CHAPTER 1

Some Introductory Matters

Scope of this Book

1.01 This book is intended for practitioners and for students who are studying for their professional qualifications. It covers the rules of civil procedure as applied in the Court of Final Appeal,[1] the High Court[2] and the District Court,[3] but does not deal with the procedure applicable in Hong Kong's tribunals such as the Small Claims Tribunal,[4] the Labour Tribunal[5] or the Lands Tribunal.[6]

1.02 The rules regulating the procedure in the Court of First Instance and the District Court are substantially the same, although some significant differences do exist.[7] Where such differences exist, they are pointed out in the text.[8]

1 The Hong Kong Court of Final Appeal was established by the Hong Kong Court of Final Appeal Ordinance (Cap 484) which came into effect on 1 July 1997. The power of final adjudication was vested in the Court of Final Appeal replacing the former jurisdiction of the Privy Council in London: Hong Kong Court of Final Appeal Ordinance s 3.

2 The High Court comprises the Court of Appeal and Court of First Instance: High Court Ordinance (Cap 4) s 3(1).

3 The District Court was established in 1953 by the District Court Ordinance (Cap 336).

4 The Small Claims Tribunal was established in 1976 by the Small Claims Tribunal Ordinance (Cap 338). See Chapter 2 'Jurisdiction of the Courts and Tribunals and Transfer of Proceedings'.

5 The Labour Tribunal was established in 1973 by the Labour Tribunal Ordinance (Cap 25). See Chapter 2 'Jurisdiction of the Courts and Tribunals and Transfer of Proceedings'.

6 The Lands Tribunal was established in 1974 by the Lands Tribunal Ordinance (Cap 17). See Chapter 2 'Jurisdiction of the Courts and Tribunals and Transfer of Proceedings'.

7 For the jurisdiction of the District Court, see Chapter 2 'Jurisdiction of the Courts and Tribunals and Transfer of Proceedings'.

8 For the main differences, see below.

The Nature of Civil Procedural Law

1.03 Civil procedural law is a separate, distinct branch of the law which exercises a pervasive influence over all the other branches of the law, except for criminal law and procedure. It covers the entire body of civil law, including the practice and procedure of the courts, which regulates the machinery and governs the administration of civil justice. It extends every legal or equitable claim, right, relief or remedy properly brought before any court whether inferior or superior, at first instance or on appeal, which has power and jurisdiction to recognise, determine or adjudicate upon such claim or right and to award and enforce the appropriate relief or remedy.

1.04 Civil procedural law forms an indispensable part of the machinery of justice and operates as an essential tool for enforcing legal rights and claims, for redressing or preventing legal wrongs, for asserting legal defences, and for such other ancillary purposes as the supervision and control of inferior courts, tribunals and other judicial decision-making bodies by way of judicial review.

1.05 Civil procedure acts in a manner complementary to the substantive law. Whereas the substantive law creates rights and obligations, the procedural law provides the manner of enforcement of those rights and obligations.

Civil Procedure Distinguished from Criminal Procedure

1.06 The expression 'civil' is used to distinguish this procedure from 'criminal' procedure. In Hong Kong, the systems of civil and criminal procedure are quite distinct, and criminal procedure is largely[9] governed by its own legislative rules. The criminal process has a distinct trial procedure and all trials in the Court of First Instance are conducted before a jury. By contrast, jury trials in civil proceedings are very rare.

1.07 The purpose of criminal proceedings is to assess guilt or innocence and to impose an appropriate penalty, whereas the purpose of civil proceedings is to adjudicate upon liability and assess appropriate compensation. There is, however, an inevitable, although slight, overlap between the civil and

9 But not entirely since some of the rules of the High Court and District Court apply to criminal proceedings as well as civil proceedings: see the Rules of the High Court (Cap 4A) (RHC) O 1 r 2(3) and the Rules of the District Court (Cap 336H) (RDC) O 1 r 2(3), and below.

criminal processes in, for example, the award in civil cases of exemplary damages,[10] the entitlement to plead criminal convictions as evidence in civil cases,[11] and the entitlement to invoke the rule against self-incrimination to withhold the disclosure and production of documents or the answering of interrogatories.[12] Conversely, the criminal courts may make restitution orders[13] and compensation orders[14] against convicted persons.

10 Exemplary damages may be awarded only in tort and in three classes of cases; the first is where there has been oppressive, arbitrary or unconstitutional action by government servants; the second is where the defendant's conduct has been calculated by him to make a profit for himself which might well exceed the compensation payable to the plaintiff; and the third is where statute so provides. See, for example, *Rookes v Barnard* [1964] AC 1129, [1964] 1 All ER 367 (HL); *Cassell & Co Ltd v Broome* [1972] AC 1027, [1972] 1 All ER 801 (HL); *Ng Man Sun v Law Wai* [1991] 1 HKC 311 (exemplary damages awarded in defamation action); *Yeung Wah James v Alfa Sea Ltd* [1993] 1 HKC 440 (exemplary damages for trespass by defendant landlord).

11 See the Evidence Ordinance (Cap 8) s 62. See also *Mak Yuk Kiu v Tin Shing Auto Radio CTR Ltd* [1981] HKLR 77, [1981] HKCU 13; *China Everbright–IHD Pacific Ltd v Ch'ng Poh* [1999] 2 HKLRD 555, [1999] 1 HKC 278 (defendant was convicted of crime of conspiracy and was subsequently sued for breach of fiduciary duty; plaintiff sought to adduce evidence of the conviction and also to get admitted the statement of a co-conspirator given to the ICAC, transcripts of evidence at the criminal trial and the judge's summing-up; the court held that the effect of the Evidence Ordinance, s 62(2)(a) was to shift the legal burden of proof from the plaintiff to the defendant; the statement, transcript and summing-up were all relevant and would be admitted in the civil trial); *J v Oyston* [1999] 1 WLR 694 (plaintiff sued defendant and relied upon defendant's criminal conviction; although the defendant admitted the conviction, he denied that he had committed the offence; plaintiff applied to strike out that part of the defence as being an abuse of the court's process; held that the application should be dismissed since, under the UK equivalent of s 62 of the Evidence Ordinance the conviction was prima facie but not conclusive evidence that the person convicted did commit the offence; the Ordinance permitted a convicted person to challenge his conviction in a civil action, although the burden was upon him to show that he had been convicted in error).

12 In criminal proceedings, witnesses other than the accused (see the Criminal Procedure Ordinance (Cap 221) s 54(1)(e)) enjoy privilege from self-incrimination: *Blunt v Park Lane Hotel Ltd* [1942] 2 KB 253, [1942] 2 All ER 187 (CA(Eng)). The privilege extends also to civil proceedings in which an allegation is made that a witness has committed a criminal offence: *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380, [1981] 2 All ER 76 (HL); *Bishopsgate Investment Management Ltd (in provisional liquidation) v Maxwell* [1993] Ch 1, [1992] 2 All ER 856 (CA(Eng)); *United Norwest Co-operatives Ltd v Johnstone* (1994) Times, 24 February (CA(Eng)). In some cases the privilege has been excluded by statute: see, for example, the High Court Ordinance s 44A.

13 The court is empowered to order that an offender restore to the owner property in the possession of the offender: see the Criminal Procedure Ordinance s 84; and the Theft Ordinance (Cap 210) s 30(1).

14 Victims of crimes who suffer personal injuries or sustain damage to their property may be awarded compensation by the courts: see the Magistrates Ordinance (Cap 227)

The Adversarial System of Justice

Main differences between the pure adversarial system and the inquisitorial system of justice

1.08 Hong Kong has adopted the common law adversarial system of procedure as distinct from the inquisitorial system used in civil law jurisdictions. The main differences between the pure adversarial system and the inquisitorial system of justice are as follows:

(a) Under an adversarial system, investigation is left to the discretion and initiative of the parties to the claim; under an inquisitorial system, the judge will take the initiative in directing inquiries to ascertain the truth.

(b) Under an adversarial system, the collection and production of evidence rests exclusively in the hands of the parties.

(c) Under an adversarial system, the speed with which the action proceeds is generally left to the discretion of the parties to the action;[15] under an inquisitorial system, the judge controls the speed of the progress of the action.

(d) Under an adversarial system, the judge presides at the hearing and generally assumes the passive role of umpire in the presentation of the evidence.[16] Under an inquisitorial system, however, the judge takes a much more active role in the adjudication process.

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s 98; the Criminal Procedure Ordinance s 73; and the Theft Ordinance s 30(1)(c).

