

where such course of action is considered to be in the public interest.¹³ Similarly, the court will decline to hear and determine a case where there is no issue left to be adjudicated between the parties and the issue has become academic.¹⁴ Nor will the court rule on future acts unless the public interest so requires.¹⁵

3. LIMITS ON FINANCIAL JURISDICTION OF CERTAIN COURTS

[2-8] Although there is no financial limit on the jurisdiction of the High Court,¹⁶ the District Court¹⁷ and Small Claims Tribunal¹⁸ enjoy only limited financial jurisdiction.

made); *Charter View Development Ltd v Golden Rich Enterprises Ltd* [2000] 2 HKC 77 (CA) (in relation to the sale and purchase of a flat, the plaintiff sought declaration as to whether, if it chose to assert that the defendant had repudiated the agreement and if it accepted that repudiation, which it had not yet done, it could recover the deposit paid; held that declaratory judgment should not be granted where issue hypothetical or merely required advisory opinion). The court may, however, in special cases make a declaration as to future rights but this power is exercised with considerable reserve: *Mellstrom v Garner* [1970] 2 All ER 9, [1970] 1 WLR 603 (CA, Eng); *Koon Wing Yee v Securities and Futures Commission* [2008] 6 HKC 271 (CA) (application for judicial review of notice from respondent informing him that he was under investigation for certain criminal offences; held that application premature and hypothetical since applicant was not at the time facing any criminal charges).

13 See *R v Secretary of State for the Home Department, ex parte Salem* [1999] 1 AC 450 at 456, [1999] 2 All ER 42 (HL) at 47, per Lord Slynn of Hadley; *Leung v S-J* [2006] 4 HKLRD 211 at 225–228, [2006] HKCU 1585 (CA), per Ma CJHC.

14 *Sun Life Assurance Co of Canada v Jervis* [1944] AC 111, [1944] 1 All ER 469 (HL); *Re Estate of Yu Leung Fong* [1991] 1 HKC 494, [1989–91] CFR 299 (HC) (court will not grant a declaration of death on an ex parte application where there is no present dispute between two parties as to their respective rights; proceedings in which an owner of property attempts ex parte to obtain a declaration in order to arm himself against some difficulty which may arise in the future are proceedings which fundamentally misconceive the function of the court in civil proceedings; it is not the function of the court to settle the doubts of owners of property about the state of their title in the absence of any other party interested in the property); *Right to Inherent Dignity Movement Association v Hong Kong SAR Government* [2008] HKCU 1692 (unreported, HCAL 104/2008, 31 October 2008) (CFI). Cf *Secretary for Security v Sakthevel Prabakar* (2003) 6 HKCFAR 397 at 400, [2004] 1 HKLRD 568, [2003] HKCU 1128 (CFA), per Bokhary PJ: 'If there is a sufficiently great public interest to be served by having a question or questions of public law decided by the highest court in the land, then the granting of leave to bring such an appeal can be appropriate even where such an appeal would be academic as between the immediate parties.'

15 See *Leung v S-J* [2006] 4 HKLRD 211, [2006] HKCU 1585 (CA) (challenge to legislation criminalising certain homosexual acts); *Yao Man Fai George v Director of Social Welfare* [2010] HKCU 1344 (unreported, HCAL 69/2009, 21 June 2010) (CFI); *FB v Director of Immigration* [2009] 1 HKC 133, [2009] 2 HKLRD 346 (CFI).

16 High Court Ordinance s 3(2).

17 See section 6 below.

18 See section 8 below.

4. LIMITS OF COURTS' TERRITORIAL JURISDICTION

[2-9] In respect of the courts' territorial jurisdiction, the courts may exercise jurisdiction only over those parties on whom a writ can properly be served and there are detailed statutory provisions in respect of service upon persons both within and outside Hong Kong.

[2-10] In brief, the courts have jurisdiction over, and therefore process may be served upon, any person who is present in Hong Kong and this jurisdiction extends even to a foreigner who is only temporarily within the jurisdiction.¹⁹ If, however, the person served wishes to maintain that Hong Kong is not the appropriate forum for the action, he can apply for a stay of the Hong Kong action.²⁰ If the defendant is successful in obtaining a stay, the plaintiff may need to commence or continue his action elsewhere in a more appropriate forum.

[2-11] In respect of jurisdiction over persons who are not present in Hong Kong, there are important statutory provisions for service of process on persons outside Hong Kong.²¹ The effect of these provisions is to entitle the Hong Kong courts to exercise jurisdiction over persons who owe no allegiance to Hong Kong and the provisions prima facie constitute an infringement of the sovereignty of the other country in which service is effected. Nonetheless, the legislature has provided, in accordance with the principle of the comity that exists between nations, that each country is entitled, in circumstances permitted by its own laws, to exercise judicial power by the issue and service of judicial process in other countries.²²

19 *Maharanees of Baroda v Wildenstein* [1972] 2 QB 283, [1972] 2 All ER 689 (CA, Eng). This jurisdiction does not apply, however, where the defendant was induced by fraud to enter the jurisdiction for the purpose of his being served with legal process: *Watkins v North American Land and Timber Co Ltd* (1904) 20 TLR 534 (HL).

20 The application for a stay may be made either on the grounds of 'forum non conveniens' (see *Spiliada Maritime Corp v Cansulex Ltd (The Spiliada)* [1987] AC 460, [1986] 3 All ER 843 (HL)), 'lis alibi pendens' or by reason of an exclusive jurisdiction clause; see below.

21 See RHC and RDC O 11, discussed later in Chapter 5 'Service of Process and Acknowledgment of Service'.

22 Although the court's jurisdiction has on many occasions been described as an 'exorbitant jurisdiction' (see, eg, per Hunter JA in *Wo Fung Paper Making Factory Ltd v Sappi Kraft (Pty) Ltd* [1988] HKC 10 at 22, [1988] 2 HKLR 346 (CA) at 356), more recently the court has stated that this view is no longer realistic in the present day where litigation between residents of different states is a routine incident of modern commercial life: see *Abela v Baadarani* [2013] 1 WLR 2043, [2013] UKSC 44 (SC, UK) (the traditional characterisation of service out of the jurisdiction as the exercise of an exorbitant jurisdiction, based on the notion that service of proceedings abroad was an assertion of sovereign power over the defendant and a corresponding interference with the sovereignty of the state in which process was served, was no longer realistic; since in the overwhelming majority of cases where service out was authorised there would have been either a contractual submission to the jurisdiction of the local court or a substantial connection between the dispute and this country, and litigation between residents of different states was a routine incident of modern

4.1 Where jurisdiction is lacking, parties cannot confer jurisdiction on courts

[2-12] The courts have made it clear that, where, by reason of any limitation imposed by statute, a court lacks jurisdiction to entertain any particular action or matter, neither the acquiescence nor the express consent of the parties can confer jurisdiction upon that court.²³ Nor can jurisdiction be conferred upon a court by reason of estoppel.²⁴

4.2 Ouster of court's jurisdiction by agreement

[2-13] An agreement purporting entirely to oust the jurisdiction of the courts is illegal and void on grounds of public policy.²⁵ For example, a provision in a testator's will which purports to empower the trustee to determine all questions and matters of doubt arising under the will and to make that determination conclusive and binding on all persons interested under the will is void on this ground.²⁶

[2-14] On the other hand, an agreement that no right of action shall arise or for the postponement of the enforcement of a claim by action in the courts unless and until the parties' differences have been settled in some other way, for example by arbitration, is valid and may be enforced by way of a stay; and this may extend, not only to the question of the amount which is due, but also to the question of whether any liability has been incurred.²⁷

commercial life, the decision whether to permit service out of the jurisdiction was generally a pragmatic one in the interests of the efficient conduct of litigation in an appropriate forum; it should no longer be necessary to resort to the kind of muscular presumptions against service out which were implicit in adjectives like 'exorbitant', applied in *Deutsche Bank AG, Hong Kong Branch v Zhang Hong Li* [2016] 4 HKC 266, [2016] 3 HKLRD 303 (CA).

23 *Green v Rutherford* (1750) 1 Ves Sen 462 at 471, [1558-1774] All ER Rep 153 (Ch) at 158, per Lord Hardwicke LC.

24 *Ananda Non-Ferrous Metals Ltd v China Resources Metal and Minerals Co Ltd* [1994] 1 HKC 204 (CA) (no jurisdiction conferred upon court by way of estoppel); *SOL International Ltd v Guangzhou Dong-jun Real Estate Interest Co Ltd* [1998] 3 HKC 493, [1998] 2 HKLRD 637 (CA) ('For the future, I hope we shall never again be faced with an argument that a jurisdiction, which the court would not otherwise possess has been conferred upon it by estoppel or waiver; this is just as contrary to first principles as is the proposition that a jurisdiction which it would not otherwise possess can be conferred on the court by consent', per Godfrey JA).

25 See, for example, *Doleman and Sons v Osset Corp* [1912] 3 KB 257; *Baker v Jones* [1954] 2 All ER 553 at 559, [1954] 1 WLR 1005 at 1010 per Lynskey J.

26 *Re Wynn's Will Trusts, Public Trustee v Newborough* [1952] Ch 271, [1952] 1 All ER 341.

27 According to the Arbitration Ordinance (Cap 609) s 20, adopting the UNCITRAL Model Law art 8, a court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the matter to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

4.3 Ouster of access to courts by statute

[2-15] The intending litigant's right of access to the courts (or a particular court) may be taken away or restricted by statute, but the language of any such statute will be jealously watched by the courts and will not be extended beyond its least generous meaning unless 'the most clear and explicit words' are used to justify such extension.²⁸ Where an issue arises upon proceedings before the court, the court's jurisdiction to dispose of that issue can only, therefore, be ousted by the plain words of a statute.²⁹

[2-16] There are many instances in Hong Kong where the Court of First Instance and District Court's jurisdiction has been ousted (or at least an attempt has been made to oust the court's jurisdiction) by statute.³⁰ The statutory provisions conferring exclusive jurisdiction upon the Small Claims Tribunal³¹ and the Labour Tribunal³² provide a clear illustration. By contrast, the statutory provisions in the Personal Data (Privacy) Ordinance (Cap 486)³³ and the Sex Discrimination

28 *Bennett and White (Calgary) Ltd v Municipal District of Sugar City* [1951] AC 786 (PC) at 808-809; *R v Lord Chancellor, ex p Witham* [1998] QB 575 at 586, [1997] 2 All ER 779 at 788, (1997) Times, 13 March ('access to the court is a constitutional right; it could only be denied by the government if it persuades Parliament to pass legislation which specifically, in effect by express provision, permitted the executive to turn people away from the court's door', per Laws J). See also *R (Privacy International) v Investigatory Power Tribunal* [2020] AC 491 (SC, UK) at 544, where the majority of the UK Supreme Court held that 'there are certain fundamental requirements of the rule of law which no form of ouster clause (however "clear and explicit") could exclude from the supervision of the courts.'

29 *AG v Boden* [1912] 1 KB 539 at 561, [1911-13] All ER Rep Ext 1306 at 1322 per Hamilton J. There have been many cases in which ouster of the court's jurisdiction to grant judicial review has been considered by the courts: see, for example, *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147, [1969] 1 All ER 208 (HL); *Chan Yik Tung v Hong Kong Housing Authority* [1989] 2 HKC 394 (HC); *R v Director of Immigration and Refugee Status Review Board, ex p Do Giau* [1992] 1 HKLR 287, [1992] HKCU 343 (HC); *Wong Pei Chun v Hong Kong Housing Authority* [1996] 2 HKLR 293, [1996] HKCU 532 (HC) (decision of Housing Authority to issue notices to quit amenable to judicial review); *Refugee Status Review Board v Bui Van Ao* [1997] 3 HKC 641 (CA); *Thai Muoi v Hong Kong Housing Authority* [2000] HKCU 370 (unreported, HCAL 155/1999, 30 May 2000) (CFI) (notice to quit issued by Housing Authority; Housing Ordinance (Cap 283) s 19(3) provided: 'No court shall have jurisdiction to hear any application for relief by or on behalf of a person whose lease has been terminated'; held that the section was not clear enough to override the presumption of the legislative intent that decisions of the executive, the tribunal or other officials are justiciable by way of judicial review).

30 District Court Ordinance (Cap 336) s 40 makes it clear that nothing in the Ordinance will affect the provisions of the Small Claims Tribunal Ordinance (Cap 338), the Landlord and Tenant (Consolidation) Ordinance (Cap 7) or the Labour Tribunal Ordinance or any other Ordinance which confers exclusive jurisdiction on a court or tribunal other than the District Court.

31 See the Small Claims Tribunal Ordinance s 5(2).

32 See the Labour Tribunal Ordinance s 7(2).

33 See the Personal Data (Privacy) Ordinance (Cap 486) s 66(5).

Ordinance (Cap 480)³⁴ do not confer exclusive jurisdiction on the District Court in an action for damages for breach of a Data Protection Principle of the Personal Data (Privacy) Ordinance and a claim based on sex discrimination respectively.³⁵ Likewise, the Lands Tribunal does not enjoy exclusive jurisdiction over matters listed in the Tenth Schedule to the Building Management Ordinance (Cap 344).³⁶

[2-17] The statutory prohibition upon a person declared to be a vexatious litigant from litigating without the leave of the court provides a further example of a restriction being placed upon an intending litigant's access to the courts.³⁷

34 In the Sex Discrimination Ordinance (Cap 480) s 76(3).

35 *Lee Kwok Tung Albert v Chiyu Banking Corp Ltd* [2018] 2 HKLRD 273, [2018] HKCU 740, [2018] 2 HKCA 123 (CA) and *Cheuk Kit Man v FWD Life Insurance Co (Bermuda) Ltd* [2018] 6 HKC 129, [2018] 5 HKLRD 259, [2018] HKDC 1234 (DC).

36 It has been held in *Kong Hoa (Hong Kong) Ltd v Lau Hung Kwan* [1976] HKLR 62, [1976] HKCU 8 (OJ), *Winbase Industrial Ltd v Mightyton Property Management Ltd* [1994] HKCU 141 (unreported, HCA 10232/1994, 25 October 1994) (HC) and *Mass Transit Railway Corp v Lam Kai Fai* [1996] HKLY 1132 (unreported, HCA 1796/1994, 21 July 1995) (HC) that the jurisdiction of the Lands Tribunal is exclusive over matters listed in the Tenth Schedule to the Building Management Ordinance (Cap 344). However, this view was rejected in *Ngan Chor Ying & Anor v Year Trend Development Ltd & Anor* [1995] 1 HKC 605, [1994-95] CPR 107 (HC), where Findlay J held that the jurisdiction of the Lands Tribunal in respect of those matters was not exclusive. He concluded that an Ordinance should not be interpreted so as to take away the jurisdiction of the superior courts, unless it did so by express words or necessary implication and there was nothing in the Ordinance which led to the conclusion that the legislature must have intended that the Lands Tribunal should have exclusive jurisdiction over all matters listed in the Tenth Schedule. The position now has been confirmed by the Court of Appeal in *Wong Hing Cheong v Wah E Investment Ltd* [2002] 3 HKC 59, [2002] 2 HKLRD 175 (CA), as applied in *Incorporated Owners of Summit Court v Full Surplus Investment Ltd* [2002] 3 HKC 193 (CFI), to the effect that the Lands Tribunal does not enjoy exclusive jurisdiction over those matters. See also *Wing Ming Garment Factory Ltd v The Incorporated Owners Of Wing Ming Industrial Centre* [2014] 4 HKLRD 52, [2014] HKCU 1506 (CFI) (G Lam J).

37 According to High Court Ordinance s 27(1), the Court of First Instance may, on the application of the Secretary for Justice or an affected person, make an order that (a) no legal proceedings shall without the leave of the Court of First Instance be instituted by the person against whom the order has been made; and (b) any legal proceedings instituted by that person in any court before the making of the order shall not be continued by him without the leave of the Court of First Instance. An 'affected person' means a person who (a) is or has been a party to any of the vexatious legal proceedings; or (b) has directly suffered adverse consequences resulting from such proceedings: High Court Ordinance s 27(5). The Court of First Instance may not make such an order unless: (a) it is satisfied that the person against whom the order is to be made has habitually and persistently and without any reasonable ground instituted vexatious legal proceedings, whether in the High Court or in any inferior court and whether against the same person or against different persons; and (b) it has heard the person against whom the order is to be made or given him an opportunity to be heard: s 27(2). An order may be made on such terms and conditions as the

5. JURISDICTION OF THE COURT OF FIRST INSTANCE

[2-18] The Court of First Instance enjoys unlimited (in the sense of financially unlimited) original civil jurisdiction over all persons and all matters in Hong Kong.³⁸

[2-19] More particularly, the High Court Ordinance provides that the civil jurisdiction of the Court of First Instance shall consist of: (a) original jurisdiction and authority of a like nature and extent as that held and exercised by the Chancery, Family and Queen's Bench Divisions of the High Court of Justice in England; and (b) any other jurisdiction, whether original or appellate, conferred on it by any law.³⁹

[2-20] Further, extensive jurisdiction in Admiralty matters has been conferred upon the Court of First Instance.⁴⁰ The Court of First Instance further enjoys an important supervisory jurisdiction over all inferior courts and tribunals by virtue of its important powers of judicial review⁴¹ and it has the additional responsibility for hearing habeas corpus applications.⁴² The Court of First Instance also exercises important appellate jurisdiction, which includes appeals to a judge of the Court of First Instance sitting in chambers from judgments or orders of masters⁴³ and appeals to the Court of First Instance from certain tribunals.⁴⁴

6. JURISDICTION OF THE DISTRICT COURT

6.1 Introduction

[2-21] The jurisdiction of the District Court over actions in contract and tort was raised from \$600,000 to \$1,000,000 in 2003⁴⁵ and further to \$3,000,000 as from 3 December 2018.⁴⁶

[2-22] Notwithstanding the significant increase in the District Court's jurisdiction, it must be borne in mind that the District Court has no jurisdiction to provide relief by way of judicial review or habeas corpus.

