8.13 Examples of "other" claims are claims for equitable relief, *e.g.* injunctions, declarations and specific performance:

(1) Because the plaintiff's entitlement to this type of remedy is in the Court's discretion, *i.e.* even if the defendant does not defend the action the Court may still refuse to give this relief to the plaintiff, the rules require the plaintiff to prepare a statement of claim (setting out in detail its case) first. This will then be used to help the Court decide whether to grant the relief requested.

8.14 As long as the writ contains an "other" claim, regardless of whether the writ also contains any of the claims in the above categories, the plaintiff will have to proceed under this RHC and RDC O.13 r.6, *i.e.* the plaintiff will not be able to get default judgment on any of its claims at this stage:

(1) However, in this situation, the plaintiff can consider abandoning the "other" claim(s). Without the "other" claim(s), the plaintiff can proceed to enter default judgment in the normal way.

8.15 Where the writ contains an "other" claim but for some reason the plaintiff no longer needs to continue with the action (*e.g.* the defendant has already satisfied the claim), the plaintiff can enter judgment for costs.[11]

(vii) *Writ Served by Post Returned Undelivered After Default Judgment Entered*

8.16 If, after default judgment has been entered, a writ served by registered post is returned undelivered, the plaintiff must (before taking any other step in the action):[12]

(1) Apply to the Court to set aside the default judgment on the ground that the writ has not been served; or

(2) Apply to the Court for directions.

(viii) *Setting Aside Default Judgment (After It Has been Entered)*

8.17 The Court may, "on such terms as it thinks just", set aside or vary any default judgment.[13]

8.18 On an application to set aside a default judgment, the first question for the Court is generally *whether the default judgment was entered "regularly" or "irregularly"* (*i.e.* properly or improperly):

(1) Why the distinction?

(a) Irregular judgments—this means the plaintiff has not followed all the relevant rules *in entering the judgment* (see below). In other words, there is no fault on the part of the defendant;

[11] RHC and RDC O.13 r.6(2).
[12] *Ibid.*, r.7(3).
[13] *Ibid.*, r.9.

(b) Regular judgments—as the plaintiff has followed all the relevant rules in entering the judgment, there is some fault on the part of the defendant, who is seeking the Court's indulgence to let it continue to defend the action despite such fault;

(2) Examples of situations where default judgments have been entered irregularly:

(a) The writ has not been properly served on the defendant;

(b) Non-compliance with RHC and RDC O.13 and/or other relevant Court rules, *e.g.* judgment was entered before the deadline has passed.

Regular judgment: 8.19

(1) The main question for the Court is whether the defendant's defence (if judgment were to be set aside and the defendant allowed to defend the action) has "*any real prospect of success*":

(a) "… *Does the 2nd Defendant here show a real prospect of success? Does his case carry some degree of conviction?* … has the 2nd Defendant disclosed merits to which the Court should pay heed'?" (Emphasis added.)[14]

(i) Other observations made by Stone J in this regard:

- "… As Bokhary JA pithily observed …: 'No defence is any good if it will not work in law even if based on fact. Likewise, no defence, whatever its effect in law if believed, is any good if it does not enjoy *any real prospect of being believed*.' … "

(ii) A defence with "real prospects of success" is a higher standard than a merely arguable defence;

(iii) The Court generally considers this question as "… a matter of common sense …";[15]

(iv) What if the Court's consideration of the merits of the defence requires the Court to assess the credibility of (competing) evidence put forward by the parties?

- What the Court should *not* do, at this pre-trial stage of the action, is to conduct any "mini-trial"—"judges should be very wary of trying issues of fact on evidence where the facts are apparently credible and are to be set … against the facts being advanced by the other side. Choosing between them is the function of the trial judge, not the judge on the interlocutory application, unless there is some inherent improbability in what is being asserted or some extraneous evidence which would contradict it";[16]

[14] *Dao Heng Bank Ltd v Chan Chiu Cheung* (HCA 6653/1996, [1997] HKLY 529) (Stone J).
[15] *Alpine Bulk Co Inc v Saudi Eagle Shipping Co Inc (The Saudi Eagle)* [1986] 2 Lloyd's Rep 221 (Sir Roger Ormrod).
[16] *Day v RAC Services Ltd* [1999] 1 WLR 2150, as cited in *Choi Chung Bun Vincent v Australia China Holdings Ltd* [2011] 3 HKLRD 622.

- In …"rare cases in which a provisional view of the probable outcome of the action cannot sensibly be formed without an assessment of the witnesses … an appropriate test to determine whether the defendant has a real prospect of success is to ask whether the defence 'could well be established' at trial;"[17]
- Similarly, in, for example, the recent case of *Choi Chung Bun Vincent v Australia China Holdings Ltd* [2011] 3 HKLRD 622, the Court stated that where the Court faced "competing assertions as to fact, neither of which, on its own, is inherently incredible and without the benefit of other independent evidence", the Court may apply the "real prospects of success" test in a slightly different way—instead of requiring the defendant to *positively* show that its defence has real prospects of success, the Court would ask "whether what the defendant says has *no* real prospect of being a successful defence" (Emphasis added.);

(b) Therefore, when applying to set aside the default judgment, the defendant should prepare a detailed affidavit/affirmation confirming the facts upon which its defence is based:

(i) If a draft defence is available at that time, it may be a good idea to exhibit (*i.e.* attach) it to the affidavit/affirmation as well;

(2) Apart from the merits of the defence, the Court will also consider "all the relevant circumstances":[18]

(a) It is good to have a reasonable explanation for the failure to give notice of intention to defend, but a lack of such explanation is not necessarily fatal to the application:

(i) "… post *Saudi Eagle* [1986] 2 Lloyd's [Rep] 221, merits are now the key in applications of this sort; …, *the merit factor, being the primary concern, outweighs the absence of a reasonable explanation for the defendant's failure to resist the default judgment*" (Emphasis added.);[19]

(ii) An example of a possible explanation for the failure is the defendant being very ill at the time, so he/she was not able to deal with the litigation;

(b) Other relevant considerations include, *e.g.*:

(i) Whether the defendant has delayed in applying to set aside the default judgment;

(ii) Whether the setting aside of the default judgment may cause any prejudice to the plaintiff;

[17] *Guangdong International Trust & Investment Corp (Hong Kong) Holdings Ltd v Yuet Wah (Hong Kong) Wah Fat Ltd* [1997] HKLRD 489 (Keith J).
[18] *Dao Heng Bank Ltd v Chan Chiu Cheung* (Stone J).
[19] *Ibid.*

(iii) The Court may also have regard to the public policy of "finality in litigation" to refuse to set aside a default judgment (even where the defendant has shown that its proposed defence has real prospects of success), especially "where the default judgment, which was entered with the prior knowledge of the person now seeking to set it aside, has been allowed to stand after its entry for a substantial period of time as a result of an informed and deliberate decision of that person… There is, in my view, a world of difference between a party who has simply been dilatory in applying to set aside a default judgment and someone who has decided with his eyes wide open not to apply to set aside the default judgment but to let it stand";[20]

(3) In the event that the Court does exercise its discretion to set aside the default judgment, it can also impose *conditions* on the judgment being set aside, e.g. payment of a sum of money equal to a part or all of the plaintiff's claim into Court:

(a) However, in *L & M Specialist Construction Ltd v Wo Hing Construction Co Ltd* [2000] 3 HKLRD 262, Ribeiro JA (as he then was) commented: … "In my view, it must be rare that a payment into court is made a condition of setting aside a [regular] judgment. It may in theory do so, as the court apparently did in the relatively old case of *Richardson v Howell*, where the defence is considered shadowy and in what one might call 'conditional leave to defend territory'. However, there is a certain logical tension between a court deciding that the defendant has real prospects of succeeding in his defence and the court considering at the same time that the defence is in shadowy realms. While I do not consider such an outcome impossible, I would expect it to be exceedingly rare … there must be something specific in the defendant's conduct or in the case which justifies the imposition of a condition …";

(b) In other words, there are generally two situations in which the Court will consider imposing a condition:

(i) Where the Court thinks the defendant's defence is "shadowy", *i.e.* there are some doubts or questions about it. However, as explained in the above quote, this will generally be rare where the Court is prepared to set aside a regular judgment, because to be prepared to do this the Court must think that the defence has real prospects of success. Logically it is difficult to imagine a defence both having real prospects of success and being shadowy *at the same time*;

(ii) Where a party's conduct justifies the Court imposing a condition, *e.g.* where, although the defence has real prospects of success, the defendant has behaved unreasonably;

[20] *Wan How Wan v Wan Hoi Wei* (HCA 578/2006, [2011] HKEC 240).