15 This is, of course, subject to the time constraints prescribed by legislation. The limitation provisions prescribe the time within which an action must be commenced and the Rules of Court and court orders frequently impose a time limit within which a step in the action must be taken. Failure to comply with a time limit may, in certain circumstances, give rise to the plaintiff's claim or the defendant's defence being struck out: see Chapter 12 'Disposal of Actions Without Trial' (striking out) and Chapter 16 'Judgments and Orders'.

16 In *Yuill v Yuill* [1945] 1 All ER 183 at 185 (CA(Eng)), Lord Greene MR described the judge's role as follows: 'It was said that the judge put many more questions to witnesses than all the counsel in the case put together and that he in effect took the case out of counsel's hands to the embarrassment of counsel and the prejudice of his case. The part which a judge ought to take while witnesses are giving their evidence must, of course, rest with his discretion. But with the utmost respect to the judge it was, I think, unfortunate that he took so large a part as he did … It is, of course, always proper for a judge – and it is his duty – to put questions with a view to elucidating an obscure answer or when he thinks that a witness has misunderstood a question put to him by counsel. If there are matters which the judge considers have not been sufficiently cleared up or questions which he himself thinks ought to have been put, he can, of course, take steps to see that the deficiency is made good. It is, I think, generally more convenient to do this when counsel has finished his questions or is passing to a new subject … the whole strength of cross-examination may be destroyed if the judge, in his desire to get to what seems to him to be the crucial point, himself intervenes and prematurely puts the question himself.' Commenting further on the judge's role, Lord Denning MR said in *Jones v National Coal Board* [1957] 2 QB 55 at 64, [1957] 2 All ER 155 at 159 (CA(Eng)): 'The judge's part … is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any points that have been overlooked or left obscure; to see that advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the robe of an advocate; and the change does not become him well. Lord Chancellor Bacon spoke right when he said that: "Patience and gravity of hearing is an essential part of justice and an over-speaking judge is no well-tuned cymbal".' As we will see below, following the Civil Justice Reform 2009, judges and masters play a more active role in controlling the speed of litigation. Judges and masters also have been empowered to make orders on their own initiative (*suo proprio motu*).

Incremental changes to the adversarial system prior to the Civil Justice Reform 2009 and the changing role of the judge

1.09 The pure mode of adversarial proceedings and the conventional non-interventionist role of the judge in adversarial proceedings had led to delays in the adjudication process and dissatisfaction on the part of litigants, lawyers and judges,[17] and, as a result, significant changes have been taking place in England[18] and Hong Kong. One noteworthy feature which can be seen in several common law jurisdictions is increasing judicial activism. This has been the product of many factors, including changes in community expectations, the need to maintain the quality of justice in the

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17 For a discussion of the perceived defects in the adversarial system, see Wilkinson and Burton, *Reform of the Civil Process in Hong Kong* (LexisNexis Butterworths, Singapore, 2000), pp 8–35; see also Mr Justice DA Ipp 'Reforms of the Adversarial Process in Civil Litigation' (1995) 69 ALJ 705.

18 Substantial changes to the civil process in England were brought about as a result of Lord Woolf's Report, *Access to Justice* (Final Report, July 1996). The main aims of Lord Woolf's reforms were: (1) to speed up civil justice; (2) to render civil procedure more accessible to ordinary people and to small businesses; (3) to eliminate the arcane language of the law; (4) to encourage early settlement; (5) to render litigation simpler and cheaper by avoiding excessive and disproportionate resort to procedural devices such as over-detailed pleadings, unreasonably expensive discovery and interrogatories, over-lengthy witness statements, extravagant use of experts and unnecessary orality at trial. See further David Leonard, 'Reforms in England: the Woolf Report and Consequences', Chapter 2 in Wilkinson and Burton, *Reform of the Civil Process in Hong Kong* (LexisNexis Butterworths, Singapore, 2000). New and significantly different civil procedure rules were enacted in 1998 to give effect to these changes.

face of growth in litigation and the decline in resources from government, the need to assist unrepresented parties, the avoidance of possible injustice caused by incompetent lawyers and the management of cases in a manner aimed at reducing cost and delay. As a result of judicial recognition that the state must make the optimum use of its resources, it is now clear that litigants cannot expect to have as much court time available to them as they might wish.[19]

1.10 Prior to Civil Justice Reform in 2009 (which is discussed below), several important developments had already taken place in Hong Kong, incrementally improving the civil litigation process. These have included:

(a) judges attempting to reduce prolix advocacy;[20]

(b) the widespread introduction of skeleton arguments, lists of authorities, dramatis personae and chronologies of events;

(c) the requirement of the exchange of witness statements[21] together with a common order that witness statements shall stand in place of evidence-in-chief;[22]

(d) the introduction of special lists and a more prominent role for case management within those lists;[23]

(e) special provisions for case management in long trials;[24] and

(f) the gradual recognition of the court's power to fix a timetable for the trial.

1.11 It is clear that the judiciary both in England and in Hong Kong has responded in the last few years by assuming a more active role in case management and the role of the judge as a case manager has now been widely recognised. When making case management decisions, the court is primarily concerned with the saving of time and cost, and with

19 The High Court of Australia observed in *Sali v SPC Ltd* (1993) 116 ALR 625 at 629: 'What might be perceived as an injustice to a party when considered only in the context of an action between parties may not be so when considered in a context which includes the claims in other litigation and the public interest in achieving the most efficient use of court resources'.

20 See, for example, *Banque Financiere de la Cite SA v Westgate Insurance Co Ltd* [1991] 2 AC 249, at 280–281, [1990] 2 All ER 947 at 959 (HL) per Lord Templeman.

21 Ie under RHC and RDC O 38 r 2A(2). In *Cheung Kai Wing v Mok Sheung Shum* (*t/a Mok Sum Kee*) [1993] 2 HKC 113 at 126 (CA), the Kaplan J said: 'It is no exaggeration to say that O 38 r 2A has revolutioni[s]ed the way in which civil litigation is conducted in England and in Hong Kong'. See Chapter 14 'Certain Aspects of Evidence'.

22 RHC and RDC O 38 r 2A(7).

23 See Chapter 18 'Personal Injury Actions and Other Particular Proceedings'.

24 See Practice Direction No 5.7 'Long Cases'. See also Chapter 10 'Case Management and Interlocutory Proceedings'.

the avoidance of unnecessary delay, undue complexity and overloading of issues. Further, to avoid a proliferation of appeals from decisions affecting case management, the Court of Appeal has made it clear that it will be reluctant to interfere with procedural decisions made by a judge in the management of the case before him and will only do so in exceptional circumstances.[25]

1.12 It became clear, however, that more radical reform was required. In the words of HH Judge Marlene Ng in *Wong Cheuk v Falcon Insurance Co (Hong Kong) Ltd*:[26]

> I should start by saying that this case exposes with startling clarity the ills of deeply entrenched legal culture that underpins the adversarial system and of litigants/lawyers clinging to the familiar and resisting change. If there has been any doubter in respect of the Civil Justice Reform, this case vindicates such reform by underscoring an urgent need for major change in how we resolve disputes and for transformation in our way of thinking. In modern litigation justice may not necessarily be best served by adhering to the traditional belief that the best way to resolve a dispute is to let litigants (or their lawyers) control the process in a contest between opposing adversaries that ultimately results in trial and judgment. Full-blown adversarialism may result in zealous lawyers going to great lengths

25 See *Cheung Yee Mong Edmond v So Kwok Yan Bernard* (*t/a Gloria English School*) [1996] 2 HKLR 48, [1996] HKCU 441 (CA); *Cheung Chi Hung v Konivon Development Ltd* [2000] 2 HKLRD 367, [2002] HKCU 337 (CA); *Lee Tak Yee v Chen Park Kuen* [2001] 1 HKLRD 401, [2001] HKCU 149 (CA) (the court would only interfere with judge's case management if judge had gone clearly wrong and made orders which clearly involved either an injustice or inability of court to carry out its task); *Lau Leung Wa v Lau Yue Kui* [2005] HKCU 401 (unreported, CACV 58/2005, 15 March 2005) (CA); *Wong Kar Gee Mimi v Severn Villa Ltd* [2012] 1 HKLRD 887, [2012] HKCU 114 (CA). 'Case management decisions are only subject to appeal in rare cases. The appellant faces a "very high hurdle" and must show that the judge "has gone clearly wrong and made orders which will clearly involve an injustice or an inability for the trial court to carry out its task"': *Lee Tak Yee v Chen Park Kuen* [2001] 1 HKLRD 401 at 403, or the judge 'erred in principle or the order was irrational having regard to the issues that had to be resolved': *Kam Miu Wah v Aeroflot Russian International Airlines* (unreported, CACV 142/2006, 6 September 2006) at [11] (CA); *Chan Wing Cheung v Ho Shu Yee* (unreported, CACV 393/2004, 10 January 2005) at [8] (CA). It need hardly be emphasised that generally, an appellate court will not interfere with a judge's exercise of discretion unless the judge has misunderstood the law or the evidence or the exercise of his discretion was plainly wrong such that it was outside the generous ambit within which a reasonable disagreement is possible: *Cheung Kam Wah v Cheung Hon Wah* [2005] 1 HKC 136 at 142; *Carlos Manuel Kwong v Lo Kam Wing* (unreported, CACV 128/2005, 3 November 2005) at [8] (CA), per Hon Kwan J).