Court of First Instance thinks just and may provide that it is to cease to have effect at the end of a specified period, but shall otherwise remain in force indefinitely: s 27(3). A copy of an order made must be published in the Gazette: s 27(4). The procedure for applying for such orders is laid down in RHC O 32A and Practice Direction No 11.3 'Restricted Application and Restricted Proceedings Orders'.

38 High Court Ordinance s 3(2).

39 *ibid*, s 12(2).

40 *ibid*, ss 12A-12D.

41 See *ibid*, ss 21I-K.

42 See *ibid*, ss 22A-24 and RHC O 54.

43 See RHC O 58 and Chapter 20 'Appeals'.

44 For example, an appeal lies to the Court of First Instance from the Small Claims Tribunal (see the Small Claims Tribunal Ordinance s 28) and the Labour Tribunal (see the Labour Tribunal Ordinance s 32).

45 See LN 241 of 2003.

46 See LN 131 of 2018 and LN 138 of 2018.

[2-23] As the financial limits to the District Court's jurisdiction are quite complex, we must consider them in greater detail.

6.2 General jurisdiction in actions of contract, quasi-contract and tort

[2-24] The District Court has jurisdiction to hear and determine any action (or counterclaim⁴⁷) founded on contract, quasi-contract or tort where the amount of the plaintiff's claim does not exceed \$3,000,000.⁴⁸ The amount of the plaintiff's claim means the amount the plaintiff claims after taking into account: (a) any set-off or any debt or demand the defendant claims or may recover from the plaintiff; (b) any compensation, as defined in section 3 of the Employees' Compensation Ordinance (Cap 282), paid to the plaintiff under that Ordinance; and (c) any contributory negligence that the plaintiff admits in his statement of claim.⁴⁹

[2-25] All writs issued in the District Court must contain a plea that the relief sought falls within the jurisdiction of the District Court, specifying which section(s) of the District Court Ordinance apply.⁵⁰ A claim for unliquidated claim or damages to be assessed may be made in the District Court provided it is made clear that the plaintiff does not seek an amount beyond the court's jurisdiction.⁵¹

[2-26] Further, the District Court has jurisdiction to hear and determine any proceedings by way of interpleader in which the amount or value of the matter in dispute does not exceed \$3,000,000.⁵²

6.3 Money recoverable by enactment

[2-27] The District Court has jurisdiction to hear and determine any action (or counterclaim)⁵³ for the recovery of any penalty,⁵⁴ expenses, contribution or other like demand which is recoverable by virtue of any enactment for the time being in force and for the recovery of any sum which is declared by any enactment to be recoverable as a civil debt if: (a) it is not expressly provided by that or any other

47 See the District Court Ordinance s 39.

48 District Court Ordinance s 32(1).

49 *ibid*, s 32(2)(a)–(c).

50 See Practice Direction No 27 'Civil Proceedings in the District Court' para 4. Failure to comply will not, however, be fatal to a plaintiff's claim so as to lead to the action being struck out: *Sunbeam Investment Ltd v Mamitop Investment Co Ltd* [2007] HKCU 1366 (unreported, DCCJ 1985/2006, 9 August 2007) (DC) at para 6 per DDJ Abu B bin Wahab.

51 A plaintiff may abandon part of its claim to give jurisdiction to the District Court. See District Court Ordinance s 34.

52 See the District Court Ordinance s 32(3).

53 See the District Court Ordinance s 39.

54 'Penalty' does not include a fine to which any person is liable on conviction on indictment or on summary conviction: District Court Ordinance s 33(2).

enactment that the demand is recoverable only in some other court; and (b) the amount claimed does not exceed \$3,000,000.⁵⁵

6.4 Abandonment of part of claim to give court jurisdiction

[2-28] If the plaintiff agrees to abandon the amount of his claim (or the defendant his counterclaim)⁵⁶ which is in excess of the District Court's jurisdiction and the action is one in which the District Court otherwise has jurisdiction, the District Court then does have jurisdiction to hear and determine the action.⁵⁷ The District Court cannot, however, award to the plaintiff in an action under this provision an amount exceeding its monetary jurisdiction limit for the action⁵⁸ and the judgment of the court in an action limited under this section is in full discharge of all demands in the cause of action.⁵⁹

6.5 Jurisdiction in respect of recovery of land

[2-29] The District Court has jurisdiction to hear and determine any action⁶⁰ for the recovery of land where the annual rent or the rateable value of the land, determined in accordance with the Rating Ordinance (Cap 116), or the annual value of the land, whichever is lower, does not exceed \$320,000.⁶¹

6.6 Jurisdiction where title to land in question

[2-30] The jurisdiction of the District Court over actions where title to land is in issue depends upon the rateable value or annual value of the land. The District Court has jurisdiction to hear and determine any action⁶² which would otherwise be within the jurisdiction of the District Court and in which the title to an interest in land comes into question if: (a) for an easement or licence, the rateable value, determined in accordance with the Rating Ordinance or the annual value, whichever is lower, of the land over which the easement or licence is claimed does not exceed \$320,000; or (b) for any other case, the rateable value or the annual value, whichever is the less, of the land does not exceed \$320,000.⁶³

55 District Court Ordinance s 33(1)(a) and (b).

56 See the District Court Ordinance s 39.

57 *ibid*, s 34(1), as amended by the District Court (Amendment) Ordinance 2000 s 23.

58 District Court Ordinance s 34(2).

59 *ibid*, s 34(3).

60 'Action' includes a counterclaim: District Court Ordinance s 39.

61 District Court Ordinance s 35. It was raised from \$240,000 to \$320,000 as from 3 December 2018.

62 'Action' includes a counterclaim: *ibid*, s 39.

63 *ibid*, s 36(a) and (b). The District Court has jurisdiction under this provision to hear and adjudicate upon 'pure title cases': see *Ng Cho Chu Judy v Chan Wing Hung* [2016] 1 HKLRD 1073, [2016] HKCU 124 (DC) (court had jurisdiction to adjudicate upon an action involving the issue whether a claimant had an interest in land by way of resulting trust). The District Court also has jurisdiction to hear and

the hire of goods provides for the payment of periodic sums by way of rent, each sum constitutes a separate cause of action.⁷⁶ On the breach of a hire-purchase agreement where the goods have been seized, it has been held that an action for arrears of hire before the termination of the agreement is an action for debt and a later action for damages for breach of contract is not brought on the same cause of action, and is not, therefore, barred.⁷⁷ Similarly, damage to goods and injury to the person, although occasioned by one and the same wrongful act, are infringement of separate rights and, therefore, give rise to separate causes of action.⁷⁸

6.9 Jurisdiction as to counterclaims and transfer of counterclaims to Court of First Instance

[2-36] In respect of the jurisdiction of the District Court, references to an action or proceeding are to be construed as including references to a counterclaim.⁷⁹ If, therefore, a party makes a claim and the defendant counterclaims, the question whether or not the District Court has jurisdiction to adjudicate upon the counterclaim must be resolved by application of the rules set out above.

[2-37] The effect of this is that, if a defendant in an action or proceeding within the jurisdiction of the District Court makes a counterclaim which is not within the jurisdiction of the District Court but is within the jurisdiction of the Court of First Instance, the District Court has three alternative courses of action open to it. It may, either of its own motion or on the application of any party, order that the whole proceedings be transferred to the Court of First Instance. Alternatively, it may order that the proceedings on the counterclaim be transferred to the Court of First Instance and the proceedings on the plaintiff's claim, except for a defence of set-off as to the whole or part of the subject matter of the counterclaim, be heard and determined by the District Court. The third alternative is that, where the court considers the whole proceedings should be heard and determined in the District Court, the matter must be reported to a judge of the Court of First Instance⁸⁰

which would reveal a balance due and owing at a given time; held that this gave rise to one cause of action and could not be split). But cf *Brunskill v Powell* (1850) 19 LJ Ex 362 where a plaintiff, who had supplied liquor and lent money to a defendant at different times, and who had marked down separate items but subsequently entered them in a book as one account and sent an account for the whole to the defendant, was allowed to sue in respect of separate causes of action, and *Lun Tai Insurance Co Ltd v Lee Ying-lin* [1965] HKLR 961, [1965] HKCU 85 (FC), where a plaintiff insurance company employed the defendant as broker and sued for money had and received on two separate occasions. There was no evidence that the parties had agreed to a running account. It was held that no weight could be attached to the fact that the plaintiff rendered accounts for the total sum due and separate causes of action existed.

76 *Rentit Ltd v Oaten* [1938] LJNCCCR 137.

77 *Overstone Ltd v Shipway* [1962] 1 All ER 52, [1962] 1 WLR 117 (CA, Eng).

78 *Brunsdon v Humphrey* (1884) 14 QBD 141, [1881-5] All ER Rep 357 (CA, Eng).

79 District Court Ordinance s 39.

80 *ibid*, s 41(3)(a)-(c). See *Re Estate of Chow Nai Chee* [2010] 6 HKC 515, [2010] 5 HKLRD 640 (CFI) (the District Court should make more use of its powers under

and, on the receipt of the report, the judge may, as he thinks fit, order either that the whole proceedings be transferred to the Court of First Instance or that the whole proceedings be heard and determined by the District Court or that the proceedings on the counterclaim be transferred to the Court of First Instance and the proceedings on the plaintiff's claim, except for a defence of set-off as to the whole or part of the subject matter of the counterclaim, be heard and determined by the District Court.⁸¹ If no report is made or if on any such report it is ordered that the whole proceedings be heard and determined in the District Court, the District Court will have jurisdiction to hear and determine the whole proceedings notwithstanding any enactment to the contrary.⁸²

[2-38] The Rules sensibly provide that, where an order is made that the proceedings on the counterclaim be transferred to the Court of First Instance but the claim be heard and determined in the District Court, and judgment on the claim is given for the plaintiff, execution of the judgment in the District Court must, unless the judge of the Court of First Instance orders otherwise, be stayed until the proceedings transferred to the Court of First Instance have been concluded.⁸³

6.10 Matrimonial jurisdiction of the District Court

[2-39] The District Court enjoys considerable matrimonial jurisdiction in its capacity as the Family Court. In some cases this jurisdiction is shared with the Court of First Instance; in others the court has power in appropriate circumstances to transfer the case to the Court of First Instance for adjudication.

[2-40] The District Court's most significant matrimonial jurisdiction⁸⁴ is as follows:

- (a) Jurisdiction under the Matrimonial Causes Ordinance (Cap 179) to grant divorces,⁸⁵ nullity decrees,⁸⁶ judicial separations⁸⁷ and to make orders in respect of proceedings for presumption of death.⁸⁸ Proceedings under the Ordinance must be commenced in the District Court, but may be transferred to the Court of First Instance.⁸⁹ The

s 41(3)(c), per Lam J); *Cecchetti Silvia Giada v Tsang Tak Yip* [2016] HKCU 1733 (unreported, DCCJ 300/2015, 22 July 2016) (DC) (matter reported to the Court of First Instance under s 41(3)(c), District Court Ordinance for determination of the appropriate forum for the trial).

81 *ibid*, s 41(4)(a)-(c).

82 *ibid*, s 41(6).

83 *ibid*, s 41(5).

84 See Practice Direction 15.12 'Matrimonial Proceedings and Family Proceedings' para 4.

85 Matrimonial Causes Ordinance (Cap 179) s 3.

86 *ibid*, s 4.

87 *ibid*, s 5.

88 *ibid*, s 6.

89 *ibid*, s 10A. According to the Matrimonial Causes Rules (Cap 179A) r 32(1), the District Court may order that a cause or application pending in that court be transferred to the Court of First Instance where, having regard to all the circumstances including

founded in contract, quasi-contract or tort where the amount claimed is not more than \$75,000, whether on balance of account or otherwise.¹¹⁹

- [2-46] The tribunal does not, however, have jurisdiction to hear and determine:
- any action in respect of defamation;
 - any action or proceedings in respect of a maintenance agreement within the meaning of section 14 of the Matrimonial Proceedings and Property Ordinance;
 - any action by a moneylender licensed under the Money Lenders Ordinance for the recovery of any money lent, or the enforcement of any agreement or security made or taken in respect of money lent;
 - any action that lies within the jurisdiction of the Minor Employment Claims Adjudication Board;¹²⁰ or
 - any action that lies within the jurisdiction of the Labour Tribunal.¹²¹

[2-47] The tribunal also has jurisdiction in respect of any claim for the recovery of any penalty,¹²² expenses, contribution or other amount which is recoverable by virtue of any enactment and for the recovery of any amount which is declared by any enactment to be recoverable as a civil debt if it is not expressly provided by that or any other enactment that the demand shall be recoverable only in some other court and the amount claimed does not exceed \$75,000.¹²³

[2-48] No claim may be split¹²⁴ and pursued in separate proceedings for the sole purpose of bringing the claim within the jurisdiction of the tribunal.¹²⁵

8.2 Abandonment of part of claim to give tribunal jurisdiction

[2-49] Where a claimant has a claim which exceeds the monetary sum in respect of which the tribunal has jurisdiction, the plaintiff may abandon the excess so as to bring the claim within the tribunal's jurisdiction.¹²⁶ Where such excess is

119 *ibid*, s 5(1) and Schedule para 1. The Schedule may be amended by resolution of the Legislative Council; *ibid*, s 6. The pecuniary limit of the tribunal's jurisdiction was raised from \$8,000 to \$15,000 in 1988 by the Administration of Justice (Miscellaneous Amendments) Ordinance 1988, from \$15,000 to \$50,000 in 1999 by the Small Claims Tribunal (Amendment) Ordinance 1999, and from \$50,000 to \$75,000 on 3 December 2018 by a Resolution of the Legislative Council 2018 (LN 132 of 2018).

120 As established by the Minor Employment Claims Adjudication Board Ordinance (Cap 453) s 3.

121 Small Claims Tribunal Ordinance s 5 and Schedule para 1(d).

122 'Penalty' does not include a fine imposed on the conviction of any person for an offence: Small Claims Tribunal Ordinance Schedule para 2.

123 Small Claims Tribunal Ordinance Schedule para 2.

124 For the meaning of 'splitting' in the context of the splitting of a cause of action in respect of the District Court's jurisdiction, see [2-35] above.

125 *ibid*, s 8.

126 *ibid*, s 9(1).

abandoned, the tribunal's award will be in full discharge of all demands in respect of the claim and judgment will be deemed to be entered accordingly.¹²⁷

8.3 Jurisdiction as to counterclaims

[2-50] Where any counterclaim or set-off and counterclaim in proceedings in the tribunal is a monetary claim which is not within the tribunal's jurisdiction, the tribunal must order that the proceedings on the counterclaim or set-off and counterclaim be transferred to the Labour Tribunal, Lands Tribunal, District Court or Court of First Instance as is appropriate.¹²⁸ Where an order of transfer is made and judgment on the claim is given for the claimant, then execution must, unless the tribunal otherwise orders, be stayed until the proceedings transferred to a tribunal or court have been determined.¹²⁹ Alternatively, the defendant making the counterclaim or set-off and counterclaim may abandon the excess so as to bring the counterclaim or set-off and counterclaim within the jurisdiction of the tribunal¹³⁰ and, where the excess is abandoned, the tribunal's award will be in full discharge of all demands in respect of the claim and judgment will be deemed to be entered accordingly.¹³¹

9. ESTABLISHMENT AND JURISDICTION OF THE LABOUR TRIBUNAL

[2-51] The Labour Tribunal was established by the Labour Tribunal Ordinance in 1973 and enjoys exclusive¹³² jurisdiction consisting of:

- Any claim for a sum of money¹³³ which arises from (i) the breach of a term, whether express or implied, of a contract of employment,¹³⁴

127 *ibid*, s 9(2).

128 *ibid*, s 10(1).

129 *ibid*, s 10(2).

130 *ibid*, s 10(3).

131 *ibid*, s 10(4).