(4) The defendant applying for a regular default judgment to be set aside generally has to pay the plaintiff's costs of the application:

(a) "… the broad principle … in setting aside of judgment cases the golden thread is that, generally speaking, the person asking for the indulgence generally pays … ";[21]

(b) As explained above, a regular judgment is one where the plaintiff has followed all the relevant rules in entering the judgment, so there has been some fault on the part of the defendant. The defendant is now seeking the Court's indulgence to set aside the judgment and allow it to continue defending the action;

(c) However, the above is by no means the only possible result, as the Court will exercise its discretion on costs on the basis of the circumstances of the case. For example, in *Welson International Ltd v Jebson Investments Ltd* (HCA 2620/2008, [2010] HKEC 1041), where the plaintiff had opposed the setting aside application (mainly in respect of the merits of the defence) but lost (*i.e.* the Court did set aside the default judgment), the Court did *not* order the defendant to bear *all* of the costs of the application. Instead, the Court ordered the *plaintiff* to pay a part of the costs of the application, to reflect the *failure of its opposition*:

(i) In other words, despite the general rule that the defendant seeking the Court's indulgence (in setting aside a regular default judgment) has to pay for the indulgence, if the plaintiff chooses to oppose the application but loses, the plaintiff may have to bear the (additional) costs caused by its opposition.

8.20 Irregular judgment:

(1) *Timing*—a party must make an application to set aside an irregular default judgment "within a *reasonable time* and *before* the party applying has taken any fresh step after becoming aware of the irregularity" (Emphasis added.);[22]

(2) The traditional approach (and probably still the approach adopted by the Hong Kong Court)[23] is that an irregular default judgment will be set aside *as of right (or ex debito justitiae), i.e.* the merits of the defence are *not* considered;[24]

(a) In theory, the Court, having regard to other relevant factors in the case, has a residual power to refuse to set aside an irregular judgment,[25] but this power is very rarely used;

[21] *Dao Heng Bank Ltd v Chan Chiu Cheung* (Stone J).
[22] RHC and RDC O.2 r.2(1).
[23] See, *e.g. Sinokawa Investment (Holdings) Ltd v Li Chun* [2006] 3 HKLRD 441, *Haifa International Finance Co Ltd v Concord Strategic Investments Ltd* (HCA 2308/2006, [2009] HKEC 1141) and *Choi Chung Bun Vincent v Australia China Holdings Ltd* [2011] 3 HKLRD 622.
[24] *Po Kwong Marble Factory Ltd v Wah Yee Decoration Co Ltd* [1996] 4 HKC 157.
[25] *Ibid.*

(b) More commonly, as explained above, the Court may impose conditions on setting aside the default judgment, depending on, *e.g.* the conduct of a party:

(i) For example, in *Po Kwong Marble Factory Ltd v Wah Yee Decoration Co Ltd*, Bokhary JA commented: "*Ex debito justitiae or as of right means without going into the merits of the defence. It does not mean shutting one's eyes to the circumstances surrounding the question of service and why things went wrong in that regard. The Court's statutory jurisdiction is unfettered.* Here, there is a very real risk—suggested by the strange way of doing things—that any judgment which the plaintiff may ultimately obtain may be an empty one if we do not guard against it. The way to guard against it is to impose the condition proposed by my brother Sears. And there is jurisdiction to do so";

(ii) In terms of the parties' conduct, the Court may not simply restrict itself to that of the Defendant (applying to set aside the default judgment). For an example of where the Court considered the *Plaintiff's* conduct (on the basis of which the Court refused to impose conditions), see *Du Huizhen v Chen Mei Huan* (HCA 1176/2012, [2012] HKEC 1629);

(iii) A common example of a condition imposed by the Court is the payment of a sum of money equal to a part or all of the plaintiff's claim into Court;

(iv) However, the Court will not impose a condition which it knows the Defendant cannot satisfy, because that would effectively be a refusal to set aside the default judgment;[26]

(3) A changing trend? Some Courts had started to take the view that even where the default judgment is irregular, the Court can (and should) refuse to set aside the default judgment if the defence is hopeless:

(a) For example, see *Faircharm Investments Ltd v Citibank International Plc* [1998] Lloyd's Rep Bank 127: "[w]here a party was bound to lose on a subsequent application for summary judgment under O.14, it would be pointless to set aside an existing judgment which had been found to be irregular, unless the irregularity was so fundamental that the judgment in the case would have to be set aside whatever the circumstances … ":

(i) In other words, where the defence is so bad that, even if the Court does set aside the default judgment, the defendant will lose on a summary judgment application (summary judgment is granted where the Court thinks the defendant has no defence to the plaintiff's claim(s)—see below), it would be pointless (and will likely waste more costs and time) to set aside the default judgment in the first place;

[26] *Wang Siau Yu v Wu Cho Mei (t/a Mui Far Chung Restaurant)* (CACV 121/1993, [1994] HKLY 942) and *Zig Zig Boutique Ltd v Wong Chiu Lam* (DCCJ 2630/2011, [2013] HKEC 156).

(b) Some support of the *Faircharm* approach can be found in comments made by judges in Hong Kong Court decisions. However, as stated above, this is probably *not* yet the law in Hong Kong. Some examples of support for the *Faircharm* approach are set out below:

(i) "It has not been suggested by the 3rd Defendant that the present judgment had been obtained irregularly. In any event, even if it had been obtained irregularly, the modern approach is to still consider whether there are any merits in the defence, instead of adopting a rigid distinction between judgments which had been regularly obtained and those which had not";[27]

(ii) "For what it is worth I find the *Faircharm* approach every bit as attractive as did Nazareth V-P … If there is no defence, then there cannot be any point in prolonging the agony. To do so is to rely on empty formalism in the name of justice. It is as well to remember that if justice requires that a defendant irregularly sued should have the judgment set aside, it equally requires that a defendant who owes money and has no defence should have a judgment against him";[28]

(4) On the issue of costs, as the plaintiff should *not* have entered the irregular default judgment, normally the Court will order the plaintiff to pay the defendant's costs of the setting aside application. However, the Court does of course have an absolute discretion on costs, which it will exercise on the basis of its perception of where justice lies in any given case.

(c) In Default of Service of Defence

(i) *General*

8.21 As mentioned earlier, the defendant must serve a defence (and counterclaim, if any) within 28 days after the *later* of the deadline for acknowledging service of the writ or the date of service of the statement of claim by the plaintiff:[29]

(1) Under the old RHC and RDC O.18 r.2, the 28-day period used to be 14 days.

8.22 If the defendant fails to serve the defence within the above time period, the plaintiff may be able to enter default judgment in accordance with amended RHC O.19 and RDC O.19:

(1) As with default judgment under O.13, whether or not the plaintiff can enter default judgment under O.19 also depends on the type(s) of claim made by the plaintiff (see below);

[27] *Standard Chartered Finance Ltd v Wai Fat Motors Co Ltd* (HCA 9254/1995).
[28] *Bank Austria Aktiengesellschaft v Suwardi Sukamto* [2002] 1 HKC 232 (Deputy Judge Muttrie).
[29] Amended RHC and RDC O.18 r.2(1).

(2) As mentioned previously, in the context of a counterclaim, the defendant is in the position of a plaintiff and vice versa. Therefore, if the plaintiff fails to serve a defence to counterclaim by the relevant deadline, the defendant can enter/apply for default judgment on the counterclaim under the same rules.[30]

(ii) *Liquidated Claims, Unliquidated Claims, Claims for Detention of Goods and Possession of Land and Mixed Claims*

The rules here are in substance the same as the rules for default judgment under RHC and RDC O.13.[31] 8.23

(iii) *"Other" Claims*

The definition of "other" claims under O.19 is the same as the definition under O.13. 8.24

Where the plaintiff makes an "other" claim and the defendant fails to serve a defence in time, the plaintiff can *apply* by summons to the Court for default judgment. The Court will give whatever judgment that it thinks the plaintiff is entitled to:[32] 8.25

(1) In deciding such an application, the Court will *only* consider whether the plaintiff appears to be entitled to judgment on the basis of its statement of claim. Indeed, the Court takes the view that it *cannot* receive evidence from the Plaintiff to help prove its case.[33]

(iv) *Notice Before Entering Default Judgment Under Amended RHC O.19 and RDC O.19*

Before entering default judgment under O.19 against a defendant who has filed an AOS (giving notice of intention to defend), the plaintiff *must* serve a "notice in writing of … intention to [enter default judgment] on the party against whom judgment is sought or if that party is legally represented, on his solicitor" *not less than two clear days* before entering judgment:[34] 8.26

(1) The notice does not have to be in any particular form, *e.g.* it can be contained in a letter;

(2) When can the r.8A notice be served? In essence, as soon as the defendant has filed the AOS in Court:

(a) "*The Notice may be served at any time, whether or not the defendant is already in default*: see *Ho Yuen Tsan v Hop Wing Transportation Co Ltd* [1997] HKLRD 46. In other words, *the Notice may be served before the default occurs*. The purpose of such a Notice is simply to give warning to the other party that no indulgence will be given once default occurs. …

[30] RHC and RDC O.19 r.8.
[31] *Ibid.*, rr.2–6.
[32] Amended RHC O.19 r.7(1), 7(3) and RDC O.19 r.7(1), 7(3).
[33] See, *e.g. Biostime International Investment Ltd v France Heson Paper (Hong Kong) Co Ltd* [2015] 2 HKLRD 658.
[34] RHC and RDC O.19 r.8A(1)(a).