26 [2009] HKCU 726 (unreported, DCEC 688/2008, 20 May 2009).

Contribution notices against an existing party

6.154 Specific provision is made in Order 16 rule 8 for a defendant to make a claim or obtain relief from someone who is already a party to the action (ie as opposed to someone who is not a party). This is done by serving what is commonly called a contribution notice on the other party.[373] Let us suppose, by way of example, that a plaintiff pedestrian, who is injured as a result of a crash between two drivers, commences proceedings against both drivers. Further, that one of the drivers has sustained damage to his vehicle caused by the other driver. In such a case, he may seek a contribution against his co-defendant in respect of his liability, if any, towards the plaintiff and for the damage suffered to his car.

6.155 The person on whom the notice is served then has 14 days to issue a summons applying to the court for directions.[374]

6.156 The Order 16 rule 8 procedure is not, however, applicable if the claim should be made by the defendant by way of counterclaim against the other party under Order 15 rule 3.

Claims by third and subsequent parties

6.157 Order 16 rule 9 contains a procedure similar to that in third party proceedings whereby a third party may bring in a fourth party, and a fourth party a fifth party, and so on successively.[375] The claim by the third party or relief sought against the fourth party must be of the same kind as is specified in Order 16 rule 1(1).[376] The third party may serve a fourth party notice without leave provided the action was begun by writ and the notice is issued before the expiration of 14 days after the time limited for acknowledging service of the third party notice against him.[377] Thereafter, the rules relating to third party proceedings[378] apply with any necessary modifications as if the third party were a defendant.[379]

373 RHC and RDC O 16 r 8.
374 RHC and RDC O 16 r 4(2), applied and modified by RHC and RDC O 16 r 8(4).
375 RHC and RDC O 16 r 9(1).
376 Ibid.
377 RHC and RDC O 16 r 9(3). After the expiration of this time, or if the action was begun by originating summons, leave to issue a fourth party notice is required: RHC and RDC O 16 r 9(3). As to the application, see RHC and RDC O 16 r 2, applied by RHC and RDC O 16 r 9(1).
378 Ie RHC and RDC O 16 rr 1–8.
379 RHC and RDC O 16 r 9(1).

CHAPTER 7

Causes of Action, Joinder of Actions and Consolidation of Actions

Meaning Of 'Cause of Action'

7.01 In *Letang v Cooper*[1] Lord Diplock defined a 'cause of action' as simply meaning a factual situation the existence of which entitles one person to obtain from the court a remedy against another person. The phrase has been held from the earliest time to include every fact which is material to be proved to entitle the plaintiff to succeed, and every fact which the defendant would have a right to traverse.[2] 'Cause of action' has also been described more broadly as being that particular act on the part of the defendant which gives the plaintiff his cause of complaint.[3]

Joinder of Causes of Action against Same Defendant

Introduction

7.02 Occasions will arise where a party wishes to join more than one cause of action against the same defendant. For example, the plaintiff might allege that he has been defamed by the defendant on two entirely separate occasions and it would clearly be a waste of time and costs to pursue two distinct actions.

1 [1965] 1 QB 232 at 242, [1964] 2 All ER 929 at 934 (CA(Eng)) per Lord Diplock.
2 *Cooke v Gill* (1873) LR 8 CP 107 at 116 per Brett J. Lord Esher MR later defined the words as comprising every fact, though not every piece of evidence, which it would be necessary for the plaintiff to prove if traversed, to support his right to the judgment of the court: *Read v Brown* (1888) 22 QBD 128 at 131 (CA(Eng)).
3 *Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 458, [1971] 1 All ER 694 (PC).

7.03 Joinder of causes of action must be read together with joinder of parties[4] and third party proceedings.[5] If the plaintiff wishes to sue two or more defendants in the same action, this is not a case of joinder of causes of action but rather joinder of parties and the rules relating to joinder of parties will apply. The purpose of the rules relating to joinder of causes of action, joinder of parties and third party proceedings is, of course, the same; that is to avoid multiplicity of actions and reduce costs and delay.[6]

When can causes of action be joined?

7.04 The power to join causes of action is very wide and the rules provide that the plaintiff may claim relief in one action against the same defendant in respect of more than one cause of action (a) if the plaintiff claims and the defendant is alleged to be liable in the same capacity in respect of all the causes of action;[7] or (b) if the plaintiff claims or the defendant is alleged to be liable in the capacity of executor or administrator of an estate in respect of one or more of the causes of action and in his personal capacity but with reference to the same estate in respect of all the others.[8]

7.05 This power must be read, however, subject to the overriding discretion of the court to order separate trials where it appears to the court that joinder might embarrass or delay the trial.[9]

4 See Rules of the High Court (Cap 4A) (RHC) and Rules of the District Court (Cap 336H) (RDC) O 15 r 4(1) and see Chapter 6 'Parties'.

5 See RHC and RDC O 16 and Chapter 6 'Parties'.

6 These rules were intended to give effect to one of the great objectives of the Supreme Court of Judicature Acts 1873 and 1875 (UK), namely to bring all parties to disputes relating to one subject matter before the court at the same time so that the disputes might be determined without the delay, inconvenience and expense of separate actions and trials (see *Byrne v Brown (Diplock, third party)* (1889) 22 QBD 657 at 666, 667 (CA(Eng)) per Lord Esher MR) and so that, so far as possible, all matters in controversy between the parties might be completely and finally determined, and all multiplicity of legal proceedings concerning any of those matters avoided: see High Court Ordinance (Cap 4) s 16(2); District Court Ordinance (Cap 336) s 48(4). The modern practice is to construe RHC and RDC O 15 r 1, dealing with the joinder of causes of action, as liberally as RHC and RDC O 15 r 4, dealing with joinder of parties: see *Payne v British Time Recorder Co Ltd and WW Curtis Ltd* [1921] 2 KB 1, [1921] 2 All ER Rep 388 (CA(Eng)).

7 RHC and RDC O 15 r 1(1)(a).

8 RHC and RDC O 15 r 1(1)(b).

9 Where the joinder of causes of action is permissible under the rule without leave, joinder is a matter of right, but the court is empowered under RHC O 15 r 5(1) to order separate trials or make such other order as may be expedient where it appears to the court that the joinder may embarrass or delay the trial.

7.06 In addition, the court has power to give the plaintiff leave to join several causes of action in the same action in whatever capacity the claims are made by or against a party.[10] The application for leave is made ex parte by affidavit before the issue of the writ or originating summons and stating the grounds of the application.[11]

7.07 Where the plaintiff unites in one action several distinct claims founded on distinct grounds, each claim must be stated and pleaded separately and distinctly.

Consolidation of Actions

The court's jurisdiction to order consolidation

7.08 Consolidation is the process by which two or more causes or matters are by order of court combined or united and treated as one cause of action. The main purpose of consolidation is, therefore, just like joinder, to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action.

7.09 The jurisdiction to consolidate arises where there are two or more causes or matters pending in the court and it appears to the court:

(a) that some common question of law or fact arises in both or all of them;

(b) that the rights to relief claimed in them are in respect of or arise out of the same transaction or series of transactions; or

(c) that for some other reason it is desirable to make an order consolidating them.[12]

7.10 In these circumstances, the court may order those causes of action or matters to be consolidated on such terms as it thinks just.[13] The circumstances in which actions may be consolidated are broadly similar to those in which parties may be joined in one action.[14] Accordingly, actions relating to the same subject matter between the same plaintiff and the same

10 RHC and RDC O 15 r 1(1)(c).

11 RHC and RDC O 15 r 1(2).

12 RHC and RDC O 4 r 9(1)(a)–(c).

13 RHC and RDC O 4 r 9(1). The power to make an order for consolidation is discretionary and the court has to consider whether such an order is desirable in all the circumstances: see *Payne v British Time Recorder Co Ltd and W W Curtis Ltd* [1921] 2 KB 1 at 16 (CA(Eng)) per Scrutton LJ.