132 Labour Tribunal Ordinance s 7(2).

133 A 'claim for a sum of money' is not restricted to a claim for liquidated damages but includes a claim for unliquidated damages: *Ireland v Canton Fitzgerald (HK) Ltd* [1988] HKC 493 (HC), following *Steward v Hong Kong Philharmonic Society Ltd* (unreported, HCA 3031/1979, 18 December 1979) (HC); *Panalpina (Hong Kong) v Ulrich Haldermann* [1983] HKLR 275, [1983] HKCU 15 (HC); not following *Hung Sang Engineering Works v Yu Wing Fat* [1975] HKLR 394, [1975] HKCU 2 (FC). Cf *Lee Yih Jen v Chung Newspapers Ltd* [1983] 2 HKC 550 (HC) (a 'claim for a sum of money' in its ordinary and natural sense means a proceeding for a particular fixed sum and not for money in any amount to be subsequently assessed, per Liu J).

134 'Contract of employment' means (a) an agreement, whether express or implied by law, whereby one person agrees to employ another and that other person agrees to serve his employer as an employee whether payment is to be on a price, task or time basis and wherever the services are to be rendered; and (b) a contract of apprenticeship: Labour Tribunal Ordinance s 2. For the difference between a contract of service (employer/employee) and a contract for services (employer/independent

11.2 Transfer to the Court of First Instance of proceedings within jurisdiction of District Court

[2-63] The District Court is empowered, either of its own motion or on the application of any party, to transfer to the Court of First Instance all or part of any action, notwithstanding that it falls within the jurisdiction of the District Court.¹⁶⁴

[2-64] Further, where proceedings have been instituted against the Government in the District Court and the Government applies to the Court of First Instance with a certificate from the Secretary for Justice to the effect that the proceedings (a) may involve an important question of law or be decisive of other cases arising out of the same matter; or (b) are, for other reasons, more fit to be tried in the Court of First Instance, they must be transferred from the District Court to the Court of First Instance.¹⁶⁵

[2-65] The District Court may also, either of its own motion or on the application of any party, order the transfer of 'costs only proceedings' to the Court of First Instance.¹⁶⁶

11.3 Transfer of proceedings to District Court from Court of First Instance

[2-66] The Court of First Instance has power, either of its own motion or on the application of any party, to order the transfer to the District Court of all or part of an action, other than a counterclaim, which appears to the Court of First Instance likely to be within the jurisdiction of the District Court.¹⁶⁷ Indeed, the Court of

164 *ibid*, s 42. See *Ho Kwok Wai v Chan Yun* [2015] HKCU 500 (unreported, DCCJ 955/2013, 9 March 2015) (DC) (a District Court judge may properly decide to transfer an action to the Court of First Instance where an action has already been commenced by one party in the Court of First Instance and a second related action has been commenced by the other party in the District Court where the District Court judge is of the opinion that it is appropriate for both actions to be consolidated or, at least, tried by the same judge).

165 Crown Proceedings Ordinance (Cap 300) s 15(1). The procedure governing the transfer is prescribed in RHC O 78.

166 District Court Ordinance s 53B.

167 District Court Ordinance s 43(1). As to the exercise of the court's discretion, see *Wong Miu Kwan v FPD Savills Property Management Ltd* [2006] 1 HKC 575 (CFI) (plaintiff commenced action in Court of First Instance claiming \$1.7 million for personal injuries; master transferred case to District Court; held on appeal that, apart from the matters which, according to statute, should be taken into account (employee's compensation already paid: District Court Ordinance s 32(2)(b)) and matters which should not be taken into account (contributory negligence unless admitted: District Court Ordinance s 32(2)(c)), the court in deciding whether to transfer a case to the District Court should also take into account the following matters: (a) in the absence of abuse, a plaintiff should be entitled to frame his case in the manner he wishes; (b) at an interlocutory stage, it would not be proper for the court or a master to view

the plaintiff's evidence in the same way that it would be viewed at trial by weighing the different evidence or by believing or disbelieving some or all of the evidence; that exercise could only be carried out when all the evidence, cross-examination and submissions had been heard, particularly where there were factual and/or other disputes between the parties, as, for example, expert evidence; (c) accordingly, the plaintiff's case on quantum as framed by him ought to be viewed at its highest when determining the proper court in which the case should be brought; in the instant case the master had erred in ordering case to be transferred to District Court, per Suffiad J); *Wong Tak Shun v Luk Chueck Wah Stella* [2005] HKCU 1528 (unreported, HCPI 9/2005, 2 November 2005) (CFI) (for the purpose of determining whether to order a case to be transferred the court should make no assessment of matters which are genuinely controversial; a borderline case should stay in the Court of First Instance; held that, since the plaintiff's claim viewed realistically fell within the upper end of the District Court scale, the master's order to transfer the case to the District Court had been a proper exercise of her discretion). The order may be made at any stage of the proceedings: District Court Ordinance s 43(2). As regards a master's powers of transfer, it had been held in *Inchcape (HK) Ltd t/a Gilman Business Systems v Performa (Asia) Ltd* [1992] 2 HKC 364 (HC) that, although a master had jurisdiction under RHC O 32 r 11 to exercise the court's powers of transfer, an order of this nature could not be made until the hearing of the summons for directions at which the parties could be heard and the exercise of powers of transfer at an earlier stage of the proceedings constituted a breach of natural justice. In *Hang Seng Credit Card Ltd v Tsang Nga Lee* [2000] 3 HKC 269, [2000] 3 HKLRD 33 (CFI), however, Yam J held that *Inchcape* should not be followed and a master had jurisdiction under the District Court Ordinance s 40 to transfer a case to the District Court without waiting for the hearing of the case management summons.

168 District Court Ordinance s 43(3). See *Pacific Bridge Services Ltd v Wide Tech Shipping Ltd* [2000] HKCU 1111 (unreported, HCA 12492/1999, 25 October 2000) (CFI), where an Admiralty claim for \$150,000 had been commenced in the Court of First Instance. On an application for transfer to the District Court, the Court of First Instance held that this was not a case of importance or complexity, nor was there any other reason why the case should be heard by the Court of First Instance. The words 'any other reason' should be construed in the same way as the similar provision in respect of applications for leave to appeal to the Court of Final Appeal, so that the reason must be of such an exceptional nature as to enable the court to say that it should remain in the Court of First Instance. See also *Hampton, Winter & Glynn (a firm) v Erving Brettell (a firm)* (unreported, HCA 5290/1998, 28 March 2001) (CFI) (claim was essentially a claim of impropriety against a solicitor in his conduct as an officer of the court; that was sufficient reason for the action to remain in the Court of First Instance).

169 For a discussion of 'costs only proceedings', which were newly introduced by the Civil Justice (Miscellaneous Amendments) Ordinance 2008 in 2008, see Chapter 19 'Costs'.

170 High Court Ordinance s 52C.

- (a) One copy of the writ for each defendant named in the writ⁴⁹ together with two extra copies. One of the extra copies (after franking with the appropriate fee) will be filed in the Court Registry. The plaintiff will retain the remaining copy.
- (b) Three copies of the prescribed form of acknowledgment of service (the formal parts duly completed) for each defendant named in the writ.⁵⁰ The acknowledgment of service will accompany the service of the writ.⁵¹
- (c) The requisite fee.

[4-25] Upon presentation of the above at either the High Court or District Court Registry, the court officer will first check the forms for completeness. He will then assign an action number to the writ, which number will be written in the right top corner of the writ. Next, he will seal⁵² the writ and date the same. In the High Court Registry, an action number will be allocated to the action either as a High Court Action or Miscellaneous Proceedings, or the action may be assigned to the Commercial List, Personal Injuries List, Construction and Arbitration List, Admiralty List, Bankruptcy List or Winding-up List. In the District Court Registry, the court officer will allocate an action number to the action either as District Court Civil Action, Miscellaneous Proceedings, Personal Injuries List or Employee's Compensation List.⁵³

[4-26] Particulars of the action number, the parties, the solicitors' firms involved and the nature of the claim will be entered manually in the appropriate Cause Book.⁵⁴ A case file will be opened on which the original writ is filed⁵⁵ and the Registry staff will then return the other copies of the writ to the issuing party. Once entered in the Cause Book, the writ may be searched for, inspected and a

49 Sufficient copies should be presented to the Registry at the same time when the writ is issued for sealing and not as and when they are required for service: see Notes on Procedures in the High Court Registry, issued by the Registry in June 1986. To facilitate the processing of an originating document, practitioners should identify the dominant cause on the top of the document: see Practice Direction No 24.1 'Sealing of Writs of Summons, Newspaper Advertisements, Filing of Documents' para 7 and App A.

50 See Notes on Procedures in the High Court Registry, issued by the Registry in June 1986.

51 As to service, see Chapter 5 'Service of Process and Acknowledgment of Service'.

52 As to sealing, see above.

53 See also Chapter 8 'Pleadings'.

54 Each List has its own Cause Book.

55 RHC and RDC O 6 r 7(5). Practice Direction No 24.1 'Sealing of Writs, Newspaper Advertisement, Filing of Documents' para 3 provides that, when a writ of summons is tendered for sealing in the Registry, the party tendering it must lodge with the Registrar an additional copy. This Practice Direction applies to the District Court by virtue of Practice Direction No 27 'Civil Proceedings in the District Court' para 5. The purpose of lodging the copy is to facilitate the inspection of originating process under RHC and RDC O 63 r 4(1)(a).

copy of it taken.⁵⁶ In certain circumstances, a writ may only be discontinued or withdrawn with the leave of the court, on an ex parte application.⁵⁷

[4-27] If concurrent writs are required, these may be issued at the plaintiff's request.⁵⁸ A concurrent writ will be stamped with an official stamp marked 'concurrent', by the officer by whom the writ is sealed.⁵⁹ One example of a concurrent writ is where a writ for service within the jurisdiction is issued as concurrent with one that is to be served outside the jurisdiction or vice versa.⁶⁰

[4-28] The date of issue of the writ marks the commencement of the action⁶¹ and is significant for two reasons. First, in calculating the time for service of the writ.⁶² Secondly, for the purposes of calculating time under the Limitation Ordinance (Cap 347).⁶³

2.2.1 Court's power to backdate writ

[4-29] In an appropriate case the court has inherent power to order that a writ be backdated.⁶⁴

2.2.2 Leave to issue writ

[4-30] Leave to issue a writ is necessary in both the Court of First Instance and the District Court where the writ is to be served out of the jurisdiction, unless every claim made by the writ is one which, by virtue of any written law, the court has power to hear and determine, notwithstanding that the person against whom

56 RHC and RDC O 63 r 4(1)(a).

57 RHC and RDC O 21 r 3. For discontinuance without leave, see RHC and RDC O 21 r 2.

58 RHC and RDC O 6 r 6(1). A concurrent writ cannot be issued after the original has expired: *Doyle v Kaufman* (1876) 3 QBD 7.

59 RHC and RDC O 6 r 7(4).

60 RHC and RDC O 6 r 6(2).

61 *Godard v Benjamin* (1813) 3 Camp 331; *The Espanoleto* [1920] P 223.

62 As to service, see Chapter 5 'Service of Process and Acknowledgment of Service'.

63 For a consideration of the limitation provisions, see Chapter 3 'Pre-Commencement Considerations'.

64 See *Cinerent Ltd v Gan Assurances Iard Compagnie Francaise D'Assurances et de Reassurances Incendie Accidents et Risques Divers* [2010] 1 HKLRD 378, [2009] HKCU 2088 (CFI) (plaintiff took writ to Registry for registration but clerk at Registry, having inspected the writ, refused to register it on the grounds that there was no accompanying letter stating that the claim was for more than \$1 million; writ only issued next day; as a result of concerns about possible limitation issues, plaintiff applied for writ to be backdated to date of first attempt to register; held first that there was no requirement for any letter to the effect that the claim exceeded \$1 million to accompany the draft writ and Registry was wrong to have refused to issue the writ on this ground; secondly, the court had inherent power to order a writ to be backdated: *Riniker v University College of London* [1999] All ER (D) 371; order made that writ be backdated to date when Registry wrongfully refused to issue the writ, per Recorder Patrick Fung SC).

party.⁷⁶ Where, however, the name of a party is simply amended,⁷⁷ the normal rule applies and the time for service runs from the date of issue of the writ and not from the date of the amendment.⁷⁸

[4-34] Any person named as a defendant in a writ which has not been served on him may serve on the plaintiff a notice requiring the plaintiff within a specified period not less than 14 days after service of the notice either to serve the writ on the defendant or to discontinue the action as against him.⁷⁹ Where the plaintiff fails to comply with this notice within the time specified, the court may, on the application of the defendant by summons, order that the action be dismissed or make such other order as it thinks fit.⁸⁰

2.3.2 Application for extension of the writ

[4-35] If the plaintiff fails to serve the writ within the 12-month period, the plaintiff must apply to the court to have the validity of the writ extended. The court has jurisdiction to extend the validity of a writ under either its specific power (under Order 6 rule 8)⁸¹ or its general power to extend time (under Order 3 rule 5).⁸² Order 6 rule 8 empowers the court to, from time to time, extend the validity of a writ for a period not exceeding 12 months at any one time, beginning with the day next following that on which it would otherwise expire.⁸³ This means that, where a plaintiff has delayed for more than 12 months after the expiry of the writ in seeking an extension, the court has no jurisdiction under Order 6 rule 8

76 *Seabridge v H Cox and Sons (Plant Hire) Ltd* [1968] 2 QB 46, [1968] 1 All ER 570 (CA, Eng) applied in *Lee Yuk Yung v Yeung Kwok Keung* [1985] HKLR 468, [1985] HKCU 44 (HC).

77 *Id* under RHC and RDC O 20 r 5(3).

78 *Lee Yuk Yung v Yeung Kwok Keung* [1985] HKLR 468, [1985] HKCU 44 (HC).

79 RHC O 12 r 8A(1).

80 RHC O 12 r 8A(2). For the exercise of the court's discretion, see *Grande Holdings Ltd (provisional liquidators appointed) v Christopher Ho Wing On* [2013] HKCU 2354 (unreported, HCA 565/2013, 9 October 2013) (CFI) (plaintiff commenced action against defendants in April 2013 by issuing protective writ; writ not served; plaintiff then went into liquidation and provisional liquidators appointed; defendant applied under RHC O 12 r 8A for order that plaintiff serve the writ or, if not, the action be dismissed; DHCJ Leung first observed that it was for the defendants to satisfy the court that the circumstances of the case called for the court's intervention notwithstanding that the time for service of the writ had not expired; the defendants contended that they would suffer prejudice as a result of having the writ hanging over their heads and that the underlying objective required that the case be expeditiously resolved; the learned judge noted that such prejudice could be either actual or potential but should be imminent or likely instead of merely possible; the provisional liquidators had explained that it was likely that they would be in a position to decide whether there was a sound basis for pursuing the claim before the expiry of the validity of the writ; there had been no suggestion that their explanation was not genuine; the application would be dismissed).

81 RHC and RDC O 6 r 8.

82 RHC and RDC O 3 r 5.

83 RHC and RDC O 6 r 8(2).

to grant such an extension, but an extension might be granted in exceptional circumstances under the court's general power to extend time under Order 3 rule 5.⁸⁴ The application for extension is made ex parte to a master, supported by an affidavit and accompanied by the original writ.⁸⁵ The general principles to be applied by the court in determining whether or not to grant an extension were laid down by the House of Lords in *Kleinwort Benson Ltd v Barbrak Ltd, The Myrto (No 3)*.⁸⁶ The main principles may be summarised as follows:

- (a) the power to extend the validity of the writ should only be exercised for good reason;
- (b) the question whether good reason exists in any particular case depends on all the circumstances of the case; and
- (c) the decision whether an extension should be allowed or disallowed is a matter for the discretion of the court dealing with the application. In exercising its discretion, the court is entitled to take into account all the circumstances of the case, including the balance of hardship to the plaintiff were an extension to be refused against the hardship to the defendant were an extension to be granted.

[4-36] Clearly, the hardship suffered by the plaintiff if an extension is refused is that he will be deprived of a remedy against the defendant. The hardship to the defendant if an extension is granted is that he may lose the benefit of a defence under the Limitation Ordinance, where the writ has ceased to be valid and the limitation period has expired.

[4-37] In *Kleinwort Benson*, the House of Lords also carefully analysed the situations in which extensions are sought. According to the House of Lords, these situations fall into three categories:

- (a) cases where the application for an extension of time is made when the writ is still valid and before the relevant limitation period has expired;

84 See *Bank of China (Hong Kong) Ltd v Chen Jianren* [2009] 3 HKLRD 163, [2007] HKCU 2104 (CFI). In that case, DHCJ Carlson affirmed on appeal the Master's order made on 19 July 2007 extending the validity of the writ issued over six years ago on 22 June 2001 for a period of three months from the date of his order and deeming that service of the writ on the defendant had taken place on 16 November 2006.