Where such a Notice is served *before* the default has occurred, then judgment in default can be entered as soon as the default occurs providing that two clear days have elapsed";[35]

(i) In practice, as a matter of litigation strategy, the r.8A notice is often served well before the deadline for the service of the defence, *e.g.* where a generally indorsed writ was issued and served and the defendant has filed the AOS in Court, the plaintiff may give the r.8A notice at the same time as when it serves the Statement of Claim;

(3) After serving the r.8A notice, the plaintiff must file in Court an affidavit/affirmation confirming service of this notice;[36]

(4) There is no need to serve any r.8A notice before entering default judgment if:[37]

(a) The Court has made an order setting or extending the time for the service of the defence; or

(b) The defaulting party does not have a solicitor and has failed to give an address in Hong Kong for service of documents.

8.27 The same rules apply to a defendant wishing to enter default judgment on a counterclaim. In this context, the r.8A notice can be given as soon as the defence and counterclaim has been filed in Court,[38] and before the deadline for the plaintiff to serve the defence to counterclaim.

(v) *Effect of Time Summons?*

8.28 "An application for extension of time will *not* stop time running and will *not* prevent the plaintiff from entering default judgment: see *GP Vickers & Co Ltd v Humanbo Enterprises Ltd* [(HCA 12076/1983, 16 January 1984)] Power J" (Emphasis added.):[39]

(1) Defendants should therefore be very careful, because if the plaintiff manages to enter default judgment in the meantime (before the defendant has obtained a Court order extending the time for service of the Defence), the defendant would have to apply to *set aside* the default judgment *first* (see below) (which may not be straightforward) before the Court will consider how much further time to grant to the defendant.[40]

(vi) *Setting Aside Default Judgment Under O.19*

8.29 The Court may, "on such terms as it thinks just", set aside or vary any default judgment.[41]

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35 *Schindler Lifts (Hong Kong) Ltd v Ocean Joy Investments Ltd* [2002] 1 HKLRD 279 (Ma J).
36 RHC and RDC O.19 r.8A(1)(b).
37 *Ibid.*, r.8A(2).
38 *Ibid.*, r.8A(1).
39 *Schindler Lifts (Hong Kong) Ltd v Ocean Joy Investments Ltd.*
40 See, *e.g. Commissioner of Inland Revenue v Maple Ridge Holdings Ltd* (DCTC 701/2016, [2017] HKEC 168).
41 RHC and RDC O.19 r.9.

8.30 The Court's considerations on applications to set aside default judgments under O.19 are the same as those for setting aside default judgment under O.13. In particular, the starting point is normally whether the default judgment was entered "regularly" or "irregularly".

2. Summary Judgment

(a) General

8.31 The main Court rule governing summary judgment applications is the amended RHC and RDC O.14.

8.32 The purpose of the summary judgment procedure is … "to enable a plaintiff to obtain a quick judgment where there is *plainly* ***no defence*** *to a claim*" (Emphasis added.):[42]

(1) The reference to "no defence" in this context means the defendant has *no legal grounds* to resist the plaintiff's claims. This is a *separate question* from whether a defendant has served a Defence (*i.e.* the formal document setting out the defendant's case). In other words, even if a defendant has served the Defence document, this does not necessarily mean that the defendant has any legal grounds to resist the plaintiff's claims:

(a) The above distinction is important and goes to the difference between default judgments (under O.19) and summary judgment:

(i) The default judgment procedure (under O.19) focuses on whether the Defence *document* has been served; but

(ii) The summary judgment procedure focuses on whether the defendant has any legal grounds to resist the plaintiff's claims (regardless of whether the Defence document has been served), *i.e.* a summary judgment application can be made even *after* the Defence has been served.

8.33 When is it appropriate to use the summary judgment procedure under RHC and RDC O.14? There are four conditions and all of them must be met:

(1) The action is started by writ;[43]

(2) The plaintiff has served the Statement of Claim;[44]

(3) The defendant has filed the AOS (giving notice of intention to defend);[45] and

(4) The defendant has no defence, *i.e.* no legal grounds to resist the plaintiff's claim(s):[46]

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42 *Home and Overseas Insurance Co Ltd v Mentor Insurance Co (UK) Ltd* [1990] 1 WLR 153.
43 RHC and RDC O.14 r.1(2).
44 *Ibid.*, r.1(1).
45 *Ibid.*
46 *Ibid.*

(a) Rationale:

(i) "Since the policy which underlies the summary procedure is to prevent the defendant from delaying the plaintiff from obtaining judgment in a case in which the defendant has clearly no defence to the plaintiff's claim, the procedure should be invoked only where this condition is satisfied";[47]

(b) If the defendant does put forward a defence (*e.g.* in its affidavit/ affirmation opposing the summary judgment application), is the defence (factually) credible?

(i) "Unless it is obvious that the defence put forward by the defendant is '*frivolous and practically moonshine*, O.14 ought not to be applied': see *Codd v Delap* (1905) 92 LT 510, *per* Lord Lindley at 511" (Emphasis added.);[48]

(ii) "*... to embark on a mini trial of the action on affidavit evidence ... is not a proper course for the court to take ... sufficient for the court to ask itself the simple question: 'Is what the defendant says credible?'* If so, he must have leave to defend. If not, the plaintiff is entitled to summary judgment. *The issue is not whether the defendant's assertions are to be believed; it is whether those assertions are believable*" (Emphasis added.);[49]

(iii) "... whether the defendant's assertions are believable is a question to be answered *not by taking those assertions in isolation but rather by taking them in the context of so much of the background as is either undisputed or beyond reasonable dispute*",[50] *e.g.* is the defence put forward consistent with other evidence (in particular, documentary evidence) and/or is it generally plausible?

(iv) The *point in time* at which the defendant puts forward a defence may also be relevant, *e.g.* if a new defence is raised very late, such as just before the summary judgment application, the Court may conclude that it is without merit and "only raised to muddy the waters of the Order 14 application".[51]

(c) Apart from being factually credible, the defence put forward must *also* be *arguable in law*.[52]

8.34 The RHC and RDC O.14 procedure is *not* appropriate where there is material factual dispute or a complex (or novel) legal dispute:

[47] *Man Earn Ltd v Wing Ting Fong* [1996] 1 HKC 25 (Godfrey JA).
[48] *Ibid.*
[49] *Ng Shou Chun v Hung Chun San* [1994] 1 HKC 155 (Godfrey JA).
[50] *Re Safe Rich Industries Ltd* (CACV 81/1994, [1994] HKLY 183) (Bokhary JA), cited in *Bank of China (Hong Kong) Ltd v Cosan Ltd* (HCA 1600/2004, [2006] HKEC 1564).
[51] *LBM Ltd v Yearful Contracting Ltd* (HCCT 35/2007, [2009] HKEC 52).
[52] *Schindler Lifts (Hong Kong) Ltd v Ocean Joy Investments Ltd* [2003] 1 HKC 438.

(1) "... Order 14 is for clear cases; that is, cases in which there is *no serious material factual dispute and, if a legal issue, then no more than a crisp legal question as well decided summarily as otherwise. ...*" (Emphasis added.);[53]

(a) However, if a case turns on a particular point of law, it may be more appropriate to use the RHC and RDC O.14A procedure instead (see below).

Defendants can also apply for summary judgment on a counterclaim.[54] **8.35**

RHC and RDC O.14 does *not* apply to, among other things: **8.36**

(1) Actions including a claim for libel, slander, malicious prosecution, false imprisonment or seduction, or based on an allegation of fraud:[55]

(a) The "fraud" exception *used to be* construed narrowly, as restricted to an action based on fraud as defined in *Derry v Peek* (1889) 14 App Cas 337, *i.e.* "a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false";[56]

(b) The *current* position, however, is that a *wide* definition of the "fraud" exception is adopted. In *Pacific Electric Wire & Cable Co Ltd v Harmutty Ltd* [2009] 3 HKLRD 94, the CA held as follows:

(i) Contrary to any suggestion in previous cases, the "fraud" exclusion was *not* restricted to actions involving a claim for damages for fraud. The exclusion also covers all actions in which there is "a claim in respect of which the *underlying allegations* on which the claim was based constituted an allegation of fraud" (Emphasis added.);

(ii) In respect of a writ that contains a number of different claims, as long as *one* of those claims is based on an allegation of fraud, O.14 cannot be used in that case at all;

(c) In the recent case of *Zimmer Sweden AB v KPN Hong Kong Ltd* [2016] 1 HKLRD 1016, the CA (with Yuen JA delivering the main judgment) has further clarified the scope of the "fraud" exception:[57]

(i) "(1) The court should determine whether "the fraud exception" applies *at the time when the application for summary judgment is heard*. Therefore the court should *not* be restricted to a consideration of the statement of claim only, but should examine *all relevant materials existing at the time of the hearing*, including subsequent pleadings and the affidavits...

[53] *Crown House Engineering v Amec Projects Ltd* 48 BLR 32 (Bingham LJ) cited in *Man Earn Ltd v Wing Ting Fong*.
[54] RHC and RDC O.14 r.5.
[55] *Ibid.*, r.1(2).
[56] *Tan Eng Guan v Southland Co Ltd* [1996] 2 HKLR 117.
[57] Also note that in this case, Lam V-P also commented that "I can see considerable force in the argument that [the "fraud" exception] no longer sits well with the modern litigation landscape. I will recommend to the Rules Committees of the Rules of the High Court and the Rules of the District Court to review the appropriateness of keeping this exception in our rules."