14 As to joinder of parties, see RHC and RDC O 15 r 4 and Chapter 6 'Parties'.

defendant, or between the same plaintiff and different defendants[15] or between different plaintiffs and different defendants, or between different plaintiffs and the same defendant, may be consolidated on the application of either a plaintiff or a defendant.

7.11 On the other hand, there may be circumstances which render it undesirable or even impossible, or at least impracticable, to make an order for consolidation. Thus, two actions cannot be consolidated where the plaintiff in one action is the same person as the defendant in another action unless one action can be ordered to stand as a counterclaim in the consolidated action.[16] Again it is generally impossible to consolidate actions where the plaintiffs in two or more actions are represented by different solicitors.[17] Moreover, a consolidation order will as a matter of discretion be refused where it would be likely to cause embarrassment at the trial.[18] Consolidation has been refused on the grounds of the different stages of progress that the actions proposed to be consolidated have reached.[19]

7.12 In an appropriate case, the court has power to make an order for partial consolidation. A good illustration would be personal injury actions. Where several actions have been commenced by different plaintiffs, each of whom has a separate claim for damages for personal injuries, the actions

15 For example, it may be appropriate for two actions to be consolidated where the plaintiff has sustained personal injuries in two separate incidents so that the court can determine the causation and extent of injuries caused by each accident: see *Lau Wing Yeung v Kowloon Cricket Club* [2014] HKCFI 703 (unreported, HCPI 955/2013, 16 April 2014) (plaintiff sued defendant claiming damages for personal injuries sustained as a result of a fall in the defendant's kitchen; he also commenced an action claiming damages for personal injuries sustained in a traffic accident some 18 months later; Master Leong observed that: 'right from the beginning the plaintiff and those advising him should have been aware that there was an overlap of injury … and both claims should have been consolidated so that, whilst liability could be determined separately against different defendants, the issues of causation and damages have to be investigated and apportioned, if needed, between the defendants').

16 See *Wing Yip Refrigeration Co Ltd v Jardine Engineering Corp Ltd* (unreported, HCA A3212/1989).

17 See *Lewis v Daily Telegraph Ltd (No 2)* [1964] 2 QB 601, [1964] 1 All ER 705 (CA(Eng)). The plaintiffs could, however, agree that only one firm of solicitors should act on behalf of all of them, so as to pave the way to consolidation. That firm must then take steps to appear on the record as the sole solicitors for all the plaintiffs.

18 See *Daws v Daily Sketch and Sunday Graphic Ltd* [1960] 1 All ER 397, [1960] 1 WLR 126 (CA(Eng)) (actions by different plaintiffs based on the same libel but where different defences were raised in respect of each of them).

19 *Wing Yip Refrigeration Co Ltd v Jardine Engineering Corp Ltd* (unreported, HCA A3212/1989).

may be consolidated on the issue of liability, but thereafter each plaintiff is left to pursue his separate claim for damages independently.[20]

Application for consolidation

7.13 An application for consolidation is made by summons and should be made as soon as possible, although it may also be made on the case management summons.[21] A separate summons should be issued in each action proposed to be consolidated or one summons may be issued provided it sets out fully the titles of each such action. The principle is that all the actions to be consolidated should be before the court at the same time.[22]

Alternatives to consolidation

7.14 Where the court considers that it is not desirable or appropriate to make an order for the consolidation of two or more causes or matters, it has power to order them to be tried at the same time, or one immediately after the other, or may order any of them to be stayed until after the determination of any other of them.[23] Orders of this nature are very useful

20 *Healey v A Waddington & Sons Ltd* [1954] 1 All ER 861, [1954] 1 WLR 688, (CA(Eng)). Where the several plaintiffs are represented by different solicitors, it will be necessary for all of them to agree that the conduct of the action on the issue of liability would be placed in the hands of one solicitor. An alternative form of order is to treat the action nearest to the date of trial as a test action on the issue of liability, by which all the other parties agree to be bound, and to stay the other actions meanwhile: see *Amos v Chadwick* (1877) 4 Ch D 869.

21 As to the case management summons, see Chapter 10 'Case Management and Interlocutory Proceedings'.

22 See *Daws v Daily Sketch and Sunday Graphic Ltd* [1960] 1 All ER 397, [1960] 1 WLR 126 (CA(Eng)).

23 RHC and RDC O 4 r 9(1). See, for example, *Ko Chi Keung v Lee Ping Yan Andrew* (unreported, HCA 18029/1999, 28 February 2001) (application for consolidation of two actions; held that consolidation not suitable since, although common questions of fact involved, the issues in one action were much narrower than the issues in the other; however, since there were common witnesses where their credibility was in issue, order made that one action be tried immediately following the other by the same judge, per Sakhrani J); *Re Prudential Enterprises Ltd* (unreported, HCCW 594/1999, 19 August 2003) (substantial overlapping of issues in three actions; in making case management decisions, the court was primarily concerned with saving of time and cost and with the avoidance of unnecessary delay, undue complexity and overloading of issues; in the present context, the main merit of having the three actions tried together was that the common witnesses would be saved the inconvenience of having to repeat their testimony; this was of particular significance for those witnesses living overseas and for the common experts; however, the court was not confident that trying the three actions together would achieve a great saving in time and cost, as the evidence in each action would vary; held that the proper order was that each

in that, for example, they will save the expense of two attendances by counsel, solicitors and witnesses and the trial judge will be able to try the several actions in such order as may be convenient or even at the same time and, with the consent of the parties, which will normally be readily given, to treat the evidence in one action as evidence in the other or others. Any party in the second action, who is not also a party to the first, will be permitted to take part in and to attend the trial of the first and cross-examine the witnesses.

Consolidation distinguished from joinder of causes of action

7.15 It can be seen, therefore, that consolidation is wider in scope than joinder of causes of action. Whereas two or more actions can be consolidated in an appropriate case even when they involve different plaintiffs or different defendants, the right to join causes of action is restricted to the situation where the plaintiff wishes to pursue more than one cause of action against the same defendant.

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action should be tried one after the other, per Chu J); *Tsui Wai Kuen v Cheung King Chung Ray* [2007] HKCU 1984 (unreported, HCA 2405/2007, 26 November 2007) (plaintiff presented petition under the former Companies Ordinance (Cap 32) s 168A and also commenced derivative action in circumstances where there was overlapping in the relief claimed; held that the two actions should be heard by the same judge who would decide, at the interlocutory stage, the order in which the actions would be tried and whether the evidence and fruits of discovery in the first action could stand in the second action, per Dty Judge Carlson); *Ironwood Capital Ltd v Du Wang* [2007] HKCU 1213 (unreported, CACV 34/2007, 13 July 2007) (order that actions be consolidated, but action for account be tried before action for recovery; both actions were to be heard by the same judge and the finding in the first action would stand as the finding in the second action, per Rogers VP).

CHAPTER 8

Pleadings

The Nature and Purpose of Pleadings

The meaning of 'pleading'

8.01 In early times in England, pleadings were oral and not written and, upon appearance, each party made in open court a verbal statement of the facts on which he relied. It was the duty of the judges to moderate this oral controversy so as to reach a point where a specific matter was affirmed by one side and denied by the other. When this point was reached, the parties were said to be 'at issue' (ie at the end of their pleading). If an issue thus arrived at was a question of law, it was decided by the judge; if it was a question of fact, it was tried according to one of the modes of trial then in vogue. During the oral contention by which the issues were ascertained, entries were made on a parchment roll by an officer of the court of the allegations made by each party in turn. On this roll was also entered a short notice of the nature of the action and of the acts of the court itself. This parchment roll, called 'the record', was the official register of the pleadings. It was preserved as a perpetual, intrinsic, and exclusively admissible testimony of all the proceedings to which it referred. These oral pleadings were delivered either by the party himself, or by his pleader (called 'narrator' or 'advocatus'). In very early times, it was established that none but a regular advocate, or barrister, could be a pleader in a case not his own. Gradually, it became the practice for the pleader to enter his statement in the first instance on the parchment roll, to which his opponent was allowed to have access in preparing his answer. Then, to lessen inconvenience, a practice arose by which the pleader delivered his pleading already written, and its entry on the roll was deferred until later in the action. However, the abandonment of oral pleading did not change the form of the allegation to be made. The same principles continued to govern the practice of pleaders, and the parties came to an issue in their written pleadings as in former times they had done when they disputed orally at the bar of the court. The last surviving relic of the oral pleading is the defendant's plea of 'guilty' or 'not guilty' in a criminal trial.