85 *Lee Fai t/a Fai Kee Timber v Chan Kui* [1997] 3 HKC 228, [1997] 1 HKLRD 1154 (CA). The application must of necessity be made ex parte, since at that stage there is no defendant before the court: *ibid*. Renewal without application is an irregularity which does not necessarily invalidate the renewal: *Bugden v Ministry of Defence* [1972] 1 All ER 1, [1972] 1 WLR 27 (CA, Eng). If the application is not made during the validity of the writ, the affidavit must fully explain the reasons for the delay and set out all the facts and circumstances relied upon to support the application for the renewal, stating in particular what efforts, if any, have been made to serve the defendant, and why those efforts failed: *Kleinwort Benson Ltd v Barbrak Ltd, The Myrto (No 3)* [1987] AC 597, [1987] 2 All ER 289 (HL); *Lewis v Harewood* (1996) Times, 11 March (CA, Eng).

86 *Kleinwort Benson Ltd v Barbrak Ltd, The Myrto (No 3)* [1987] AC 597, [1987] 2 All ER 289 (HL).

- (b) delay caused by the plaintiff in instructing his solicitors to apply for legal aid or for the removal of a legal aid restriction;⁹⁶
- (c) that there was difficulty in tracing witnesses or obtaining expert or other evidence;⁹⁷
- (d) confusion on the part of the solicitor;⁹⁸ or confusion between two members of staff of the plaintiff's solicitors;⁹⁹
- (e) that the applicant had a choice whether or not to issue a writ within the period of its validity but chose not to do so until he could accompany it with a statement of claim and a statement of special damages;¹⁰⁰ and
- (f) carelessness or negligence on the part of the plaintiff's solicitors.¹⁰¹

[4-42] As mentioned above, the court also has the power to extend the time for service of the writ under its general power to extend time under Order 3 rule 5.¹⁰² Order 3 should be read with Order 2 rule 1 which provides that where there has been any failure to comply with any requirement of the Rules, the failure (in this case, the failure to serve the writ) is treated as an irregularity and the court may waive it accordingly.¹⁰³ The test to be applied under Order 3 rule 5 is more rigorous than that under Order 6 rule 8. The courts have made it clear that an application under Order 3 rule 5 will only be granted in exceptional circumstances, where the justice of the case so requires.¹⁰⁴ This means that if the plaintiff cannot overcome the hurdles under Order 6 rule 8, it is unlikely that he will obtain an

96 *Waddon v Whitecraft-Scovill Ltd* [1988] 1 All ER 996, [1988] 1 WLR 309 (HL), applied in *Dixon v Grand Hyatt Hong Kong Co Ltd & Anor* [1994] 2 HKC 489 (HC); *Chow Ching Man v Sun Wah Ornament Manufactory Ltd* [1996] 2 HKC 460, [1996] 2 HKLR 338 (CA).

97 See *Portico Housing Association v Brian Moorhead and Partners* (1985) 1 Constr LJ (CA, Eng).

98 *Doble v Haymills (Contractors) Ltd* (1998) *Times* 5 July, (1988) 132 SJ 1062 (CA, Eng).

99 *Lee Fai (t/a Fai Kee Timber) v Chan Kui* [1997] 3 HKC 228, [1997] HKLR 1154 (CA).

100 *Chow Ching Man v Sun Wah Ornament Manufactory Ltd* [1996] 2 HKC 460, [1996] 2 HKLR 338 (CA).

101 *The Delta Pla* [2003] HKCU 510 (unreported, HCAJ 31/2002, 29 April 2003) (CFI) (the failure to renew the writ was the result of an oversight on the part of the plaintiff's lawyers. In setting aside the original order extending the validity of the writ, the court held that omission or carelessness on the part of the plaintiff's lawyers did not constitute a good reason for granting an extension); *Chan Lap Shun, formerly trading as Lap Shun Pao Hong v Cheng Shing* [2011] HKCU 2202 (unreported, DCCJ 4449/2009, 15 November 2011) (DC) (letterbox service ineffective; application for extension of writ after writ had expired and after limitation period had also expired; application for extension refused on grounds that applicant's solicitor should have realised that service would not be effective).

102 RHC and RDC O 3 r 5.

103 RHC and RDC O 2 r 1. See Chapter 1 'Some Introductory Matters', above.

104 *Singh, Joginder v Dupont Harper Foundries Ltd* [1994] 2 All ER 889, [1994] 1 WLR 769 (CA, Eng); *Ward-Lee v Linehan* [1993] 2 All ER 1006, [1993] 1 WLR 754 (CA, Eng); *Bank of China (Hong Kong) Ltd v Chen Jianren* [2009] 3 HKLRD 163, [2007] HKCU 2104 (CFI) (see above).

extension under Order 3 rule 5 and Order 2 rule 1.¹⁰⁵ This was most aptly put in *Leal v Dunlop Bio-Processes International Ltd*¹⁰⁶ where the court stated that if the plaintiff 'cannot properly enter through the front door of O 6 r 8, he should not be allowed to enter through the back door of O 2 r 1'.

One final point of practical importance is that, where the court does grant an application to extend the validity of the writ, the writ must be marked with an official stamp showing the period for which it has been extended.¹⁰⁷ In the absence of such a stamp, service of the writ may be set aside.¹⁰⁸

2.4 Amendment of the writ

2.4.1 General rules

(a) Amendment without leave of court

[4-43] The writ, including the general indorsement, may be amended once in any way before the pleadings in the action are deemed to be closed.¹⁰⁹ This means that any second or subsequent amendments always require leave of the court. There are five important points to note here. First, the rule that permits the writ to be amended without leave before close of pleadings applies only to a writ, and not to a statement of claim indorsed on the writ.¹¹⁰ Secondly, a defendant may apply to disallow the amendment.¹¹¹ Thirdly, the rule does not extend to an amendment consisting of:

105 *Leal v Dunlop Bio-Processes International Ltd* [1984] 2 All ER 207, [1984] 1 WLR 874 (CA, Eng); *Boocock v Hilton International Co* [1993] 4 All ER 19, [1993] 1 WLR 6055 (CA, Eng); *Dixon, John Millard v Grand Hyatt Hong Kong Co Ltd & Anor* [1994] 2 HKC 489 (HC).

106 [1984] 2 All ER 207 at 215, [1984] 1 WLR 874 (CA, Eng) per Slade J.

107 RHC and RDC O 6 r 8(3).

108 Service was set aside in *Hong Kong and Shanghai Banking Corp v Bittker* [1988] HKC 577 (HC) on the ground that the order extending the writ had not been stamped on the writ.

109 RHC and RDC O 20 r 1(1). Pleadings are deemed to close 28 days after service of the defence, unless there is a reply or defence to a counterclaim, in which case pleadings close 14 days thereafter: RHC and RDC O 18 r 20. See further, below.

110 RHC and RDC O 20 r 1(3)(c). Note, however, that the statement of claim may be amended without leave under RHC and RDC O 20 r 3. See further, below.

111 RHC and RDC O 20 r 4(1). The application must be made within 14 days after the service of the amended writ: see RHC and RDC O 20 r 4(1). Where the court is satisfied that if an application for leave to make the amendment had been made under RHC or RDC O 20 r 5 and leave would have been refused, he will order that the amendment be struck out: RHC and RDC O 20 r 4(2).

- (n) summary proceedings for possession of land where the plaintiff alleged that land is occupied solely by persons (not being tenants or tenants holding over after termination of tenancy) who entered or remained in occupation without the consent or licence of the plaintiff or his predecessor;¹⁴⁶ and
- (o) an application under the Child Abduction and Custody Ordinance (Cap 512).¹⁴⁷

3.2 Proceedings which may, in accordance with any written law, be begun by originating summons

[4-54] There are many instances where written laws authorise (but do not mandate) proceedings to be begun by originating summons. Perhaps the best example is the 'vendor/purchaser summons' under the Conveyancing and Property Ordinance (Cap 219) section 12.¹⁴⁸ By this procedure, a vendor of property may obtain a judicial decision on whether the vendor has given a good title or answered the purchaser's requisitions adequately, which will bind all parties before the court, and then sell his property with the benefit or burden of such decision.¹⁴⁹ Further, many applications under the Companies Ordinance (Cap 622) and the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) may be made by originating summons.¹⁵⁰

3.3 Proceedings which are appropriate to be begun by originating summons

[4-55] By virtue of Order 5 rule 4(2), the following proceedings are appropriate to be begun by originating summons: (a) proceedings in which the sole or principal

146 RHC O 113 r 1.

147 RHC O 121 r 2.

148 Conveyancing and Property Ordinance (Cap 219) s 12 provides that a vendor or purchaser of land may apply by originating summons or petition to the court (the High Court unless the parties submit to the jurisdiction of the District Court) in respect of any question arising out of or connected with any contract for the sale of land (not being a question affecting the validity of a contract or compensation payable by a public body) and the court may make such order as appears just. Note that this procedure is inappropriate where the parties are jointly represented: *Wong Yiu v Leung Sum* (unreported, HCMP 2421/1987, 3 December 1987) (HC). The decision of the court will only bind the parties to the action and will have no effect upon third parties: *Wong Yiu v Leung Sum & Anor* (unreported, HCMP 2421/1987, 3 December 1987).

149 *In re Nichol's and Van Joel's Contract* [1910] 1 Ch 43 (CA, Eng), per Farwell J.

150 RHC O 102 r 2(1). Note that most of the provisions in the old Companies Ordinance (Cap 32) have been repealed by the new Companies Ordinance (Cap 622) with effect from 3 March 2014. The old Companies Ordinance has remained in force with a narrower scope of content and has been retitled to the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32).

question at issue is one of construction of any legislation¹⁵¹ or of any document or one of pure law,¹⁵² and (b) proceedings in which there is unlikely to be any substantial dispute of fact.¹⁵³

[4-56] The object of the first limb of Order 5 rule 4(2) is to facilitate the determination of short questions of construction that can be examined, without affidavits, upon the document itself.¹⁵⁴ Thus, this limb is only intended to enable the court to decide questions of construction where the decision of those questions (whichever way it may go) will settle the litigation between the parties.¹⁵⁵

[4-57] Under this part of the rule, the court will, for example, construe a contract,¹⁵⁶ memorandum and articles of association,¹⁵⁷ or a deed of mutual covenant.¹⁵⁸ However, the court will not decide an academic or theoretical question.¹⁵⁹

[4-58] The second limb of Order 5 rule 4(2)¹⁶⁰ makes it clear that the originating summons procedure is inappropriate where there are substantial issues of fact between the parties or claims of a contentious nature.¹⁶¹ Nor should an action

151 See, for example, *Lee Miu Ling v A-G of Hong Kong* [1996] 1 HKC 124 (CA) (question whether the provisions of the Legislative Council (Electoral Provisions) Ordinance (Cap 381) infringed the Hong Kong Bill of Rights Ordinance (Cap 383)).

152 RHC and RDC O 5 r 4(2)(a).

153 RHC and RDC O 5 r 4(2)(b). Note that this procedure is not appropriate if the plaintiff intends to apply for summary judgment under RHC or RDC O 14. As to applications for summary judgment, see Chapter 12 'Disposal of Actions Without Trial'.

154 *Re Nobbs, Nobbs v Law Reversionary Interest Society* [1896] 2 Ch 830 at 83, per Kekewich J.

155 *Lewis v Green* [1905] 2 Ch 340; *Hunt v Hunt* (1907) 97 LT 822 (CA, Eng).

156 *Mason v Schuppiser* (1899) 43 Sol Jo 718, 81 LT 147 (CA, Eng).

157 *Morgan's Brewery Co v Crosskill* [1902] 1 Ch 898; *Cyclists' Touring Club v Hopkinson* [1910] 1 Ch 179.

158 *Hong Kong Ping Jeng Lau Co Ltd v The Incorporated Owners of United Centre* [1990] 1 HKC 178 (CA); *Re Gadd's Land Transfer, Cornmill Development Ltd v Bridle Lane (Estates) Ltd* [1966] Ch 56, [1965] 2 All ER 800, but see *Rigden v Whitstable Urban District Council* [1959] Ch 422, [1958] 2 All ER 730.

159 *Re Carnarvon Harbour Acts 1793 to 1903, Thomas v A-G* [1937] Ch 72, [1936] 2 All ER 1325. See *Rigden v Whitstable Urban District Council* [1959] Ch 422, [1958] 2 All ER 730; *Sumner v William Henderson & Sons Ltd* [1963] 2 All ER 712, [1963] 1 WLR 823 (CA, Eng); *Wyko Group plc v Cooper Roller Bearings Co Ltd* (1995) Times, 4 December. As to the use of the procedure as an alternative to judicial review, see *Punton v Ministry of Pensions and National Insurance* [1963] 1 All ER 275, [1963] 1 WLR 186 (CA, Eng); *Punton v Ministry of Pensions and National Insurance (No 2)* [1964] 1 All ER 448, [1964] 1 WLR 226 (CA, Eng); *Lee Miu Ling v A-G of Hong Kong* [1996] 1 HKC 124 (CA) (question whether the provisions of the Legislative Council (Electoral Provisions) Ordinance offended the Hong Kong Bill of Rights Ordinance; held on appeal that issue should have been resolved by way of judicial review proceedings, per Litton JA).

160 RHC and RDC O 5 r 4(2).

161 For example, by beneficiaries against trustees: *Sir Lindsay Parkinson & Co Ltd's Trust Deed, Bishop v Smith* [1965] 1 All ER 609, [1965] 1 WLR 372 (CA, Eng) (where it was held that the action should have been commenced by writ).

summons is made, the originating summons is not kept alive unless the order specifically so states.¹⁹⁶

3.8 Amendment of originating summons

[4-72] Unlike a writ of summons, there is no provision in the Rules permitting an originating summons to be amended without the leave of the court.¹⁹⁷ However, the court has the same wide powers of amendment of an originating summons as it has with amending a writ.¹⁹⁸ Thus, the court may grant leave on such terms as to costs or otherwise as may be just, and in such manner as it may direct.¹⁹⁹

[4-73] The court also has inherent power to strike out or amend an originating summons as being an abuse of the process of the court²⁰⁰ or under the Rules to strike out or amend an originating summons as disclosing no reasonable cause of action.²⁰¹

3.9 Discontinuance of action commenced by originating summons

[4-74] The plaintiff may, without the leave of the court, discontinue the action or withdraw any particular question or claim in the originating summons as against any or all of the defendants. However, he must do so no later than 14 days after service on him of the defendant's affidavit evidence.²⁰² Where there are two or more defendants, the plaintiff has 14 days from the affidavit evidence served by the last defendant.²⁰³

4. ORIGINATING MOTION

[4-75] The third type of originating process is an originating motion.²⁰⁴ The term 'motion' connotes the application made to the court, rather than the document embodying the application. A motion is an oral application. Notice of intention

196 *Re Pattman's Will Trusts, Westminster Bank Ltd v Pattman* [1965] 2 All ER 191, [1965] 1 WLR 728.

197 Cf RHC and RDC O 20 r 1 (amendment of writ without leave). See also RHC and RDC O 2 r 1 (non-compliance with Rules).

198 RHC and RDC O 20 r 7, applying the provisions of RHC and RDC O 20 r 5 (amendment of writ or pleadings with leave) to originating summonses.

199 RHC and RDC O 20 r 5, as applied by RHC and RDC O 20 r 7. See, for example, *Talent Hope Ltd v Magnificent Estates Ltd* [1995] 3 HKC 593 (HC) (amendment of originating summons when expedited form improperly used). See also the powers laid down in RHC and RDC O 20 r 8(1).

200 *Punton v Ministry of Pensions and National Insurance* [1963] 1 All ER 275, [1963] 1 WLR 186 (CA, Eng).

201 *Re Caines (deceased), Knapman v Servian* [1978] 2 All ER 1, [1978] 1 WLR 540 (CA, Eng).

202 Ie filed pursuant to RHC and RDC O 28 r 1A(2).

203 RHC and RDC O 21 r 2(3A).

204 RHC and RDC O 8 r 1.

to make such an application is called a 'notice of motion' or, in the case of an originating motion, an 'originating notice of motion'. When an application is made to the court by motion, the court is said to be 'moved'. Originating motions may be moved by counsel or by litigants in person.²⁰⁵

[4-76] Motions are governed by the provisions of Order 8 rule 1 except in the case of originating motions of a particular class that are subject to special provisions made by the Rules or any written law.²⁰⁶

4.1 Proceedings which must or may be begun by originating motion

[4-77] This type of originating process is rather specialised and may only be used if any written law (including the Rules) expressly requires or authorises the proceedings to be commenced in this fashion.²⁰⁷ Thus, in *Re Wing Yick Bamboo Scaffolders Ltd*,²⁰⁸ where an application for revocation of a patent (under the Patents Ordinance (Cap 514)) was made by originating motion, the court held that as there was no written law authorising such proceedings to be commenced in this manner, the application should have been made by originating summons.²⁰⁹

[4-78] The following proceedings are expressly required to be begun by originating motion:

- (a) an appeal to the High Court by way of rehearing from any court, tribunal or person;²¹⁰
- (b) an appeal from a tribunal to the Court of Appeal by way of case stated;²¹¹
- (c) an appeal to the Court of Appeal;²¹²
- (d) proceedings for the apportionment of salvage under the court's Admiralty jurisdiction;²¹³ and
- (e) an appeal against an order made by the Solicitors' Disciplinary Committee.²¹⁴

205 Save in those cases where a litigant, such as a company, must appear through a solicitor, as to which see Chapter 6 'Parties'.

