

are capable of giving rise to an arbitral award (whether interim or final) that may be enforced in Hong Kong under the Arbitration Ordinance (Cap.609) or any other Ordinance.<sup>94</sup> But if such conditions are satisfied, the Court may grant a *Mareva* injunction even if the subject matter of the arbitral proceedings would not, apart from s.45(5) of the Arbitration Ordinance (Cap.609), give rise to a cause of action over which the Court would have jurisdiction; or the order sought is not ancillary or incidental to any arbitral proceedings in Hong Kong.<sup>95</sup> In the exercise of its discretion, the Court must however have regard to the fact that the power is ancillary to the arbitral proceedings outside Hong Kong, and for the purposes of facilitating the process of an arbitral tribunal outside Hong Kong that has primary jurisdiction over the arbitral proceedings.<sup>96</sup> It has been said that "particular caution should be exercised by the court in relation to interim relief in aid of foreign arbitrations", and "this is even more so when it is now currently pending", as "there is foreign arbitral body which can deal with any interim measure that is required to be taken".<sup>97</sup>

3.081 Under the new s.21M of the High Court Ordinance (Cap.4), upon application by originating summons,<sup>98</sup> the Court also can now grant a *Mareva* injunction in relation to intended or ongoing foreign "proceedings", provided that they are capable of giving rise to a judgment which may be enforced in Hong Kong under any ordinance or at common law.<sup>99</sup> In *Prema Birkdale Horticulture (Macau) Ltd v Venetian Orient Ltd*,<sup>100</sup> Deputy Judge Bharwaney S.C. left open the question whether s.21M can apply to foreign arbitrations. In *Hornor Resources (International) Co Ltd v Savvy Resources Ltd*,<sup>101</sup> Chu J accepted that, where a *Mareva* injunction had been obtained in Hong Kong proceedings which had since been stayed in favour of English arbitration, the Court had jurisdiction to continue the injunction, even during the stay, pursuant to the then s.2GC of the Arbitration Ordinance (Cap.341) (now repealed) and s.21M of the High Court Ordinance (Cap.4). In *Muginoho Co Ltd v Vimiu HK Co Ltd*,<sup>102</sup> where an injunction was sought in Hong Kong in aid of arbitration commenced in Japan, Deputy Judge Mimmie Chan referred to both s.45 of the Arbitration Ordinance (Cap.609) and s.21M of the High Court Ordinance (Cap.4), but it is unclear from the Judgment as to under which basis she continued the injunction granted there. On the overall state of authorities it would seem that s.21M of the High Court Ordinance (Cap.4) would, apart from s.45 of the Arbitration Ordinance (Cap.609), afford an additional basis for the Court to grant a *Mareva* injunction in aid of foreign arbitrations capable of giving rise to an arbitral award (whether interim or final) that may be enforced in Hong Kong.

<sup>94</sup> Arbitration Ordinance, Cap.609, s.45(5).

<sup>95</sup> Arbitration Ordinance, Cap.609, s.45(6).

<sup>96</sup> *Ibid.*, s.45(7).

<sup>97</sup> *China Minsheng Banking Corp Ltd (Shenzhen Branch) v Dichain Holdings Ltd* (unrep., HCCT 58/2006, [2006] HKEC 2155), per Waung J at para.22.

<sup>98</sup> RHC, O.29 r.8A.

<sup>99</sup> *Prema Birkdale Horticulture (Macau) Ltd v Venetian Orient Ltd* [2009] 5 HKLRD 89, 92, paras. 4-5.

<sup>100</sup> [2009] 5 HKLRD 89.

<sup>101</sup> [2010] 4 HKC 50.

<sup>102</sup> (Unrep., HCMP 107 2012, [2012] HKEC 420).

**Practice.** An application for a *Mareva* injunction in support of arbitration proceedings is made in accordance with RHC, O.73. The application normally should be made by originating summons<sup>103</sup> with supporting affidavit and to the Judge in charge of the Construction and Arbitration List (subject to the Judge's diary).<sup>104</sup>

An application for a *Mareva* injunction in aid of intended or ongoing foreign proceedings usually is made by originating summons with supporting affidavit<sup>105</sup> to a Judge in chambers.