CHAPTER 15

The Trial Process

The Expanding Role of the Court in Case Management

15.01 As we have already seen,[1] historically, under the pure adversarial system the investigation of the case and the speed with which the action proceeds are left to the discretion and initiative of the parties and the judge plays a largely passive role both at the interlocutory stage of the proceedings and at the trial itself. This system has, however, led to delays in the adjudication process and dissatisfaction on the part of litigants, lawyers and judges.[2]

15.02 Judicial officers in England and Hong Kong responded in recent years by assuming a more active role in case management and the role of the judge as a case manager received judicial recognition. The courts have now acknowledged that measures of court management must be introduced both in the public interest[3] and in the interests of other court users.[4]

1 For a more detailed consideration of the pure adversarial system and the increasing role of the court in case management, see Chapters 1 and 10.

2 For a discussion of the perceived defects in the adversarial system, see Wilkinson and Burton *Reform of the Civil Process in Hong Kong* (Butterworths, Singapore, 2000); Sir Richard Eggleston, 'What is Wrong with the Adversary System?'(1975) ALJ 428; PD Connolly, 'The Adversary System – Is It Any Longer Valid?'(1975) ALJ 439; Mr Justice DA Ipp, 'Reforms of the Adversarial Process in Civil Litigation'(1995) ALJ 705.

3 See *Ketterman v Hansel Properties Ltd* [1987] AC 189; *Du Pont de Nemours & Co v Commissioner of Patents* (1987) 16 FCR 423 at 424.

4 The public interest in making optimum use of scarce and costly court resources has gained recognition of late: see *Sali v SPC* Ltd (1993) 67 ALJR 841 at 849, 116 ALR 625 at 636 (Aust HC) per Toohey and Gaudron JJ; *Ashmore v Corp of Lloyds* [1992] 2 All ER 486 (HL) at 488 per Lord Roskill, at 493 per Lord Templeman, [1992] 1 WLR 446 at 448 per Lord Roskill, at 453 per Lord Templeman.

Civil Justice Reforms; setting time limits within the trial

15.03 As we have seen above,[5] the Civil Justice Reforms operative as from April 2009 have emphasised the need for more active case management taking into consideration the objectives underlying the Rules. Most of the new provisions relating to case management impact upon the interlocutory stage of proceedings, but one important change has been introduced relating to the trial itself. At any time before or during a trial, the court may by direction:

(a) limit the time to be taken in examining, cross-examining or re-examining a witness;

(b) limit the number of witnesses (including expert witnesses) that a party may call on a particular issue;

(c) limit the time to be taken in making any oral submission;

(d) limit the time to be taken by a party in presenting its case;

(e) limit the time to be taken by the trial; and

(f) vary a direction made under this rule.[6]

15.04 In deciding whether to make such direction, the court must have regard to the following matters in addition to other matters that may be relevant:

(a) the time limited for a trial must be reasonable;

(b) any such direction must not detract from the principle that each party is entitled to a fair trial;

(c) any such direction must not detract from the principle that each party must be given a reasonable opportunity to lead evidence and cross-examine witnesses;

(d) the complexity of the case;

(e) the number of witnesses to be called by the parties;

(f) the volume and character of the evidence to be led;

(g) the state of the court lists;

(h) the time expected to be taken for the trial; and

(i) the importance of the issues and the case as a whole.[7]

5 See Chapter 10 'Case Management and Interlocutory Proceedings'.

6 RHC and RDC O 35 r 3A(1). Under this power the court has directed that there be no cross-examination of a particular witness: see *Wynn Resorts v Mong Henry* [2010] HKCU 379 (unreported, HCA 192/2009, 12 February 2010); *Beijing Hantong Yuzhi Convention Centre Ltd v Lao Yuan Yi* [2013] HKCU 1038 (unreported, HCA 1208/2010, 7 May 2013).

7 RHC and RDC O 35 r 3A(2).

15.05 Such directions would most appropriately be made at the pre-trial review.

Place and Mode of Trial

Determination of place of trial

15.06 The High Court is required to sit at such times and in such places as the Chief Justice appoints[8] and, subject to rules of court, the place of trial of a cause or matter or of any question or issue arising in that cause must be determined by the court and be either the High Court building or such other place or places as may be authorised by the Chief Justice.[9] In every action begun by writ, the court must by order determine the place of trial.[10]

15.07 Similar provisions apply to cases to be heard by the District Court.[11]

Mode of trial generally

15.08 There are several modes of trial available in the Court of First Instance and the most common by far is trial before a judge sitting alone. The hearing of any cause or matter or any question or issue arising in it may be tried in the Court of First Instance before (a) a judge alone;[12] (b) a judge sitting with a jury;[13] (c) a judge with the assistance of assessors;[14] or (d) a master.[15] In every action begun by writ, the mode of trial must be determined by the court.[16]

15.09 In the District Court, cases may be tried either (a) before a judge alone; (b) before a judge sitting with assessors; or (c) before a master.[17] Jury trial is not, however, available in the District Court.

15.10 The Court of First Instance has also an inherent jurisdiction to refer a case to arbitration at the request of the parties.[18]

8 High Court Ordinance (Cap 4) (HCO) s 28(1).

9 RHC O 33 r 1.

10 RHC O 33 r 4(1).

11 District Court Ordinance (Cap 336) s 12(2); RDC O 33 rr 1, 4(1).

12 RHC O 33 r 2(a); see below.

13 RHC O 33 r 2(b); see RHC O 33 r 5 below.

14 RHC O 33 r 2(c); see RHC O 33 r 6 below.

15 RHC O 33 r 2(e); see RHC O 36 r 9 below.

16 RHC O 33 r 4(1).

17 RDC O 33 r 2(a)–(c).

18 Although it is rarely exercised, the Court of First Instance has an inherent jurisdiction to make an order for reference to arbitration in any case where the parties desire that

Trial by judge alone

15.11 The predominant mode of trial of actions in the Court of First Instance[19] and the District Court[20] is by a judge sitting alone. A Justice of Appeal may, however, sit in the Court of First Instance and act as a judge thereof whenever the business in the Court of First Instance so requires, in which case he enjoys all the jurisdiction, powers and privileges of such a judge.[21]

Trial by a judge sitting with a jury

15.12 On the application[22] of any party to an action to be tried in the Court of First Instance, where the court is satisfied that there is in issue a claim in respect of libel, slander, malicious prosecution or false imprisonment or any question or issue of a kind prescribed by rules of court,[23] the action

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the cause or matter should be decided by an arbitrator instead of by the court. The subject matter of the reference by consent is not necessarily limited to the scope of the cause or matter in which the order is made, but may include all matters in difference between the parties which they agree should be referred: *Darlington Wagon Co Ltd v Harding and Trouville Pier and Steamboat Co Ltd* [1891] 1 QB 245 (CA(Eng)). If counsel have indorsed their briefs for reference to arbitration by consent this might constitute an arbitration agreement in writing within the Arbitration Ordinance (Cap 341) [now Cap 609].

19 High Court Ordinance s 32(1).

20 District Court Ordinance s 6(1).

21 High Court Ordinance s 4(2).

22 The application must be made before the place and mode of trial is fixed under RHC O 33 r 4: RHC O 33 r 5(1); and late applications will not be entertained: see *Chau Hoi Shuen Solina Holly v SEEC Media Group Ltd* [2012] 3 HKLRD 331, [2012] 3 HKC 430 (application for jury trial made at pre-trial review; application rejected); cf *Martnok Thanradee v Commissioner of Police* [2014] HKCU 218 (unreported, HCA 789/2011, 24 January 2014) (plaintiff commenced an action against defendant for malicious prosecution alleging misconduct by members of the police force and leave was granted to set down the action before a judge alone; plaintiff, who had previously been refused legal aid, was then granted legal aid and counsel newly assigned to her issued a summons to vary the mode of trial to jury trial; Dty Judge Marlene Ng was first called upon to decide whether the court had jurisdiction to vary the mode of trial after leave had been given to set the case down for trial; the learned judge noted that Dty Judge Lok had concluded in *Chau Hoi Shuen Solina Holly v SEEC Media Group Ltd* [2012] 3 HKC 430 that the court had no jurisdiction to vary the place and mode of trial after the case management conference had been held; this was because RHC O 33 r 5 provided that the application for jury trial had to be made before the place and mode of trial had been fixed, which was usually at the case management conference; notwithstanding RHC O 33 r 5, the learned judge, disagreeing with the conclusion reached by Dty Judge Lok, ruled that the court retained jurisdiction to vary the mode of trial under HCO s 33A(3)).

