(b) Statements of truth

2.006 All pleadings (and any amendments) are required to be verified by a Statement of Truth (RHC O.41A). RHC O.41A r.3 sets out who may sign a Statement of Truth. In general, it needs to be signed by the parties or their legal representative. When signed on behalf of a corporation, it should be signed by someone in a senior position. The form of a Statement of Truth for a pleading as required by RHC O.41A r.5 is:

> "[I believe] [the (plaintiff or as may be) believes] that the facts stated in this [name of document being verified] are true."

2.007 Statements of Truth are very important. The basic purpose is to ensure that documents put before the court accurately reflect the case of the party. The rule is designed to discourage pleadings which are unsupported by evidence or wholly speculative. The person signing the statement should take care to ensure that the facts stated in the pleading or document are correct. It may be contempt of court to sign a false statement of truth. For example, in *Kinform Ltd v Tsui Loi*,[1] defendants who signed false statements of truth were found in contempt of court and sentenced to two weeks' imprisonment.

2. The Checklists

2.008 Checklists 2.1–2.6 require extensive use of the RHC which is really the only accurate guide to *procedure*. In addition to the RHC, it is, however, necessary to be familiar with the *practice* by which procedure is implemented in the Hong Kong courts. The checklists contain cross-references to explanations in this commentary.

2.009 The commentary that follows should be used in conjunction with the checklists, and therefore adopts the same principal headings, although some sub-headings have been added. The checklists and commentary have been written so that reference must be made to paragraphs of the RHC or other textbooks. The reason for this is that familiarity with the RHC and in particular, *Hong Kong Civil Procedure* (and textbooks such as *Bullen and Leake and Jacob's Hong Kong: Precedents of Pleadings* and *Atkins' Court Forms*), is essential whilst a solicitor is gaining experience (and probably almost as essential, at least so far as the RHC is concerned, even when he thinks they know it all). Rules can and do change and it is unwise to rely on memory or historical knowledge when acting as a professional adviser. Further, always check the cumulative supplements to the RHC and also check whether any relevant circulars have been issued by the Chief Justice.

3. Action before Drafting Pleadings

(a) Obtaining instructions from your clients

2.010 It is not always obvious from whom you are, or are supposed to be, taking instructions. You may know that a person is connected with a certain company or firm, but you may not know his position within that firm. It is important that you establish that the person from whom you are taking instructions has authority to give them.

2.011 Where the client is a company, instructions should be given either by a director or by someone with ostensible authority to give you instructions (e.g. the manager of the company). Indeed, you should ensure that you have authority to act for the company, e.g. by obtaining a board resolution. Where the client is a partnership or a firm, the instructions should either come from a partner, or you should clarify with a partner or a manager of the firm that the person you are dealing with has been authorised by them to instruct you in the matter. Failure to do so may lead to criticism from the client. In certain circumstances, it may even render your firm personally liable for costs.

(b) Analysis of documents

2.012 You should obtain from the client all documents that are relevant to the dispute, together with any oral explanation that is necessary. As disputes often relate to what was said between the parties as well as what was stated in writing, it is vital that you talk to the client about the case. In addition, getting the client to explain the contents of documents that are not immediately understandable can save a considerable amount of time when analysing them. Any discussions between the parties on social media or other electronic communications should also be obtained. These should be copied and preserved. As a real time written record of events they can be given much weight by the court. Your client may not recall having made statements in such conversations that could harm their case and it is of vital importance to obtain and copy all records as soon as possible.

2.013 It is important to establish, at the analysis stage, that there are no documents that might be relevant which you have not yet seen. When the question of discovery (see Chapter 7) is explored further with the client after the close of pleadings, an additional search by the client, prompted by the need to give full discovery, frequently results in further relevant documents being found. Ideally, all relevant documents should be obtained at the outset because their contents may affect the merits of your client's case and affect the way in which your client's pleading is drafted.

2.014 If there are technical documents or technical terms in the documents which are relevant to the dispute, it is important that you understand them fully. The client may be able to help you in this but, if not, you may have to seek independent technical advice (e.g. in the construction industry, many of the terms used are not comprehensible to a person without experience in that field).

2.015 If there is something you do not understand, either confirm with the client (to your own satisfaction) that it is irrelevant, or find out what it means. Where there are figures in the documents, analyse them and make sure that these add up, rather than merely accepting that these are accurate.

2.016 Once you have gained an understanding of the factual background to your client's case, you should seek to identify all relevant causes of action (i.e. whether the claim should be brought in contract or in tort and, if the latter, what is required to establish the duty which it will be said has been broken and caused the damage). It is very important that you assess whether your client has a good claim in law and this will usually require legal

[1] [2011] 5 HKLRD 57.

research. Sometimes you may want to consult a colleague, or even instruct a barrister to advise if you remain unsure of the position after your research is complete.

2.017 Having identified the likely causes of action, you will need to decide from your reading of the documents and your assessment of the oral explanations given by the client whether there is sufficient evidence to support such a claim. For example, if the claim is in contract for the payment of a debt, there must be sufficient documentary or oral evidence to show the amount of the debt, the fact that it is owed by the defendant to the plaintiff, and to show that conditions precedent (such as service of notices) have been satisfied and the debt is already due and payable.

2.018 You will quite often find that there is more than one cause of action that you can pursue against the defendant. Where the RHC refers to "joinder" of causes of action (see RHC O.15 r.1), it means claiming in respect of more than one cause of action. For example, there may be a claim for damages arising from both breach of contract and from fraud.

2.019 It is normal to include in your pleading a claim in respect of more than one cause of action.

2.020 Although this question may seem technically difficult, in the normal case the answer to the question of whether a cause of action can be "joined" is straightforward and a matter of common sense. Generally speaking, if both the facts and the parties in respect of two separate causes of action are the same, the two causes of action can be joined.

2.021 You should next consider the possible parties against whom these causes of action can be brought.

(c) The parties to an action

2.022 When identifying possible defendants, a question of primary importance is whether a potential defendant has the financial resources to pay the damages claimed against it and to pay for the costs of the action should it lose. If you suspect that the potential defendant may not have sufficient funds to pay, the client must be advised of this (see Chapter 1). Joining extra parties may increase the financial exposure of your clients to costs, particularly, if the different defendants instruct different law firms. This risk should also be assessed when deciding whether to join an extra defendant.

2.023 When considering the financial means of defendants, always remember to check whether a defendant is likely to be insured. Although the insurer cannot be joined into the action, if an insurer accepts the defendant's insurance claim, it will provide the defendant with funds to pay the plaintiff's claim in whole or in part.

2.024 Just as there is often more than one cause of action to be pursued, there is often also more than one defendant who could be joined in the action. For example, in a claim in tort against builders for negligent work, there will probably be a cause of action against the contractor and the sub-contractor, both of whom will owe the plaintiff a duty of care.

2.025 If the client is contemplating issuing proceedings against a company, it is worth considering whether the directors of the company have incurred liability (or are joint tortfeasors) and if so, whether they too should be joined as co-defendants. A company search at the Companies Registry will reveal the identities and the addresses of the directors.

You should ensure to conduct searches for the entire period covered by the dispute as the directors may have been changed.

2.026 Alternatively, there may be more than one possible plaintiff with a right to claim in respect of the same cause of action. For example, a negligent driver might have a claim brought against him by more than one passenger in his vehicle. The term "joinder" of parties therefore means the inclusion of more than one plaintiff, and/or more than one defendant in the action.

2.027 The commentary contained in *Hong Kong Civil Procedure* under **Order 15 r.4 of the RHC deal in detail with the question of joinder of parties. The general rule is that no leave is required where, if separate actions were brought by more than one plaintiff, or against more than one defendant:

- those actions would involve some common question of law or fact; and
- the right to relief in those actions arises out of the same transaction or series of transactions.

(d) Legal status

2.028 It is important to establish the legal status of the plaintiff(s) and defendant(s) in the action. Special provisions affecting the way in which you will need to draft the statement of claim (or defence) and effect service are listed in Checklist 2.2. As pointed out in paras.2.010–2.011, this question is also important in establishing that the person giving you instructions has the authority to do so on behalf of the client.

2.029 An example of the importance of establishing the legal status of the plaintiff is where your client is a sole proprietor of a firm which is not a limited company. Unlike a limited company and unlike a partnership, the sole trader must sue in his own personal name and may not merely use the firm's trading name (although he may be sued in his trading name RHC O.81 r.9).

2.030 An example of the importance of establishing the legal status of a defendant is where you are suing a partnership. The advantage of suing partners in the name of their firm, rather than suing the individual partners, is that service of documents is easier and judgment can be enforced against the property of the firm within the jurisdiction or against the private property of any person identified in the action as a partner pursuant to Order 81 rule 5(2) of the RHC (i.e. any person who acknowledged service of the Writ, or was served with the writ as a partner, or admitted in his pleading or adjudged as a partner). In the normal case you will, therefore, wish to sue a partnership under the firm's name. However, it may be that only one partner has any property worth pursuing, the others being financially destitute. Given that leave is required to enforce a judgment against any person who is not identified in the action as a partner (RHC O.81 r.5(2)) or was out of jurisdiction and did not acknowledge service of the writ, or was not served with the writ in accordance with the requirements of RHC (O.81 r.5(3)), you may wish to join that partner into the action personally.

2.031 A search in the Business Registration Register will sometimes provide the names of the partners and the address for service of all business letters. However, just because a person is not listed as a partner on the Business Registration Register does not mean that

invalid. Furthermore, when you are close to the end of the limitation period (in personal injury cases the limitation period is only three years), or nearing the end of the validity period of the writ (i.e. the 12 months allowed for service of an issued writ), ineffective service can have drastic consequences. There will also be adverse costs consequences for the party failing to effect valid service.

2.053 If it proves impracticable or impossible to serve the writ or statement of claim or any other documents, you should consider making an application to court for an order for substituted service (see Sample Documents 2.7 and 2.8) (RHC O.65 r.4). Before making an application for leave to effect substituted service, ensure that the recommended guidelines set out in the commentary under RHC O.65 r.4 in *Hong Kong Civil Procedure* have been followed.

2.054 If the validity of the writ expires before service can be effected, the plaintiff can apply to the court for leave to extend the validity of the writ for a period of not more than 12 months (RHC O.6 r.8). As it is the duty of the plaintiff to serve a writ on the defendant promptly, the plaintiff must show a good reason for allowing the validity of the writ to lapse (see commentary in *Hong Kong Civil Procedure* under RHC O.6 r.8).

2.055 Once the writ is served, it is very important that all relevant dates are noted in the diary. Effective noting of relevant dates keeps the plaintiff's solicitor aware of the times at which it may be possible to enter judgment in default. As solicitor for the defendant, failure to diarise dates for an important step may result in judgment being obtained against your client.

(a) Judgment in default

2.056 An application for judgment in default of acknowledgment of service can be made for certain types of claims set out in RHC O.13. Essentially, this covers claims for liquidated or unliquidated sums, detention of goods or possession of land. The application is made by filing an affidavit of service and draft judgment for approval. An interest calculation must be made for these purposes.

2.057 Judgment in default of defence may also be obtained for the same type of claims. As a prerequisite to this step, the plaintiff must ensure that two clear days prior notice in writing is served on the defendant where the defendant has filed an acknowledgment of service indicating his intention to defend (see RHC O.19 r.8A and Chapter 4).

2.058 Where judgment in default is sought for other claims, such as claims for an injunction, an application can only be made after the time limited for filing a defence expires (that is, 42 days after service of the writ (including the day of service)), even if the defendant is in default of acknowledgment of service. The application is made by summons and heard by a master or a judge depending on the relief sought (see RHC O.13 r.6 and O.19 r.7). In the case of injunctions, the application should be listed before a judge because masters do not have the power to grant injunctions other than by consent (RHC O.32 r.11(1)(d)).