206 See, for example, the rules relating to notices of appeal in RHC O 59 r 3.

207 RHC and RDC O 5 r 5.

208 *Re Wing Yick Bamboo Scaffolders Ltd* [2002] 1 HKC 395, [2002] 1 HKLRD 166 (CFI).

209 The court ordered, inter alia, that the proceedings be continued as if begun by writ. See further, 'Commencement by the wrong mode of origination process', at section 6 below.

210 RHC O 55 r 3(1). This provision does not apply to appeals by way of case stated or appeals under the Magistrates Ordinance: RHC O 55 r 1(2).

211 RHC O 61 r 2(2).

212 RHC O 59 r 3(1).

213 RHC O 75 r 33(1).

214 RHC O 106 r 12(1).

the suit itself and not to future actions.²⁶⁰ Nor does the rule extend to making an appeal against, or applying to set aside, the order for contempt.²⁶¹

[4-93] Although every individual (subject to the exceptions mentioned above) has the right to act in person, a litigant in person is inevitably at a significant disadvantage in coping with the complex and technical rules of practice and procedure. Further, if he repeatedly institutes vexatious proceedings then, however much he may feel a victim of grievance or injustice, he runs the risk of being declared a vexatious litigant by the High Court.²⁶² He will then be unable to institute or continue to make any application in any legal proceedings without the leave of the court.²⁶³

[4-94] Upon filing an appropriate notice, a party who sues or defends by a solicitor may change his solicitor,²⁶⁴ or act in person,²⁶⁵ and a party who sues or defends in person may appoint a solicitor to act for him.²⁶⁶

7.2 Use of a 'McKenzie' friend

[4-95] Where a litigant is acting in person, the court retains discretion, in the exercise of its inherent jurisdiction, to permit that person to be assisted by a 'McKenzie' friend. Any person, whether a lawyer or not, may attend the trial as a friend of either party, take notes and quietly make suggestions and offer advice.²⁶⁷ The leave of the court is not required for assistance of this nature to be utilised, with the exception that leave is required where the proceedings are not open to public.²⁶⁸ On rare occasions, the court has permitted the friend to take a more

260 See *Bettinson v Bettinson* [1965] Ch 465, [1965] 1 All ER 102, [1965] 2 WLR 448.

261 See *The Messiniaki Tolmi* [1981] 2 Lloyd's Rep 595 (CA, Eng).

262 See the High Court Ordinance s 27. See above.

263 *ibid.*

264 RHC and RDC O 67 r 1. An omission to comply with the procedure for substituting one solicitor for another is an irregularity which can be waived: *Mason v Grigg* [1909] 2 KB 341 (CA, Eng); *Norris v Bailey* (1893) 62 LJQB 338. But see *De Reuter v Morris Process Co* (1895) 39 SJ 399 (managing director of company purported to appoint a new solicitor to act for the company in place of the solicitor appointed by the directors; held he had no authority to do so and the name of the new solicitor was taken off the record).

265 RHC and RDC O 67 r 4.

266 RHC and RDC O 67 r 3.

267 See *Collier v Hicks* (1851) 2 B & Ad 663, 109 ER 1290, approved in *McKenzie v McKenzie* [1971] P 33, [1970] 3 All ER 1034 (CA, Eng); *R v Bow County Court, ex p Pelling* [1999] 4 All ER 751 (CA, Eng).

268 For example where an application for leave for a person to attend court as a McKenzie friend, see *CWK v PTK* [2018] HKCU 4384, [2018] HKFC 104 (DC).

active part in the proceedings.²⁶⁹ This does not extend, however, to permitting the friend to issue proceedings on behalf of a party.²⁷⁰

[4-96] Note, however, that where proceedings are being heard in chambers in private, the nature of the proceedings which made it appropriate for them to be heard in private, might also make it undesirable in the interests of justice for a McKenzie friend to assist.²⁷¹

269 See *B v A* [1998] 1 HKLRD 557, [1998] HKCU 2592 (CFI); *Lobo v Kripalani* [1998] 2 HKLRD 325, [1998] HKCU 718 (CA); *Susan Caroline Berry v William Allan* [1997] HKCU 146 (unreported, CACV 170/1996, 26 February 1997) (CA) (Patrick Chan J permitted McKenzie friend to address court where party was suffering from ill health); *Chan Kueng Un Roy v China Vest II-A* [1999] HKCU 1101 (unreported, CACV 154/1999, 2 September 1999) (CA) (appellant adjudged bankrupt and appealed to Court of Appeal; appellant's elder sister permitted to address the court although appellant had himself lodged the appeal); *Law Siu Yin Ada v Lo Hung Kwan* [2001] HKCU 366 (unreported, CACV 1034/2000, 3 May 2001) (CA) (plaintiff aged 80; leave granted for her son to argue the case, although plaintiff was required to be present in court throughout the proceedings).

270 See *Ng Jack Fong v Ng Chan Ning* [2007] HKCU 490 (unreported, DCCJ 2830/2005, 19 March 2007) (DC) (appeal commenced by someone purportedly on behalf of the plaintiff was rejected).

271 *R v Bow County Court, ex p Pelling* [1999] 4 All ER 751 (CA, Eng) (a matrimonial case heard in chambers); *Mones, Celestina Saldivar v Lui Siu Hung* (unreported, HCLA 81/1999, 4 November 1999) (CFI) (McKenzie friend refused entry in hearing in chambers of appeal from Labour Tribunal decision). But cf *Re H (a minor)* (1997) Times, 6 May (CA, Eng) (even if a hearing was in chambers because it concerned a child, a litigant appearing in person was not to be deprived of the presence and proper assistance of a friend).

sufficient for the Hong Kong court to assume jurisdiction.¹⁹ However, where the defendant is induced to enter the jurisdiction as a result of fraud, for example, for the concealed purpose of effecting service upon him, the court will generally decline jurisdiction.²⁰ Note that it is also open for a foreign defendant to apply for a stay of the Hong Kong proceedings on the ground that Hong Kong is not the most appropriate forum for the trial of the action (the doctrine of *forum non conveniens*)²¹ or that proceedings are already on foot in a foreign court in respect of the same cause of action (the doctrine of *lis alibi pendens*).²²

2.2 Methods of service

[5-12] The manner of service of all forms of originating process in both the Court of First Instance and the District Court is governed, in the main, by Orders 10 and 65. The general principle is embodied in Order 10 rule 1(1), which states that a writ and all other types of originating process must be served personally on each defendant by the plaintiff or his agent.²³ This rule is, however, expressed to be subject to the provisions of any statutory enactment and to the Rules themselves.²⁴ Under the Rules, there are a number of important exceptions to the rule requiring personal service. These are set out below as follows:

- (a) where the originating process is served by registered post or through the letter box of the defendant's usual or last known address;²⁵

- 19 *Colt Industries Inc v Sarlie* [1966] 1 All ER 673, [1966] 1 WLR 440 (where an American staying in a London hotel for a few days on a visit was served on behalf of an American plaintiff in respect of a debt incurred in America); *Maharane of Baroda v Wildenstein* [1972] 2 QB 283, [1972] 2 All ER 689 (CA, Eng); *Fine Furs Ltd v Louis Levine* [1976] HKLR 544, [1976] HKCU 44 (HC) (defendant served during brief business visit).
- 20 *Watkins v North American Land and Timber Co Ltd* (1904) 20 TLR 534 (HL).
- 21 The doctrine of *forum non conveniens* was first formulated in *Sim v Robinow* (1852) 19 R 666 at 668 per Lord Kinnear. The classic exposition of this doctrine is now found in *Spiliada Maritime Corp v Consulex, Ltd; The Spiliada* [1987] AC 460, [1986] 3 All ER 843 (HL).
- 22 The doctrines of *forum non conveniens* and *lis alibi pendens* are discussed below in section 5 'Service out of the Jurisdiction'.
- 23 See RHC and RDC O 10 r 1(1) for writ of summons; and O 10 r 5 for originating summons, originating motion and petition.
- 24 See RHC and RDC O 10 r 1(7) which states that RHC and RDC O 10 r 1 has effect subject to the provisions of any Ordinance and the Rules, in particular to any enactment which provides for the manner of service on bodies corporate.
- 25 These alternative modes of service apply to a writ of summons (RHC and RDC O 10 r 1(2)), an originating summons (other than an ex parte originating summons or an originating summons under RHC O 113) (RHC O 10 r 5(1); RDC O 10 r 5), an originating notice of motion and a petition, other than a bankruptcy petition (which, according to the Bankruptcy Rules (Cap 6A) must be served personally to ensure receipt (see *Wing Lung Bank Ltd v Ho Shiu-Sun* [1986] 6 HKLR 1134, [1986] HKCU 316 (CA) and *Yeung Kwok Ying, formerly t/a Owl Night Club, ex p Hang Lung Bank Ltd* (unreported, HCB 242/1987, 18 November 1988) (HC) (RHC O 10 r 5(2))). Apart from originating processes, these alternative methods also apply to a counterclaim against a person not already a party (RHC and RDC O 15 r 3(5)) and a third party notice (RHC and RDC O 16 r 3(4)).

- (b) where there is deemed service. Service is deemed to occur in two situations. The first is where the defendant's solicitor indorses on the writ or other originating document a statement that he accepts service on behalf of the defendant.²⁶ The second is where the defendant acknowledges service before actual service of the originating process;²⁷
- (c) where an order for substituted service is made;²⁸ and
- (d) where service is effected pursuant to a contract.²⁹

[5-13] An additional exception is where the parties themselves have agreed upon a method of service outside the ambit of the Rules. Service effected in accordance with such agreement is valid.³⁰

[5-14] Service of originating process by fax³¹ or e-mail³² is not permitted under the Rules save where the parties have expressly agreed to such mode of service (see sections 2.2.5 and 2.2.6 below) or as a mode of substituted service when so ordered by the court (see section 2.3 below).

[5-15] The Rules also make special provision for the service of originating process upon particular types of defendants³³ and in particular types of actions.³⁴ These special provisions are considered later in this chapter. First, we consider each of the above methods of service in more detail.

- 26 RHC and RDC O 10 r 1(4).
- 27 RHC and RDC O 10 r 1(5).
- 28 *Id* under RHC and RDC O 65 r 4.
- 29 RHC and RDC O 10 r 3(1).
- 30 *Kenneth Alison Ltd v AE Limehouse & Co* [1992] 2 AC 105, [1991] 4 All ER 500 (HL).
- 31 See *Yung Mei Chun Jessie v Merrill Lynch (Asia Pacific) Ltd* [2015] HKCU 324 (unreported, DCCJ 3068/2013, 11 February 2015) (DC) (statement of claim served by fax; held by Andrew Li J that service defective). Similarly, an appellant must provide an address for service in the notice of appeal and a fax number will not suffice: see *AXA China Region Insurance Co Ltd v Leong Fong Cheng* [2016] 6 HKC 220 (CA).
- 32 See *Weng Chi Cheong v Barclays Capital Asia Ltd* [2016] HKCU 2949 (unreported, HCA 741/2016, 6 December 2016) (CFI) (service on company; writ of summons sent by e-mail; DHCJ Marlene Ng held that service had to be effected in accordance with s 827 of the Companies Ordinance (Cap 622) and that service by e-mail had been defective).
- 33 See, for example, (a) service on agent of overseas principal (RHC and RDC O 10 r 2(1)); (b) service on a limited company registered under the Companies Ordinance (Cap 622) s 827; (c) service on a non-Hong Kong company under the Companies Ordinance s 803; (d) service on body corporate other than a limited company (RHC and RDC O 65 rr 2 and 3(2)); (e) service on partnership or firm (RHC and RDC O 81 r 3); (f) service on sole proprietor (RHC and RDC O 81 r 9); (g) service on unincorporated bodies; (h) service on person under a disability (RHC and RDC O 80 r 16(2)(a)); (i) service on the Government (Crown Proceedings Ordinance (Cap 300) s 14); (j) service on a foreign state (RHC and RDC O 11 r 7).
- 34 Service in action for possession of unoccupied land or premises (RHC and RDC O 10 r 4); service in summary proceedings for the possession of land (RHC and RDC O 113 r 4); service in actions *in rem* (RHC O 75 r 8, applicable to the High Court only).

[5-33] Secondly, where service is effected by registered post and subsequently by personal service, service will be effective from the date of personal service if it is earlier than the deemed date of service under Order 10 rule 1(3)(a).⁸²

[5-34] Thirdly, the deeming provision contained in Order 10 rule 1(3)(a) is only a presumption and the presumption may be rebutted by evidence to the contrary. There are three situations where the courts have held that the deeming rule has been displaced and that service has been effected on a date other than that provided by Order 10 rule 1(3)(a), or that service has not been validly effected at all. They are as follows:

- (a) Where either party establishes that the defendant did in fact receive the writ within the seven-day period. In such a case, service will be effected on the date of actual receipt of the writ by the defendant, and not on the seventh day after the writ was posted or inserted through the letter box.⁸³
- (b) Where the plaintiff proves that the defendant acquired knowledge of the writ (as opposed to actual receipt) on a date other than the deemed date of service. In *Barclays Bank of Swaziland v Hahn*,⁸⁴ the plaintiff bank was able to establish that the defendant had acquired actual knowledge of the writ whilst within the jurisdiction on the date when the writ was inserted into the letter box. Thus, service was held to have taken place on that date.⁸⁵
- (c) Where the defendant proves that the writ, although sent by registered post or inserted through his letter box, never actually came to his notice. In *Forward v West Sussex County Council*,⁸⁶ the English Court of Appeal held that under Order 10 rule 1(2), service is properly effected only when the proceedings are brought to the notice of the defendant and not on mere delivery of the writ. This means that, where the defendant can establish that he did not receive

82 *Tindixs Services Ltd v Cheng Wing Chun* [1998] 4 HKC 194 (CA). Consequently, the time for filing the acknowledgment of service will run from the earlier date of personal service. Note however that *Alden v Beckley* (1890) 25 QBD 543 seems to suggest that in the case of service on a partnership firm under O 81 r 3, if service was effected by different methods on two different dates, the time for filing the acknowledgment of service would run from the later date of service instead of the earlier date. That case may however be explained on the basis that the partner who raised the challenge did not actually know about the earlier service.

83 *Hodgson v Hart District Council* [1986] 1 All ER 400 (CA, Eng).

84 *Barclays Bank of Swaziland v Hahn* [1989] 2 All ER 398, [1989] 1 WLR 506 (HL).

85 See also *Christow Corporation Trust v Asiacom International Holdings Ltd* [2015] 4 HKC 449, [2015] 2 HKLRD 1134 (CFI) (where the writ is sent by post to the defendant's usual or last known address when the defendant is not in Hong Kong at the date of purported service, but the writ subsequently comes to the defendant's notice when he has returned to Hong Kong, the 7th day deemed date of service will not apply and the date of service will be the date on which he first acquires or should have acquired notice of the writ provided that, at that point of time, the writ is still valid and has not expired).

86 *Forward v West Sussex County Council* [1995] 4 All ER 207 (CA, Eng).

actual notice of the proceedings, service will not have been validly effected.⁸⁷ However, the court did not necessarily have to accept the defendant's bare assertion on affidavit no matter how improbable it is, and the burden is on the defendant to provide convincing evidence.⁸⁸

2.2.3 Substituted service

[5-35] Under Order 65 rule 4, where it is impracticable for any reason to serve the writ or other originating process in the manner prescribed by the Rules, the court may make an order for substituted service of that document⁸⁹—ie service in some other manner as the court may direct to bring the document to the attention of the defendant. This means that a plaintiff may obtain an order for substituted service where personal service or the alternative forms of service permitted by Order 10 rule 1 are impracticable, for example, where the defendant is known to be in Hong Kong but cannot be located.

[5-36] This rule applies not only to all originating processes but also to all documents that are required by the Rules to be served personally.⁹⁰ The terms of the rule are of very wide application and give a very wide discretion that the court is not inclined to limit.⁹¹

87 *ibid*; applied in *Wing Lung Bank v Ho Man Iam* [1999] 3 HKC 368 (CFI); *Desirable International Fashions Ltd (in liq) v Chiang Shi Chau* [1997] 3 HKC 170 (HC); *Chu Kam Lun v Yap Lisa Susanto* [1999] 3 HKC 378 (CA); *Kwan Kam Wah v Chan Wai Ming* [2000] 2 HKC 378 (CFI); *Yongcheng Nevada International Co Ltd v Chan Mau Tak* [2000] 2 HKC 584 (CFI); *Au Yeung Kun v Greenfield Property Ltd* (unreported, HCA 1024/1999, 30 May 2001) (CFI); *Cosec Nominees Ltd v Lau Hon Ming* [2001] 3 HKC 290, [2001] 2 HKLRD 581 (CFI); *Phillip Securities (HK) Ltd v Lam Chi Bin Stanley* [2002] 1 HKC 432 (CFI); *Bank of China (Hong Kong) Ltd v Hung Chun Wai* [2004] HKCU 1086 (unreported, HCA 69/2000, 3 September 2004) (CFI).