(2) … the question to be asked by the court is "*does this action include a claim for which an allegation of fraud would have to be made by the plaintiff in order to establish or maintain that claim?*" If the answer is affirmative, "the fraud exception" is engaged and the court has no jurisdiction to hear the summary judgment application, even if the plaintiff seeks to hive off that claim from another claim (*e.g.* for dishonoured cheque) for which summary judgment would have been available. …

(3) … one must look at the *substance, and not the mere form*, of the plaintiff's case. If all the factual constituents of fraud are alleged and relied upon, it does not matter whether the actual word "fraud" has or has not been used…

(4) … The court must consider whether those factual constituents of fraud are relied upon *in order to establish or maintain a claim*…

(5) It may be that originally a claim (*e.g.* breach of fiduciary duty) may be established without the plaintiff having to make an allegation of fraud…But the nature of the defence … may be such that in rebuttal …, the plaintiff would have to allege fraud, in which case, "the fraud exception" would be engaged. … Consequently, by the time of the hearing of the summary judgment application, the plaintiff would have to make out an allegation of fraud by the defendant in order to maintain the claim for [to take the example at the start of this sub-paragraph] breach of fiduciary duty.

(6) … as to what is an *allegation of fraud* for the purpose of "the fraud exception", this Court is bound by the judgment in *Pacific Electric Wire* to adopt the *wide/liberal meaning*. … To conclude, "the fraud exception" would be engaged where what is alleged is an *intentional or reckless dishonest act (or omission) done with the purpose of deceiving*" (Emphasis added.);

(d) The "fraud" allegation in question must be made against the *Defendant itself* as opposed to other parties;[58]

(2) Actions falling within the amended RHC and RDC O.86 and O.88:[59]

(a) RHC and RDC amended O.86:

(i) In short, O.86 governs applications for summary judgment where the writ claims for the specific performance of an agreement for the sale, purchase, mortgage, lease etc. of a property (including land), as well as the rescission of or forfeiture/return of deposit under such an agreement:[60]

[58] *Universal Capital Bank v Hongkong Heya Co Ltd* [2016] 2 HKLRD 757.
[59] RHC and RDC O.14 r.1(3).
[60] *Ibid.*, O.86 r.1.

- Although O.86 is frequently used in actions relating to land, strictly speaking, its application is not limited to land;

(b) Amended RHC O.88 and RDC O.88:

(i) O.88 applies to "mortgage actions". In essence, these are actions started by a mortgagee or mortgagor (or any other person having the right to foreclose or redeem any mortgage) claiming for various things in relation to the mortgage, including payment of money secured by the mortgage and the sale or possession of the mortgaged property;

(ii) Apart from mortgages, O.88 also covers legal and equitable charges;

(3) Claims against the Government.[61]

(b) Application

The application is by summons, supported by an affidavit/affirmation which:[62] **8.37**

(1) Must verify the factual basis of the claim (the affidavit/affirmation may include statements of information and belief as long as their sources and grounds are stated). and

(a) The plaintiff's application for summary judgment is of course on the basis of its case as pleaded in the Statement of Claim, and the purpose of the supporting affidavit/affirmation is to verify, on oath, the facts of/within such case. It is therefore important for the supporting affidavit/affirmation to be comprehensive (in covering all the facts of/within the plaintiff's case) and consistent (with the facts pleaded in the Statement of Claim). For an example of where inconsistencies between the supporting affidavit and the Statement of Claim were fatal to the summary judgment application, see *Li Chuen Kwai v Po Lam Construction Development Ltd* (HCA 2376/2013, [2014] HKEC 1755);

(2) Must state that in the deponent's (*i.e.* the person making the affidavit/affirmation) belief there is no defence to that claim.

The summons and affidavit/affirmation must be served on the defendant "not less than 10 *clear days* before" the day of hearing (Emphasis added.)[63] **8.38**

If the defendant opposes the application, it should file an affidavit/affirmation before the hearing (although there is no time limit) setting out *as fully as possible* its defence and any triable issues (or, failing this, any other reason why there should be a trial): **8.39**

(1) It is very important for the affidavit/affirmation in opposition to contain enough particulars of the defence—"when the affidavits are brought forward to raise that defence they must … condescend upon particulars. It is not enough to swear, 'I

[61] RHC and RDC O.77 r.7.
[62] *Ibid.*, O.14 r.2.
[63] *Ibid.*, r.2(3).

say I owe the man nothing.' … You must satisfy the Judge that there is reasonable ground for saying so";[64]

(2) "Triable issues" are issues which (the defendant says) should be determined by the Court *at trial, e.g.* material factual disputes. If the Court is satisfied that triable issues exist, it will normally not grant summary judgment;

(3) Any other reason for trial—there may be situations in which, although the defendant cannot show any triable issues, it can point to other reasons why, in the interests of justice, there ought to be a trial, *e.g.* where there are circumstances that ought to be investigated by the Court.[65]

8.40 Once the plaintiff has satisfied the Court that the case is within O.14 and that it has complied with the procedural requirements in its application for summary judgment, the onus shifts to the defendant to show the existence of triable issue(s) and/or other reasons for the matter to go to trial.[66]

(c) Orders that may be Made on Summary Judgment Application

8.41 There are several possible orders that the Court may make:

(1) Grant summary judgment, *i.e.* the Court is satisfied that the defendant has no defence:

(a) The action relating to the plaintiff's claim effectively ends here;

(b) If the defendant has made a counterclaim in the action, the Court may stay execution of the plaintiff's judgment (*i.e.* suspend any further procedures to get money by enforcing the judgment) until after the trial of the counterclaim[67] (see below);

(c) Where the plaintiff obtains summary judgment in respect of the whole of its claim(s), without more, the Court will likely order the defendant to pay the plaintiff's costs of the whole action:

(i) For an explanation of the main principles regarding costs, see Chapter 12;

(ii) The Court's order on costs will not be "in any event" because the action has ended and there will be no trial;

(2) Give "leave to defend", *i.e.* the Court is satisfied that "there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial":[68]

[64] *Interform (Interior & Marble) Co Ltd v Far East Wagner Construction Ltd* (CACV 59/1999, [1999] HKEC 1209) (Mayo JA).
[65] *Talent Wise Ltd v Cheung Shui Ching* [1998] 2 HKLRD 744.
[66] RHC and RDC O.14 r.3(1).
[67] *Ibid.*, r.3(2).
[68] *Ibid.*, r.3(1).

(a) There are two types of leave:

(i) "Conditional" leave—this is where the Court thinks there is something shadowy about the defence put forward:

- "Summary judgment is not appropriate where there is a real dispute of fact. … *If the defence asserted is less than probable but more than shadowy, then unconditional leave should be granted; where shadowy, then it may be appropriate to grant conditional leave*" (Emphasis added.);[69]
- An example of a common condition is for the defendant to pay into Court a sum equal to the whole or a part of the plaintiff's claim;[70]
- The Court should *not* impose a condition (even where the defence is shadowy) where, because of the defendant's financial position, this would in effect be the same as refusing leave to defend—the defendant has to show that it would be *impossible* (*i.e.* not just difficult) for it to fulfil the condition, whether by itself, or with the help of anyone else, *e.g.* friends, relatives, associates, financial institutions, directors or other interested parties:[71]
  - The onus is on the defendant to put 'sufficient and proper evidence before the court as to his means. He must make full and frank disclosure';[72]

(ii) "Unconditional" leave—the Court thinks that the defendant has put forward a believable defence and/or there are clearly other reasons why the matter should go to trial, but the plaintiff's application was not unreasonable;

(b) When leave to defend is given (whether conditional or unconditional), the action will continue;

(c) The costs of the application will usually be "costs in the cause";

(d) The Court will give further "directions" (*i.e.* orders regarding the further steps in the action, including their timing);[73]

(e) If the defendant has not already served the defence, the defendant can do so within 28 days after leave to defend is given:[74]

(i) Under the old RHC and RDC O.18 r.2, the 28-day period used to be 14 days;

[69] *Tong Nai Kan v Cheung King Fung Francis* [2005] 2 HKC 249 (Stock J).
[70] *Wu Yi Development Ltd v Big Island Construction (HK) Ltd* (HCA 714/2007).
[71] *Kwong Key Construction & Engineering Ltd v Sunlink Ltd* [2003] 4 HKC 300.
[72] *Ibid.*
[73] Amended RHC and RDC O.14 r.6(1).
[74] *Ibid.*, O.18 r.2(2).