6. Consideration of the Defence

2.059 When the defendant's solicitor has served and filed a defence to the statement of claim, you will need to read and understand it. In the light of your consideration of the defence,

you should re-analyse the documents and factual background to the case and decide whether or not the points made in the defence are persuasive legally (perhaps more persuasive than your own conclusions when drafting the statement of claim!). You must also decide whether the defendant will have sufficient evidence to support his case.

2.060 The commentary to RHC O.18 r.19 in *Hong Kong Civil Procedure* explains in detail the basis upon which a defence may be struck out in whole or in part and should be read very carefully. Furthermore, if the defence does not disclose any triable issue, consideration should be given to whether to take out an application for summary judgment under RHC O.14 (see Chapter 5).

2.061 Just as before, when the documents were being analysed with a view to drafting the statement of claim, consideration of the evidence is extremely important. If a defendant admits certain facts pleaded in the statement of claim, it will not be necessary to produce evidence to prove those facts. Alternatively, if a fact is denied or expressly not admitted, it will be necessary to produce evidence of that fact at trial. For example, if a defendant does not admit to signing a certain document, the document bearing the defendant's signature will have to be produced at trial and evidence given by someone who saw him sign it or alternatively by someone who can recognise his signature.

2.062 The facts pleaded by the defendant should be compared closely with the facts pleaded in the statement of claim and the evidence should be reviewed with this comparison in mind. It may well be that new facts, hitherto unknown to you, are pleaded by the defendant. Those facts may affect the merits of your case and your client's comments upon the facts will have to be obtained. This stage of preparation is a good opportunity to evaluate your client's case and its prospects of success.

2.063 It may be necessary, because of certain matters pleaded in the defence, for the statement of claim to be amended or for a reply to be served. The question of amendment of pleadings is dealt with in Chapter 4. A reply is not normally necessary and need only be served if it has been decided:

- to plead specifically any matter which makes the claim or defence of the other party unmaintainable — for example performance, release, estoppel, limitation, fraud or illegality;
- to plead specifically any matter which raises new issues of fact;
- to admit part of the other party's pleading — this may save on costs (see generally RHC O.18 r.8 and Checklist 2.7).

2.064 As regards consideration of the contents of a defence to counterclaim, the same considerations apply as to the main defence.

7. Action to be Taken on Behalf of the Defendant

2.065 The considerations that should be addressed by a plaintiff's solicitor generally also apply when advising a defendant to an action. As the defendant's solicitor, you must gain a full understanding of all relevant documents and evidence (written and oral), and

you must analyse the law and evaluate the evidence. You should identify other possible defendants with a view to commencing third-party proceedings (see paras.2.073–2.080) and ultimately, you must assess your client's chances of success at trial.

2.066 Again, noting all relevant dates in the diary (e.g. time for filing of the notice of intention to defend and the defence) is essential and failure to do so may result in judgment being entered against your client. As an example, if default judgment is entered against the defendant for failure to serve a notice of intention to defend, or a defence, he will need to apply to the court to set aside the judgment. In such instances, not only is he required to give a satisfactory explanation on oath of the failure to comply with the rules, he will also have to put forward, again on oath, the merits of his case to satisfy the court that he has a triable defence. Even if the defendant succeeds in setting aside the judgment, only in rare instances will he not be ordered to pay the plaintiff's legal costs occasioned by his set aside application (see also para.4.008).

2.067 It is important to allow yourself sufficient time to draft an adequate defence. Under CJR, bare denial of the averments of fact in the statement of claim is no longer allowed. The defendant has to state the reasons for the denial and put forward his version of events to rebut the allegations (RHC O.18 r.13(5)). Care should be taken when requesting an extension of time to file the defence. While it was normal for at least one extension of time to be granted without having to apply to the court before CJR, this is not necessarily the case now that the defendant has 28 days to file his defence. The plaintiff may insist on, and the court may make, an "unless order" even if an extension of time is granted.

2.068 Before drafting the defence, you should consider whether your client has *any* claims that can be brought against the plaintiff. If so, these may be made in the same action by way of counterclaim (RHC O.15 rr.2 and 3). The counterclaim should be pleaded immediately after the defence in the same document. Such claims do not need to arise out of the same subject matter as the plaintiff's claim. The advantages of bringing a counterclaim are that:

- it does not involve the expense of commencing fresh proceedings (although the court may order that the counterclaim is tried separately from the plaintiff's claim);
- it may reduce the plaintiff's claim against the defendant if a set-off is appropriate; and
- tactically, it allows the defendant to go on the attack in the proceedings.

2.069 When drafting a counterclaim, you should take into account the same considerations as you would if you were commencing a separate action even though the counterclaim is contained in the body of the defence under a heading "Counterclaim" (see Sample Document 2.4). The writ itself must be in Form No 1 in Appendix A to the RHC. Check RHC O.6 to ensure compliance with the rules in drafting the writ (also see paras.2.039–2.047).

2.070 Before drafting the defence and counterclaim, you should familiarize yourself with the terms of RHC O.18 and the notes to it using it both as a guide and as a checklist.

2.071 A counterclaim may constitute an equitable defence by way of set-off against the plaintiff's claim if it arises out of the same transaction or a transaction closely associated

with the transaction which is the subject of the plaintiff's action. A counterclaim can be as large or larger than the plaintiff's claim. A counterclaim will not prevent the plaintiff from obtaining summary judgment against the defendant, for part or all of its claim, if there is no equitable defence by way of set-off. In such a case, the court will enter judgment in favour of the plaintiff with respect to part or all of the main claim and leave the defendant to pursue the counterclaim.

2.072 It is important to bear in mind that where a counterclaim is served with a defence, a defence to the counterclaim must be prepared and filed, irrespective of whether a reply is necessary (RHC O.18 r.3(2)); otherwise the defendant may enter judgment under RHC O.19 on the counterclaim against the plaintiff (see RHC O.19 r.8).

2.073 With a view to facilitating early settlement of claims, a defendant may now make an admission to all or part of a claim. The procedures are set out in the new RHC O.13A introduced under the CJR. This new order applies to monetary claims only (liquidated or unliquidated) and allows a defendant who admits liability to propose terms (such as amount of settlement or time of payment) on which judgment would be entered. The court may then determine any outstanding issues on paper or at a hearing, or give such directions as it considers appropriate

(a) Action by the defendant on third-party proceedings (RHC O.16)

2.074 You may often find that if your client has been joined as a defendant into the proceedings, there are other parties whom the plaintiff has not joined into the action against whom your client can claim and thereby insulate itself from the plaintiff's claim. So, for example, if your client was a clothing distributor who was being sued by the plaintiff for breach of contract due to late delivery, your client may have a claim against the manufacturer of those goods for late delivery. Therefore, just as the plaintiff must consider all possible defendants to its action, the defendant should consider all possible parties against whom or in relation to whom:

- it may claim a contribution or indemnity; or
- it can claim any relief or remedy, including damages, provided this is connected with the subject matter of the plaintiff's claim; or
- a question or issue arises relating to or connecting with the subject matter of the plaintiff's claim which it is appropriate to have decided (RHC O.16 r.1).

2.075 The advantages of commencing third-party proceedings include a saving in costs since the defendant does not have to bring a separate action. Furthermore, third-party proceedings ensure that the court's decision in relation to the defendant's claim will be decided at the same time as the plaintiff's claim, and not at a later date. This avoids inconsistent judgments and may forestall orders requiring payment by your client of the plaintiff's claim when sums are owed by the third party to the defendant.

2.076 It should be remembered throughout the action that the third-party proceedings are regarded by the court as a separate action and that they have a life of their own. Therefore, even if the main action is discontinued or stayed, the third-party proceedings may continue. Just as in the main action, the third party may raise a counterclaim in the

9 Make detailed attendance notes of arrangements and attempts to effect service and use them to swear an affidavit of service in support of an application for default judgment (see Sample Document 4.3), or an affidavit of failure to effect service in support of an application for substituted service (see Sample Documents 2.8 and 2.9). ☐

10 If service is unsuccessful (e.g. if personal service is unsuccessful and/or the writ is returned through the post marked "undelivered") consider applying for substituted service (RHC O.65 r.4). ☐

11 Make a diary note of all relevant dates:
- time for acknowledgment of service is 14 days after (deemed) service of the writ (including the day of service) (RHC O.12 r.5); ☐
- time for service of the defence is 28 days thereafter (RHC O.18 r.2). ☐

12 If no acknowledgment of service is made within time and/or no notice of intention to defend is given, or no defence is filed, consider applying for judgment in default (RHC O.13 and O.19) (see Chapter 4). ☐

13 If notice of intention to defend is given and no statement of claim was endorsed on the writ, make a diary note to draft, serve and file the statement of claim within 14 days after notice is given (RHC O.18 r.1). ☐

14 If there is no defence to the claim or a particular part of the claim, or the only issue is one of quantum, consider applying for summary judgment. ☐

15 File an original signed copy of the pleading at court. *Photocopies will not be accepted.* ☐

16 Endorse the statement of claim with an endorsement of service on the backsheet (see the backsheet to Sample Document 2.2). ☐

17 Endorse the backsheet with the filing date, the action heading (see Checklists 2.2 and 2.4), the action number, the date of service, and the name, address and reference of the plaintiff's solicitors. ☐

18 Take the pleading to the Registry at LG1, High Court Building. ☐

19 Sign the pleading on its last page (not the backsheet). ☐

20 If no defence is served within time, consider applying for judgment in default (RHC O.19 and see Chapter 4). ☐

2.4 Consideration of the Defence

Keep Client Informed Throughout	**Tick information obtained**
1 Consider an application to strike out the defence in whole or in part on the following grounds (RHC O.18 r.19):	
• it discloses no defence; or	☐
• it is scandalous, frivolous or vexatious; or	☐
• it may prejudice, embarrass or delay the fair trial of the action; or	☐
• it is otherwise an abuse of the process of the court.	☐
2 If the defence discloses no valid grounds for a defence, consider an application for summary judgment (RHC O.14).	☐
3 Note the admissions made by the defendant:	
• decide what evidence is necessary to prove the plaintiff's claim;	☐
• consider entering partial judgment on the admissions.	☐
4 Identify what evidence the defendant will need to support its pleaded contentions and whether it will be able to obtain or rely upon such evidence.	☐
5 If the defence raises questions of fact not dealt with sufficiently in the statement of claim (performance, release, limitation, fraud — see RHC O.18 r.8), consider service and filing of a reply (RHC O.18 rr.3, 8 and 14). See Checklist 2.7.	☐
6 If there is a counterclaim, make a diary note of the time for service of a defence to counterclaim.	☐
• 28 days after service of the defence and counterclaim (RHC O.18 r.3).	☐
7 If there is not sufficient time to draft a defence to counterclaim:	☐
• write a letter requesting further time and/or;	☐
• if no agreement to an extension is given or possible, issue, serve and file a time summons — see Sample Document 4.4 (RHC O.3 r.5);	☐
• the time summons must comply with service requirements (RHC O.32 r.3).	☐
See para.2.066 regarding time extensions request	
8 If documents are referred to in the defence, write to the defendant under RHC O.24 r.10 giving notice that within four days it must reply giving a time and place within seven days from the date of the reply for inspection of those documents, or must state the grounds of his objection to doing so.	☐

HCA [*number*]/20[*year*]

IN THE HIGH COURT OF THE
HONG KONG SPECIAL
ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE

ACTION NO [*number*] OF 20[*year*]

Endorsement of Service

I [*name*], a messenger of [*solicitor's firm*] did serve a copy of the Writ and Statement of Claim on the Defendant's solicitors on [*date*].