23 High Court Ordinance s 33A(1)(a), (b).

must be ordered to be tried with a jury,[24] unless the court is of the opinion that the trial requires any prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made with a jury.[25]

15.13 Where an action to be tried does not fall within the classes of actions mentioned above, it must be ordered to be tried without a jury unless the court for good reason orders it to be tried with a jury.[26] Good reason means something that shows that trial by jury would be likely overall to produce a more just result than trial by judge alone and the onus of persuading the judge to that end rests fairly and squarely upon the party asking for

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24 High Court Ordinance s 33A(1). In the classes of case specified there is, therefore, a prima facie right to trial by jury, although in practice the parties often forgo this right.

25 High Court Ordinance s 33A(1). See *Taylor v Anderton (Police Complaints Authority intervening)* [1995] 2 All ER 420 (CA(Eng)) (where heavy documentation involved, claim should be tried by judge alone since likelihood that trial would be very lengthy, expensive and burdensome requiring prolonged examination of documents); *Aitken v Preston; Aitken v Granada Television Ltd* (1997) Times, 21 May (CA(Eng)) (the fact that the libel case involved prominent public figures and issues of national interest was an important consideration in favour of granting jury trial; however, since the trial would require prolonged examination of documents which could not conveniently be made with a jury, trial by a judge alone was to be preferred); *Asia Television Ltd v Oriental Daily Publisher Ltd* [2001] HKCU 899 (unreported, HCA 6124/2000, 11 September 2001) (libel action; held jury trial appropriate since trial did not involve any prolonged examination of documents or any scientific investigation which could not conveniently be dealt with by a jury); *Dr Esthetic Product Research & Production Centre Ltd v Next Magazine Publishing Ltd* [2009] HKCU 1239 (unreported, HCA 2776/2006, 21 August 2009) (in libel action application by defendant for jury trial; the court first noted that in *Beta Construction Ltd v Channel 4 TV Ltd* [1990] 2 All ER 1012, [1990] 1 WLR 1042 at 1047 (CA(Eng)), Stuart-Smith LJ had identified four main areas in which the efficient administration of justice might be rendered less convenient if the trial were to take place with a jury; they were cases involving (i) the physical problem of handling large numbers of documents in the jury box; (ii) a substantial prolongation of the trial because of the number and complexity of the documents; (iii) significant increased expenses, both by the added length of trial and extra copying; and (iv) the risk that the jury might not understand the documents, especially accounts and commercial documents; the instant case involved the weight reducing properties of aroma therapy and required scientific investigation and expert reports; the jury would be required to understand these reports which involved the discussion and analysis of scientific theories, propositions and jargon in the areas of olfactory, neurology and neurophysiology; in the view of the court the scientific examination of such theories and documents would, if conducted before a jury, render the trial and the administration of justice less convenient and would involve a substantial increase in the length of the trial; there was also a risk that the jury might not understand the complex issues raised by the expert reports; the application would, accordingly, be refused, per Dty Judge Au).

26 See the High Court Ordinance s 33A(3).

jury trial.[27] For example, in actions for personal injuries, trial by jury will not be ordered unless there are exceptional circumstances militating in favour of jury trial[28] and the courts have held that it is not an exceptional circumstance that the action involves issues of credibility nor, except at the instance of the party affected, that it involves issues of integrity and honour.[29] Similarly, a jury trial will only be ordered in medical negligence cases in exceptional circumstances.[30]

15.14 Although the court has a wide discretion to refuse an order for trial with a jury, it is not an untrammelled, unfettered or unrestrained discretion, and its exercise will, if necessary, be reviewed by the Court of Appeal to ensure that it is exercised upon proper considerations and materials.[31]

27 *B Volvo (A Swedish Corp) v Tanfory Co Ltd (t/a Club Volvo)* [1990] 2 HKLR 203, [1990] 1 HKC 158 (CA); *Kabushiki Kaisha Yakult Honsha v Yakudo Group Holdings Ltd (No 2)* [2003] 1 HKLRD 176 (passing off action; defendant applied for trial by jury; held that, in exercise of court's discretion under the High Court Ordinance s 33A, judge should bear in mind, inter alia, whether the issues in dispute were equally well within the grasp of a single judge as compared with a jury; if not, he had to ask himself whether the difference in grasp was sufficient to outweigh the other party's legitimate interest in having the case tried by the normal method unattended by the disadvantages which were normally consequent upon trial by jury; in the instant case, defendant had failed to persuade court that trial by jury would achieve a fairer result; there were complicated issues in the case which involved mixed questions of law and fact; application refused).

28 *Ward v James* [1966] 1 QB 273, [1965] 1 All ER 563 (CA(Eng)); *H v Ministry of Defence* [1991] 2 QB 103, [1991] 2 All ER 834 (CA(Eng)) (it is only in exceptional cases that the court will exercise its discretion in favour of jury trial in personal injury cases since, in assessing compensatory damages, a jury is unlikely to achieve compatibility with the conventional scale of awards; a jury trial might be appropriate, however, where the personal injury results from a deliberate abuse of authority giving rise to a claim for exemplary damages).

29 *Williams v Beesley* [1973] 3 All ER 144, [1973] 1 WLR 1295 (HL); *Iqbal Hussain Khan v AG* [1974] HKLR 63 (decided on the former rules since repealed).

30 *Saatori v Raffles Medical Group* [2007] 1 HKLRD 672, [2007] 1 HKC 449 (plaintiff commenced an action against the defendant claiming a substantial sum for medical negligence, contending that medical malpractice during an ear-wash had caused him tinnitus, an injury which was allegedly undetectable and incurable; plaintiff applied for the case to be tried before a jury; held that the general rule in respect of cases other than libel, slander, malicious prosecution, false imprisonment or seduction was that the case should be tried without a jury save in exceptional circumstances; even if it could be proved that tinnitus was undetectable and incurable, this did not make the injury unique or the case exceptional meriting that it be tried before a jury; nor was the fact that issues of credibility were involved sufficient for departing from the general rule, applying *Williams v Beesley* [1973] 3 All ER 144, [1973] 1 WLR 1295 (HL)).

31 *Ward v James* [1966] 1 QB 273, [1965] 1 All ER 563 (CA(Eng)).

15.15 In all civil trials conducted with a jury, the jury must consist of seven persons except where the judge orders that the jury must consist of nine persons.[32] Where the judge orders a jury trial, the party applying for such order must, within seven days after the cause is set down for hearing or within such further period as the judge may allow, deposit with the Registrar a sum sufficient to cover the expenses of the jury[33] and these expenses will be treated as costs in the cause.[34] In a jury trial, the verdict of the jury need not be unanimous and the court will accept a majority verdict.[35]

Trial by judge with assessors

15.16 In any civil proceedings, the Court of First Instance and District Court may hear and determine the case with the aid of one or more assessors specially qualified.[36] Express provision is also made for assessors to sit in the Court of First Instance in Admiralty actions[37] and in the Court of First Instance and District Court on the review of a taxing officer's certificate.[38]

15.17 An assessor is an expert, specially qualified in the subject matter of the action in which he is appointed and his function is to assist and advise the court on the technical questions or issues arising. He is not generally permitted to take an active part in the proceedings, and thus he may not examine the witnesses; nor may he be examined or cross-examined by the parties. His presence acts as a restraining influence on the parties' own expert witnesses. Whatever advice or assistance the trial judge may receive from an assessor, the sole responsibility for the ultimate decision in the case rests with the judge,[39] who is not bound to follow the assessor's advice.[40]

32 Jury Ordinance (Cap 3) s 3.

33 Ibid, s 15(1). If such deposit is not made within the time prescribed, the case must be tried without a jury: ibid, s 15(2).

34 Ibid, s 15(3).

35 Ibid, s 24(2)(a).

36 High Court Ordinance s 53(1); District Court Ordinance s 58(1); RHC O 33 r 2(c), RDC O 33 r 2(b). Any remuneration to be paid to an assessor is to be determined by the court: High Court Ordinance s 53(2), District Court Ordinance s 58(2).