Chapter 12

COSTS

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1. Main Principles

(a) General

Generally, there are the following main types of costs in civil litigation: **12.1**

(1) "Party and party" costs—these are the legal costs of *another party* in the action. These are normally that other party's solicitors' professional fees and disbursements (*i.e.* expenses such as barristers' fees, photocopying, telephone charges etc.):

  (a) In certain circumstances, a party may ask the Court to review the amount of costs spent by another party (through a process called "taxation"—see below). This type of taxation is called a "party and party taxation";

(2) "Solicitor and own client" costs—these are a party's *own* legal costs:

  (a) Generally speaking, the client has to pay these (as a matter of contract with the solicitor) *regardless of* whether the client wins or loses the action;

  (b) In certain circumstances, the client can ask the Court to tax the costs incurred by its own solicitor. This type of taxation is called a "solicitor and own client taxation"[1];

  (c) There are detailed professional conduct rules in this area (for both solicitors and barristers).

The main Court rule dealing with costs is the amended RHC and RDC O.62. **12.2**

General rule: *Costs are in the absolute discretion of the Court*,[2] *i.e.* subject to the relevant Court rules, the Court has full power to decide *who pays* legal costs in civil litigation and the *amount* of those costs: **12.3**

(1) The Court may make separate costs orders in respect of different parts of a Court action. For example, the Court will make a separate costs order in respect of each interlocutory application;

(2) The amended RHC and RDC O.62 r.5 expressly states that in exercising its discretion on costs, the Court must, to the extent appropriate, take account of, among other things:

  (a) The "underlying objectives" in the new RHC and RDC O.1A r.1;

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[1] RHC O.62 r.29.
[2] HCO s.52A and DCO s.53.

(i) For instance, in *Ho Kin Keung v Tong Kin Wa* (DCPI 2620/ 2008, [2010] HKEC 339) (a personal injury action), on the basis that "there was no basis at all upon which [the plaintiff] could have made a claim for loss of pre-trial earnings" (as the evidence showed there was no such loss), despite the plaintiff winning at trial, the Court ordered the plaintiff to pay to the defendant his costs in relation to such claim. The Court commented that "parties are encouraged, particularly under the Civil Justice Reform, to make realistic sanctioned offers or payments and to reasonably consider settlement of unrealistic claims, and the court should not be indulgent of parties making unjustified claims, or being careless or simply reckless as to the contents of documents they lodge in court or permit their lawyers to lodge in court." In the circumstances of the case, the Court expressed that the above order "should duly reflect, in my judgment, the spirit and objectives of the Civil Justice Reform";

(ii) The introduction of the 'underlying objectives' generally, and expressly to the list of matters to be considered by the Court in exercising its discretion on costs, must not be under-estimated. In *Wing Hong Construction Ltd v Tin Wo Engineering Co Ltd* (HCCT 13/2010, [2010] HKEC 919), the Court commented that: "[a]ny statements of the courts as to principle in respect of costs, delivered prior to CJR, must now, necessarily, be reconsidered in the light of [the Underlying Objectives]";

(iii) An example of the Court making a drastic costs order on the basis of the Underlying Objectives is 李仕仁訴黃德強 (DCCJ 2414/2009, [2010] CHKEC 684). The Plaintiff had initially started his action in the Small Claims Tribunal. However, upon one of the Defendants starting an action in the District Court against the Plaintiff, the Court transferred the Small Claims Tribunal action to the District Court and consolidated it with the District Court action, as both actions related to the same traffic accident. After trial, the District Court found in favour of the Defendants and awarded some HK$53,000 in damages to them. On the issue of costs, the Court commented that the extra HK$3,000 or so in damages (above the financial jurisdiction of HK$50,000 of the Small Claims Tribunal) must be seriously outweighed by, and disproportionate to, the amount of costs spent in the District Court (which might have been over HK$100,000). Bearing in mind the Underlying Objectives, in particular, "to promote a sense of reasonable proportion and procedural economy in the conduct of proceedings", the Court only awarded HK$5,000 costs to the successful Defendants;

(b) Settlement offers made by a party. However, note that parties are required to use the sanctioned payment and offer procedure in the amended RHC and RDC O.22 (see para.10.44) where available—the Court may not take into account any offer stated to be "without prejudice save as to costs"

(*e.g. a Calderbank* offer—see para.10.57 onwards) if the party could have made a sanctioned payment or offer instead;

(c) Whether a party has succeeded on a *part* of its case, even where it has not succeeded on its whole case;

(d) The parties' conduct, which includes:

(i) Whether it was reasonable for a party to raise or pursue or contest a particular allegation or issue:

- In *Lee Ming Mang Sharon v Ng Siew Seng Richard* (HCA 1536/2006, [2009] HKEC 1770), the Court took into account the parties' failure to ask the Court to determine, as a preliminary issue before the trial, the question of whether the action started by the plaintiff had constituted an abuse of process of the Court;

(ii) The manner in which a party has pursued or defended the case or a particular issue or allegation;

(iii) Whether a successful claimant had exaggerated its claim;

(iv) A party's conduct before and during the action;

(e) In summary, 'as an overriding principle, the court should always exercise the discretion on costs judicially with a view to achieving a fair and just result on the facts of the case before it. In this regard, the court takes into account all the relevant circumstances'.[3]

(b) Liability to Pay Another Party's Costs

(i) *Requirement of a Court Order*

Subject to limited exceptions, no party is entitled to costs from any other party unless *the Court so orders*.[4] **12.4**

Exceptions: see RHC and RDC O.62 r.10, *e.g.*: **12.5**

(1) As explained in para.10.69, where the plaintiff discontinues (*i.e.* formally ends) an action (or withdraws a claim) without the Court's leave, the defendant is automatically entitled to costs of the action (or costs occasioned by the matter withdrawn), *i.e.* the plaintiff has to pay the defendant's costs;

(2) As explained in Chapter 10, under the Civil Justice Reform, a new regime of "sanctioned payments" and "sanctioned offers" has been introduced—the costs consequences of these are dealt with in the amended RHC and RDC O.22 (see para.10.44) (see also the amended RHC and RDC O.62 r.10(5)).

[3] *Re LLC (No 2)* [2010] 4 HKLRD 400.
[4] RHC and RDC O.62 r.3(1).

(a) Where the plaintiff accepts a "payment into court" in accordance with the old RHC and RDC O.22 r.3(1) (see para.10.56), the plaintiff is entitled to the costs of the action incurred up to the time of it giving the notice of acceptance.

(ii) *Costs Generally Follow the Event*

12.6 General rule: The Court must, subject to RHC and RDC O.62, order costs to "follow the event" (in short, *e.g. the* ***winner*** *of an action will normally be awarded its costs in respect of that action, i.e.* the loser will have to pay those costs to the winner), *except* where in the circumstances some other order should be made:[5]

(1) An example of where, owing to the circumstances of the case, the Court did *not* award all the costs to the winner is the case of *Lau Chi Keung v Wong Wai Kei* [2010] 5 HKC 582. In this case, although the plaintiff was ultimately successful (and *did* beat the defendant's sanctioned payment—albeit by a small margin—and so could not be penalized under O.22), the Court was of the view that it was not worthwhile for the plaintiff to have continued pursuing the action after the defendant's sanctioned payment. Therefore, despite the plaintiff being the winner, the Court ordered *each party to bear his own costs* after the date of the sanctioned payment;

(2) Before the Civil Justice Reform came into effect, the general rule that costs should "follow the event" was *required* to be followed by the Court in all matters (unless the circumstances of the case point to some other costs order being more appropriate). However, after the Civil Justice Reform, *the emphasis has changed*—"while the 'follow the event principle' will still play a significant role in Hong Kong, it will nonetheless only be a *starting point* from which the Court can depart, the rationale being that a mechanistic adoption of the 'follow the event principle' may result in parties incurring unnecessary costs in civil litigation" (Emphasis added.),[6] or, as stated more recently, 'the approach under this new regime is to regard the proposition that costs should follow the event not as a general rule but as operating to shift to the unsuccessful party the burden of showing why some different approach should be adopted on the facts of a particular case';[7]

(3) The emphasis has shifted *even further* for costs of *interlocutory* proceedings—the new O.62 r.3(2A) expressly states that in respect of interlocutory proceedings, the Court may "order the costs to follow the event or make such other as it sees fit";

(a) In other words, under the amended RHC and RDC O.62, "costs to follow the event" *is no longer the normal principle* in relation to costs of *interlocutory* proceedings.[8] Instead, the Court can make whatever costs order it thinks is appropriate, and will take account of, among other things, the parties' conduct:

(i) For a recent illustration, see *Coleman Teresa v Hong Kong & Kowloon Ferry Ltd* (DCPI 76/2002, [2009] HKEC 812). In that case, the plaintiff applied to file and serve its statement of claim out of time (it was about six years late) and the defendant applied to dismiss the plaintiff's case for want of prosecution. The defendant's application failed because it failed to fulfil the requirements for such a dismissal, and the Court granted a time extension for the plaintiff to file and serve its statement of claim (and another related document). However, the Court stated that it regarded this as an "exceptional indulgence" for the plaintiff, and made no order as to costs on the defendant's application (*i.e.* refused to order costs in favour of the plaintiff), even though the plaintiff actually won on the application.