[*Signature*]

BETWEEN

ABC LIMITED *Plaintiff*

and

XYZ LIMITED *Defendant*

WRITE OF SUMMONS

Dated the [*date*] day of [*month*] 20[*year*]

Name of Solicitors:

Address:

Tel:

Ref:

2.3 Statement of Claim (Served Separately from Writ)

HCA [*number*]/[*year*]

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE

ACTION NO [*number*] OF 20[*year*]

BETWEEN

HENRY YIP *Plaintiff*

and

JOHN COLE *First Defendant*
DAVID CHAN *Second Defendant*

STATEMENT OF CLAIM
(Writ issued on [*date*])

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1. At all material times, the first Defendant was employed by the second Defendant as a driver of motor vehicle registration No AB1234 (the van); and was the servant and/or agent of the second Defendant.
2. At all material times the second Defendant was the registered owner of the van.
3. On the first day of March 2020 at about 7:30 pm, the Plaintiff was driving his motor vehicle registration No CD5678 (the Plaintiff's vehicle) along Kennedy Road in a southbound direction when the first Defendant, whilst driving the van along Cotton Tree Drive towards the junction of Kennedy Road, caused or permitted it to collide with the Plaintiff's vehicle.
4. The accident was caused solely by the negligence and breach of statutory duty on the part of the first Defendant.
5. By reason of the first Defendant's employment and position as servant and/or agent of the second Defendant, the second Defendant is vicariously liable for the first Defendant's negligence and breach of statutory duty particularised below.

Particulars of Negligence

The first Defendant was negligent in that he:

(a) Drove at a speed which was too fast in the circumstances;

(b) Failed to display headlights of the van;

(c) Emerged onto the junction of the roads without first ascertaining or ensuring whether it was safe so to do, and when it was unsafe and dangerous so to do;

2.4 Statement of Damages (for Personal Injury Claim)

HCA [*number*]/[*year*]

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE

ACTION NO [*number*] OF 20[*year*]

BETWEEN

HENRY YIP — Plaintiff

and

JOHN COLE — First Defendant
DAVID CHAN — Second Defendant

STATEMENT OF DAMAGES

1. Personal Particulars of the Plaintiff and Background Information

(1)	Plaintiff's date of birth:	1 January 1978
(2)	Sex:	Male
(3)	Date of accident:	1 March 2021
(4)	Age of the Plaintiff at accident:	43 years of age
(5)	Age of Plaintiff at issue of Writ:	[ ] years of age
(6)	Pre-accident occupation:	Truck Driver
(7)	Pre-accident earnings:	HK$18,000.00 per month
(8)	Pre-trial period	[ ] months from the date of the accident
(9)	Notional date of trial	[date]

2. Summary of Injuries and Treatment Received

(a) The Plaintiff suffered the following injuries:

(i) A fracture of the right femur;

(ii) Considerable bruising over the body, in particular, severe bruising over the forehead and cheeks; and

(iii) As a result of the accident, the Plaintiff has been suffering from recurring migraines and nightmares that have prevented the Plaintiff from returning to work since the accident.

(b) The Plaintiff received the following treatment:

(i) He was the treated at [ ] hospital between the [date] and [date] for the fracture and bruising, including physiotherapy.

(ii) He was treated by a Chinese bonesetter on the [dates] for the fracture.

(iii) He has received treatment and continues to receive treatment for the recurring migraines and nightmares from a psychologist.

(c) The Plaintiff has suffered the following disabilities:

(i) With regard to the fracture and bruising the Plaintiff has not suffered any permanent disability.

(ii) With regard to the migraines and nightmares, the Plaintiff continues to receive treatment. To date, it is not practicable to make a prognosis as to this disability.

3. Pain, Suffering and Loss of Amenities

The Plaintiff's injuries fall within the "serious injury" category. The Plaintiff claims a sum of not less than HK$[amount].

4. Pre-trial Loss of Earnings

With regard to loss of earnings, at the time of the accident, the Plaintiff was working as a truck driver in DEF Ltd, a well-known transportation company, earning a monthly salary of HK$18,000.00. By reason of the accident, the Plaintiff was granted sick leave since the date of the accident until [date]. The loss of earnings claimed by the Plaintiff during the period from he was on sick leave is approximately HK$[amount] [HK$[monthly salary x number of months] plus the corresponding Mandatory Provident Fund at [HK$[monthly salary × 5% × number of months]].

5. Special Damages

The Plaintiff claims the following special damages:

(i)	Hospital charges:	HK$[amount]
(ii)	Costs of medical treatment by Chinese bonesetter:	HK$[amount]
(iii)	Nutritious food:	HK$[amount]
(iv)	Costs of travelling from home to hospital and return for physiotherapy treatment:	HK$[amount]
(v)	Cost of repairing motor vehicle registration No CD5678:	HK$[amount]
(vi)	Loss of a pair of glasses, suit, and a Du Pont fountain pen:	HK$[amount]

TOTAL: HK$[amount]

6. Future Medical Expenses

The Plaintiff is still receiving psychiatric treatment in government hospitals or private clinics due to the migraines and nightmares, as a result of the accident. Therefore the Plaintiff will incur further medical expenses in the future. The Plaintiff estimates that future expenses for continued psychiatric treatment, together with any related expenses thereon such as travel expenses, will be HK$[amount].

7. Interest

The Plaintiff claims interest on PSLA at 2 per cent per annum from the date of the Writ to the date of judgment. Interest on the aggregate of items (i) to (vii) in para.3 above is calculated at half judgment rate from the date of the accident to the notional date of the trial.

8. Summary of Claim

PSLA

Pre-trial loss of earnings

[Set out all other items and their respective amounts.]

TOTAL: HK$[amount]

Dated the [date] day of [month] 20[year].

[*Name of counsel if settled by counsel*]

[*Name of firm*]
Solicitors for the Plaintiff

Statement of Truth

I believe the facts stated in this Statement of Damages are true.

Henry Yip

2.5 Defence and Counterclaim

HCA [*number*]/20[*year*]

IN THE HIGH COURT OF
THE HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE

ACTION NO [*number*] OF 20[*year*]

BETWEEN

ABC LIMITED *Plaintiff*

and

XYZ LIMITED *Defendant*

DEFENCE AND COUNTERCLAIM

DEFENCE

1. Paragraphs 1, 2 and 3 of the Statement of Claim are admitted.
2. Save that the Plaintiff's order note dated 9 January 2021 contained some of the terms of the Purchase Contract, para.4 of the Statement of Claim is not admitted.
3. Paragraph 5 of the Statement of Claim is denied. Save that there was a conversation between the Plaintiff and the Defendant on 9 March 2021, no agreement was reached as to the terms of the Purchase Contract as alleged. The agreement reached was for delivery of the 500 jackets and 500 suits (the contract goods) by 1 May 2021 and for payment of an additional HK$200,000.00 should delivery be made on or before 1 May 2021.
4. Paragraph 6 of the Statement of Claim is admitted.
5. The Defendant has no knowledge of the matters pleaded in para.7 of the Statement of Claim as alleged or at all. The Defendant puts the Plaintiff to strict proof of the matters stated therein.
6. Save that a sum of HK$3,000,000.00 was received by the Defendant from the Plaintiff on 11April 2021 in the form of a banker's draft no 12345 issued by [*name of bank*], no admission is made as to para.8 of the Statement of Claim.
7. Paragraph 9 of the Statement of Claim is not admitted and the Plaintiff is put to strict proof thereof.
8. Paragraph 10 of the Statement of Claim is denied. The Defendant avers and says that pursuant to the agreement reached on 9 March 2021 pleaded in para.3 above, the date for delivery of the contract goods was varied by an extension of one month from 1April 2021 and therefore the delivery of the contract goods to the Plaintiff on 10 April 2021 was made in accordance with the terms of the Purchase Contract as subsequently varied.

2. The Preparation of a Summons

3.008 A summons is a document which, broadly speaking, falls into four sections (see Sample Document 3.1).

3.009 First, there is the title of the action naming the parties, the case number and so on.

3.010 Second, there is the formal part of the summons from which the document takes its name: this is the part which requires (or summons) the parties to attend the court before a particular master or judge at a certain time and place to hear an application made by one of the parties to the action.

3.011 The third part of the summons is by far the most important. This is the part which sets out the nature of the application or the order which is being sought (see paras.3.014–3.019).

3.012 Finally, the summons ends with certain formalities: it is dated, bears the name of the court's Registrar, shows the name of the solicitors who issued it and the estimated length of the hearing. This part of the summons also shows that the document is addressed to the solicitors for the other parties to the action.

3.013 Every summons must have a stiff card corner at the top left-hand side where it is stapled. A hole must be punched through the corner so that the original summons can be filed. It is proper practice to include a reference in the left margin to the order and rule of the RHC under which the application is made. If the application is made under the inherent jurisdiction of the court, this should be indicated in the left margin.

(a) Drafting the part of the summons dealing with the application

3.014 The importance of drafting this part of the summons correctly cannot be overstated. In effect, drafting this part of the summons amounts to drafting the order which the party is asking the court to make. If the application made by the summons is entirely successful, the order granted by the master or the judge will be set down in the same terms as those used in this part of the summons. At the end of a successful application, the master or judge may simply say, "OIT", i.e. "order in terms". That phrase indicates that the order is made in the terms set out in the summons. Your object, therefore, in drafting this part of the summons will be to set out the precise terms of the order which the court is being asked to make.

3.015 There are two obvious reasons why that precision is required. The first is that lack of precision in the summons may mean that the court will not grant the order. For example, in an application to strike out pleadings under RHC O.18 r.19, the application should specify precisely what order is being sought (to strike out or amend the pleading or indorsement of the writ). It should also state precisely what is being attacked — that is to say, whether it is the whole pleading or only parts of the pleading which are attacked and the grounds relied upon. If only parts of the pleading are attacked, then the offending parts should be clearly specified.

3.016 To take another example, in an application for leave to amend a writ or pleading under RHC O.20 r.5, the intended amendments should be set out precisely, because in practice, leave to amend is given only when and to the extent that the proposed amendments have been properly and exactly formulated in the summons or the pleading with the intended amendments annexed to the Summons.

3.017 The second reason that precision is required in drafting this part of the summons is that if the order is drafted imprecisely, it may be unenforceable either for technical reasons, or because loose drafting of the order allows the person to whom the order is directed to claim either that he has complied with the order, or that the order does not, for some reason, apply to him.

3.018 Many examples can be found of orders which may be too imprecise to achieve their intended effect. For example, in an application for specific discovery under RHC O.24 r.7, an order requiring the other party to make an affidavit stating whether he has certain letters relating to the matter in issue will not require him to include in his affidavit details of other communications such as faxes or emails or messages sent by social media.

3.019 The principle can be very important where injunctions are sought because courts are particularly reluctant to punish a party for having committed a contempt of court by failing to comply with an order if it is unclear that the order prohibits the steps taken by the alleged guilty party.

(b) Costs

3.020 The summons should include a paragraph dealing with the costs of the application. In some cases the rules or practice require that a particular order for costs should normally be made. For example:

- the costs of and occasioned by any application to extend time are to be borne by the party making the application unless the court otherwise orders (RHC O.62 r.3(4)); and
- in an application for leave to amend it is usual to provide that the costs of and occasioned by the amendments shall be to the other party in any event. (However, if the other side opposes the amendments and leave is granted for the amendments to be made, they may be ordered to pay the costs of the hearing.)

3.021 In general, costs of or incidental to any proceedings (including interlocutory proceedings) should follow the event, i.e. the successful party should be awarded his costs (RHC O.62 r.3(2)).

3.022 It is now common for masters or judges to make a summary assessment of the costs of interlocutory applications in lieu of taxation (see RHC O.62 r.9A). Practice Direction 14.3 (Costs) provides the rules for summary assessment of costs and specifically provides that taxation of costs is not the preferred method for dealing with costs of interlocutory applications. Summary assessment can often result in less than 50 per cent of the costs incurred in an application being recovered by the successful party.