**Service out of the jurisdiction.** The claimant or intended claimant under an intended or ongoing arbitration usually would make the application for a *Mareva* injunction in support of the arbitral proceedings by originating summons under s.45 of the Arbitration Ordinance (Cap.609) and RHC, O.73, rr.1-4. Service out of the jurisdiction is permissible with the leave of the Court under RHC, O.73 r.7. If such claimant also wishes to invoke s.21M of the High Court Ordinance (Cap.4) to seek a *Mareva* injunction in aid of foreign arbitrations, service of the originating summons out of jurisdiction is permissible with leave under RHC, O.11 r. 1(1) (oc).

**Venue.** Case law under the old s.2GC of the repealed Arbitration Ordinance (Cap.341) suggests that in the normal situation a party seeking interim relief under that section should apply in the first instance to the arbitrator seized of a dispute. "The jurisdiction of the court to intervene in a live arbitration should be used sparingly and only where there were special reasons for doing so".<sup>106</sup> There seems to be no good reason for departing from such practice under the new Arbitration Ordinance (Cap.609).<sup>107</sup> Where, however, the application is urgent and an arbitrator has not yet been appointed,<sup>108</sup> the court may make such orders as are appropriate for the purpose of preserving evidence or assets. Evidence of urgency should of course be included within the affidavit in support.

**The form of order.** Guidance as to the form of the order was provided by Mocatta J at first instance in *Cretanor Maritime Co Ltd v Irish Marine Management Ltd*.<sup>109</sup> Mocatta J granted a *Mareva* injunction, to continue "until 14 days after the publication of the award in any arbitration between the (owners) and the (charterers) or further order".

#### (ii) Post-Judgment relief

**Injunctions after domestic and foreign judgments.** The courts of Hong Kong have jurisdiction to grant a *Mareva* injunction in aid of execution of a judgment made in a

<sup>103</sup> RHC, O.73 rr.1-4.

<sup>104</sup> Practice Direction 6.1 - Construction and Arbitration List, paras.3, 5, 9-10.

<sup>105</sup> RHC, O.29 r.8A.

<sup>106</sup> See Arbitration Ordinance, Cap.341 (repealed), s.2GC(6); cf. Arbitration Ordinance, Cap.609, s.45(4); *Leviathan Shipping Co Ltd v Sky Sailing Overseas Co Ltd* [1998] 4 HKC 347, 355D-H; *Hsin Chong Construction (Asia) Co Ltd v Henble Ltd* [2005] 3 HKC 27, 31, [13].

<sup>107</sup> See s.45(4).

<sup>108</sup> *Hsin Chong Construction (Asia) Co Ltd v Henble Ltd* [2005] 3 HKC 27.

<sup>109</sup> [1978] 1 WLR 966.

3.082

3.083

3.084

3.085

3.086

3.087



claim litigated within the jurisdiction.<sup>110</sup> A *Mareva* injunction also may be granted in aid of execution of a foreign judgment or arbitration award.<sup>111</sup>

**3.088 Injunction ancillary to actual and intended enforcement.** An application for a *Mareva* injunction can be made as ancillary to the actual or intended application for enforcement of the judgment in the courts of Hong Kong. Service of the enforcement proceedings out of the jurisdiction is permitted with leave of the Court under RHC O.11 r.1(1)(m) and O.73 r.7(2) (in the case of arbitral awards).

(i) A 'good arguable case'

(i) *General*

**3.089 Need for 'good arguable case'.** The merits of the applicant's case are relevant in two different respects:

1. first, the applicant must establish that he has a good arguable case as a minimum threshold condition for the grant of any relief; and
2. second, where the applicant's case satisfies the threshold, the strength of his case is to be weighed in the balance with other factors relevant to the exercise of the court's discretion.<sup>112</sup>

**3.090** A judge hearing an application for a *Mareva* injunction is not only entitled but required to make some assessment of the applicant's chance of success at the trial. This exercise usually will be undertaken on the initial *ex parte* application. If an injunction is granted on the *ex parte* application, then it will also be undertaken on the return day. Indeed, it has been said that the concept of a "good arguable case" becomes of most significance where two arguments are being weighed in the interim context. While any mini trial should be avoided, the phrase reflects the concept that "one side has a much better argument on the material available".<sup>113</sup> Comparison of the opposing arguments is obviously a difficult task on the basis of affidavit evidence alone, but occasionally there is little alternative; in *Jau Hwa Stewart v E. Excel Ltd*<sup>114</sup> the Commercial judge, Stone J, expressed the dilemma thus (at page 30):