12.7 Other exceptions to the "costs follow the event" principle include the following:

(1) Unless the Court orders otherwise, the costs of and occasioned by *amendments* to a writ or pleading without the Court's leave are to be paid by the party making the amendments to the other party or parties affected by the amendments:[9]

(a) For example, where the plaintiff has already served the statement of claim and the defendant has already served the defence, if the plaintiff then amends the statement of claim, the defendant may have to amend the defence to take account of the plaintiff's amendments (and will incur costs in doing so);

(2) A party seeking the *indulgence* of the Court, even if successful in the application, will normally have to bear the costs caused by this indulgence, *e.g.*:

(a) A defendant successfully applying to set aside a "regular" default judgment. As discussed in Chapter 8, as the default judgment is regular, the plaintiff has complied with all the relevant Court rules. Accordingly, in seeking to set it aside, the defendant is seeking the Court's indulgence;

(b) By the same token, unless the Court orders otherwise, the costs of and occasioned by an application to extend time (for completing a step in the action, *e.g.* service of a pleading) are to be paid by the party seeking the extension;[10]

(3) 'The general rule [that costs should follow the event] does not cease to apply simply because the successful party raises issues or makes allegations on which he fails, but *where that has caused a significant increase in the length or cost of the proceedings he may be deprived of the whole or part of his costs. … Where the successful party*

5 RHC and RDC O.62 r.3(2).
6 *Wong Kam Tong v Tin Shing Court, Yuen Long (IO) (No 2)* [2012] 2 HKLRD 1128.
7 *Leung Chung Ching Edwin v Estate of Leung On Mei Amy* [2016] 2 HKLRD 365.
8 This was expressly confirmed by the Court in *Melvin Waxman v Li Fei Yu* [2013] 6 HKC 424.
9 RHC and RDC O.62 r.3(3).
10 *Ibid.*, r.3(4).

raises issues or makes allegations improperly or unreasonably, the court may not only deprive him of his costs but may order him to pay the whole or a part of the unsuccessful party's costs … [but] a successful party who neither improperly nor unreasonably raises issues or makes allegations on which he fails ought not to be ordered to pay any part of the unsuccessful party's costs' (Emphasis added.):[11]

(a) Traditionally, the Court has generally been reluctant to "fillet" cases (*i.e.* separate out individual issues) for costs purposes, and will not consider doing so unless the issue/allegation in question is really discrete and can be safely isolated;[12] However, note that, more recently, the Court has confirmed that '[s]ince [the Civil Justice Reform], the court is more ready to take an issue-based approach';[13]

(b) In *Chan Mei Yiu Paddy v Secretary for Justice* (HCAL 16, 17, 18, 19/2007, HCMP 1175/2007, [2010] HKEC 1910), the Court held that, following the Civil Justice Reform, where the overall successful party had failed on an issue/allegation, the Court can now order that party to pay the unsuccessful party's costs on that issue/allegation *even where* the issue/allegation has *not* been raised "improperly or unreasonably". This is for the 'purpose of encouraging litigants to be selective as to the points they took, thus decreasing the costs of litigation';

(4) In general, where anything is done or not done "improperly or unnecessarily" by a party, even if that party is successful, the Court may deprive the party of costs that it would otherwise normally be entitled to and *even order that party to pay the costs of other parties* caused by such misconduct:[14]

(a) The Courts will have particular regard to the following:[15]

(i) The underlying objectives set out in the new RHC and RDC O.1A r.1;

(ii) "[T]he omission to do any thing the doing of which would have been calculated to save costs";

(iii) "[T]he doing of any thing calculated to occasion or in a manner or at a time calculated to occasion, unnecessary costs";

(iv) "[A]ny unnecessary delay in the proceedings".

(5) For restrictions on the Court's discretion on costs in the case of a party opposing a will, or a party involved in an action in the capacity of a trustee, personal representative or mortgagee, see RHC and RDC O.62 r.6.

[11] *Re Elgindata Ltd (No 2)* [1992] 1 WLR 1207 (Nourse LJ).
[12] *Re Moulin Global Eyecare Holdings Ltd* (HCCW 470/2005, [2008] HKEC 1756).
[13] *KJ v KMLM (Variation; Costs)* [2014] HKFLR 227.
[14] Amended RHC and RDC O.62 r.7.
[15] *Ibid.*, r.7(2).

(iii) *Cost Orders Made in Respect of Interlocutory Applications*

In respect of interlocutory applications, the Court may make a range of costs orders. The most common costs orders are: 12.8

(1) "Plaintiff's costs in any event", *i.e.* the defendant has to pay the plaintiff's costs of the application in question, *regardless of* who wins in the action:

(a) "In any event" means that the defendant has to pay these costs regardless of who wins in the action *and* that payment is to be made at the end of the matter after the trial;

(b) Where appropriate, the Court may change "in any event" to "to be payable forthwith" (or words to that effect). This means that the costs must be paid *immediately*:

(i) Before the CJR, simply deleting the words "in any event" used to have the same effect, *i.e.* "plaintiff's costs" used to mean that the plaintiff was entitled to tax and receive payment of the costs *immediately*;

(ii) However, the above has been changed by the new RHC and RDC O.62 r.9D—"[w]here a costs order does *not* specify the time for taxation, or does *not* state that a party should have costs 'forthwith', taxation shall be done *upon completion of an action* under O.62 r.9D(1)" (Emphasis added.):[16]

- In other words, a costs order that simply states "plaintiff's costs" does *not* now entitle the receiving party to tax and receive payment of the costs *immediately*; instead, taxation (and payment) will only take place at the end of the action;

(iii) For recent discussions of the factors considered by the Court in deciding whether to order costs to be taxed and paid immediately or at the end of the action, see *Midland Business Management Ltd v Lo Man Kui (No 2)* [2011] 2 HKLRD 667 and *Wing Fai Construction Co Ltd v Yip Kwong Robert (No 2)* (2012) 15 HKCFAR 454. In particular, as Lam J stated in *Midland Business Management Ltd* (cited and approved in *Liquidator of Wing Fai Construction Co Ltd*): "[u]nder the Civil Justice Reform, the court is encouraged to order *immediate* payment of costs of interlocutory proceedings and if possible by way of summary assessment of costs [see para.12.20]. The objective is to *discourage unnecessary and disproportionate interlocutory applications*. It is recognized that the lack of immediacy of orders to pay costs 'in the cause' [see para.12.8(4)] or 'in any event' weakens costs as a sanction against unwarranted applications or resistance…" (Emphasis added.);

[16] *Big Boss Investment Ltd v So Lai Kei* [2010] 1 HKLRD 793.

(2) "Defendant's costs in any event"—this has exactly the same meaning as sub-para.(1) above, except that the plaintiff would have to pay the defendant's costs of the application;

(3) "No order as to costs"—each party has to bear its own costs;

(4) "Costs in the cause"—this means that the Court does not decide at this stage which party is awarded the costs of this application. Instead, the party that is awarded the costs of the action in the end (usually the party winning at trial) will also get the costs of this application:

(a) A variation of this is "plaintiff's costs in the cause" (or "defendant's costs in the cause")—if that party is awarded the costs of the action in the end, it will also get the costs of this application; otherwise, each party has to bear its own costs of this application;

(5) "Costs reserved"—the Court does not at this stage decide on the costs of the application, but leaves this decision to later. For example, where a hearing is adjourned (*i.e.* postponed to a later date), the costs of the earlier hearing may be "reserved" to be decided at the later hearing:

(a) To state the obvious, unless and until the Court does make an order in respect of the reserved costs, there is no order in respect of those costs. Remember the general principle, set out in para.12.4, that no party is entitled to costs from any other party unless the Court so orders. Therefore, if (*e.g.* by oversight) there is a set of reserved costs in respect of which no order has been made, no party is entitled to recover those costs, *not even* the winner of the action who has been awarded the costs of the action.[17]

(iv) *Legal Representatives' Personal Liability for Costs*[18]

12.9 Traditionally, the Court had the power to make *solicitors personally* liable for costs:

(1) This power had existed as part of the Court's inherent jurisdiction and only covered solicitors:

(a) "The jurisdiction of the court to make solicitors personally liable for costs is well established. One does not need to look further than *Ho Lee Man v Wong Wai Kai (No 2)* [1993] 1 HKC 193 in which Litton JA (as he then was) described the source of jurisdiction, regulated by O.62 r.8(1), as the inherent jurisdiction of the court to exercise control over its own officers including solicitors. The jurisdiction has to be exercised with care and discretion and only in clear cases. The test is whether the conduct of solicitors amounts to a serious dereliction of duty";[19]

[17] *E.g. Lin Yanjin v Smart Billion Engineering Ltd* (HCPI 739/2009, [2011] HKEC 1090)].
[18] Amended RHC and RDC O.62 r.8 and new rr.8A–8E.
[19] *Que Jocelyn Co v Broadair Express Ltd* [1999] 3 HKLRD 104.

(2) Where costs "are incurred improperly or without reasonable cause or are wasted by undue delay or by any other misconduct or default" of a solicitor, the Court may:[20]

(a) Disallow costs which may otherwise by payable by the client to the solicitor; and

(b) Either: order a solicitor to pay to the client costs which the client is ordered to pay to other parties;

(c) Or: order the solicitor personally to indemnify other parties against costs.