88 In *Bank of China (Hong Kong) Ltd v Cheung King Fung Francis* [2007] 1 HKLRD 462, [2005] HKCU 986 (CA), Tang JA said: 'A defendant is required to provide convincing evidence; how much evidence is required must depend on the circumstances of the particular case'. See also *Cheng Chi Lun v Ng Lai Ming Juliana* [2007] HKCU 290 (unreported, HCA 1611/2006, 4 February 2007) (CFI), per Recorder Fok SC.

89 RHC and RDC O 65 r 4(1). Note that the change in the wording of the rule from 'unable to effect prompt personal service' has not changed the practice, since what has to be shown is not mere lack of promptness but that service in the manner prescribed for one reason or another is impracticable: *In re Conan Doyle's Will Trusts, Harwood v Fides Union Fiduciaire* [1971] Ch 982, [1971] 2 All ER 1377 (Ch).

90 For documents required to be served personally, see section 1 'Service Generally', above.

91 *Porter v Freudenberg, Kreglinger v S Samuel and Rosenfeld, Re Merten's Patents* [1915] 1 KB 857 (CA, Eng) at 888, per Lord Reading. In this case, leave was given to issue a concurrent writ against an alien enemy and to serve the defendant's agent within the jurisdiction.

guardian, on the person with whom he resides or in whose care he is.¹⁸⁹ In the case of a mentally incapacitated person, the document must be served on the person, if any, who is authorised under Part II of the Mental Health Ordinance (Cap 136) to conduct the proceedings on behalf of the mentally incapacitated person. If there is no such person authorised, the document must be served on the person with whom he resides or in whose care he is.¹⁹⁰

2.3.9 Service on the Government

[5-74] Where proceedings are commenced against the Government, service on the Government must be effected by service on the Secretary for Justice.¹⁹¹ It is important to note that the rules regarding personal service contained in Order 10 do not apply in relation to service of originating process on the Government.¹⁹² Also specifically excluded are Order 11 (service out of the jurisdiction)¹⁹³ and Order 65 rule 5 (ordinary service).¹⁹⁴

2.3.10 Service on a foreign state

[5-75] Order 11 rule 7 contains detailed provisions as to how service of a writ may be effected on a foreign state.¹⁹⁵ In addition, a particular state may have agreed to a method of service other than in the manner provided for by Order 11 rule 7. In such a case, the writ may be served either by the method agreed or in accordance with Order 11 rule 7.¹⁹⁶

2.4 Service in particular types of action

[5-76] Further exceptions to the rule requiring personal service of originating process also exist in relation to certain types of action. These are explained below.

2.4.1 Service in action for possession of unoccupied premises or land

[5-77] In normal cases, a writ in an action for possession of land should be served personally on each defendant,¹⁹⁷ or served by registered post or through

189 RHC and RDC O 80 r 16(2)(a).

190 RHC and RDC O 80 r 16(2)(b).

191 Crown Proceedings Ordinance s 14 and RHC O 77 r 4(2).

192 RHC and RDC O 77 r 4(1).

193 *ibid*.

194 RHC and RDC O 77 r 4(2). Also excluded is RHC and RDC O 65 r 9. Note that RHC and RDC O 65 r 7 is modified: RHC and RDC O 77 r 4(3).

195 As defined in the State Immunity Act 1978 (UK) s 14, which was extended to Hong Kong by the State Immunity (Overseas Territories) Order 1979 (LN 192/79) but no longer applies in Hong Kong. Note that the RHC has not been amended properly in this respect. 'Foreign state' is defined in the Interpretation and General Clauses Ordinance s 3 as a state other than the People's Republic of China.

196 RHC and RDC O 11 r 7(4).

197 *Ie* pursuant to RHC and RDC O 10 r 1(1).

the letter box.¹⁹⁸ In addition to such service, a copy of the writ must be posted in a conspicuous place on or at the entrance to the premises or land recovery or possession of which is claimed.¹⁹⁹

[5-78] However, if no person appears to be in possession of the premises or land and service cannot otherwise be effected on any defendant, the plaintiff may apply for service to take place in the manner prescribed by Order 10 rule 4. Such an application is made *ex parte* to a master supported by an affidavit. The affidavit should show that (a) no one is in possession of the premises or land sought to be recovered²⁰⁰ and (b) service cannot or could not otherwise be or have been effected.²⁰¹ If the court is satisfied as to the conditions specified in (a) and (b) above, it may authorise service to be effected by affixing a copy of the process on some conspicuous part of the premises or land.²⁰² Alternatively, it may order that service already effected in that manner, be treated as good service.²⁰³

2.4.2 Service in summary proceedings for the possession of land under Order 113²⁰⁴

[5-79] The manner of service of an originating summons²⁰⁵ in summary proceedings for the possession of land under Order 113 depends upon whether

198 *Ie* as an alternative to personal service under RHC and RDC O 10 r 1(1): RHC and RDC O 10 r 1(2).

199 RHC and RDC O 10 r 4(2).

200 Not only must the plaintiff show that the premises are unoccupied, but also that they are deserted. If articles of furniture or other goods have been left in the premises or on the land, this does not necessarily show that any person appears to be in possession of the land (*Isaacs v Diamond* [1880] WN 75 (CA, Eng)). However, it is for the plaintiff to show that the furniture or goods have been abandoned and have not been left there as evidence that some person is still in possession (albeit constructive possession) of the premises in question.

201 The affidavit must show (a) what efforts have been made to effect personal service or, if appropriate, service by post or by insertion through the defendant's letter box; (b) why service cannot be effected, and (c) that service is required or has already been made under RHC and RDC O 10 r 4.

202 RHC and RDC O 10 r 4(1)(a).

203 RHC and RDC O 10 r 4(1)(b).

204 RHC and RDC O 113 makes provision for a special procedure where the plaintiff is seeking possession of land against wrongful occupiers, such as squatters, or against licensees of land whose licences have been terminated. This special procedure is not available against tenants holding over after the termination of the tenancy: RHC and RDC O 113 r 1.

205 The originating summons must be in the prescribed form (RHC and RDC App A Form 11A): RHC and RDC O 113 r 2. Before a summons can be issued against unnamed defendants, the plaintiff must take reasonable steps to identify the occupiers; otherwise the proceedings will be invalidated: *Re 9 Orpen Road, Stoke Newington* [1971] 1 All ER 944 (Ch). It appears, however, that such an irregularity may be waived under RHC O 2 r 1 if no injustice would be caused: *Burston Finance v Wilkins and Persons Unknown* [1976] 2 EGLR 117, (1975) 240 Estates Gazette 375 (Ch).

[6-115] Representative proceedings are regulated by Order 15 rule 12. This rule states that where numerous persons have the same interest in any proceedings,²⁷⁸ the proceedings may be begun, and, unless the court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.²⁷⁹

[6-116] It has been stated that this rule should be treated as a flexible tool of convenience in the administration of justice, and should not be applied in a strict or rigorous sense.²⁸⁰ In practice, however, it has been applied in a somewhat restrictive manner.

[6-117] The rule uses the words 'numerous persons'. This means that a representative order will not be made where there are only a few parties unless the amount involved is very small, or all persons interested wish to be so represented.²⁸¹ In *Hong Kong Kam Lan Koon Ltd v Realray Investments Ltd*,²⁸² the court held that an unincorporated association²⁸³ of an unknown class of persons which requires its administration to be conducted by no less than 74 persons clearly falls within the definition of 'numerous persons' stipulated in Order 15 rule 12. Conversely, in

interest against a large number of unidentified persons by way of injunctive relief; applying *Bloomsbury Publishing Group Plc v News Group Newspapers Ltd* [2003] 3 All ER 736, [2003] 1 WLR 1633 (Ch), the following safeguards were applicable: (i) the description of the unnamed defendants had to be sufficiently certain to identify both those who were included and those who were not; (ii) the nomenclature of the defendants had not to prejudice the rights of those potentially affected by whatever orders the court might make from being notified about the proceedings and from appearing in court to defend their rights, if they so wished; (iii) proper directions had to be given for proper service of the proceedings and notification to those who might be affected of the time frame for joining in as named parties and to put forward their defences; and (iv) if no one came forward to resist the plaintiff's application against such a group, the court should consider whether caveats similar to those in RHC O 15 r 12(3)-(6) should be built into any relief it might grant (including an order of costs) other than orders for injunctive relief; in the instant case the same result had been achieved by naming six defendants).

278 Ie excluding proceedings under RHC and RDC O 15 r 15 which concern the representation of interested persons who cannot be ascertained in any proceedings concerning the estate of a deceased person, or trust property or the construction of a written instrument.

279 RHC and RDC O 15 r 12(1).

280 See *John v Rees* [1970] Ch 345, [1969] 2 All ER 274, per Megarry J, cited with approval in *Hong Kong Kam Lan Koon Ltd v Realray Investments Ltd* [2004] 2 HKC 673.

281 *Re Braybrook, Braybrook v Wright* (1916) 60 Sol Jo 307; *China Vest II-A, LP v Chan Keung Un Roy* [1998] 4 HKC 453 (CA) (where for the purposes of determining whether proceedings had been properly constituted, it was held that the proceedings had been properly initiated even though the sellers on whose behalf proceedings were brought were not numerous as they had consented to representation by one party only; however, the court ordered they all be added as parties).

282 *Hong Kong Kam Lan Koon Ltd v Realray Investments Ltd* [2004] 2 HKC 673 (CFI). See also *Hong Kong Kam Look Ltd v Realray Investments Ltd (No 2)* [2005] 1 HKC 565 (CFI), where the court refused to discharge the representative order.

283 As to unincorporated associations, see section 2.4 above.

Malayan Banking Berhad v China Insurance Co Ltd,²⁸⁴ the Court of Appeal held that an action by the plaintiff bank, in its capacity as agent for a syndicate of three banks, had not been properly constituted as a representative action under Order 15 rule 12. There was no reason to allow the three interested banks to be represented by only one of their number.

[6-118] Not only must there be numerous persons, but the group or class of persons to be represented must also be clearly identified.²⁸⁵ Thus, a claim to represent merely 'some' members of a class without defining which members would not be maintainable.²⁸⁶ Further, the persons sought to be represented may need to be identified by reference to the date on which the cause of action arose.²⁸⁷

[6-119] Note that if any of the persons sought to be represented are excepted for any reason, this fact must appear in the definition or description of the class, and such persons must be made parties in their personal capacity.²⁸⁸

[6-120] Where a writ is issued in a representative action, the title must show that the action is a representative action. For example, 'X suing on behalf of himself and as representative of the members of the Pentecostal Mission, Hong Kong'.²⁸⁹ The writ must also be indorsed with a statement of the capacity in which the representative party sues.²⁹⁰

[6-121] Under this rule, a plaintiff may commence an action by or against a group without leave of the court. However, he should seek a representative order

284 *Malayan Banking Berhad v China Insurance Co Ltd* [2003] HKCU 644 (unreported, CACV 424/2002, 10 June 2003) (CA). See also *Calm Ocean Shipping SA v Wing Goal Tading Ltd & Ors* [2020] HKCU 1125, [2020] HKCFI 801 (CFI), where Anthony Chan J held that 'So small a number as five persons would not be regarded as "numerous", unless the amount involved was very small, or the court was satisfied that it was the wish of all the persons interested that the representation desired should be ordered' at para 35.

285 *J Bollinger SA v Goldwell Ltd* [1971] RPC 412 at 420, per Megarry J.

286 *Markt & Co Ltd v Knight SS Co Ltd* [1910] 2 KB 1021 (CA, Eng) at 1033-1034, per Fletcher Moulton LJ applied in *Re Pentecostal Mission, Hong Kong and Kowloon* [1962] HKLR 171, [1962] HKCU 20 (OJ).

287 *Campbell v Thompson* [1953] 1 QB 445, [1953] 1 All ER 831 (an action in tort against a members' club by an employee).

288 *Fraser v Cooper* (1883) 21 Ch D 718. The representative capacity of the plaintiffs or defendants must be stated in the title of the writ and of the statement of claim.

289 *Re Pentecostal Mission, Hong Kong and Kowloon* [1962] HKLR 171, [1962] HKCU 20 (OJ). See also *Harold William Newnham Fynn v A-G* [1990] HKCU 166, [1991] HKCU 339 (unreported, HCA 3562/1990, 30 August 1990) (HC) (X suing on behalf of himself and all others employed by the Hong Kong Government in the grade of Police Research Officer).

290 RHC and RDC O 6 r 3(a) and (b). It is the indorsement on the writ which is the crucial matter and not the statement in the title which is a mere description: *Bowler v John Mowlem & Co* [1954] 3 All ER 556, [1954] 1 WLR 1445 (CA, Eng). For the effect of failure to specify the representative capacity when an action is commenced by an administrator, see *Shing Hai-doing v Genius Knitting Factory Ltd* [1978] HKLR 305, [1978] HKCU 50 (HC).

They also include any subsequent documents used to express the party's case.² For certain purposes, further and better particulars are also pleadings.³ A concise statement of the nature of the claim indorsed on the writ is not, however, a pleading,⁴ nor is a notice of appeal.⁵ Further, for the purposes of the Rules, a 'pleading' does not include a petition, summons or preliminary act.⁶

1.2 The purpose of pleadings

[8-3] The purpose of pleadings is to give fair notice of the case which has to be met and to define the issues on which the court will have to adjudicate in order to determine the matters in dispute between the parties.⁷ Thus, a party is bound by his pleadings and his case is confined to the issues raised on the pleadings unless and until they are amended.⁸ The fact that a particular cause of action is not

- 2 Under the rules of procedure now in force, the pleadings seldom go beyond reply or a defence to counterclaim, but in a proper case leave may be given by the court to serve a subsequent pleading: RHC and RDC O 18 r 4. For example, the defendant may, with leave, in response to the plaintiff's reply, deliver a rejoinder, and the plaintiff in answer to this might deliver a surrejoinder. The pleadings might be continued by means of a rebutter delivered by the defendant, in answer to which the plaintiff might deliver a surrebutter.
- 3 Further and better particulars of a statement in a pleading are part of the pleadings for the purposes of the rule as to striking out: *Davey v Bentinck* [1893] 1 QB 185, [1891-4] All ER Rep 691 (CA, Eng). They are also required to be verified by a statement of truth: see RHC and RDC O 18 r 20A(1) and (2). See section 3 below.
- 4 A generally indorsed writ of summons by which an action is begun is not a pleading: *Murray v Stephenson* (1887) 19 QBD 60; *Edward Butler Vintners Ltd v Grange Seymour Internationale Ltd* (1987) Times, 9 June (CA, Eng), per Kerr LJ.
- 5 See *Chung Fai Engineering Co Ltd & Ors v Maxwell Engineering Co Ltd & Ors* [2001] 3 HKC 24 (CA), per Keith JA.
- 6 RHC and RDC O 1 r 4(1).
- 7 *Thorp v Holdsworth* (1876) 3 Ch D 637 at 639, per Jessel MR; *Esso Petroleum Co Ltd v Southport Corpn* [1956] AC 218 at 238, [1955] 3 All ER 264 (HL) at 868, per Earl Jowitt. In *Aktieselskabet Dansk Skibsfinansiering v Wheelock, Marden & Co Ltd* [1994] 2 HKC 264 (CA) at 269-270, Bokhary JA adopted the purposes of pleadings identified in *The Supreme Court Practice 1993* para 18/12/2, namely (1) to inform the other side of the nature of the case they have to meet as distinguished from the mode in which the case is to be proved; (2) to prevent the other side from being taken by surprise at the trial; (3) to enable the other side to know what evidence they ought to be prepared with and to prepare for trial; (4) to limit the generality of the pleadings, the claim and the evidence; (5) to limit and define the issues to be tried and as to which discovery is required; and (6) to tie the hands of the party so that he cannot without leave go into any matters not included. Also see *Lavery Co Ltd v Wong Lee Yuk Ping Agnes & Anor* [2018] HKCU 824, [2018] HKCA 131 (CA), where Yuen JA remarked that the objective of pleadings 'is for both sides to articulate their cases in the clearest way possible, so that the real issues in dispute between them would be apparent to both sides, and to the court, well in advance of trial.'
- 8 See, for example, *Wong Chi Shing v Argos Engineering & Heavy Industries Co Ltd & Ors* [1993] 1 HKC 598 (HC) (failure to raise tax implications for assessment of damages). Failure to raise an issue at the pleading stage may also prevent its being

mentioned specifically in the statement of claim will not necessarily mean that the plaintiff will not succeed on that cause of action provided the facts as pleaded sufficiently identify that cause of action.⁹ A plaintiff who at the trial radically departs from his case as pleaded, however, is likely to fail,¹⁰ although it has been held by the Court of Final Appeal that the court may decide a case in favour of the plaintiff on facts pleaded by the defendant provided that the defendant has pleaded and advanced those facts during the trial and provided that no unfairness will result to the defendant.¹¹ It follows that the pleadings enable the parties to decide in advance of the trial what evidence will be needed. From the pleadings, the appropriate method of trial can be determined. They also form a record which will be available if the issues are sought to be litigated again.¹² The matters in issue are determined by the state of pleadings at their close.¹³