3.023 This practice is to discourage litigants from making applications for full taxation unless it is absolutely necessary to do so. It also serves to penalise litigants who have acted unreasonably. For summonses listed for 3 minutes or less the costs awarded are usually HK$800.

4. Procedure Once the Date for Hearing the Summons Is Fixed

3.033 The listing officer responsible for fixing the dates (see paras.3.028–3.032), will fix a label on the original summons presented to him showing the time and date of the hearing and the master or judge who will hear the application. The solicitor's clerk should then jot down this date and go to the filing counters on LG1 of the High Court Registry where he presents the summons for filing. The original summons is retained by the court and placed on the court's file for the case.

3.034 At this stage the summons has been issued. The solicitor's clerk will normally return to the office to notify the solicitor of the time for the hearing so that the copies of the summons can be served. However, if there is some urgency and the clerk has taken with them a sufficient number of summonses to court, he may enter the time and date on the copies (one for each of the other parties) and proceed to serve them by hand at the offices of the solicitors for the other parties. However, it is good practice and professional courtesy for summonses to be served with a covering letter or at least a compliment slip bearing the reference of the case-handler.

5. Service of the Summons

3.035 A summons must normally be served by delivering a copy of the summons to every other party no later than at least two clear days before the hearing date, except where the summons is only asking for an extension or abridgement of time, when it may be served the day before the hearing date (RHC O.32 r.3). However, the time required for serving certain other types of summons is longer, e.g. a summons for interim payment has to be served on the defendant not less than ten clear days before the return day (RHC O.29 r.10(4)). You should therefore always check the court rules before issuing and serving a summons.

3.036 In practice, summonses are usually served on the other side once they have been issued out of the court, well in advance of the relevant time limit set down under RHC. This is because, with the exception of a time summons, it can take between one to two weeks from the date of issue of the summons for a 3-minute hearing to be heard, and over a month for a 30-minute hearing to be heard. There may be longer waiting periods when the court diary is busy, particularly before court vacation time. It is, therefore, good practice to serve the summons on the other side as soon as it is issued so that the party taking out the summons does not forget about serving it. It also gives the recipient of the summons time to consider the case and to see if any agreement can be reached.

3.037 Service of the summons can be by "ordinary service" as the rules do not require "personal service" (RHC O.65 r.1). Ordinary service may be effected by any means set out in RHC O.65 r.5. The means available are:

- by leaving the document at the proper address of the person to be served; or
- by post; or
- where the address includes a numbered box at a document exchange by leaving the document at that exchange (though this document exchange system is rarely used nowadays); or
- in such other manner as the court may direct.

3.038 Usually, the "proper address" will be the business address of the solicitor for the party (RHC O.65 r.5(2)(a)) if represented. The rules do not deal with service by facsimile transmission or by other electronic means.

3.039 There is a practice in Hong Kong of serving summonses (and other documents) simply under cover of a compliment slip and sometimes even without it. Technically this is good service as the rules do not require a covering letter to accompany a document when it is served. However, it shows a lack of courtesy to fellow solicitors. In addition, having a covering letter on the correspondence file is a useful record of the date of service of a document particularly if the letter is stamped with a chop from the other parties acknowledging receipt. Irrespective of whether the summons is served under a compliment slip or a letter, the compliment slip or letter should clearly show the other parties' reference and the name of the handling solicitor so that it can be brought to his attention without delay.

6. Time Summons

3.040 RHC O.3 r.5(3) specifically provides that consent for an extension of time to file any pleading or document may be given in writing without a court order. Parties should not issue a time summons if the time extension can be agreed in correspondence to save the court's time in dealing with a time summons, even if it is a consent summons as it simply is unnecessary.

7. Preparing for the Interlocutory Summons Hearing

3.041 PD 5.4 (Preparation of Interlocutory Summonses and Appeals to Judge in Chambers for Hearing) provides detailed rules for the preparation for hearing of interlocutory summonses. PD 5.4 also applies with suitable adaptations in the District Court. PD 5.4 does not affect the operation of the Practice Directions for the Construction and Arbitration List (PD 6.1), *ex parte*, Interim and Interlocutory Applications for Injunctions (PD 11.1), the Personal Injuries List (PD 18.1), the Constitutional and Administrative Law List (PD SL3), the Intellectual Property List (PD 22.1) or for family law practice.

3.042 It is expressly provided by PD 5.4 that those not observing or complying with the directions may be called upon to explain such failure and, in the absence of a satisfactory explanation, may be penalised in costs irrespective of whether or not they are the parties who succeed on the application. It is therefore important for solicitors to comply with this direction (PD 5.4 para.30).

3.043 In respect of all contested interlocutory summonses which are listed for more than 30 minutes before a master or judge, or for disposal on the papers by a master (except interlocutory injunctions which are dealt with in Chapter 6, time summonses or cases

when an agreed order is sought), the parties are expected to agree on the contents of the hearing bundles to include all relevant pleadings, summonses, orders, affidavits/affirmations, exhibits and correspondence; a chronology of events cross-referenced to the hearing bundles; and where appropriate, a *dramatis personae*. Detailed rules are provided in PD 5.4 for preparing the hearing bundles and these should be referred to.

3.044 The applicant must serve on the other parties and the court a short, succinct skeleton submission specifying the order sought; the grounds upon which the order is sought; the evidence and authorities relied upon; the relevant rules of the High Court; and the paragraph numbers of any commentary relied upon in *Hong Kong Civil Procedure*. Where there are case authorities, copies of these must be annexed to the list of authorities and the skeleton submission should cite references to passages relied upon. These, along with the hearing bundles, chronology of events and *dramatis personae*, must be lodged with the court and served on the other party or parties at least 72 hours before the hearing (excluding Saturdays, Sundays and general holidays) (PD 5.5 (Submission of Authorities)). Photocopies of the authorities cited, except for RHC and commentary from *Hong Kong Civil Procedure*, should be annexed to the list of authorities. PD 5.5, Submission of Authorities, was re-issued in 2017 and provides that only unreported judgments need to be submitted and that the Clerk of the Court will arrange for copies of reported judgments. However, the almost universal practice of advocates is to submit all authorities, including reported judgments.

3.045 At least 48 hours before the hearing, the respondent to the summons must serve on the other party and lodge with the court a short, succinct skeleton submission in response to that of the applicant's, indicating which part of the order is opposed and the grounds of opposition; which part of the evidence is relied upon if different to the references in the applicant's skeleton submission; and whether there are any other rules of the High Court or passages in *Hong Kong Civil Procedure* to be relied upon. The respondent's skeleton submission should also, if applicable, cite with appropriate references any other case authorities to be put forward, any different orders that are being sought, and if so, why that is more appropriate, with reasons including any authorities to be relied upon. Where the respondent seeks to rely on additional authorities, these should be annexed to the list of authorities as is required by the applicant.

3.046 While a skeleton argument should be short and succinct, it should at the same time be comprehensive in that it should state all the points which a party intends to take and summarise the argument on each of those points. A point not taken or an argument not advanced in a party's skeleton argument may not be pursued at the hearing of the application or appeal without the leave of the court (PD 5.4 para.7).

3.047 For hearings of less than 30 minutes before a judge (except summonses for extension of time and unless orders) (PD 5.4 Part B), the applicant and the respondent should lodge with the court and serve on the other party a skeleton argument and the authorities 72 and 48 hours respectively before the hearing (excluding Saturdays, Sundays and general holidays). The skeleton arguments should be brief, generally no more than two pages. Each party should inform the judge's clerk in writing of the court documents, affidavits/affirmations and exhibits which are proposed to be referred to at the hearing.

3.048 Under RHC O.32 r.11A a master or judge may dispose of a case on the papers. This procedure was rarely used prior to the COVID-19 pandemic. However, during the

pandemic, numerous applications were disposed of on paper and it is likely that the courts will continue to dispose of more cases on the papers. If the master or judge decides to proceed in this way, he will give directions for filing of affidavits/affirmations and skeleton arguments to dispose of the summons. If a party wishes to seek summary assessment of costs, a statement of costs should be enclosed with the skeleton arguments (PD 5.4 Part D).

3.049 If you can realistically predict that your application is likely to be successful, you should consider whether to prepare a costs schedule in case the master or judge orders the costs to be assessed summarily (RHC O.62 r.9A). If the master or judge is inclined to make an order for a summary assessment of costs in lieu of taxation, the losing party will be ordered to pay the allowed costs forthwith or within a reasonable time.

8. Hearing the Summons

3.050 The hearings of the vast majority of applications made by summons are conducted by solicitors admitted in Hong Kong who have rights of audience at all hearings in chambers. In the case of hearings before a master in chambers which are uncontested or are estimated to last 3 minutes or less, PD 14.1 (Rights of Audience Before a Master) extends rights of audience to:

- a trainee solicitor, including a trainee solicitor on secondment to a solicitor in Hong Kong from a firm of solicitors in England and Wales;
- a legal executive, who has successfully completed the Hong Kong Polytechnic University Legal Executive course (with three years' legal work experience);
- a holder of the Associate Degree/Higher Diploma in Legal Studies from the City University of Hong Kong (with three years' legal work experience);
- a holder of the Diploma in Legal Studies from the School of Professional and Continuing Education of the University of Hong Kong (with three years' legal work experience);
- a member of the English Institute of Legal Executives;
- a legal executive, who is a holder of the Higher Diploma in Legal and Administrative Studies from the Hong Kong Institute of Vocational Education (Tuen Mun) (with three years' legal work experience);
- a legal executive, who is a holder of the Higher Diploma for Legal Executives from the University of Hong Kong School of Professional and Continuing Education (with three years' legal work experience);
- a legal executive, who is a holder of the Professional Diploma for Legal Executives from the Hong Kong Institute of Vocational Education (Tuen Mun) (with three years' legal work experience);
- a legal executive, who is a holder of the Higher Diploma in Law and Administration from the Hong Kong Institute of Vocational Education (with three years legal work experience); and

3.087 The document is not annexed to the affidavit (in the sense of being physically attached to it) but it is identified by a certificate of the person before whom the affidavit is sworn which is attached to the front of the document (RHC O.41 r.11) (see Sample Documents 3.2 and 3.3).

3.088 You should take care when preparing copy documents to be used as exhibits that all pages of the copy are properly legible. If it is not possible to make legible copies, then the text of the document (or the relevant part thereof) should be retyped and included as part of the exhibit. The text of the affidavit should explain what has been done.

11. The Form of an Affidavit

3.089 The form of an affidavit is governed by RHC O.41 r.1 and by PD 10.1 (Affidavit Evidence). The affidavit should start with the heading of the action, including the action number. The text of the affidavit must commence by stating that the deponent "makes oath", or in the case of an affirmation, by stating that the deponent "solemnly and sincerely affirms" the text.

3.090 The affidavit must be expressed in the first person and must state the place of residence of the deponent and their occupation. If he is a party or is employed by a party, the affidavit must state that fact. Where a deponent is giving evidence in a professional, business or other occupational capacity, the affidavit may, instead of stating the deponent's residence, state the address at which he works.

3.091 Every affidavit must be divided into paragraphs numbered consecutively and each page must be numbered consecutively. Dates, sums and other numbers must be expressed in figures and not in words. Every affidavit must be signed by the deponent and the *jurat* must be completed and signed by the person before whom it is sworn.

3.092 A *jurat* is the statement at the end of the affidavit alongside which the deponent places his signature. The *jurat* states the date when and the place where the affidavit was sworn. Below the *jurat* there is a statement that the swearing of the oath took place "Before me". The solicitor or other person who witnessed the oath signs his name at this point. It is important for the court to be able to identify the person before whom the affidavit was sworn, so it is common practice for the solicitor's name and firm to be added at this point by means of a rubber stamp. An affidavit cannot be sworn in front of the solicitor who is acting for one of the parties or any other person in that solicitor's firm. Most firms have arrangements with nearby firms whereby they agree to swear affidavits for each other. It is also possible for the deponent to appear before the Commissioner for Oaths on LG1 of the High Court Building for the purpose of swearing an affidavit to be used in Hong Kong court proceedings. The *jurat* should appear on a page which has at least some of the text of the affidavit on it (*Hong Kong Civil Procedure* 41/1/9).