"...if and in so far as the task of this court is to weigh what is said in the balance, and that 'everything must depend upon the strength which the assertions command in the circumstances of the particular case, which is the way Mustill LJ put it in *Societe Commerciale de Reassurance v Evas International Limited* [1992] 1 Lloyd's 570 – then in my view the prospects for this dispute, when

<sup>110</sup> Where there are proceedings in England, the court has jurisdiction to make a post-judgment worldwide *Mareva* injunction against defendants domiciled out of the jurisdiction under s.21L of the High Court Ordinance (Cap.4); *Chinachem Charitable Foundation Ltd v Chan Chun Chen* [2012] 1 HKC 587.

<sup>111</sup> See *Mercedes-Benz AG v Leiduck* [1995] 3 HKC 1, [1996] AC 284 (on appeal from Hong Kong).

<sup>112</sup> *The Niedersachsen* [1983] 2 Lloyd's Rep 600, 603.

<sup>113</sup> See Roth J in *The Complete Retreats Liquidating Trust v Geoffrey Logue* [2010] EWHC 1864 (Ch) at [71]–[72] adopting the observations of Waller LJ in *Canada Trust Co v Stolzenberg (No. 2)* [1998] 1 WLR 547, 555 made in the context of an application for permission to serve out of the jurisdiction.

<sup>114</sup> (unrep., HCA 2493 of 2001 30 August 2001).

viewed through the prism of a 'good arguable case', clearly appear to favour the defendants. It seems to me that this is a case where the court legitimately may conclude, as it now does, that in all the circumstances not only does this plaintiff fail on the reef of 'good arguable case', but also upon the shoal of the 'just and appropriate' benchmark. Damon Runyan once famously observed that 'the race does not always go to the fleet, nor the fight to the strong, but that is the way to bet'. In my judgment, on the basis of this evidence...it is the defendants who seem to me to have considerably the greater cause for optimism."

In *The Niedersachsen*<sup>115</sup> "good arguable case" was defined as "a case which is more than barely capable of serious argument, and yet not necessarily one which the judge believes to have a better than 50 per cent chance of success". *The Niedersachsen* has been applied in Hong Kong on many occasions.<sup>116</sup> **3.091**

**The approach of the court to the merits.** In deciding whether the applicant's case is such as to pass the threshold, the court should adopt the same approach as that adopted in respect of applications for other interim injunctions and on comparatively brief evidence. **3.092**

**The approach of the courts to the merits—Mareva injunction in support of foreign proceedings.** Where the application is made for a *Mareva* injunction in support of foreign proceedings, the applicant must have a good arguable case in the foreign proceedings in question.<sup>117</sup> Often, expert evidence will be required. In particular, on the initial *ex parte* application, the applicant should be astute to provide a full and fair analysis of the applicable legal principles and of any defences that might be advanced by the respondent in such proceedings in order to comply with the duty to make full and frank disclosure. Similar considerations apply where the claim is to be litigated in this jurisdiction but the claim is governed by the substantive law of some other jurisdiction.<sup>118</sup> **3.093**

If the *Mareva* application initially was not mounted before the forum seized with the substantive dispute, the applicant must give adequate reasons. It is not sufficient to say that even if the forum seized of the substantive dispute had seen fit to grant a worldwide *Mareva*, the plaintiffs still would have needed to apply to the Hong Kong court for an order to freeze the Hong Kong assets, as there may not be any good reason why there could not have been "back to back" injunctive relief.<sup>119</sup> **3.094**

<sup>115</sup> [1983] 2 Lloyd's Rep 600, 605.