37 In Admiralty actions, the order made on the summons for directions must determine whether the trial is to be without assessors or with one or more assessors: RHC O 75 r 25(2). The function of nautical assessors is to advise the court upon such nautical matters as seamanship or navigation.

38 See RHC and RDC O 62 r 35(5); *Lam Put v Tai Yieh Construction and Engineering Co Ltd* [1992] 1 HKC 291 (assessor appointed where fee of medical witness challenged).

39 *The Gannet* [1900] AC 234 (HL).

40 *The Magna Charta* (1872) 1 Asp MLC 153 at 154 (PC).

practice is to decline to review the evidence for a third time in the absence of special circumstances and will not disturb such findings merely on the ground that the courts below did not accord appropriate weight to the evidence.[221] The Court of Final Appeal as a final appellate court would also be very reluctant to consider an issue not duly raised and considered in the Court of Appeal. It was only in very exceptional circumstances that an issue which had not been dealt with or referred to by that court could be revived or introduced before the Court of Final Appeal.[222]

221 See, for example, *Sky Heart v Lee Hysan* (1997–98) 1 HKCFAR 318, [1999] 1 HKLRD 100, [1999] 1 HKC 18 (CFA); cf *Kwan Siu Man Joshua v Yaacov Ozer* (1997–98) 1 HKCFAR 343, [1999] 1 HKLRD 216, [1999] 1 HKC 150 (CFA) where the Court of Final Appeal overruled the concurrent findings of fact of the lower courts on ground that there was simply no evidence upon which the lower courts could find (as they had done) such a fact.

222 See, for example, *Ahamath v Sariffa Umma* [1931] AC 799 (CA(Eng)) and *A-G v Cheng Yick Chi* [1983] 1 HKC 14 (PC). For an example of the Court of Final Appeal finding the very exceptional circumstances for allowing an issue dropped in the Court of Appeal to be raised, see *Wong Tak Yue v Kung Kwok Wai David* (1997–98) 1 HKCFAR 55, [1998] 1 HKC (CFA).

CHAPTER 22

Alternative Dispute Resolution

What is Alternative Dispute Resolution ('ADR')?

22.01 In the last twenty to thirty years, widespread dissatisfaction with the perceived expense, tardiness and complexity of litigation in various jurisdictions resulted in the growing use of alternative dispute resolution or 'ADR' throughout both common and civil law jurisdictions.[1] Unfortunately, the Rules of the High Court ('RHC') and Rules of the District Court ('RDC') do not contain a definition of alternative dispute resolution or ADR.[2] The Glossary to the English Civil Procedure Rules ('CPR'),[3] however, states that ADR is a:

> Collective description of methods of resolving disputes otherwise than through the normal trial process.

22.02 To put it another way, ADR is those means of resolving disputes other than by litigation – hence the word 'alternative' or the use of the letter 'A' before 'DR'. This definition is, however, rather broad. The UK Centre for Effective Dispute Resolution ('CEDR')[4] defines ADR as:

> … a body of dispute resolution techniques which avoid the inflexibility of litigation and focus instead on enabling the parties to achieve a better or similar result, with the minimum of direct and indirect cost.

1 The National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (the 'Pound Conference') in April 1976 addressed the perceived inefficiency and unfairness of the United States courts. It is widely seen – at least in the United States – as the start of the ADR 'movement'. Similar conferences in other jurisdictions at the same time reached similar conclusions about their courts. See Hai Ming Leung, *Hong Kong Mediation Handbook* (2nd Edn, Sweet & Maxwell, 2014) chapter 4 for a discussion of these developments.

2 Although see the definition of ADR in Practice Direction 31 below.

3 The full set of the CPR can be found at http://www.justice.gov.uk/civil/procrules_fin/index.htm.

4 CEDR's website address is http://www.cedr.co.uk/. CEDR is one of the leading arbitral and mediation bodies in the UK and elsewhere.

22.03 The US International Institute for Conflict Prevention and Resolution ('the CPR Institute')[5] defines ADR as:

> An approach to conflict resolution designed to circumvent public litigation, or other adjudicative processes. In North America, ADR has taken one of two forms: arbitration or mediation. However, the modern approach to ADR encompasses an array of hybrid systems, combining elements of arbitration and mediation. In other regions, 'ADR' often is used synonymously with mediation.

22.04 The Chief Justice's Working Party on Civil Justice Reform ('CJR') discussed ADR in both its Interim and Final Reports.[6] The Working Party observed that litigants were not obliged to go to court to resolve their differences but could, if they so wished, choose some other methods to do so. These other methods, the Working Party noted, were 'usually referred to generically as alternative dispute resolution or ADR'.

22.05 The main distinction, as far at the Working Party saw it, between the compulsory jurisdiction of the court and these various forms of ADR was that the latter required the willing participation of the parties, in essence: 'A party cannot generally force ADR on any other party'.[7] Whilst there are some experts who dispute whether ADR is or should be truly voluntary, the general view is that the power of the parties to choose or reject ADR; the informality and flexibility of the various ADR processes; and their private (as opposed to public) nature distinguish ADR from traditional litigation.[8]

5 The Institute's website is http://www.cpradr.org/.

6 The Interim and Final Reports can be found on the CJR website at www.civiljustice.gov.hk/eng/archives.html.

7 The Interim Report observed that it would not be possible to compel parties in Hong Kong to mediate as this would infringe Art 35 of the Basic Law, which grants Hong Kong residents the right of access to the courts. Any 'compulsory' ADR could only be introduced in conjunction with the option of going to court if ADR failed. Similar concerns have been raised in England, where it has been suggested that compulsory mediation infringes Art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR'). The Interim Report listed six options for promoting ADR. Under them, ADR can be: (a) made mandatory by a statutory or court rule for all cases in a defined class; (b) made mandatory by an order issued at the court's discretion in cases thought likely to benefit; (c) made mandatory by one party electing for ADR; (d) made a condition of getting legal aid in certain types of cases; (e) voluntary but encouraged by the court, with unreasonable refusal or lack of cooperation running the risk of a costs sanction; or (f) entirely voluntary, with the court limiting its role to encouragement and the provision of information and facilities.

8 See Boettger, U, *Efficiency Versus Party Empowerment – Against A Good-Faith Requirement in Mandatory Mediation* in The University of Texas Review of Litigation (23 Rev.Litig. 1) for a discussion of compulsory and voluntary mediation and, in particular, the use of 'good faith' clauses in mediation agreements.

22.06 Despite sharing the civil litigation problems of other jurisdictions – such as rising legal costs – Hong Kong had not, until very recently, seen a comparable growth in the use of the most popular form ADR, namely mediation. Mr Wong Yan Lung SC, the Hong Kong Secretary for Justice, acknowledged this fact in November 2007:[9]

> … in his policy address delivered in October, our Chief Executive pledged to develop mediation services in Hong Kong. Mediation has been in use in Hong Kong for some time. But it is fair to say its application is still relatively narrow.

22.07 The Hong Kong Government, judiciary, legal profession and business community are now very supportive of mediation. The Chief Executive's 2007 policy address, together with many speeches by the Secretary for Justice and members of Hong Kong Judiciary,[10] demonstrated a desire to 'catch up' with other jurisdictions. This desire has found concrete expression in the post-CJR court rules; Practice Direction 31; the Judiciary's Mediation Information Office;[11] the Mediation Ordinance (Cap 620); new provisions in both the Law Society's and Bar Association's codes of professional conduct; the establishment of the Hong Kong Mediation Accreditation Association Limited (HKMAAL);[12] and the creation of various mediation working groups, parties and task forces by both the Judiciary and the Department of Justice. Some of these developments are discussed further below.

Types of ADR

22.08 There are many varieties of ADR in operation in jurisdictions across the world, they include:

(a) *Mediation* – an informal, flexible and private process in which a neutral third party (the mediator) helps the parties towards a settlement. The parties retain control of the decision to settle and the terms of any agreement. As stated above, this is the most common form of ADR. Indeed, as the CPR Institute recognised, when people discuss 'ADR', they often mean 'mediation'.

9 At the 'Mediation in Hong Kong: The Way Forward' conference. See http://www.doj.gov.hk/eng/archive/index2007.html#a.

10 See a number of these speeches at http://mediation.judiciary.gov.hk/en/speeches.html

11 The Judiciary's Mediation Information office was established in January 2010. Its website is at http://mediation.judiciary.gov.hk/en/index.html.