1.3 Close of pleadings and joinder of issue

[8-4] The pleadings in an action are deemed to be closed at the expiration of 14 days after service of the reply¹⁴ or, if there is no reply but only a defence to counterclaim, after the service of the defence to counterclaim.¹⁵ If neither a reply nor a defence to counterclaim is served, the pleadings are deemed to be closed at the expiration of 28 days after the service of the defence.¹⁶ Where there are several defendants, the pleadings are only deemed to be closed when the time stipulated

- raised on appeal: see, for example, *Qualcast (Wolverhampton) Ltd v Haynes* [1959] AC 743 at 758, [1959] 2 All ER 38 (HL) at 44, per Lord Somervell of Harrow.
- 9 See, for example, *Yeung Wah James v Alfa Sea Ltd* [1993] 1 HKC 440 (HC) (breach of covenant for quiet enjoyment pleaded; damages for trespass awarded).
- 10 *Bell v Lever Bros Ltd* [1932] AC 161, [1931] All ER Rep 1 (HL); *Clarke v Sun Hung Kai Investment Services Ltd* [1991] HKCU 71 (unreported, CACV 196/1990, 26 March 1991) (CA).
- 11 *Poon Hau Kei v Hsin Chong Construction Co Ltd* [2004] 2 HKC 235, (2004) 7 HKCFAR 148, [2004] 2 HKLRD 442 (CFA) (plaintiff injured during employment as scaffolding contractor sued employer pleading that he had been injured whilst falling from ladder; defence pleaded that he had fallen from light trough; at first instance, the court concluded that plaintiff had fallen from light trough and damages awarded to plaintiff; decision reversed by Court of Appeal on grounds that plaintiff had not pleaded this case; on further appeal, Court of Final Appeal held that the court was entitled to decide in favour of a party on the basis of a scenario that had been pleaded by his opponent). Also see *Mak Kang Hoi v Ho Yuk Wah* (2007) 10 HKCFAR 552, [2007] HKCU 567 (CFA) (Court of Final Appeal held that unless there were exceptional circumstances, no party to a contract could claim to be taken by surprise by the terms he had agreed, whether or not those terms were precisely pleaded in a dispute about them).
- 12 See *Henderson v Henderson* (1843) 3 Hare 100; *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581, [1973-76] HKC 194 (PC); *Tam Lam Hong Ltd v Gridway Knitters Ltd* [1988] HKC 184 (CA). See further Chapter 12 'Disposal of Actions without Trial'.
- 13 As to the close of pleadings, see section 1.3 below.
- 14 As to the service of a reply, see section 6.2 below.
- 15 RHC and RDC O 18 r 20(1)(a).
- 16 RHC and RDC O 18 r 20(1)(b).

should be careful to identify and select the most appropriate person to verify their pleadings. The most appropriate person will be that person who is truly able to speak to the truth of what is pleaded and this will usually be the party himself rather than his solicitor.⁴⁶ Where the party is a body of persons, corporate or unincorporate, the statement of truth must be signed by a person holding a senior position in the body.⁴⁷ Where the party is a public officer, the statement of truth must be signed by the public officer or a person holding a senior position in the public body or public authority to which the proceedings relate.⁴⁸ Where the party is a partnership, the statement of truth must be signed by one of the partners or a person having the control or management of the partnership business.⁴⁹ An insurer or the Motors Insurers' Bureau of Hong Kong may sign a statement of truth in or in relation to a pleading on behalf of a party where the insurer or the Bureau has a financial interest in the result of proceedings brought wholly or partially by or against that party.⁵⁰ Where a legal representative signs a statement of truth, he must sign in his own name and must not sign only in the name of the firm to which he belongs.⁵¹

[8-17] Subject to what is provided below, a statement of truth is a statement that the party putting forward the pleading believes that the facts stated in the pleading are true.⁵² In the case where a party is conducting proceedings with a next friend or guardian *ad litem*, the statement of truth in or in relation to a pleading is

46 See *UES International (HK) Ltd v Maritima Maruba SA* [2013] HKCU 2668 (unreported, HCA 632/2011, 19 November 2013) (CFI) (plaintiff's reply verified by its solicitor; Anthony Chan J observed that it was extraordinary for a professional adviser to be performing such a task for his client; solicitors were plainly not the appropriate persons to verify the pleadings of their clients).

47 RHC and RDC O 41A r 3(2). Each of the following persons is a person holding a senior position: (a) in respect of a corporation that is neither a public body nor a public authority, any director, manager, secretary or other similar officer of the corporation; (b) in respect of an unincorporated association that is neither a public body nor a public authority, any corresponding person appropriate to that unincorporated association; and (c) in respect of a public body or public authority, a person duly authorised by the public body or public authority for this purpose: RHC and RDC O 41A r 3(4). Where a statement of truth is signed by a person holding a senior position, that person must state in the statement of truth the office or position he holds: RHC and RDC O 41A r 3(5). The person making the verification should state the position he holds in the statement of truth itself and not below the statement of truth: *Grandee Model & Casting Co Ltd v Grey Advertising Hong Kong Ltd* [2012] 3 HKC 155 (DC).

48 RHC and RDC O 41A r 3(3). For the meaning of 'a person holding a senior position', see above.

49 RHC and RDC O 41A r 3(6).

50 RHC and RDC O 41A r 3(8).

51 RHC and RDC O 41A r 3(10).

52 RHC and RDC O 41A r 4(1). A statement of truth verifying in a pleading which are subsequently deleted via amendment will not be regarded as if it was never made. The fact that previous averments of material facts were verified by a statement of truth strengthens the proposition that a party is entitled to rely on such previous averments of material facts to support their pleaded case: *Fordadoor Ltd v Wong Kwong Wing & Ors* [2020] HKCU 77, [2020] HKCFI 85 (CFI).

a statement that the next friend or guardian *ad litem* believes the facts stated in the pleading being verified are true.⁵³ Where a legal representative or insurer has signed a statement of truth on behalf of a party, the court must treat his signature as his statement that: (a) the party on whose behalf he has signed had authorised him to do so; (b) before signing he had explained to the party that in signing the statement of truth he would be confirming the party's belief that the facts stated in the pleading were true; and (c) before signing he had informed the party of the possible consequences to the party if it should subsequently appear that the party did not have an honest belief in the truth of those facts.⁵⁴ The statement of truth shall state:

I believe [or the plaintiff believes] that the facts stated in this [name the pleading being verified] are true.⁵⁵

[8-18] Where the statement of truth is not contained in the pleading that it verifies: (a) the document containing the statement of truth must be headed with the title of the proceedings and the action number; and (b) the document being verified must be identified in the statement of truth as follows: (i) pleading: 'the [statement of claim or as may be] served on [name of party] on [date]'; (ii) particulars of pleading: 'the particulars of pleading issued on [date]'.⁵⁶ The court may strike out a pleading that has not been verified by a statement of truth.⁵⁷

[8-19] Proceedings for contempt of court may be brought against a person if he makes, or causes to be made, a false statement in a pleading verified by a statement of truth without an honest belief in its truth.⁵⁸ Such proceedings for contempt

53 RHC and RDC O 41A r 4(2).

54 RHC and RDC O 41A r 4(3).

55 RHC and RDC O 41A r 5(1). In *BPost Hong Kong Ltd v Jade Incorporation Ltd* [2017] 6 HKC 371, [2017] 5 HKLRD 453 (DC), the statement of truth purportedly verifying a statement of claim was defective: first, the statement of truth referred to the date of filing of the statement of claim instead of the date of service as required under O 41A r 5(3)(b)(i); second, the plaintiff's director failed to specify the position he held in the plaintiff within the statement of truth. Refusing to set aside a default judgment obtained in the action, DDJ Benny Lo held that (i) the writ being duly served, the plaintiff could obtain default judgment under O 13 without even serving a statement of claim or a statement of truth, and as such the defects in the statement of truth did not affect the plaintiff's entitlement to the default judgment or render it irregular; (ii) if there were any consequences arising from the defects, there were sufficient provisions to deal with them under O 41A, in particular r 2(3) and rr 6-9; and (iii) even if the default judgment were irregular, the court would have accepted the plaintiff's undertaking to file and serve a fresh statement of truth to cure any such irregularity, and would have exercised its discretion against setting aside the default judgment *ex debito justitiae*, given that the defects had not caused the defendant to suffer any prejudice.

56 RHC and RDC O 41A r 5(3).

57 RHC and RDC O 41A r 6(1). However, in *De Bedin & Lee LLP v Bruno Atzori* [2017] HKCU 277 (unreported, DCCJ 4720/2016, 1 February 2017) (DC), the court held that even though a statement of defence did not incorporate a statement of truth, 'this irregularity certainly could be remedied by giving defendant at least another chance, but not by striking it out right away.'

58 RHC and RDC O 41A r 9(1).

a party wishes to plead inconsistent facts or sets of facts in a pleading, they must be alleged as alternative grounds on which he relies, and he is entitled to amend, or to apply for leave to amend, his previous pleading so as to plead the allegation or claim in the alternative.⁹⁴ A party does not, however, enjoy an unrestricted right to plead inconsistent averments even where they are pleaded in the alternative. The pleadings should clearly identify which one is the primary case and how the primary case relates to the alternative claims.⁹⁵ If the other party would be prejudiced in having to meet inconsistent allegations, the party pleading might be made to elect which ground he will rely upon.⁹⁶ Ultimately, there should only be one version of true facts despite the alternative pleadings.⁹⁷

with alternative and mutually inconsistent versions of the facts, because the facts as known to him admit of alternative interpretations, the pleading is permissible and verifiable on the basis that the party believes on the evidence available that the facts will ultimately correspond to one or other of the possibilities pleaded. However, if the matters pleaded are matters which are plainly within that party's knowledge, so that he must know which of the inconsistent alternatives is the correct one, then the pleading of inconsistent alternative cases is not permissible', per Zervos J).

94 RHC and RDC O 18 r 10(2).

95 *Silver Universe Investments Ltd v China Times Securities Ltd* [2021] HKCU 377, [2021] HKCA 105 (CA) at para 29.

96 See *Ho Tak Ming v Chiu Ka Tsui* [2003] HKCU 1397 (unreported, HCA 3130/2001, 16 December 2003) (CFI) (there are circumstances under which an alternative plea based on an inconsistent version of facts is permissible; it depends on the facts of each case and, if the other party is seriously prejudiced by inconsistent alternative cases being put forward, such a pleading could be embarrassing and the court can exercise its power to strike out such a pleading, per Lam J); *Union Knopf (HK) Ltd v Marcel Sosnowski* [2013] HKCU 801 (unreported, DCCJ 680/2010, 12 April 2013) (DC) (where a plaintiff (or defendant by counterclaim) claims alternative remedies which are inconsistent, he will be required to make an election as to the remedy which he will pursue; the court must decide, in the exercise of its case management discretion, when such an election is to be made; for example, where a split trial of liability and damages has been ordered, the election will normally be made after judgment on liability has been given; where, however, there is no split trial, the court may order that the election be made at the beginning of the trial or as part of the party's closing submissions); *Lavery Co Ltd v Wong Lee Yuk Ping Agnes & Anor* [2017] HKCU 117 (unreported, HCA 393/2016, 13 January 2017) (CFI) (statement of claim contained pleadings in the alternative by plaintiff; DHCJ Hunsworth observed that the practical reasons for the principle that pleading inconsistent alternative cases was impermissible, save for exceptional cases, were obvious; if a plaintiff were to be routinely allowed to assert a primary case but then have an alternative and divergent fallback position, much time and money would be wasted in dealing with the fallback position which would be wholly unnecessary if the plaintiff made good his primary case; furthermore, a defendant was entitled to know the case it was said he had to meet on the matters pleaded; this was particularly so where serious allegations were made against a defendant of dishonesty where it would, as a matter of principle, be wrong to allow a plaintiff to claim that, notwithstanding he could not make good his primary case of dishonesty, he was entitled to deduce from the facts an alternative and different type of wrongdoing on the part of the defendant; in the instant case the alternative pleadings by the plaintiff would be disallowed).

97 *Tang Kai Ming Kenneth & Ors v Lau Man Sang James* [2021] HKCU 684, [2021] HKCFI 415 (CFI) at paras 100–101.

4.3 Consistency between pleadings and witness statements

[8-36] Pleadings must contain all material facts and must be consistent with the parties' witness statements. Two principles of law result from this rule: first, an omission to plead a necessary allegation in the statement of claim or defence cannot be cured by the omitted fact or allegation being put forward in a witness statement; secondly, a material allegation in a witness statement that is not contained in the pleading may be struck out.⁹⁸

4.4 Specific matters relating to the drafting of pleadings

4.4.1 Presumptions

[8-37] A party need not plead any fact if it is presumed by law to be true, or if the burden of disproving it lies on the other party, unless the other party has specifically denied it in his pleading.⁹⁹

4.4.2 Conditions precedent

[8-33] The rules provide that a statement that a thing has been done or that an event has occurred, being a thing the doing or occurrence of which constitutes a condition precedent necessary for a party's case, is to be implied in his pleading.¹⁰⁰ Thus, for example, failure to plead service of notice to quit will not

98 Both these principles are illustrated in *EAA Securities Ltd v Chan Lin Mui* [2006] HKCU 664 (unreported, DCCJ 4015/2003, 25 April 2006) (DC) (plaintiff, who was a securities dealer, sued his client for recovery of the debit balance on the client's trading account; client/defendant by way of defence alleged that he had never signed the trading agreements (but did not allege fraud); in a witness statement made by a witness called by the defendant, the witness suggested that there had been a conspiracy to defraud the defendant; plaintiff applied to the court in the exercise of its inherent jurisdiction to strike out the paragraphs of the witness statement alleging conspiracy to defraud since fraud had not been pleaded in the defence and such allegation only served to embarrass the plaintiff and prolong the trial unnecessarily; held that the burden rested upon the defendant to plead all relevant issues upon which they relied; RDC O 18 r 8(1) required a party in any pleadings subsequent to the statement of claim to plead specifically matters including, but not limited to, fraud or any fact showing illegality which he alleges makes any claim of the opposite party not maintainable; if such matters were not pleaded, no evidence could be adduced of such matters at the trial: *Davie v New Merton Board Mills Ltd* [1956] 1 All ER 379, [1956] 1 WLR 233; since the defendants were now advancing through the witness statement a positive case of misconduct or even a case of fraud and such a case had not been pleaded, the offending paragraphs of the witness statement should be struck out).

99 RHC and RDC O 18 r 7(3). When a defendant in his defence denies the existence of a presumed fact, it is not necessary for the plaintiff to serve a reply asserting the contrary: see RHC and RDC O 18 r 14 and below.

100 RHC and RDC O 18 r 7(4).

was made would have been refused, the court must order the amendment or that part of it to be struck out.³⁹² Any order made on such an application may be made on such terms as to costs or otherwise as the court thinks just.³⁹³

8.4 Amendment with leave

8.4.1 General principles for leave to amend

[8-128] The court may at any stage of the proceedings³⁹⁴ allow the plaintiff to amend the indorsement on his writ or any party to amend his pleading.³⁹⁵

either for disposing fairly of the cause or matter or for saving costs. It is obvious that a litigant does not have the absolute right to amend the pleading freely and at any time.

392 RHC and RDC O 20 r 4(2).

393 RHC and RDC O 20 r 4(3).

394 An amendment may be allowed at any stage of the proceedings (see RHC and RDC O 20 r 5(1) and 8(1)), whether before or at the trial. See, for example, *Wellfit Investments Ltd v Poly Commence Ltd* [1995] 3 HKC 56 (CA) (where the court said that, where amendments were made shortly before trial, it must be incumbent upon the party seeking them to ensure adequate particularity; leave to amend was refused). Amendment may be allowed even after the evidence has been heard; see, for example, *Wan Hung Choi v Cheng Kam Shui* [1990] 2 HKC 466 (HC) (amendment of pleadings permitted in the light of testimony given); *Leung Hoi v Ma Koon Sik & Anor* (unreported, HCA 3054/1992, 18 September 1995) (HC) (amendment to plead damages allowed); *Oriental Press Group Ltd v Next Magazine Publishing Ltd* [2000] 3 HKLRD 412, [2002] HKCU 1555 (CA) (application to amend statement of claim on third day of trial and after determination of preliminary issue against plaintiff; amendment was in effect to set up a new case; held amendment only allowed on condition that plaintiff paid all costs incurred to date and any costs thrown away by reason of the amendment); *Tang Kam Wah v Tang Ming Yai* [2003] 1 HKC 532 (CA) (application by defendant to amend its defence on fourth day of trial after plaintiff had closed its case; amendment refused by trial judge; on appeal, court found that amendment required to determine real issue in case, there was no dishonourable motive on the part of the defendant and adjournment could have been granted to enable plaintiff to prepare to meet new case; judge had placed too much emphasis on prejudice to plaintiff and had failed to take into account sufficiently the dramatic impact upon the defendant's case that refusal to allow amendment would have; application to amend granted on condition that defendant pay all costs incurred to date and costs thrown away by reason of the amendment). Very late amendments may, however, be disallowed: see *Ketteman v Hansel Properties Ltd* [1987] AC 189 at 220, [1988] 1 All ER 38 (HL) at 62 ('there will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall upon their own heads rather than by allowing an amendment at a very late stage of the proceedings': per Lord Griffiths); *Gainfield Investment Ltd v Lam Yi Lai (No 2)* [2016] 4 HKLRD 534, [2016] HKCU 1957 (DC) (application on first day of trial by plaintiff to re-amend its reply and defence to counterclaim; DDJ Brian Mak observed that the plaintiff had had ample opportunity to seek the amendment earlier; if the amendment were granted now, it would have the effect of disrupting the scheduled trial dates and necessitate an adjournment; the application would, accordingly, be dismissed).