12.10 Under the Civil Justice Reform, the amended s.52A of the HCO and amended s.53 of the DCO expressly provide for this power in statute and *extend the coverage to barristers*:

(1) These sections provide for the CA, CFI and the DC to have power to disallow or make "legal representatives" personally liable for "wasted costs":

(a) "Wasted costs" means costs incurred *as a result of* "improper or unreasonable act or omission" or "any undue delay or any other misconduct or default" by a "legal representative" (whether personally or through an employee or agent):

(i) By way of example, in *Re Ping An Securities Ltd* (2009) 12 HKCFAR 808, after referring to the fact that over 1,200 pages of documentary evidence were put before the CFA for that appeal (according to the judgment, about half of these documents were merely included to "illustrate" undisputed facts and "proved nothing"), Litton NPJ commented as follows: "… In the course of the hearing this Court expressed concern over the wastage of cost incurred in the preparation of the appeal. Whilst the solicitors for the appellant had the carriage of the appeal and were primarily responsible for preparing the appeal bundles, we were told by counsel that the bundles had in fact been agreed by the other side prior to the hearing. In that sense, the responsibility for those 580 pages of material being put before the Court was shared by the parties' solicitors. … The time has come to remind solicitors that, as officers of the court, they have a duty to minimize wastage, and to save costs as far as possible. A Master of the High Court, in discharge of his function in the taxation of costs, has the power under O.62 r.8(1) of the Rules of the High Court to direct a solicitor to indemnify his own client against wasted costs payable by him. It would be salutary to see this power being exercised in an appropriate case". The CA gave a similar reminder (and disallowed the Plaintiff's solicitors' costs of photocopying and preparing eleven appeal bundles) in *Grand Field Group Holdings Ltd v Chu King Fai* [2016] 1 HKLRD 1316;

[20] Old RHC and RDC O.62 r.8(1).

(b) "Legal representative" means a solicitor or barrister;

(c) When deciding whether to make a wasted costs order, the Court must take into account all the relevant circumstances as well as "the interest that there be fearless advocacy under the adversarial system of justice":

(i) The precise meaning of the phrase "the interest that there be fearless advocacy under the adversarial system of justice" is at present unclear, although the underlying idea should be along the lines that legal representatives should be able to do their best for their clients without constantly being in fear of a wasted costs order.

12.11 RHC and RDC O.62 r.8, the corresponding provision in the RHC and RDC, has been amended accordingly:

(1) Where the legal representative (whether personally or through his/her employee or agent) has caused a party to incur wasted costs and it is just in all the circumstances, the Court may:

(a) Disallow costs which may otherwise by payable by the client to the legal representative; *and*

(b) Either: order the legal representative to pay to the client costs which the client is ordered to pay to other parties;

(c) Or: order the legal representative personally to indemnify other parties against costs.

12.12 Further, the new RHC and RDC O.62 rr.8A to 8E have been added to set out more details about wasted costs orders. The main points include the following:

(1) The Court may make wasted costs orders either on its own initiative or on the application of a party;

(2) Applications for wasted costs orders are not to be used as a means of intimidation:

(a) One way to guard against this is by the new RHC and RDC O.62 r.8A(4) providing that such an application must normally only be made or dealt with at the conclusion of the proceedings to which the order relates;

(3) Wasted costs orders may also be made in respect of taxation proceedings;

(4) The Court's consideration of whether to make such an order will take place over a two-stage process (see the new RHC and RDC O.62 r.8B). The legal representative in question will have a chance to make submissions to the Court as to why the order should not be made.

12.13 For further details on the procedure for applying for wasted costs orders, see the amended PD 14.5.

12.14 For a detailed discussion on the Court's approach in deciding whether to make wasted costs orders, see the CFA's decision in *Ma So So v Chin Yuk Lun* (2004) 7 HKCFAR 300. Although this decision was made pre-Civil Justice Reform, the general principles discussed in this decision are, as confirmed in *Lam Rogerio Sou Fung v Ku Ling Yu John* [2011] 5 HKC 205, still relevant under the new rules.

(c) Amount of Costs to be Paid

12.15 Generally speaking, the Court's costs order (such as the examples of costs orders in interlocutory applications given above) only deals with *who pays*, but not the *amount* to be paid.

(i) *Indemnity Principle*

12.16 One important general principle related to recovering costs from another party is the "indemnity principle"—party and party costs are allowed to be recovered by way of an *indemnity, i.e.* a party can only be indemnified for legal costs that it is liable to pay. For example, if the party entitled to costs (the receiving party) is only liable to pay a less than normal amount of costs, *e.g.* because it received a discount from its own solicitor, the Court will only order the paying party to indemnify the receiving party for the discounted amount:

(1) In this regard, the Court will look at the receiving party's liability as at the *date of the costs order* giving rise to its entitlement to costs. In *Incorporated Owners of Yan's Tower v Ho Kwai Yee* [2010] 1 HKLRD 937, the Court found that the receiving party had, as at the date of the costs order in question, only been liable to pay a fixed sum of $28,000 in costs to its solicitors. Therefore, even if the receiving party had *after* that *date* agreed to pay its solicitors' costs on the normal time basis (which would have resulted in a much larger amount of costs), in accordance with the indemnity principle, the Court held that the paying party was only required to pay $28,000 to the receiving party.

(ii) *If no Agreement, then Taxation*

12.17 With regard to the amount of costs to be paid, in the absence of a "summary assessment" by the Court (see below), normally the parties will first try to agree on this. However, if they cannot reach agreement, the receiving party will need to start "taxation" proceedings:

(1) "Taxation" is a process by which a Court officer (called a "Taxing Master") will review the amount of costs spent by the receiving party. The main features of a "party and party taxation" are as follows:

(a) The receiving party will prepare a detailed breakdown of the costs in question, set out in a "bill of costs". This will be prepared by a specialist "law costs draftsman";

(i) The bill of costs should be in the format set out in Appendix B to the amended PD 14.3:

- If there is any special reason why the prescribed format cannot be used, the party should apply for directions from the Taxing Master before preparing the bill of costs;[21]
- The bill of costs should set out, with separate item numbers, each item of work the cost of which is being claimed. The items should be set out in date order and, in a writ action, divided into the different stages of the action. Time spent on conferences and communications within each stage can initially be presented as total numbers of hours spent, subject to the paying party asking for a breakdown. The bill of costs must also contain specified wording confirming compliance with the indemnity principle;[22]

(b) The paying party (or its law costs draftsman) will prepare a "list of objections". This sets out objections to items of costs claimed by the receiving party;

(i) The list of objections should be in the format set out in Appendix C to the amended PD 14.3:

- If there is any special reason why the prescribed format cannot be used, the party should apply for directions from the Taxing Master before preparing the list of objections;[23]
- Each objection in the list of objections should be given an individual serial number, and refer to a specific item number on the bill of costs. The reasons for the objection should be clearly stated. The list of objections should also indicate the total deduction if all the objections are allowed, as well as the estimated length of the taxation hearing (if the Taxing Master orders one);[24]

(c) The Taxing Master will determine (in accordance with different "bases of taxation" (see below)) how much of those costs should be paid by the paying party to the receiving party:

(i) The Taxing Master has a wide range of powers in respect of the conduct of taxations, *e.g.* see RHC and RDC O.62 rr.14 and 16 and new r.13A;

(d) The receiving party will generally *not* recover all of its costs, *i.e.* it will be out of pocket in respect of a (significant) portion of these costs;

[21] Amended PD 14.3, para.17.
[22] *Ibid.*
[23] Amended PD 14.3, para.18.
[24] *Ibid.*

(2) As the Taxing Master has to review in detail the items of costs spent, taxation is often a time-consuming process (especially if the action was complex). This makes it an expensive process because parties will normally instruct solicitors and law costs draftsmen for the taxation;

(3) Under the Civil Justice Reform, the amended RHC and RDC O.62 (together with the amended PD 14.3 on costs (at section C(2)) set out in detail, amended procedures for starting and conducting taxation proceedings, *e.g.* see the amended RHC and RDC O.62 r.21 onwards. The main points include the following:

(a) Under the amended procedures, a taxation must be started within two years (or any extension of this granted by the Court) of the "completion date" (as defined in the amended RHC and RDC O.62 r.22(9)—this will usually be the date on which the costs order in question was made or if the costs order was initially made as an order *nisi*, when it was varied or made absolute);

(b) The amended procedures include giving the Taxing Master the powers to order the receiving party to start taxation proceedings (if, within three months of the "completion date", this has not been done and the amount of costs to be paid has not been agreed by the parties) and to order the receiving party to proceed with the taxation (after it has been commenced):[25]

(i) If the Taxing Master thinks a party has unduly delayed in starting or proceeding with a taxation, the Taxing Master has wide powers to penalize the party for such delay, including disallowing a part of the costs to be taxed;

(c) Further, the Taxing Master has an extended power to conduct "provisional" taxations, *i.e.* by reviewing the relevant materials and then making an order *nisi*, *without* an oral hearing:[26]

(i) A party who is dissatisfied with the order *nisi* can insist on an oral hearing. However, it may be ordered to pay the costs of the hearing if the taxed costs do not "materially exceed" the provisionally taxed costs;

(ii) See Sections C(2)(f) to (i) in the amended PD 14.3 for further guidance on the practice of provisional taxations;

(iii) In the recent case of *Chiang Chin Tsai v Shum Kin Wong* (DCPI 900/2007, [2010] HKEC 1816) which concerned a provisional taxation, the Court reminded practitioners to follow the provisions of the amended PD 14.3 fully and carefully, otherwise the Court may consider making wasted costs orders (including against parties' legal representatives personally);

[25] Amended RHC and RDC O.62 r.22.
[26] RHC and RDC O.62 amended r.13 and new r.21B.