3.093 An affidavit signed outside Hong Kong must be signed before a local notary public (RHC O.41 r.12(2)) or a Chinese Consular Official (Oaths and Declarations Ordinance (Cap.11) s.10). A Hong Kong solicitor only has power to take an oath in Hong Kong. Since 1 July 1997, it is no longer possible to sign affidavits in Commonwealth countries before a solicitor.[2] Signing affidavits before Chinese Consular Officials can also be difficult. Some officials have refused to take oaths from non-Chinese citizens or may refuse to verify documents that contain hearsay.

3.094 Where the deponent is not fluent in the language the affidavit is drafted in, the common practice is for a further *jurat* to be added after a certificate stating that some person has translated the affidavit to the deponent and that the deponent has fully understood the contents thereof. The translator then signs the affidavit in front of the person before whom it is sworn (see Oaths and Declarations Ordinance s.8 and Sample Document 3.2).

3.095 PD 10.1 sets out requirements concerning markings which must be made on the top right corner of the first page of every affidavit and also on the backsheet, and also gives guidance on how exhibits are to be prepared, numbered and arranged generally. There is no substitute for reading the relevant practice directions carefully on each occasion when an affidavit is prepared until you are thoroughly familiar with its requirements.

12. Filing Affidavits

3.096 Every original affidavit and its exhibits must be filed at court. Holes must be punched in the top left-hand corner of the documents to facilitate filing (see also RHC O.41 r.9).

3.097 The solicitors for the parties should also ensure that they serve copies of the affidavits, with exhibits, on the other parties involved. Some rules specify the time for service of evidence and, as stated above, it is generally sensible in a complex application for the parties to agree some timetable for the exchange of evidence. In other cases, evidence should be served at least two clear days before the hearing of the application.

3.098 It can often be the case that a deponent approves a draft affidavit by telephone, fax or email but that he cannot swear the affidavit until some later date (or it can be sworn overseas but will take some time for the original to arrive in Hong Kong). In such cases where time limits are tight and the solicitor is confident that the deponent will not alter the affidavit, the normal procedure is for the solicitor to swear an affidavit attaching the unsworn draft or scanned copy of the sworn affidavit and file and serve this. That way, the other side can start to consider the evidence as soon as possible. The sworn version of the affidavit can be served formally when that becomes available. Similarly, draft affidavits can be used in the same way before a judge hearing an urgent interlocutory application, e.g. an *ex parte* injunction application, within an undertaking by the solicitor to file and serve the sworn version as soon as it is available and/or received.

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[2] *Top Flying Investment Ltd v Open Mission Assets Ltd* [2006] 4 HKLRD 83 and commentary to RHC O.41 r.12 in *Hong Kong Civil Procedure*.

interlocutory judgment will be entered regarding liability and a date will be fixed with the court for a master to assess the damages (see Sample Document 4.2). If, however, it is a mixed claim for both liquidated and unliquidated damages, a combination of final and interlocutory judgment will be entered (see Sample Document 4.2). If an injunction or other relief sought does not fall within the types of claims mentioned in O.13 rr.1–4, it is not possible to enter judgment in default of acknowledgement of service and instead the action should proceed. If the defendant does not file a defence in due time, the plaintiff may apply to enter judgment in default of defence (see para 4.012 below.) It is possible to abandon that part of the claim that does not fall within rr.1–4 and enter default judgment.

4.007 RHC O.13 r.8 makes provision for a defendant to apply for a stay of execution of a default judgment.

4.008 The court may set aside or vary any judgment entered pursuant to RHC O.13 r.9. In the case of a regular judgment, that is where service has been properly effected, the defendant must show a "real prospect of success" to have the judgment set aside. In the case of an irregular judgment, that is one where some procedural defect has occurred in the proceedings, the judgment will normally be set aside, however, there remains a residual discretion not to set aside the judgment (see *Maryo Development v Tsang Yau May*[1] and *Brown v Lehman*[2] for analyses by the Court of Appeal of the principles relating to default judgments.)

(c) Admission in claim for payment of money (RHC O.13A)

4.009 If the only remedy sought by a plaintiff is for the payment of money, the defendant may admit the liquidated or unliquidated claim in part or in whole by completing the RHC Appendix A Form 16 or 16C which accompanies the acknowledgment of service. Where the claim is for liquidated damages, the defendant can when admitting the claim make certain proposals regarding payment arrangements, including date of payment or payment by instalment (see RHC O.13A r.9). Such proposals will need to be filed with the defendant's admission of the claim.

4.010 The plaintiff may obtain judgment by filing the appropriate request for judgment form (see RHC Appendix A Forms 16A, 16B or 16E). If the plaintiff has claimed interest, the judgment must include the amount of interest claimed to the date of judgment (see RHC O.13A r.12).

4.011 If the plaintiff accepts the defendant's proposals contained in the request for time to pay, the plaintiff should indicate accordingly on the request for judgment. If the plaintiff does not accept the request for time to pay, the plaintiff should indicate so accordingly on the request for judgment form, whereafter the court will enter first judgment in favour of the plaintiff in the amount admitted (less any payments made) and then determine the date, times, and rate for payment taking into account any information and reasons provided by the parties (see RHC O.13A r.10).

[1] (CACV 101/2015, HCA 2297/2012, 271/2013, [2016] HKEC 74).
[2] (CACV 119/2012, [2016] HKEC 1651).

(d) Default of defence (RHC O.19)

4.012 If the defendant fails to serve a defence within the prescribed time, having acknowledged service of the writ and indicated that he wishes to contest the proceedings, the plaintiff can enter judgment in default with final judgment for a liquidated amount (see RHC O.19 r.2 and Sample Document 4.1) or for an unliquidated claim, interlocutory judgment with damages to be assessed (see RHC O.19 r.3 and Sample Document 4.2). For other claims, such as those seeking injunctive relief, it is necessary to issue a summons for default judgment (see RHC O.19 r.7). It is necessary to proceed in this way even if the Defendant has not filed an acknowledgement of service (see RHC O.13 r.6).

4.013 If the statement of claim was endorsed on the writ, the defence must be filed within 28 days of giving notice of intention to defend. If the statement of claim was served separately, the defence must be filed within 28 days of service of the statement of claim.

4.014 Judgment in default of defence shall not be entered against a defendant, in the situation where a defendant has filed an acknowledgment of service giving notice of intention to defend, or on a counterclaim, without two clear days' notice of the intention to do so (see RHC O.19 r.8A) given to the defendant or his solicitors (if the defendant is legally represented). The notice can be given at any time after the defendant has filed the acknowledgment of service form. It is not necessary to wait until after default of service of the defence. Evidence of service of the notice of intention to enter judgment by way of affidavit must also be filed with the court.

4.015 If the defendant serves a defence before judgment is entered, default judgment cannot be entered, even if the defence is served out of time.

(e) Prerequisite for entering default judgment

4.016 Before entering default judgment, the plaintiff has to prove that the writ was served properly. An affidavit giving evidence of proper service of the writ will therefore have to be filed at the time of the application for default judgment (see Sample Document 4.3).

(f) Costs

4.017 The plaintiff will be entitled to fixed costs upon entering default judgment under either RHC O.13 r.1, RHC O.19 r.2 or under RHC O.13A without hearing (see RHC Sch.2 to O.62 for the current scale of costs). If judgment is entered under RHC O.19 r.7, the court has a discretion to award costs as it sees fit.

3. Time Summons

4.018 The court rules give the court power to extend or abridge the time within which a person/entity is required by the rules, judgment, or other direction of the court to do any act in the proceedings (see RHC O.3 r.5). A common example of the court exercising this discretion is when it allows the defendant more time to file his defence. However, post-CJR (pursuant to which the time for filing of pleadings has been extended from 14 days under the old court rules to 28 days) and pursuant to the court's enhanced case

management powers, the court is now more likely to grant time extensions in the form of "unless" or peremptory orders.

4.019 There are various rules for calculating periods of time, depending on the wording used. Reference should always be made to RHC O.3 r.2 and Part X of the Interpretation and General Clauses Ordinance (Cap.1) which set out rules for computing time. For example, "within two weeks" does not mean the same as "after the expiry of 14 days", and there are special rules about what "a day's notice", "within a specified period", and "clear days" mean and what happens when time expires on a Sunday or during the holiday period. Sundays and holidays are not counted if the period specified for doing an act is less than 7 days. Always check carefully exactly when time will expire. Note the exclusion of the summer vacation for the computation of time for filing, serving and amending pleadings (see RHC O.3 r.3 and RHC O.64 r.1) as well as the running of time for periods not exceeding one month during the summer vacation (see High Court Ordinance (Cap.4) s.31).

4.020 Many claims are complicated and a statement of claim often runs to many pages. When advising a defendant who has been served with a lengthy or complicated statement of claim, a solicitor will need time to discuss the matter with the client in order to understand the claim, to research the position and thereafter to advise the client. He may well wish to instruct counsel to draft or at least settle (i.e. review and approve) the defence. He will perhaps need time to take statements from the client and prepare any necessary instructions to counsel. Counsel (if instructed) will also need time to make the necessary preparations. It is sometimes impossible to do all of the above within 28 days. However, as set out in para.4.018, the court will often now only grant an order for an extension of time to file the defence on the basis of an "unless" order in order to facilitate the expeditious resolution of the dispute.

4.021 Before issuing a time summons, the defendant's solicitor should request an extension of time from the plaintiff. While it was normal practice for the plaintiff to consent to one request for a reasonable extension of time for service of the defence before the CJR, one must not assume that such consent is readily given now that the defendant has 28 days within which to file his defence pursuant to the post CJR rules. It is not uncommon for the plaintiff to consent to an extension but on the basis of an unless order. If a request for an extension is refused by the other side, an application to court will be necessary.

4.022 If the plaintiff consents to the defendant's request for an extension of time to file the defence or if the court makes an order granting an extension of time to file the defence or any document which does not impose any special terms or special directions, no order needs to be drawn up (see RHC O.42 r.4(2)). The practice in Hong Kong is for the consenting party to endorse his consent to filing out of time on the back sheet of the defence or other pleading for which an extension of time for service is sought and granted before the same is filed at court.

4.023 A time summons can be taken out in any action. It can be taken out even after the time allowed for doing something has expired, although the application should obviously be made and a hearing fixed before the expiry of a time limit, wherever possible. This is because the issue of a time summons does not stop time running for the stage in the action for which the extension of time is sought. You should, therefore, issue a time summons as soon as possible if the other side refuses to grant you an extension of time (see Sample Document 4.4).

4.024 A time summons will be heard before a master in chambers, and such hearings, when contested, are often the new practitioner's first experience of advocacy. Whilst the applications may seem fairly trivial, they can be of crucial importance and you should always prepare your arguments carefully in advance. The master will almost invariably grant a reasonable extension (subject to the comments set out at paras.4.018 and 4.020 on unless orders) although the applicant will usually have to bear the other side's costs (fixed costs of HK$800) occasioned by the application. There is no need to draw up an order which does not impose any special terms or special directions other than directions as to costs (see RHC O.42 r.4(2)). Some solicitors consider it appropriate to insist on a consent summons to extend time so as to be paid the HK$800 fixed costs. RHC O.3 r.5(3) specifically provides that a time extension can be granted by consent and in writing. It is sufficient, therefore, that the extension is recorded in correspondence. Insisting on a consent summons for the extension in order to be paid HK$800 is wrong and is an unnecessary use of the court's time as the court still has to deal with the consent summons.