<sup>116</sup> See for example *Hsin Chong Construction Co Ltd v Yaton Realty Ltd* [1986] HKC 406; *Anglo-Eastern (1985) Co Ltd v Knutz* (unrep., CACV 100/1987, 28 October 1987, [1987] HKLY 753); *Winata v Widarto* (unrep., HCA6700/1986, 17 December 1986, [1986] HKEC 229); *Mandarin Resources Corp Ltd v Grand China Ltd* (unrep., HCA5096/1988, 11 August 1989, [1989] HKEC 75); *Huang Kwok Chen v Tse Fung Ping* (unrep., HCA5629/1989, 1 November 1989, [1989] HKEC 88); *Sanshin Trading Co Ltd v Kwok Kwok Yu* (unrep., CACV156/1990, 26 February 1991, [1991] HKEC 125); *Sinom Shanghai Import & Export Co Ltd v Exfin (India) Mineral Ore Co Pvt Ltd* (unrep., HCCT 45/2006; [2006] HKEC 1089); upheld on appeal (unrep., CACV 208/2006; [2006] HKEC 1118); *Akai Holdings Ltd v Ho Wing On* (unrep., HCCL 37, 40/2005, 9 February 2009, [2009] HKEC 191).

<sup>117</sup> *The Complete Retreats Liquidating Trust v Geoffrey Logue* [2010] EWHC 1864 (Ch) at [73].

<sup>118</sup> For examples of *Mareva* applications in aid of foreign proceedings, see *Hornor Resources (International) Co Ltd v Savvy Resources Ltd* [2010] 4 HKC 50; *Deulemar Shipping SpA v Transfield ER Futures Ltd* [2011] 1 HKLRD 75; *Her Majesty's Revenue & Customs v Shahdadpuri* [2012] 1 HKLRD 223.

<sup>119</sup> *Deulemar Shipping SpA v Transfield ER Futures Ltd* [2011] 1 HKLRD 75, 87–89, [48–50].



## (j) Assets (which need not necessarily be within the jurisdiction)

## (i) General

**3.095 Wide definition of assets.** For the purposes of a *Mareva* injunction, the respondent's assets cannot be the plaintiff's asset, wrongfully held by the defendant. That requires a different preemptive remedy. For these purposes, assets:

- can be tangible or intangible;
- must be within the legal or beneficial ownership of the respondent;
- must not be subject to the legal or equitable interests of third parties to the extent that they would not be available on execution of a judgment;
- must be held by the respondent in the same capacity as that in which proceedings are pursued against him;<sup>120</sup>
- must not be those of a state, unless the the impleaded state has waived in court both its jurisdictional immunity from suit in Hong Kong and the immunity of its property from execution by Hong Kong's process.<sup>121</sup>

**3.096** In some instances, the plaintiff will be capable of identifying with particularity the defendant's assets to be "frozen" by the injunction in terms of nature and location. To the extent to which the assets are known or suspected to exist, these should be identified even if their value is unknown; and if it is known or suspected that they are in the hands of third parties, everything should be done to define their location to the greatest possible extent.<sup>122</sup>

**3.097 Assets must have value in the jurisdiction.** The assets must be of some value. They must, in other words, be available for execution. The purpose of a freezing injunction is to prevent the dissipation of assets available for execution and not to exert pressure on the respondent to pay the debt. Thus, in *Camdex International Ltd v Bank of Zambia (No. 2)*<sup>123</sup> it was held that a *Mareva* injunction should be varied so as to exclude from its ambit "assets" in the form of unissued Zambian bank notes, which had no value in the jurisdiction but the restraint of which would cause substantial hardship within Zambia.

## (ii) Trust assets

**3.098 The standard order: assets held in trust by the respondent not covered by general words.** The words in the standard form of *Mareva* injunction "his assets" refer to assets owned beneficially by the respondent. When combined with the words "whether or not they are in his own name",<sup>124</sup> the ambit of the order extends to assets beneficially owned by the respondent even when held in the name of some other entity on his

<sup>120</sup> *Roberts v Death* (1881-82) LR 8 QBD 319.

<sup>121</sup> *Democratic Republic of the Congo v FG Hemisphere Associates LLC* [2011] 4 HKC 151.

<sup>122</sup> *Z Ltd v A-Z and AA-LL* [1982] 1 QB 558.

<sup>123</sup> [1997] 1 WLR 632 CA.

<sup>124</sup> Now found in para. 1(1) of the standard form of order contained in PD 11.2.

behalf.<sup>125</sup> The standard order does *not* cover assets which the respondent legal owner holds on behalf of the true beneficial owner.