395 RHC and RDC O 20 r 5(1), which is expressed to be subject, inter alia, to RHC and RDC O 20 r 8. 'Pleading' here includes particulars served separately from a pleading: *Clarapede & Co v Commercial Union Association* (1883) 32 WR 262 (CA, Eng).

[8-129] The purpose of amendment is to facilitate the determination of the real question in controversy³⁹⁶ between the parties to any proceedings, and for this purpose the court may at any stage of the proceedings order the amendment of any pleading or any other document, either on the application of any party to the proceedings or of its own motion,³⁹⁷ on such terms as to costs or otherwise as may be just³⁹⁸ and in such manner, if any, as the court may direct.³⁹⁹ The court shall not, however, order a pleading to be amended unless it is of the opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs.⁴⁰⁰ This provision was enacted as part of the Civil Justice Reforms and the cases preceding the reform may require reconsideration in the light of the new provision. The courts have recognised that they are entitled, in reaching the decision whether to allow an amendment, to take into account the strain that

396 The object of the rules as to pleading is to obtain a correct issue between the parties, and when an error has been made it is not intended that the party making the mistake should be punished in the loss of the trial: *Tildesley v Harper* (1878) 10 Ch D 393 (CA, Eng) at 396–397 ('My practice has always been to give leave to amend, unless I have been satisfied that the party applying was acting mala fide, or that, by his blunder, he had done some injury to his opponent which could not be compensated for, by costs or otherwise': per Bramwell LJ); *Cropper v Smith* (1884) 26 Ch D 700 (CA, Eng) at 710–711 ('Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or of grace. It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice, as anything else in the case is a matter of right', per Bowen LJ).

397 The court very rarely exercises this power of its own motion. 'In a civil suit the function of a court ... is not inquisitorial': *Fallon v Calvert* [1960] 2 QB 201 at 204, [1960] 1 All ER 281 (CA, Eng) at 282, per Pearce LJ. Where the court makes an amendment of its own motion, the parties must be given an opportunity to argue the matter: *Chau Mei Lee, Fragrance v Ng Yee Tim* [1996] 4 HKC 46 (CA) (court was wrong to make re-amendment after final addresses without giving the parties the opportunity to make further submissions on the point). Still, the court may correct a misnomer on its own motion: see 8.4.5 below. See also *Benchmark Electronics (Thailand) PCL v Cargo Container Line Ltd* [2020] HKCU 803, [2020] HKCA 168 (CA) (plaintiffs intended to sue a BVI company but erroneously issued the writ against a company with identical name incorporated in Malta; held, the court always had power without O 20 r 5(3) to correct a misnomer even if the limitation period had expired).

398 *Cropper v Smith* (1883) 26 Ch D 700 (CA, Eng) at 710 ('It is a well-established principle that the object of Courts is to decide the rights of the parties and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights ... I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct if it can be done without injustice to the other party', per Bowen LJ). The usual terms for allowing the amendment are that the party amending should in any event pay the costs of and caused or thrown away by the amendment: *Steward v North Metropolitan Tramways Co* (1886) 16 QBD 556 (CA, Eng) at 558, per Lord Esher MR.

399 RHC and RDC O 20 r 8(1).

400 RHC and RDC O 20 r 8(1A).

adequate form. A supporting affidavit is not generally required.⁴⁰⁷ The amendment granted should be embodied in the record.

[8-132] Once the court has given leave to amend, the court is *functus officio* so far as that amendment is concerned and has no jurisdiction to reverse the order except through the appeal process.⁴⁰⁸

8.4.2 Amendment to add necessary factual averment that has arisen after issue of writ

[8-133] Although the courts might permit an amendment to be made to a statement of claim to add a new cause of action which had accrued after the date of the issue of a writ (see section 8.4.3 below), they will not normally give leave to amend a statement of claim which is defective by the addition of a necessary factual averment that could not have been pleaded at the date of issue of the writ,⁴⁰⁹

or pleading without having sight of the formulated amendment; the court ought to be clear as to how precisely the applicant was seeking to modify its existing case and the other party ought to have a proper opportunity to object to the amendment); *Hall v Meyrick* [1957] 2 QB 455 at 481, [1957] 2 All ER 722 (CA, Eng) at 729, per Parker LJ (unless and until an amendment has been put into writing and submitted to the other side and the other side has had the opportunity of making submissions upon it, anything the trial judge has said as to allowing it is in the nature of a provisional view and not a final ruling); *Wing Kwong Street (IO of Nos 6, 6A, 6B, 8, 10, 12, 14 & 16) v Wong Kang Ming* [2014] 5 HKLRD 888, [2014] HKCU 1173 (DC) (a party seeking a late amendment had to provide the court with adequate particulars of the proposed amendment; in the instant case the application for leave to amend would be rejected on the ground, inter alia, that the proposed amendment lacked the necessary particularity).

407 See *Honey Bee Electronic International Ltd v Golden Lucky Co Ltd* [2007] 3 HKLRD 524 (CA) (action for breach of contract whereby plaintiff claimed return of deposit paid; plaintiff applied for leave to amend statement of claim by adding an averment that the contract was void for illegality, but judge rejected application partly because it had not been supported by affidavit evidence in support of its new allegation and secondly there had been no affidavit explaining why there had been delay in making the application to amend; on appeal, held that in general it was not necessary for a party seeking to amend a pleading to support the application with an explanation by way of affidavit save in exceptional circumstances such where the party was seeking to withdraw an admission or where there had been substantial delay in applying for an amendment which might cause prejudice to the other party; in the instant case, there had been no delay causing prejudice to the defendant and the appeal should be allowed).

408 *Chau Mei Lee, Fragrance v Ng Yee Tim* [1996] 4 HKC 46 (CA).

409 *Lead Mile Ltd v Sino Peak Finance Ltd* [2004] 4 HKC 646 (CFI) (plaintiff made loan to company which was guaranteed by defendant; according to loan agreement, loan could only be recovered from guarantor if money could not be recovered from company despite proceedings having been taken for its recovery; company failed to repay loan and writ issued against guarantor/defendant in August 1998; two months later plaintiff obtained default judgment against company, but company unable to pay judgment debt; guarantor contended that the condition precedent to recovery of the loan from him had not been fulfilled at date of writ since, at that date, it could not be shown that the loan was irrecoverable from the company; therefore, no cause of action existed against defendant at time of issue of writ; plaintiff applied to amend

8.4.3 Amendment to add a cause of action that has accrued after issue of writ

[8-134] It used to be the case that, except by consent, a plaintiff could never amend his writ and set up a cause of action which had accrued since the issue of the writ.⁴¹⁰ This is because amendments 'relate back' to the date of the original pleading sought to be amended and, as a matter of logic, a cause of action once commenced cannot be added to by an amendment of further facts which have arisen after the date of the writ. There are some minor exceptions to this principle. For example, the courts have permitted a relaxation of this rule where the proposed amendment will clarify the original claim. Further, where a party makes allegations of a continuing tort such as nuisance, allegations of further acts of nuisance may be added without offending the relation back doctrine.⁴¹¹ The courts have recently, however, inclined to a slightly more lenient approach in certain limited circumstances.⁴¹²

writ to aver the irrecoverability of loan; held that the statement of claim could not be amended to cure a defective claim by the addition of a necessary factual averment that could not be pleaded as at the date of the issue of the writ; this was not the averment of an additional cause of action (see below), but a case where there was no cause of action at all at the date of the issue of the writ).

410 *Application des Gaz SA v Falks Veritas Ltd* [1974] Ch 381, [1974] 3 All ER 51 (CA, Eng); *Roban Jig & Tool Co Ltd v Taylor* [1979] FSR 130 (CA, Eng); *Wing Siu Co Ltd v Goldquest International Ltd* [2003] 2 HKC 64 (CA) (action for arrears of rent; application by plaintiff to add new cause of action claiming damages for wrongful repudiation of lease arising after service of writ; held that, although the position had been slightly relaxed in England, no decision had gone so far as allowing, in the face of opposition, an amendment which would introduce into a writ a cause of action which simply did not exist at the date of issue of the writ).

411 See *Jack Gordon Leslie Smith v Tam Michael Wing Wah* [2007] HKCU 493 (unreported, HCA 2638/2004, 20 March 2007) (CFI) (plaintiff commenced proceedings seeking an injunction to restrain the defendants from committing a nuisance in breach of the deed of mutual covenant; plaintiff, alleged that the defendants, his neighbours, had breached the deed of mutual covenant by erecting structures on their wall and had played loud music from loudspeakers in their garden, both acts causing a nuisance to the plaintiff; plaintiff applied for leave to amend the statement of claim to include further allegations of nuisance that the defendants had thrown lighted cigarette ends onto the plaintiff's canopy causing burn holes in the canopy; defendants objected to the new allegations maintaining that, since the alleged acts had occurred subsequent to the issue of the writ, they could not be added in the light of the relation back doctrine; held that the courts had of late been more lenient in permitting parties to add fresh allegations that had arisen after the commencement of the action: see *Vax Appliances Ltd v Hoover plc* [1990] RPC 656 (CA, Eng); *Maridive & Oil Services (SAE) v CNA Insurance Co (Europe) Ltd* [2002] EWCA Civ 369, [2002] 1 All ER (Comm) 653 (CA, Eng); in the instant case, the alleged cause of action was nuisance involving several different acts and to treat each act of alleged nuisance as a separate cause of action would render the proceedings hopelessly cumbersome; leave to add the fresh allegations was accordingly granted).

412 See *Vax Appliances Ltd v Hoover Plc* [1990] RPC 656 (CA, Eng); *Maridive & Oil Services (SAE) v CNA Insurance Co (Europe) Ltd* [2002] EWCA Civ 369, [2002] 1

to a *subpoena duces tecum*.²⁶ It would also appear that the court enjoys inherent jurisdiction to order pre-action discovery against a non-party where justice so demands.²⁷

were items in the account which would be material evidence upon the matters in issue, per DDJ Benny Lo).

26 See RHC and RDC O 38 r 14; and Chapter 14 'Certain Aspects of Evidence'. A *subpoena duces tecum* can only be issued for the purposes of a trial and cannot, therefore, be used as a means to secure pre-trial disclosure of documents from a person who is not a party: *Penn-Texas Corp v Murat Anstalt (No 2)* [1964] 2 QB 647, [1964] 2 All ER 594 (CA, Eng); *Hsin Chong Construction Co Ltd v Hong Kong and Kowloon Wharf and Godown Co Ltd* [1986] 5 HKLR 987, [1986] HKCU 296 (HC). A subpoena is an order to produce a specified document to the court and not to the other party and technically the other party has no right to see the document without the leave of the court. A witness may insist that the document should not be handed to the parties even at the trial: *Burchard v Macfarlane, ex p Tindall* [1891] 2 QB 241 (CA, Eng) at 247–248, per Lord Esher MR, and a witness cannot be compelled to give discovery of any document in his possession merely because it may be relevant to an issue in the case: *Macmillan Inc v Bishopsgate Investment Trust Ltd* [1993] 4 All ER 998, [1993] 1 WLR 1372 (CA, Eng).

27 See *Chan Chuen Ping v The Comr of Police* [2014] 2 HKC 266, [2014] 1 HKLRD 142 (CFI) (plaintiff was injured when struck by a wheelchair in Tai Po; plaintiff reported matter to police but did not know the identities of the person pushing the wheelchair or the person in the wheelchair; police investigated the incident and compiled an accident report; plaintiff sought discovery from the police of the identities of the persons involved but the police failed to respond for several months, contending that the applicant had first to commence an action (which was, of course, impossible until the identity of the likely defendants had been obtained); DHCJ Seagroatt held that the court had an inherent jurisdiction to do what was fair and just; where a person reported to the police any accident involving injury to himself which might arguably give rise to a claim for compensation and the police, having ascertained the identity of the person alleged to be responsible, then refused to disclose the identity to him or his agent, they were obstructing the proper efficient and fair administration of justice; in conclusion, (i) in relation to accidents in general where data came into the possession of the police, they were exercising a public function in acquiring or receiving such data, whether it has been reported to them or whether they had carried out their own investigations; (ii) where an application was made to the police by or on behalf of a party who had or might have a claim arising out of an incident in respect of which the police had acquired information relating to such act, they were obliged to provide such information upon payment of a reasonable fee; (iii) the Personal Data (Privacy) Ordinance (Cap 486) did not inhibit such a response, nor could it justify any failure on the police's part to respond promptly and constructively to such request; and (iv) failure to respond was likely to constitute an obstruction of the administration of justice; the order for pre-action discovery sought would be granted); *Chan Wai Ming v Leung Shing Wah* [2014] 1 HKLRD 376, [2013] HKCU 2741 (CFI) (when the plaintiff was riding pillion on the motorbike driven by the defendant, he was injured when the defendant's motorbike collided with a car; the plaintiff commenced an action against the defendant contending that his injuries had been caused by the negligent driving of the defendant; the defendant's solicitors wrote to the Commissioner of Police asking for a copy of the relevant notebook of the policeman who had attended the accident; the police refused to supply it,

[9-12] The scope of (a) pre-writ discovery against likely parties and (b) post-writ discovery against non-parties was, prior to the Civil Justice Reform, restricted to actions for personal injury and death, but has now been extended to all actions to facilitate the litigation process. These provisions are an important aid to civil litigation but, as the cases noted below show, should only be resorted to in appropriate circumstances.

2.2.2 Pre-writ discovery against likely parties

[9-13] A person who, in the eyes of the court, appears likely to be a party to subsequent proceedings in that court in which a claim is likely to be made,²⁸ may apply to the court for an order requiring another person who appears to the court to be likely to be a party to the proceedings and to be likely to have or have had in his possession, custody or power any documents which are directly relevant to an issue arising or likely to arise out of that claim, to disclose whether those documents are in his possession, custody or power, and to produce such of them as are in his possession, custody or power to the applicant or, on such conditions as may be specified in the order (a) to the applicant's legal advisers; (b) to the applicant's legal advisers and any medical or other professional adviser of the applicant; or (c) if the applicant has no legal adviser, to any medical or other professional adviser of the applicant.²⁹ A document is only to be regarded as

replying that it was not relevant; DHCJ Seagroatt observed that it was not for the police but the parties or potential parties to decide what was or was not relevant to the proceedings; the police's obligation was to supply the material reasonably requested; if refusal were persisted in, then the requesting solicitors had either to issue a *subpoena duces tecum* against the policeman for his attendance in court or, at an early stage, commence proceedings to obtain early disclosure: see *Tse Lai Yin v Incorporated Owners of Albert House* [1999] 1 HKC 386 (CFI); *Chan Chuen Ping v The Comr of Police* [2014] 2 HKC 266, [2014] 1 HKLRD 142 (CFI)).

28 The words 'likely to be made' should be construed as meaning 'may' or 'may well be made', dependent on the outcome of the discovery or as meaning that there is a reasonable prospect of a claim being made: see *Dunning v Board of Governors of the United Liverpool Hospitals* [1973] 2 All ER 454 (CA, Eng), but ill-founded irresponsible and speculative allegations or allegations based merely on hope will not provide a reasonable basis for an intended claim in subsequent proceedings, per James LJ at 460; *Burns v Shuttlehurst Ltd* [1999] 2 All ER 27 (CA, Eng) (a claim is 'likely to be made' if there is a reasonable basis for the intended action or the action is worthwhile); *Three Rivers District Council v Bank of England (No 4)* [2002] EWCA Civ 1182, [2002] 4 All ER 881 (CA, Eng) ('likely' means 'may well' rather than 'more probable than not'; the word 'likely' connotes a rather higher threshold of probability than merely 'more than fanciful', but a prospect could be more than fanciful without reaching the threshold of 'more probable than not'); *Shaw v Vauxhall Motors Ltd* [1974] 2 All ER 1185, [1974] 1 WLR 1035 (CA, Eng) (personal injury possibly caused by defective brakes on truck; order for defendant's maintenance reports on truck to be disclosed as disclosure could result in claim not being pursued and a consequent saving in legal aid costs).

29 High Court Ordinance s 41(1); District Court Ordinance s 47A(1) and (3). See, for example, *Deistung v South Western Metropolitan Regional Hospital Board* [1975] 1 All ER 573, [1975] 1 WLR 213 (CA, Eng) (possible negligence by hospital;