4. Further and Better Particulars (RHC O.18)

4.025 Every pleading must contain the necessary particulars of the claim, defence or other matter pleaded (RHC O.18 r.12). If a pleading is vague or otherwise insufficiently particularised, the other side is entitled to seek "further and better particulars" of the pleading so that he knows the scope of the case he has to meet and so that unnecessary expense is avoided and parties are not taken by surprise at trial.

4.026 The court will not order further and better particulars in favour of the defendant before he has filed his defence unless it is essential to do so in that, without such particulars, the defendant will not know the case being made against him and so will be unable to plead in response, or for some other special reason (see RHC O.18 r.12(5)). Subsequent to the CJR, no order for particulars will be made at all unless the court is of the view that the order is necessary either for disposing fairly of the cause or matter or for saving costs (see RHC O.18 r.12(3)(A) and (3)(b)).

4.027 An application for further and better particulars should always be preceded by a request by letter to the other side's solicitor seeking the information believed necessary to clarify the pleading (see RHC O.18 r.12(6)). There is a particular format for a request for further and better particulars (see Sample Document 4.6) and for a proper response (see Sample Document 4.7 — Sample Document 4.5 is a sample statement of claim on which Sample Documents 4.6 and 4.7 are based). The request should be sent under cover of a letter to the other side requesting a reply within a reasonable period, usually 14 days. If no adequate response is received to this informal request, an application should be made to court.

4.028 Where an application to court is necessary, the application is made to a master. Usually, the party seeking further and better particulars will indicate their intention to do so in

does not require leave if made *before* service of the writ on any party to the action (see RHC O.20 r.1(3)).

4.042 A first amendment is shown in red, a re-amendment in green, a third amendment in violet, followed by yellow if yet further amendments are required (see Practice Direction 19.1 (Pleadings) and Sample Document 4.10).

4.043 The application for leave to amend will be heard by a master in chambers. Usually, the party who needs to amend will have to pay the other side's costs of and occasioned by the application, as well as the costs of any consequential amendments the other side needs to make to its pleadings. However, costs of the hearing may be ordered against the opposing party if the amendment sought is reasonable and the objection is unreasonable.[4] The test to be applied by the court in deciding whether to allow an amendment of a pleading remains as it was under the pre-CJR regime subject to the underlying objectives of the CJR.[5]

4.044 If an application for leave to amend is made too late in the proceedings, the application may be refused. There must however be prejudice to the opponent of the applicant, which cannot be compensated in costs, as well as undue delay.[6] Under the CJR, the courts have become much stricter in relation to late applications of any type and will often refuse late applications to amend pleadings on the basis of delay alone (see PD 5.2 (Case Management) para.34.)

6. Application for Interim Payment (RHC O.29 Pt.II)

(a) Object

4.045 The object of an interim payment is to reduce the hardship or prejudice that a plaintiff may suffer during the interval between commencement of the action and judgment. An interim payment is usually sought when the plaintiff has a strong case on liability and is seeking to recover damages, debt or other sums of money. It may be that as a result of an accident giving rise to the claim (usually in personal injury claims) the plaintiff is unable to work or requires special nursing care or equipment. In such cases it is particularly appropriate to consider applying for an interim payment.

(b) The application

4.046 An application may be made by the plaintiff to a master at any time after service of the writ on the defendant and expiry of the time limit for acknowledgment of service. If there is more than one defendant, it is not necessary to wait until all defendants have been served. An application can be made against any defendant in respect of which the limit

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4 *Lessy SARL v Pacific Star Development Ltd* [1996] 2 HKLR 1. Discussed and approved by the Court of Appeal in *Asgain Co Ltd v Cheng Ka Yan* [2017] 4 HKLRD 779 on the wider principle that unnecessary opposition to an application will result in costs being awarded against a party.

5 *Global Bridge Assets Ltd v Sun Hung Kai Securities Ltd* [2011] 4 HKC 9.

6 *Tang Shun Hay v Jetline Co Ltd* [2000] 1 HKC 417; *Honey Bee Electronic International Ltd v Golden Lucky Co Ltd* [2007] 3 HKLRD 524.

for acknowledgment of service has expired. The application takes the form of a summons supported by an affidavit (see RHC O.29 r.10) (see Sample Documents 4.13 and 4.14).

The application can also be made during the summer vacation (see PD 8.2 (Vacation Business in the High Court)). **4.047**

The affidavit must: **4.048**

- verify the amount of the damages, debt or other sum to which the application relates and the grounds of the application;
- exhibit any documentary evidence relied on by the plaintiff in support of the application; and
- if the plaintiff's claim is made under the Fatal Accident Ordinance (Cap.22), contain the particulars mentioned in s.5(4) of that Ordinance (see RHC O.29 r.10(3)).

In personal injury actions, the affidavit in support: **4.049**

- must verify that the defendant falls within the certain categories (see RHC O.29 r 11(2)), i.e.:
  - a person who is insured in respect of the plaintiff's claim; or
  - a public authority; or
  - a person whose means and resources are such as to enable him to make the interim payment;
- must exhibit the medical reports;
- in cases brought under the Fatal Accident Ordinance, must contain the statutory particulars required under s.5(4) of that Ordinance;
- should set out in detail the special damages and past and future loss of earnings; and
- should explain the reason for the interim payment, including any special needs and hardship.

There are also special requirements for affidavits for actions for the possession of land (see *Hong Kong Civil Procedure* in commentary under O.29 r.10).

The summons (see Sample Document 4.13), together with a copy of the affidavit in support (see Sample Document 4.14) and any exhibited documents, must be served on the defendant not less than ten clear days before the return date (see RHC O.29 r.10(4)). **4.050**

It is also possible to make an application for interim payment at the same time as making an application under RHC O.14 or O.86 (see commentary in *Hong Kong Civil Procedure* under O.29 r.11). Where the application for summary judgment will be for an order for damages to be assessed and there is sufficient evidence to support an interim payment pending the assessment of damages, making an application for interim **4.051**

(d) The hearing itself

5.026 The application will be heard by a master in chambers on the return date (unless it is in the Construction and Arbitration List, the Commercial List, Intellectual Property List or the Admiralty List, where summary judgment applications are heard by the judge appointed to the relevant list, or you are seeking relief that a master cannot grant, such as an injunction). You will make submissions on behalf of your client on the basis of the evidence deposed in the affidavit. The master will decide the matter on the basis of the affidavit evidence and submissions from solicitors or counsel for the parties. Sometimes the master will have read the affidavits already, but more often, the plaintiff's solicitor or counsel must go through them in detail with the master. The plaintiff's representative speaks first, and then the defendant's representative is heard. Finally, the plaintiff's representative has an opportunity to reply.

5.027 At the hearing, the master may make one of the following four orders:

(1) judgment for the plaintiff which will include an order giving the plaintiff his costs;

(2) unconditional leave to defend, where the defendant raises a triable issue or satisfies the master that for some other reason there ought to be a trial. In that case, there will usually be an order for costs in the cause on the application;

(3) conditional leave to defend, the most common condition requires a payment into court of all or part of the sum claimed, or the provision of security by the defendant. This order is often made when the master doubts the *bona fides* of the defendant, or is almost certain that the arguable defence raised is a sham or that the defence raised is almost bound to fail. Again, there will usually be an order for costs in the cause on the application; or

(4) dismissal of the summons, where the case is not within the ambit of RHC O.14, or it appears that the plaintiff knew that the defendant would be entitled to unconditional leave to defend. In this case, it is probable that the plaintiff will be ordered to pay the defendant's costs, either forthwith or in any event.

5.028 With reference to conditional leave to defend, it should be noted that the court is unlikely to order conditional leave to defend if it appears that the defendant is unable to satisfy the condition to be imposed, as it would then be tantamount to granting no leave to defend.

5.029 In a case where leave to defend is given (whether conditional or unconditional), the master will give directions as to the future conduct of the action as if the hearing was on a case management summons with appropriate modifications (RHC O.14 r.6). This will normally include directions on the time for the service of the defence. If the parties consent, the Court may direct that the claim be tried by a master (rather than a judge) (see RHC O.14 r.6(2)).

It is important to recognise the importance of summary judgment applications; if successful, the case is disposed of without a trial and the consequent costs. 5.030

3. Striking out Pleadings

Just as a plaintiff may obtain summary judgment without the need to go through a full trial when there is obviously no defence to his action, a defendant may apply at an early stage in the litigation process for an action to be dismissed when the action is obviously bound to fail. RHC O.18 r.19 permits a party to apply for an order that a pleading or indorsement of a writ should be struck out or amended and to order that the action should be stayed or dismissed, or that judgment should be entered. 5.031

An application under this rule may be made when a pleading: 5.032

- discloses no reasonable cause of action or defence, as the case may be; or
- is scandalous, frivolous, or vexatious; or
- may prejudice, embarrass, or delay the fair trial of the action; or
- is otherwise an abuse of the process of the court.

Under the CJR, the court may on its own motion also strike out a pleading or anything in a pleading on the same grounds.

It is important to note that the right to apply under RHC O.18 r.19 is given to any party to an action. However, where a plaintiff forms a view that the defence contains no arguable defence whatsoever, it is more usual to apply for summary judgment under RHC O.14. However, a plaintiff might consider making an application under RHC O.18 r.19 if, for example, a defence was pleaded on two alternative grounds and, although one of those grounds was arguable, the other was plainly wrong. In such a case, the plaintiff would apply to strike out the unarguable part of the defence, and if he could demonstrate to the court that he would save considerable costs in the preparation to meet the unarguable defence at the trial, the application should be successful.[7] Even though such an application would not completely dispose of the defence, if you were advising the plaintiff you might think it worthwhile to score such a victory at an early stage in the proceedings, as this could obviate the need to deal with the unarguable part of the defence and may give you the opportunity to start negotiations to settle the case on favourable terms for your client. 5.033

(a) The grounds on which the application can be made

The four grounds referred to above are briefly considered in the following paragraphs. Detailed commentary to RHC O.18 r.19 is provided in *Hong Kong Civil Procedure*. 5.034

[7] *Yiu Ka Fung Vincent Confidence Services Centre v Dymocks Franchise Systems (China) Ltd* (CACV 96/2014, 3 July 2015).

(c) The respondent's reaction to the application and his evidence

5.046 If you are acting for a party who is the respondent to an application under RHC O.18 r.19, in most cases your objective should be to maintain the overall integrity of your client's case. This means that a range of responses are open to you, depending on the precise nature of the allegation which has been made: in some cases, your best response might be to rectify the alleged defect in the pleading and thereby avoid the costs and uncertainty of a contested hearing. Some examples of the way in which you might advise your client are set out in the following paragraphs.

5.047 If it is alleged that your client's statement of claim discloses no cause of action or is embarrassing because it is unclear, the first thing is to consider the precise nature of the allegation. There may be some cases where the alleged defect in the pleading can be cured by a simple amendment. If, for example, you have inadvertently failed to set out some important part of your client's case, such as pleading a particular term in a contract, such a defect can quickly be cured by agreeing to amend your pleading. Even if you consider that your client's pleading is adequate and you are aware that some adverse cost consequences may flow from the amendment, it may still be the most expeditious course overall to offer to amend the pleading if that will avoid the expense of a hearing. In other cases, it might be convenient for you to offer to provide particulars of your client's allegations if that will avoid the need for a hearing; if this does your client no significant harm, it might be the best course for you to take.

5.048 If the allegation is that your client's claim is frivolous and vexatious, or is an abuse of process, then you need to consider what affidavit evidence should be adduced to refute such allegation. You should remember that, at this stage, the court will not act in favour of the applicant except in clear and obvious cases, and it will not decide an issue where the affidavits submitted by the parties show that there is a conflict of factual evidence which should be resolved at a trial.