(d) Taxation proceedings are started by the receiving party filing in Court the Notice of Commencement of Taxation (NOCT) and the bill of costs:[27]

(i) The NOCT should be in the format set out in Appendix D to the amended PD 14.3;

(ii) When filing the NOCT, the receiving party must pay a taxing fee to the Court;[28]

(iii) The receiving party must serve copies of the NOCT and bill of costs on all other parties entitled to be heard on the taxation within seven days of these documents being filed in Court:[29]

- However, if the bill of costs was previously served on the paying party, *e.g.* to negotiate settlement of the costs, there is no need to serve the bill of costs on the paying party again;[30]
- A party must, within seven days of being served with the NOCT and bill of costs, give notice in writing to the Taxing Master and all other parties of its financial interest in the outcome of the taxation and whether it intends to participate in the taxation proceedings;[31]

(e) Normally, the Taxing Master will order:[32]

(i) The paying party to file and serve its list of objections within 28 days of the service of the NOCT (failing which the receiving party can apply for the bill to be taxed as drawn); and

(ii) If the parties cannot settle within 28 days after service of the list of objections, the receiving party to file and serve an Application to Set Down a Bill for Taxation (in the form of Appendix E to the amended PD 14.3);

- Paragraph 24 of the amended PD 14.3 states that the date for filing the Application to Set Down a Bill for Taxation *cannot* be postponed without the Taxing Master's approval (which will only be given if "good reasons" are shown);

(f) After receiving the Application to Set Down a Bill for Taxation, the Taxing Master may, where appropriate, tax the bill as drawn (where the paying party has failed to file any list of objections), or set the bill down for taxation (or provisional taxation), or give other directions. The parties will be informed by a Notice of Setting Down (in the form of Appendix F to the amended PD 14.3);[33]

[27] Amended RHC and RDC O.62 r.21; amended PD 14.3, para.19.
[28] *Ibid.*, r.21(5).
[29] Amended RHC and RDC O.62 r.21(2).
[30] Amended PD 14.3, para.20.
[31] Amended RHC and RDC O.62 r.21(6).
[32] Amended PD 14.3, para.21.
[33] *Ibid.*, para.26.

(g) If the parties manage to settle, and the receiving party withdraws its bill of costs, depending on the timing of this withdrawal, the paying party may receive a partial refund of the taxing fee paid to the Court—see the new RHC and RDC O.62 r.21D and para.27 of the amended PD 14.3;

(h) At the end of the taxation, the parties must normally try to agree the amount of costs allowed on the taxation (if necessary, an application for clarification can be made to the Court). The receiving party will then use this figure to prepare the "final certificate" (also known as the "allocatur"), which certifies the amount payable by the paying party to the receiving party:[34]

(i) In addition to the costs allowed on taxation, the paying party must also reimburse the receiving party for the taxing fee (calculated on the basis of the amount of costs allowed on taxation);[35]

(i) Although the starting position is that the receiving party is also entitled to be paid its *costs of the taxation proceedings*, this is subject to any statute/Court rule/PD providing otherwise as well as the Court's wide powers to make a different order (*e.g.* in view of the conduct of the parties and the amount by which the bill of costs has been reduced on taxation);[36]

(j) Note the Court's general power, given under the new RHC and RDC O.62 r.32C, to penalize a party (or its legal representatives) in costs for any non-compliance with Court rules/orders/PDs relating to the taxation or unreasonable/improper behaviour before or in the proceedings giving rise to the taxation. Paragraph 5 of the amended PD 14.3 also states that a party (or its legal representatives) may be penalized in costs for non-compliance with any provisions of the PD;

(4) For details on the old procedure for taxation proceedings, see the old RHC and RDC O.62, in particular, r.21 onwards and the old PD 14.3.

12.18 In the context of the parties' negotiations on the amount of costs, a new RHC and RDC O.62A has been added to apply the sanctioned offer and sanctioned payment procedures to taxation proceedings:

(1) For an example of a case discussing and applying O.62A, see *Manova International Ltd v Giga Technology Co Ltd* (HCA 733/2009, [2010] HKEC 299);

(2) Note that para.4 of the amended PD 14.3 imposes a duty on the parties to discuss and try to settle any disputed items of costs, as well as to consider making offers under O.62A.

[34] New RHC and RDC O.62 r.17A and amended PD 14.3, para.38.
[35] *Ibid.*, r.32B.
[36] *Ibid.*, r.32A.

(iii) *Summary Assessment or Fractional Taxed Costs*[37]

12.19 "Fractional taxed costs"—the Court has the power to order the receiving party to receive only a *proportion* of the taxed costs.[38]

12.20 "Summary Assessment" (this used to be called "gross sum assessment" before the Civil Justice Reform)—instead of going through taxation, the Court can order the receiving party to receive a gross sum, *i.e.* the Court fixes the amount of costs payable straightaway (usually at the same time as when it makes the costs order), so no taxation is needed:

(1) On a summary assessment, the Court will take a broad-brush approach in assessing the amount of recoverable costs. It will *not* embark on a "mini-taxation":

> (a) Paragraph 14 of the amended PD 14.3 states, among other things, that in conducting a summary assessment, the Court will (regardless of whether the paying party disputes the amount of costs claimed) make sure that the amount of recoverable costs is not "disproportionate and/or unreasonable having regard to the nature and circumstances of the application or matter and the underlying objectives stated in Order 1A";
>
> (i) In *Poon Shu Fan v Wong Tin Yan* [2012] 5 HKLRD 512, the CA drew guidance from the approach of the English Court of Appeal in *Lownds v Home Office* [2002] 1 WLR 2450:
>
> - A 2-stage approach should be adopted—a global approach and an item by item approach;
>
> o "The global approach will indicate whether the total sum claimed is or appears to be disproportionate having particular regard to the considerations which [English] CPR r.44.5(3)[39] states are relevant. If the costs as a whole are not disproportionate according to that test then all that is normally required is that each item should have been reasonably incurred and the cost for that item should be reasonable. If on the other hand the costs as a whole appear disproportionate then the court will want to be satisfied that the work in relation to each item was necessary and, if necessary, that the cost of the item is reasonable. If, because of lack of planning or due to other causes, the global costs are disproportionately high, then the requirement that the costs should be proportionate means that no more should be payable than would have been payable if the litigation had been conducted in a proportionate manner. This [in] turn means that reasonable costs will only be recovered for the items which were necessary if the litigation had been conducted in a proportionate manner";
>
> o In terms of what is meant by "necessary", "a sensible standard of necessity has to be adopted. This is a standard which takes fully into account the need to make allowances for the different judgments which those responsible for litigation can sensibly come to as to what is required. The danger of setting too high a standard with the benefit of hindsight has to be avoided. While the threshold required to meet necessity is higher than that of reasonableness, it is still a standard that a competent practitioner should be able to achieve without undue difficulty…" Necessity will also be affected by the conduct of the other party in the case, in particular, the level of cooperation displayed by the other party;

(2) Summary assessment is available for the costs of both interlocutory and non-interlocutory proceedings (*e.g.* costs of the trial);

(3) Summary assessment is much faster (and therefore cheaper) than the traditional taxation process;

(4) Summary assessment of costs of *interlocutory applications*:

> (a) The amended RHC and RDC O.62 r.9A(1) expressly provides that where the Court has ordered one party to pay the costs of an interlocutory application, the Court may make one of the following orders:
>
> (i) Make a summary assessment in place of taxed costs;
>
> (ii) Make a summary assessment in place of taxed costs but subject to the right of either party to insist on a taxation (referred to as "provisional summary assessment" in para.6 of the amended PD 14.3):
>
> - However, where a party does insist on taxation but the taxed costs are equal to, less than or do not "materially exceed" the summarily assessed costs, the Taxing Master may make any order regarding the costs of the taxation or any other order that is appropriate:[40]
>
> o A party should therefore take care to insist on taxation only where it thinks that the summarily assessed costs are substantially less than what it would recover on taxation;
>
> (iii) Order the costs to be taxed;
>
> (b) Summary assessment is normally the Court's preferred method of assessment for costs of *interlocutory* applications:[41]

[37] Amended RHC and RDC O.62 rr.9, 9A, 9B and 9C.
[38] *Ibid.*, r.9(4).
[39] Broadly similar to the amended RHC and RDC O.62 r.5 in Hong Kong.
[40] Amended RHC and RDC O.62 r.9A(4), 9A(5).
[41] Amended PD 14.3, para.6.