Where assets are apparently held by the respondent on trust for the benefit of a third party but there is a good arguable case that the assets truly are beneficially owned by the respondent, the order should be expressed to make it clear that such assets are covered. Thus, the order should refer to "all assets held by the respondent" or ideally identify certain specific assets without reference to them being owned or controlled by the respondent. Thus, in the case of a bank account, it should refer to it as account number x held at the ABC Bank at its XYZ branch.<sup>126</sup> **3.099**

**Inquiry as to ownership of assets: when?** Where there is a dispute as to the ownership of assets that may be subject to the injunction, the following principles apply: **3.100**

- If the assets appear to belong to a third party they should not be included in the scope of the injunction without evidence that they are the defendant's. The plaintiff must adduce evidence that the assets in question are in fact those of the defendant; it is not enough for the plaintiff to show merely that there is a serious issue to be tried as to the ownership of the assets.
- The mere assertion of the defendant that a third party owns the assets need not be accepted without inquiry. And the same principle applies to claims by a third party to intervene to vary the injunction to exclude the assets which have been enjoined.
- The court must do its best to do what is just and convenient between all concerned.
- In a proper case the court may direct an issue to be tried either before or after the main action as to the ownership of the assets.<sup>127</sup>

**Order against third party where assets are beneficially owned by defendant.** The court may grant a *Mareva* injunction over assets in the name of a third party against whom no relief is claimed where there is a good arguable case that they are in fact beneficially owned by the defendant.<sup>128</sup> Moreover, where it is not possible to identify specific assets held by that third party the order may be expressed to cover all of the assets of the third party up to a certain limit corresponding to the value of the assets of the defendant which the third party appears to hold.<sup>129</sup> **3.101**

**Order against third party: other cases.** The jurisdiction to grant *Mareva* injunctions against third parties is not confined to cases in which the third party is holding or is in control of assets beneficially owned by the defendant. **3.102**

<sup>125</sup> *Federal Bank of the Middle East v Hadkinson* [2000] 2 All ER 395, 409-410 and 415-416.

<sup>126</sup> *Ibid.*

<sup>127</sup> *Standard Chartered Securities Ltd v Lai Arthur* [1993] 1 HKC 375, applying *S.C.F. Finance Co Ltd v Masri* [1985] 1 WLR 876; and *TSB Private Bank Int'l SA v Chabra* default [1992] 1 WLR 231.

<sup>128</sup> *TSB Private Bank International SA v Charbra* [1992] 1 WLR 231 and *Mercantile Group (Europe) AG v Aiyela* [1994] QB 366; *Akai Holdings Ltd v Ho Wing On Christopher* (unrep., HCMP 1718, 1720, 1722/2009, [2009] HKEC 1585), paras.43-47.

<sup>129</sup> *Yukong Line Ltd v Rendsburg Investments Corp* [2001] 2 Lloyd's Rep 113, 123.



writ. The tenant would hold the land according to the original lease without any new lease. This does not affect the landlord's right to seek damages if he has accepted the tenant's repudiatory breach and terminated the tenancy.<sup>115</sup>

**8.062** Relief may be asked for more than once, but only with good excuse.<sup>116</sup> If the tenant does not pay within the prescribed period, the court would order possession of the land if it is satisfied that the landlord is entitled to enforce the right of forfeiture.<sup>117</sup>

**8.063** For breach of other covenants<sup>118</sup> under the tenancy, relief may be sought under s.58 of the Conveyancing and Property Ordinance (Cap.219). However, a landlord would have to serve a notice on the tenant specifying the breach and compensation required (if any), and if the breach is remediable, requiring the tenant to remedy the breach.<sup>119</sup> Summary judgment would thus be refused if the notice of requirement is not complied with.<sup>120</sup>

## 6. ACTING FOR THE PLAINTIFF

### (a) Introduction

**8.064** **The procedure.** RHC O.14 r.1 provides that:

- “(1) Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has given notice of intention to defend the action, the plaintiff may, on the ground that that defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for judgment against that defendant.
- (2) Subject to paragraph (3) this rule applies to every action begun by writ other than—
- (a) an action which includes a claim by the plaintiff for libel, slander, malicious prosecution, false imprisonment or seduction;
- (b) an action which includes a claim by the plaintiff based on an allegation of fraud, or
- (c) an Admiralty action in rem.
- (3) This Order shall not apply to an action to which Order 86 or Order 88 applies.”