5.049 If you intend to rely on affidavit evidence to resist the application, it is advisable to notify the solicitors for the applicant at the earliest opportunity so that a timetable for the filing of evidence can be agreed if possible, and so that the hearing can be adjourned to a later date for substantive argument.

5.050 It may not serve any useful purpose for an applicant for an order under RHC O.18 r.19 to serve an affidavit in reply if it merely contradicts what is in the respondent's evidence. Preparing an affidavit in reply is generally only worthwhile if you can conclusively show the falseness of some key elements in the respondent's affidavit.

(d) The hearing

5.051 The application will be first heard by a master in the 3-minute chambers list (unless the case is in a special list such as the Construction and Arbitration List, the Commercial List, Intellectual Property or the Admiralty List). If the application is contested, it would usually be adjourned to a later date for substantive argument with other necessary directions such as filing of further affidavit evidence (PD 14.2 (Proceedings before Masters) para.2).

(e) Orders which the court might make

5.052 If the court takes the view that, although the pleading is defective, the defect can be cured by amendment, or by allowing the respondent time to serve further and better particulars, then the court will usually take that course rather than striking out the pleading straightaway.

5.053 If the whole of a statement of claim or a defence is struck out, the court will normally order that the action is dismissed or enter judgment for the plaintiff as the case may be. Occasionally, the court may allow a new pleading to be filed.

5.054 If the court decides that part of a pleading should be struck out, and the effect of that is that there is then nothing left in the statement of claim which constitutes a cause of action, or nothing left in the defence which can amount to a defence, as the case may be, the court will either order the claim to be dismissed or judgment to be entered for the plaintiff.

5.055 In other cases, the action simply proceeds without the offending allegations in the pleading which have been attacked.

5.056 The master will usually order that the unsuccessful party bear the costs of the application in any event. If the effect of the application is that the whole action is dismissed or judgment is entered for the plaintiff, then usually the unsuccessful party will have to pay the costs of the whole action (which will, of course, include the costs of the application under RHC O.18 r.19).

4. Disposal of a Case on a Point of Law

5.057 The High Court also has the power to deal with cases in a summary way under RHC O.14A. This allows the court to determine any question of law or construction of any document where it appears to the court that:

- such question is suitable for determination without a full trial of the action; and
- such determination will finally determine the entire cause or matter or any claim or issue therein.

5.058 These powers may be used by the court in quite a flexible way because the court may make the determination either on its own initiative, or after an application made on summons (in the conventional way), or orally during the course of any interlocutory application to the court (RHC O.14A r.2). This means that if you are representing a party such as a plaintiff at an application for judgment under RHC O.14, or a defendant who is applying to strike out under RHC O.18 r.19, you may apply at the hearing of that application for judgment under RHC O.14A if it appears to you from the arguments at the hearing that your client's case may fall within that rule.

5.059 In general, the best way to make use of this procedure where you represent a party with a case which can be finally determined on a question of law, or construction of a document, will be to include an application under RHC O.14A as an alternative to an

5.6 Affidavit in Support of Application under Order 18 Rule 19

For hearing before [Master [*name*]/
the Honourable Mr Justice [*name*]] in chambers on
[*date*]

Defendant
F Foreman
[*number of affidavit*]
Sworn [*date*]

HCA [*number*]/20[*year*]

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE

ACTION NO [*number*] OF 20[*year*]

BETWEEN

SPLENDID DEVELOPMENTS LIMITED *Plaintiff*

And

GOOD-OH CONSTRUCTION CO LIMITED *Defendant*

AFFIDAVIT OF FRED FOREMAN

I, FRED FOREMAN of 23rd Floor, Construction Building, Wanchai, Hong Kong make oath and say as follows:

1. I am the Managing Director of the Defendant to these proceedings. I make this affidavit in support of the Defendant's application for an order that the statement of claim herein should be struck out and that the action be dismissed with costs. I am duly authorised by the Defendant to make this affidavit and the facts stated herein are true to the best of my knowledge and belief.

2. The Plaintiff's claim is for damages for breach of contract following the discovery of defects which are alleged to have been caused by the workmanship of the Defendant.

3. The Plaintiff engaged the Defendant to construct "Splendid Towers" under a building contract dated 3 March 2006. A copy of the said building contract is now produced and shown to me marked Exhibit "FF-1". Page 33 of the building contract bears the signatures on behalf of the Plaintiff and of the Defendant.

4. I have reviewed the Defendant's files related to the construction of Splendid Towers and it appears that the building was certified to be complete by the architect under the building contract on 23 April 2008. Thereafter in accordance with the building contract the "defects liability period" started. The architect issued a certificate of completion of making good defects on 9 September 2009 and then issued a final certificate on 20 January 2010. A bundle of copies of these three certificates is now produced and shown to me marked Exhibit "FF-2".

5. Accordingly, it is quite clear that the Defendant carried out no work in relation to Splendid Towers after 20 January 2010 and, if there was any breach of contract, it is clear beyond doubt that it must have been committed at some time before 20 January 2010.

6. I am advised that the Limitation Ordinance provides that unless a contract has been executed under seal, an action to recover damages for breach of the contract must be brought within a period of six years after the breach of contract was committed. The Writ herein was issued on 20 June 2020, which is more than ten years after the latest date when any breach of contract could have taken place.

7. Accordingly, I am advised that the Defendant has a complete defence to the Plaintiff's action and I respectfully request that the court should make the order requested in the Summons herein.

Affidavit of)
Sworn at [*address*])
this [*date*] day of [*month*] 20[*year*].)
Before me,

.....
Solicitor,
Hong Kong.

This Affidavit is filed on behalf of the Defendant.

8.007 Mr Porsche admits in his defence that:

(1) he was driving the black Porsche at the time of the accident; and

(2) his vehicle was in collision with a grey Honda driven by Mr Honda.

8.008 Mr Porsche also states in his defence that:

(1) he denies that he was travelling at an excessive speed;

(2) he denies that he was talking on his mobile phone just before the accident occurred;

(3) he asserts that Mr Honda was responsible for the accident, because he changed lane into the path of his Porsche so that Mr Porsche had no time to stop; and

(a) he does not admit the damage to Mr Honda's vehicle or Mr Honda's injuries.

8.009 The facts on which both parties agree are (1), (2), and (3). Thus, the matters in dispute are (2), (3), (6), (7), (8), and (9). Those are the issues which will have to be decided by the court and the parties must adduce evidence to the court to prove the facts they allege. To the extent that they are matters of opinion rather than pure fact, e.g. that Mr Porsche was travelling at excessive speed, expert evidence may be relied upon.

3. Who Bears the Burden of Proof?

8.010 The next question the solicitor must ask is, "Which party is obliged to prove which facts?", in other words, "Who bears the burden of proof?"

8.011 The general rule is that the legal burden of proof is on the party who makes an assertion of fact. In civil cases, the burden of proof is fixed at the beginning of the trial. This is usually done by the parties' pleadings, but sometimes by the substantive law. The solicitor must therefore look at the pleadings to ascertain which party is making each assertion. Only facts in issue need to be proved. Once a fact has been admitted, it is no longer in issue.

8.012 Formal admissions of facts may be made in pleadings, in particular, in answers to interrogatories, by a formal notice, by response to a notice to admit facts, or at the trial of the action. In civil cases, both the plaintiff and the defendant may be making assertions and each party then bears the legal burden of proving those facts which establish their particular assertions.

8.013 In the example given in paras.8.005–8.008, Mr Honda claims that a black Porsche driven by Mr Porsche was in collision with his grey Honda driven by him is an admitted fact. Neither Mr Honda nor Mr Porsche will have to adduce evidence before the court to show that they were driving their vehicles at the time of the accident or that their cars were in collision with each other.

8.014 Mr Honda will have to present evidence to prove that the Porsche was travelling at an excessive speed and that Mr Porsche was talking on his mobile phone because those matters are asserted by him but denied by Mr Porsche. Mr Porsche will have to adduce evidence to prove his assertion that Mr Honda changed lane in front of him and that he had no time to stop. This last issue is a new issue raised by Mr Porsche, and he must prove it.

(a) The balance of probabilities

8.015 In a civil case, the evidence presented to the court by a party in order to discharge the legal burden of proof must be such that the court can conclude after presentation of the evidence that the fact asserted is more probably true than not. This is called proving a fact in issue on a "balance of probabilities". If the evidence is such that the court can only conclude that the probabilities are equal, then the legal burden of proof has not been discharged.

8.016 In the example given in paras.8.005–8.008, assuming Mr Honda testifies to the court that Mr Porsche was talking on his mobile phone at the time of the accident, but Mr Honda's testimony reveals that he is rather uncertain on this point. If no other evidence is presented to support this assertion then the court could conclude that the probabilities of it being true or false were equal. In these circumstances Mr Honda would have failed to discharge the legal burden of proof on that fact. In practice it is rare for a court to consider matters to be so finely balanced.

(b) Facts which do not require proof

8.017 The party bearing the legal burden of proof may be assisted in discharging this burden by facts which are judicially noted and facts which are or may be presumed. Such facts do not have to be proved by evidence. Facts which are judicially noted are facts that the court accepts as true without any proof because they are such well known matters of common knowledge that there can be no serious dispute about them. For example, the fact that private cars use the streets in Hong Kong.

8.018 Presumptions, which may be of law or of fact, allocate the burden of proof in relation to a particular issue to one party or the other, irrespective of which party bears the general burden of proof. Presumptions of law may be conclusive or rebuttable, whereas presumptions of fact are always rebuttable.

8.019 An example (derived from common law) of a rebuttable presumption of law is the maxim *res ipsa loquitur*, which simply means, "let the facts speak for themselves". The maxim is most frequently invoked in negligence cases and allows a plaintiff to prove the defendant's negligence by relying on the fact that the accident occurred, without adducing evidence to prove how it occurred and that it arose from a lack of care on the part of the defendant.

8.020 For example, a plaintiff injured by debris falling from a construction site as he walked on the pavement beside the building would probably succeed in an action against the construction company by relying on the *res ipsa loquitur* maxim. The burden of proof would be on the defendant construction company to demonstrate to the court that they

had not been negligent (for example, by showing that it was not possible for debris to accidently or inadvertently fall from the building).

4. Examination of the Different Types of Evidence

8.021 The checklists in this chapter take the solicitor through a civil action from the start of a case, when the client first consults their solicitor, to the final preparations for trial. Key stages in the course of a civil action have been selected and at each stage the relevant checklist provides guidance on the steps to be taken with regard to the four main types of evidence available to prove the facts in issue. They are:

- documentary evidence;
- evidence of witnesses of fact;
- evidence of expert witnesses; and
- real evidence.

A brief discussion of each of these types of evidence follows.

(a) Documentary evidence

8.022 Documentary evidence is produced in almost every civil action. It may take the form of public documents such as birth, marriage or death certificates, judicial documents such as judgments and writs or private documents. Private documents form the largest category of documents and include formal documents such as contracts, deeds, conveyances and leases, as well as less formal documents such as letters, faxes, e-mails, social messages, memos, handwritten notes and diaries.

8.023 Examples of the sorts of documents that might be necessary as evidence in litigation are:

- personal injury cases—medical reports, hospital records, employment records, educational records, tax information, financial information, insurance records;
- police records—reports, photographs, sketches, witness statements (see Checklists 8.1 and 8.9);
- records obtainable through searches—company searches, Land Registry searches, Transport Department searches, Court Registry searches;
- documents and records of proceedings from judicial or quasi-judicial bodies — criminal proceedings (e.g. Magistrate's Court, Coroner's Court), inquiries conducted by the Labour Department or other public inquiries, records of employee's compensation proceedings; and
- documents from third parties acting as the client's agents or in professional capacities, e.g. former solicitors, (unless protected by legal professional privilege), architects, accountants, trading agents and insurance brokers.