12 The HKMAAL website is available at http://www.hkmaal.org.hk/en/index.php.

(b) *Conciliation* – a process similar to mediation but where the third party takes a more pro-active role by offering opinions on the merits of the claim and defence or even suggesting settlement terms. The terms 'mediation' and 'conciliation' are often used to describe the same process.

(c) *Adjudication* – the neutral third-party (the adjudicator) makes a binding decision on the dispute after following a set of procedures similar to, but less complex than, those of litigation or arbitration.[13]

(d) *Arbitration* – the parties choose (directly or via an arbitral organisation) the neutral third party (the arbitrator). The procedural rules are derived from statute (ie the Arbitration Ordinance) and may be modified (in part) by the parties or by an arbitral organisation. The arbitrator's decision is binding – subject to limited appeals.

(e) *Early neutral evaluation ('ENE')* – a preliminary assessment of the facts, evidence or law by a third party (who may be a judge).

(f) *Mini-trial* – the parties' lawyers make short, formal presentations to a panel of representatives from each party, with a third party as neutral chairman. Following these presentations, the parties' representatives meet (with or without the chairman) to discuss the same and negotiate a settlement.

(g) *Expert determination* – an independent third party expert is appointed to make a binding decision on the whole dispute or a specific issue. It is often used in cases involving complex, technical matters.

(h) *Mediation-arbitration ('Med-arb')* – the parties agree to give the mediator power to become an arbitrator and make a legally binding award if (after a certain time period) the mediation does not result in a settlement.[14]

(i) *Negotiation* – no neutral third party is involved. The parties may negotiate directly with one another, or through their legal representatives.

22.09 Finally, some experts believe that ADR is limited to any process in which an independent third party may help plaintiff and defendant to reach a solution, but who may not control the process and cannot impose a solution upon them. This definition excludes all forms of arbitration, adjudication

13 In *Chevalier (Construction) Company Limited v Tak Cheong Engineering Development Limited* [2011] 2 HKLRD 463, [2011] HKCU 402, Lam J remarked that adjudication 'should be considered by everyone involved in construction disputes'.

14 In *Gao Haiyan v Keeneye Holdings Ltd* [2011] 3 HKC 157, [2011] HKCU 708, Reyes J discussed the difficulties in the med-arb process which arise out of 'important differences between the mediation and arbitration processes'.

and – even if the parties' lawyers were involved – negotiation.[15] Many other experts, however, object to arbitration, adjudication and negotiation being left out of the scope of ADR.[16]

The Advantages and Disadvantages of ADR

22.10 Whilst the Hong Kong government and the courts are very enthusiastic about the use of ADR generally, and mediation in particular, this does not mean that ADR will be 'right' for every dispute and every client. The essential points to consider, other than the courts' attitude, when advising a client whether or not to use ADR are:

(a) Is the case itself 'right' for ADR?

(b) Does your client want 'victory' or simply an end to the dispute? Will it use ADR genuinely or merely as a means to this 'victory'?

(c) Is your client fully aware of the possible consequences of ADR? For example, mediation implies compromise and not 'victory'.

(d) Does your client understand that, unlike with a trial, the case may continue after the ADR? It may conclude, much later, at a trial or with a settlement (perhaps following another form of ADR).

(e) What are the other side's intentions?

22.11 The answers to these points will depend greatly on your, your client's and the other side's attitudes to the claim itself and the advantages and disadvantages of ADR, when compared to litigation, to resolve the claim.

22.12 The first stage will be for you and your client to consider the merits and shortfalls of ADR generally. It will then be necessary to decide what form of ADR to choose. Then you must discover if the other side is prepared to use it too.

22.13 It is impractical to list all the circumstances in which ADR would be appropriate. The following are, however, some of the *advantages* that may be gained from using it in certain circumstances:

15 The parties' lawyers are 'third parties' but will not, of course, be neutral.

16 See Brown and Marriott, *ADR Principles and Practices* (3rd Edn, Sweet & Maxwell, 2011) chapters 1–3 for a discussion of the types of ADR and the philosophies underlying the same. Chapter 3 of the *Hong Kong Mediation Handbook* also contains a comparison of some of the various forms of ADR.

(a) *Control* – in litigation, or arbitration, the parties surrender control of their dispute to the court (or other tribunal). In ADR, they do not because any resolution requires their consent.

(b) *Flexibility* – litigation has a winner and a loser. ADR aims at a resolution that takes into account everyone's interests.

(c) *Privacy* – litigation, with a few exceptions, is public whereas ADR is private.[17]

(d) *Speed* – litigation can be very slow. This is due, in part, to the courts' procedural timetable, which is beyond the parties' control. ADR proceeds at a speed and in a manner controlled by the parties.

(e) *Cost* – ADR costs are generally much lower than those of litigation. If ADR does not produce a settlement, its costs will be added to those of the litigation but there may still be a costs saving if the issues to be dealt with at trial have been narrowed.

(f) *Attitude* – litigation is adversarial. This can lead to unproductive behaviour including 'tactical' court applications. ADR has a consensual, 'problem-solving' approach. This saves the time, costs and stress caused by litigation.

(g) *Expertise* – in litigation, the judge may be unfamiliar with the technical issues upon which the dispute may turn (eg engineering) which could affect his decision and result in an appeal. In ADR, the parties can choose someone who is an expert in the field.

(h) *Relationships* – ADR enhances the possibility of the parties having a business relationship in the future or, alternatively, ending it amicably.

17 In *S v T (Mediation: Privilege)* [2011] 1 HKLRD 534, [2010] 4 HKC 501 (CA), the applicant sought to admit as evidence documents relating to what was discussed during mediation, in an appeal concerning custody proceedings. The application was dismissed, Rogers VP stating at [3]–[4]:

> Mediation has now become part of the process which the court approves of to the extent that parties may even be penalised in costs if they are not prepared to embark upon a mediation process. Fundamental to mediation is confidentiality. Every mediation starts with an agreement between the parties and the mediator that what is said in mediation must be kept confidential and even the process of mediation and the fact that it is embarked upon should be kept in my view, confidential. It is wholly wrong for any party, of their own motion, to refer to what was said or not said or arose out of mediation, unless and until, a concluded agreement has been reached in the mediation which encompasses what may be disclosed and not disclosed. It is not a simple question of one party waiving privilege because it is a matter for both parties. I regard this as extremely important because it goes to the root of the mediation process which, as I have said, is now part of the court's process. Unless this is adhered to the whole mediation system will come to naught and people will use mediation as a tactical advantage and then seek to introduce evidence which has come from an unsuccessful mediation and somehow bring that into court proceedings. That is quite contrary to anything which was envisaged in the process of mediation.

(i) *Risk* – ADR avoids the danger of losing at trial, with the attendant loss of money (damages and/or costs) and reputation. It also allows the parties to test the merits of their respective cases in a relatively 'risk free' environment – which in itself often leads to a more realistic assessment of the claim and its settlement.

(j) *Focus* – an ADR lasting just one or two days or comprising a limited number of submissions means that the parties must focus on the main issues and their real goals. The intensity of the effort that is often required, and the conclusions (or even 'revelations') reached, often increases the chances of settlement.

(k) *The third party* – the neutral person will have the skill to evaluate the issues from a neutral perspective and – in mediation – to help the parties reach a settlement.

22.14 There are, of course, those situations where litigation (or arbitration) may be more appropriate than ADR. The *disadvantages* of ADR include:

(a) *Precedent* – ADR is unsuitable when one wishes to set a precedent or clarify an important legal principle, for example, the scope of an auditor's duty (if any) to the shareholders of a company which he has audited.

(b) *Enforcement* – litigation offers the enforcement of judgments and orders. A settlement resulting from ADR is usually recorded in a written contract between the parties, which in the event of default, would have to be enforced through further proceedings (unless the settlement was incorporated into a court order). ADR is generally deemed to be unsuitable when one party is seeking injunctive relief.

(c) *Equality* – the court rules direct the court to ensure that the parties are treated fairly. Whilst there are power imbalances in most situations, and this is not a reason in itself to avoid ADR, there may be situations where the imbalance is so great that an equitable agreement cannot be reached.

(d) *Reputation* – one or both parties may need to have their stance publicly validated for reasons other than setting a legal precedent such as, for example, their commercial credibility. Any validation will come more readily from a judgment at trial than from a (usually) confidential settlement agreement.

(e) *Forum* – in litigation, the judge is an experienced lawyer who follows publicly prescribed rules of evidence, law and procedure in an objective fashion. In ADR, the neutral third party may not be a lawyer and his conduct will be 'governed' by the parties only.