<sup>115</sup> *Well Century Holdings Ltd v Leung Kam Yu* [2003] 2 HKLRD 653.

<sup>116</sup> Section 21F(1A) of the High Court Ordinance (Cap.4) and s.69(1A) of the District Court Ordinance (Cap.336); *Mui Lai Sze v Hau Chi Fai* [2005] 1 HKC 367.

<sup>117</sup> Section 21F(3) of the High Court Ordinance (Cap.4) and s.69(3) of the District Court Ordinance (Cap.336).

<sup>118</sup> Section 58(10) of the Conveyancing and Property Ordinance (Cap.219) provides that s.58 procedure does not apply to forfeiture for breach of covenant to pay rent.

<sup>119</sup> Section 58(1) of the Conveyancing and Property Ordinance (Cap.219).

<sup>120</sup> *Po On Auto Accessory Co Ltd v Grand Faith Holdings Ltd* (unrep., HCA 180/2010, 20 Aug 2010, [2010] HKEC 1295).

Rule 2 goes on to provide that:

- “(1) An application under rule 1 must be made by summons supported by an affidavit verifying the facts on which the claim, or the part of a claim, to which the application relates is based and stating that in the deponent's belief there is no defence to that claim or part, as the case may be, or no defence except as to the amount of any damages claimed.
- (2) Unless the Court otherwise directs, an affidavit for the purposes of this rule may contain statements of information or belief with the sources and grounds thereof.
- (3) The summons, a copy of the affidavit in support and of any exhibits referred to therein must be served on the defendant no less than 10 clear days before the return day.”

*Effect of these provisions.* The combined effect of the above rules is that, before the plaintiff starts to pursue an application for summary judgment, he must be sure that:

- his action against the defendant was begun by writ;
- his action (i) does not include any claims under O.14 r.1(2) and (ii) is governed by neither O.86 (actions for specific performance, etc. of an agreement the subjectmatter of which being property) nor O.88 (mortgage actions);
- he has served his statement of claim on the defendant;
- the defendant has given notice of intention to defend the action;
- the summons and supporting affidavit for the application comply with the requirements of O.14 r.2.

**The exceptions.** Summary judgment cannot be invoked for the categories of actions specified under O.14 r.1(2) and (3). Of particular note is the “fraud exception” provided under subrule (2)(b). It has been held that the exception should be construed narrowly and be confined to actions based on fraud as strictly defined in the English decision of *Derry v Peek*<sup>121</sup>, namely, a false representation made (i) knowingly, (ii) without belief in its truth or (iii) recklessly, careless whether it be true or false: *Comsec Travel Ltd v Fok Hing Tours Co Ltd*<sup>122</sup>.

The scope of the “fraud exception” was further explored in *Pacific Electric Wire & Cable Co Ltd v Harmutty Ltd*<sup>123</sup>, where the Court of Appeal held that:

- O.14 r.1(2)(b) applies to exclude summary judgment proceedings where one claim in the action but not another is based on an allegation of fraud.

<sup>121</sup> (1889) LR 14 App Cas 337, 374.

<sup>122</sup> [2002] 4 HKC 679, s.19, citing *Tan Eng Guan v Southland Co Ltd* [1996] 2 HKLR 117.

<sup>123</sup> [2009] 3 HKLRD 94.



- The rule is not confined to excluding actions in which there is a claim for fraud; what is excluded is any action where there is a claim in respect of which the underlying allegations on which the claim is based constitute an allegation of fraud.

Practitioners should bear in mind the rationale behind the exception, namely, that, save in the clearest possible case, it is inappropriate for the court to decide in summary proceedings on affidavits whether a defendant has been fraudulent or dishonest: see *Wavefront Trading Ltd v Po Sang Bank Ltd*<sup>124</sup>.