8.024 Where a solicitor wishes to introduce bankers' records and accounts as evidence of transactions, it must be proved that:

- the entries were made in the ordinary course of business; and
- the records were in the custody or control of the bank.

Section 20 of the EO has special rules for the production of bank records that have been produced by means of a photographic process (i.e. photocopies or, possibly, microfilm) and by computer records which should be referred to. However, since the abolition of the rule against hearsay in civil cases, these rules are less important. Documents produced by a bank that do not comply with the section will still be admissible but may be given less weightage.

8.025 A solicitor can obtain documentary evidence from his client, from the other parties to the action, and in certain circumstances third parties, through the discovery process. A person can be compelled by the court to produce, at the trial of the action, a document in their possession by the issue of a *subpoena duces tecum*. It is possible to acquire documents from third parties through discovery and certain other interlocutory proceedings (Chapter 7, para.7.044 *et seq* and Checklist 8.3 para.4).

8.026 Public and judicial documents are presumed to be authentic and certified copies can usually be produced at court instead of the originals. Some public documents are, by statute, admitted as conclusive proof of the matters to which they relate.

8.027 Under RHC O.27 r.4, documents listed in a list of documents which has been served, are deemed to be authentic, unless their authenticity is challenged by a notice issued under that rule, within 21 days after inspection of the documents or within expiry of the time for inspection, or in the pleadings. Where there is a dispute as to the authenticity of documents, evidence will have to be called to prove whether the documents are genuine or not. A party to an action should be in a position to produce the original of a document to the court if it is in his possession. However, the normal procedure is that copy documents are used at the trial of the action, though the original will have to be produced if the authenticity of a document is in issue.

(b) Evidence of witnesses of fact

8.028 Written evidence from witness of fact can take several forms, namely:

- witness statements exchanged under RHC O.38 r.2A;
- affidavit or affirmation evidence (RHC O.38 r.2); or
- depositions (see EO Part VII and RHC O.39).

Witness statement are used as evidence at trial and do not become evidence in the case, unless the witness is called or the court gives leave (O.38 r.2A(11)). Affidavits and affirmations are used as a means of giving evidence in interlocutory applications. They can be used as witness statements with leave of the court. Depositions are very rare in Hong Kong.

settlement. The solicitor should be prepared to deal with this issue if it is raised. This way you will be best placed to actively assist your client to achieve the best resolution of his case through mediation.

9.086 A solicitor has a very important role in assisting his client to choose the best mediator for the case, ensuring the mediator is provided with sufficient information and time to prepare for the mediation and is paid an appropriate fee for the effort expected. Some solicitors appear to consider mediation as part of a "check the box" a process that needs to be gone through as part of getting a case to trial. This is the entirely wrong attitude. Mediation with the right preparation, attitude and mediator should enable most parties to settle, or at least narrow, their differences.

11. Ethical Considerations When Negotiating or Mediating

9.087 The pressure on you to secure the best possible outcome for your client must not be allowed to cause you to conduct yourself improperly.

9.088 You must remember that the *Hong Kong Solicitors' Guide to Professional Conduct* (issued by the Hong Kong Law Society in two volumes) requires a solicitor to act towards other solicitors with frankness and good faith consistent with his overriding duty to his client (see para.11.01 of Vol.1 of the 3rd ed.).

9.089 You must at all times safeguard your personal integrity, observe the requirements of good manners and courtesy towards other members of the profession or their staff, and avoid deceiving them in any way.

12. Points to Cover in the Settlement

9.090 The particular terms to be included in the settlement of any dispute will depend upon the subject matter of that dispute and upon the way in which the parties decide to compromise it. However, the terms will commonly include:

- a requirement for one party to pay a sum to the other party by a specific date (possibly with interest payable in default);
- if payment by one party to the other is to be by instalments, provision that if any instalment is not paid by the due date then all instalments become immediately due and payable;
- a statement that the agreement is in full and final settlement of all claims and counterclaims made in the proceedings (and possibly, if the parties wish to ensure a clean break, of all claims which the parties have or might have against each other arising out of the facts and matters which are the subject of the action);
- provision for one party to indemnify the other against certain events, for example where the settlement leaves one of the parties exposed to a potential liability to a third party;

- provision for the costs of the proceedings;
- provision that the terms of the agreement shall be kept confidential, and possibly a provision prohibiting one party from making any critical statements about the other party (particularly relevant in professional negligence actions);
- provision for the taking of any procedural steps necessary in order to bring the proceedings formally to an end (such as the filing of a notice of discontinuance, or the entering of a consent order confirming the terms of the settlement); and
- provision for any other steps necessary to complete the settlement (for example the return by one party to the other of any guarantee of that party's obligations provided previously by a third party).

9.091 The above points (and a number of others which may need to be covered in certain cases) are set out briefly in Checklist 9.1.

9.092 As additional points, when you offer terms of settlement to the opposing party, consider whether to stipulate a time limit within which the terms must be accepted, or they will lapse. This may help increase the pressure on the opposition. It is particularly important if significant further costs (such as a brief fee) will become due if the settlement is not concluded before a certain date. Consider stipulating also that if one party fails to fulfil any of its obligations under the settlement, then the other party can pursue the defaulting party for the *full amount* of its claims, and is not limited to suing to enforce the settlement. This may be of particular importance where one party has a strong claim against the other, but accepts a lower settlement to avoid the expense and delay of pursuing proceedings. The advantage of such a settlement will be nullified if that party is forced to issue proceedings but can only enforce the settlement.

13. Formal Confirmation of the Settlement

9.093 If negotiations are successful, the terms of the agreement should be formally recorded and signed by the parties. It is possible to conduct negotiations from the outset on the basis of detailed written proposals intended to deal with all the points that either party would wish to cover. Alternatively, the negotiations may have been conducted along broader lines, perhaps through protracted conversations and/or correspondence, and agreement on the principles of the settlement may have been reached first, before the detailed matters were dealt with. In these latter cases, your agreement in principle should be expressed to be subject to the drawing up of a satisfactory formal agreement for carrying the agreed terms into effect. For this reason, it may be appropriate to mark the settlement correspondence "Without Prejudice and Subject to contract".

9.094 Once the terms of the settlement agreement are concluded or are considered to have been concluded, whether in principle or otherwise, it is advisable to write to the other party to confirm the agreement and its terms. This may save time, effort and arguments in future as to whether, and if so, when and on what terms, an agreement came into being. Where a settlement is reached during mediation, a settlement agreement will invariably be signed at the end of the mediation. As solicitor, you should be prepared to draft the settlement agreement, often with the mediator.

9.095 The major points which you may need to cover in the agreement are dealt with in paras.9.090 and 9.092, and in Checklist 9.4. In specialist actions such as libel actions, there may be other points to consider. Careful reflection on all the "loose ends" which need to be tied up in order to end the dispute will identify these other points. An example form of simple settlement agreement is to be found in Sample Document 9.6. Although Sample Document 9.6 uses an agreement format, a letter from one party (or his solicitor) countersigned by the other party (or his solicitor) is equally effective.

9.096 Careful thought must also be given to the formal means by which the proceedings themselves are to be brought to an end. These will often be ancillary to the settlement agreement themselves, but in some cases the parties may combine the two and simply embody the agreed terms in an order to be made by the court terminating the proceedings (see para.9.102).

9.097 The means by which the proceedings can be brought to a close include the following:

- by entering judgment or an order by consent pursuant to RHC O.42 r.5A; or
- by discontinuing the proceedings pursuant to RHC O.21.

(a) Notices of Discontinuance and Consent Orders

9.098 In the vast majority of cases where a compromise solution to the proceedings has been reached, the consent order is the most appropriate method of termination. Entering judgment for one party is unlikely to suit the mood of reconciliation which the settlement should have brought about and serving a notice of discontinuance does not act to bar the plaintiff from bringing fresh proceedings on the same cause of action.

9.099 Although the possibility of fresh proceedings makes a notice of discontinuance less attractive to a defendant than an appropriate consent order (see para.9.100), a plaintiff may prefer a notice of discontinuance for that very reason. A notice of discontinuance may otherwise be appropriate if there are no outstanding obligations under the settlement which the parties might want to apply to the court to enforce. An example of a simple form of notice of discontinuance appears as Sample Document 9.7. If you use a notice of discontinuance you must ensure that a separate settlement agreement stipulates that the compromise is in full and final settlement of the dispute (if that reflects the agreement). A plaintiff discontinuing an action without leave must pay the costs of the action up to the date of discontinuance (O.62 r.10). Any waiver of such costs order has to be embodied in a consent order. Any provisions for no order as to costs has to be by way of a consent order.)

9.100 A consent order may provide not only for the discontinuance of proceedings but also for agreement on costs and other matters. Sample Document 9.10 is a precedent for such an order.

9.101 A dismissal of the action by consent will operate as a bar to fresh proceedings on the same cause of action, provided it is clear that it results from a true compromise.

9.102 A consent order staying the proceedings under RHC O.42 r.5A will, in most cases, be the best option. This may be a simple order providing for the amount (if any) that is to be paid by one party to the other, providing for costs, and staying the action (subject to the parties having liberty to apply to court for the purpose of carrying the order into effect). Sample Document 9.8 is a precedent for such an order.

9.103 Note that RHC O.42 r.5A is not applicable to any order in proceedings pending in the Admiralty Jurisdiction or in the Commercial List (RHC O.42 r.5A(4)). It also does not apply to an order in proceedings in which any of the parties is a litigant in person or a person under a disability (see RHC O.42 r.5A(5)). It is therefore important to check the scope of O.42 r.5A to see if it covers the case which is being settled.

(b) *Tomlin* Order

9.104 A consent order referring to the terms of settlement in a schedule is a particular type of consent order under RHC O.42 r.5A. It is known as a *Tomlin* order after the decision of Mr Justice Tomlin in *Dashwood v Dashwood*.[15] Where more complicated terms have been agreed and there is no objection (for reasons of confidentiality) to the full settlement being filed with the court, a *Tomlin* order will be desirable. This follows the same form as the simpler order just mentioned, but refers to a schedule setting out the terms of settlement in full. Sample Document 9.9 is a precedent for a *Tomlin* order. The schedule could be an annexed copy of any settlement agreement signed by the parties. Again, the order provides that all further proceedings in the action will be stayed, save for the purpose of carrying into effect the terms set out in the order, and in the schedule. For that limited purpose only, the parties will have liberty to apply to court. If the parties want to keep the terms of settlement confidential, the schedule should be marked "confidential" and a request should be made to the court to keep the confidential schedule in a sealed envelope in the court file. The court may also allow the parties to retain a copy of the settlement agreement and not file it on the court file to avoid any risk of it being inspected by third parties.[16]

9.105 Where a *Tomlin* order is used, it is nevertheless important to include in the order itself the terms requiring payment to be made and the terms dealing with costs, even if those terms are also included in the schedule. Those terms should appear prior to the provision that the action be stayed. If the terms are only included in the schedule, the payment and costs provisions will not take effect as judgments and will not be enforceable as such, nor will they carry statutory interest as judgments.

9.106 The use of a consent order where the settlement terms are made part of the order of the court (or, in appropriate situations, given as undertakings to the court) has advantages in the event of any failure by one party to comply with the terms of the settlement. The injured party may seek to enforce the order by way of contempt proceedings or other methods of enforcement. There is no need to commence separate proceedings in order to enforce the settlement terms. However, breach of a term in the schedule of a *Tomlin* order is not in itself a contempt of court enforceable by an application to commit. Before there is any question of a contempt, you must first obtain an injunction or order for specific performance under the "liberty to apply" provision or by bringing separate proceedings.

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[15] (1927) 64 LJNC 431.
[16] *ABC Ltd v Y* [2010] EWHC 3176.