#### (b) Notice of intention to defend

- 8.068 Significance of notice of intention to defend.** RHC O.1 r.4(1) provides that “notice of intention to defend” means an acknowledgement of service containing a statement to the effect that the person by whom or on whose behalf it is signed intends to contest the proceedings to which the acknowledgment relates. If the defendant has failed to give notice of intention to defend, the plaintiff may enter a default judgment under RHC O.13. The defendant may also make an admission to the whole or part of the claim pursuant to RHC O.13A. Summary judgment should not be sought and it may not be available where these Orders apply.
- 8.069 Several defendants.** If a claim is brought against multiple defendants, summary judgment can be sought against any of the defendants who have given notice of intention to defend. A default judgment under RHC O.13 can be sought against those defendants who have not.
- 8.070 Partnership.** Where a claim is brought against partners in the name of their firm, then service may not be acknowledged in the name of the firm but only by the partners thereof in their own names: RHC O.81 r.4.
- 8.071 When does notice of intention to defend has to be given?** The rules in RHC O.13 state that where the defendant fails to give notice of intention to defend, the plaintiff may, “after the prescribed time”, enter judgment against him. The meaning of “the prescribed time” is provided in RHC O.13 r.6A:
- in relation to a writ issued against a defendant—“the prescribed time” would be the time limited for the defendant to acknowledge service of the writ;
  - if within that time (i.e. the time limited for the defendant to acknowledge service of the writ) the defendant has returned to the Registry an acknowledgment of service containing a statement to the effect that he does not intend to contest the proceedings—“the prescribed time” would be the date on which the acknowledgement was received at the Registry.
- 8.072 Timing of summary judgment application.** An application for summary judgment should be made as early as possible in the proceedings once an acknowledgment of

<sup>124</sup> [1999] 2 HKC 130, 134.

service or a defence is served, even though the rules do not in fact stipulate the time within which an application must be made. Generally speaking, a plaintiff applying for summary judgment should not delay or should explain any delay in his affidavit and/or at the hearing (e.g. the application for summary judgment has been made possible following discovery), although there can be circumstances where no affidavit would be necessary: *Stephen P. Kaufman v Maker Industrial Co Ltd*<sup>125</sup>. How the court deals with a plaintiff’s delay depends on the circumstances of the case and is a matter in the court’s discretion. In a suitable case, a plaintiff’s delay could cause the court to look at his case with great circumspection or even entitle the court to refuse to entertain his application for summary judgment: *Resona Bank Ltd v Lam Sie*<sup>126</sup>.

A plaintiff is not precluded from applying for summary judgment even if he has consented to the defence being filed out of time. He will not be taken to have impliedly admitted that there is a reasonable defence: *The Wing On Bank v Tech-Craft Industries Ltd*<sup>127</sup>. However, in a case where the court has given directions for a speedy trial, it would be inconsistent for the plaintiff to invoke the summary judgment procedure: see *C.K. Heur International Ltd v Kam Yin Shan Christine*<sup>128</sup>, where the court referred to *Pierre Fabre SA v Ronco Teleproducts Inc*<sup>129</sup>.

#### (c) Service of statement of claim

**Nature and purpose.** The statement of claim may be endorsed on the writ or served with the writ or served separately at any time after service of the writ but before the expiration of 14 days after the defendant gives notice of intention to defend: RHC O.18 r.1. The statement of claim must state all material facts with sufficient particularity to enable the defendant to know the nature of the claim he is faced with and to enable him to give his solicitor proper instructions.

**Relief claimed.** A summary judgment application will be dismissed if the relief claimed by the plaintiff has not been specifically pleaded in his statement of claim. In such a situation, the existence of words “further or other relief” in the statement of claim would not come in aid of the plaintiff: *Chang Man v Ma Shou Yung*<sup>130</sup>.

**Amendment of statement of claim and summons.** If an application for summary judgment is to be made, the statement of claim must be “complete and good in itself”: *Lai Yuen Wah v Hoi Kwong Printing Co Ltd*<sup>131</sup>. Where the statement of claim contains any defects, the plaintiff may seek to obtain the written agreement of other parties to the proceedings to amend the same pursuant to RHC O.20, r.12. Otherwise, the plaintiff would still be entitled to effect the necessary amendments once without the leave of the court under RHC O.20, r.3, before the pleadings are deemed to be closed.

<sup>125</sup> [1982] HKLR 20.

<sup>126</sup> [2004] 4 HKC 601, s.19.

<sup>127</sup> [1975] HKLR 533, 537.

<sup>128</sup> (unrep., HCA 5309/2000, 4 May 2001, [2001] HKEC 598), s.20.

<sup>129</sup> [1984] FSR 148.

<sup>130</sup> [2002] 2 HKC 213.

<sup>131</sup> [2003] 1 HKC 447, s.13, citing *Gold Ores Reduction Co Ltd v Parr* [1892] 2 QB 14.

8.073

8.074

8.075

8.076



- 8.077 **Proceeding on one of several claims.** It is to be noted that RHC O.14 r.1 allows the plaintiff to proceed on one or more of several claims included in the writ. The plaintiff should clearly and specifically identify in his summons the claim(s) which he intends to proceed on.
- 8.078 **Proceeding on part of a claim.** RHC O.14 r.1 also allows the plaintiff to proceed on part of the claim included in the writ. Likewise, the plaintiff should clearly and specifically identify in his summons which part of the claim he intends to proceed on.

## 7. ISSUE AND SERVICE OF SUMMARY JUDGMENT

### (a) Issue and service

- 8.079 **Pre-issue checks.** Before issuing the summary judgment application, the plaintiff should make sure that:
- the claim is not excluded from the summary judgment provisions under RHC O.14 r.1 as discussed earlier in this chapter;
  - the defendant has given notice of intention to defend and, if there is more than one defendant, those against whom the summary judgment application will be issued have done so;
  - the statement of claim has either been endorsed on the writ or, if not, has been served separately, and that the statement of claim complies with the relevant parts of the Rules of the High Court and discloses the nature of the case which the defendant to the summary judgment application must meet;
  - the summons and supporting affidavit for the application comply with the requirements of RHC O.14 r.2 (as will be further explained below).
- 8.080 **Other applications: interim payment, disposal of case on point of law under RHC O.14A.** A plaintiff would be well advised to consider the following applications, which may be made together with or as an alternative to his application for summary judgment:
1. The plaintiff applying for summary judgment may also want to apply for an order for an interim payment and he may include his application for interim payment in his summons for summary judgment: RHC O.29 r.10(2). Where the court gives unconditional leave to defend in a summary judgment application, however, it will not grant interim payment since that is inconsistent with the granting of unconditional leave. On the other hand, the court may grant interim payment if conditional leave is granted: *British and Commonwealth Holdings Plc v Quadrex Holdings Inc*<sup>132</sup>.

<sup>132</sup> [1989] QB 842.

2. Where the claim gives rise to a question of law or construction of any document, the plaintiff should resort to the procedure for disposal of a case on a point of law under RHC O.14A.

**Procedure not to be abused.** Whilst the summary judgment procedure provides a useful and cost effective way for a plaintiff to obtain judgment quickly for a claim to which there is no defence, practitioners should take heed of the court's words of warning in *Man Earn Ltd v Wing Ting Fong*<sup>133</sup> and guard against the misuse of this "extraordinary procedure".

**Service.** According to RHC O.14 r.2(3), the summons, a copy of the supporting affidavit and any exhibits referred to therein must be served on the defendant not less than 10 clear days before the return day. The manner in which service should be effected is governed by RHC O.65. The plaintiff would need to prove due service of the summons and supporting affidavit at the first hearing if the defendant does not appear.

**Who will hear the application?** A summons for summary judgment application should be made returnable before a master for a 15-minute hearing unless the claim is for relief, such as an injunction, which can only be granted by a judge: RHC O.32, r.11. If the matter is contested or for any reason cannot be disposed of at the first hearing, the master will give directions for the filing of evidence and adjourn the application for argument. The adjourned hearing will also be before the master, unless the master has directed that the matter should be referred to a judge: RHC O.32 r.12.

**Disposal by a master on the papers.** Where the master considers it appropriate to dispose of a summons for summary judgment on the papers pursuant to RHC O.32, r.11A, he may give directions for the filing of affidavits and/or skeleton arguments and set the date (called the "order date") for the disposal of the summons: see P.D. 5.4.

### (b) Affidavit to support application

- Pre-requisites.** The plaintiff's affidavit in support of his application must:
- be made by the plaintiff or any person duly authorised to do so;
  - identify the source(s) of the deponent's information and the ground(s) of his belief;
  - verify the facts on which the application is based;
  - contain a statement of the deponent's belief that there is no defence to the claim or part thereof in respect of which the application is made, except as to the amount of damages claimed.

<sup>133</sup> [1991] 1 HRC 225, 227-228.