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Hong Kong Civil Procedure Notes

2022
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1. INTRODUCTION

A. HOW TO USE CONVERSION NOTES

The Hong Kong Civil Procedure Notes are formatted into a step-by-step guide, which you can use as a checklist in your exams to ensure that every element of the exam question is answered. You may find the Table of Contents to be a quick and useful overview of the law to be applied. You should also answer the exam question using the ILAC method, which will ensure your answer is comprehensive.

Issue State the legal issue relevant to the problem

Law Identify the relevant case law and legislation

Analysis Analyse and apply the law to the legal issue. This is the most important part, so ensure your legal analysis is very thorough.

Conclusion Form a conclusion based on your analysis and application of the law, giving some practical advice to the hypothetical client.

It is very important to spend time perfecting your analysis section, as this is the part that examiners are most interested in. Do not worry if you reach the correct conclusion (there often isn't one clear answer) – examiners will give more weight to your legal analysis, and sometimes may even reward answers that propose an innovative and unconventional answer!

B. ABBREVIATIONS

The Hong Kong Civil Procedure Notes will refer frequently to the following using abbreviations.

Rules	The RHC and RDC collectively
RHC	Rules of the High Court (Amendment) Rules 2008
RDC	Rules of the District Court (Amendment) Rules 2008
DCO	District Court Ordinance (Cap. 336), as amended by the Civil Justice (Miscellaneous Amendments) Ordinance 2008
CFAO	Court of Final Appeal Ordinance (Cap. 484)
PD	Practice Directions of the High Court (as amended from time to time)
LAO	Legal Aid Ordinance (Cap 91)
HCO	High Court Ordinance (Cap. 4), as amended by the Civil Justice (Miscellaneous Amendments) Ordinance 2008



2. OVERVIEW OF THE CONDUCT OF CIVIL LITIGATION IN THE DISTRICT COURT AND THE HIGH COURT

Before commencing an action, it is necessary to determine the most appropriate court to commence the action taking into account of the following.

A. JURISDICTION OF THE DISTRICT COURT

Section 32(1) of the DCO provides that the District Court has jurisdiction to hear and determine any action (or counterclaim) founded on contract, quasi-contract or tort where the amount of the plaintiff's claim does not exceed \$1,000,000 after taking into account any set-off (section 32(2) DCO). 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 \$1,000,000 (section 32(3) DCO). However section 34(1) of the DCO provides that the District Court has jurisdiction to hear and determine an action that is in excess of the Court's monetary jurisdiction limit on the plaintiff abandoning the amount of the plaintiff's claim in excess and the action is one in which the Court otherwise has jurisdiction.

B. JURISDICTION OF THE HIGH COURT

Section 3(2) of the HCO provides that the Court of First Instance enjoys financially unlimited original civil jurisdiction over all persons and all matters in Hong Kong.

C. TRANSFER OF AN ACTION BETWEEN THE DISTRICT COURT AND THE HIGH COURT

Where an action or proceeding commenced in the District Court, not being a counterclaim, is outside the jurisdiction of the District Court but is within the jurisdiction of the Court of First Instance, sections 41 and 42 of the DCO provide that the District Court shall, either of its own motion or on the application of any party, order that the action or proceeding be transferred to the Court of First Instance.

Where a claim, other than a counterclaim, which appears to the Court of First Instance likely to be within the jurisdiction of the District Court but has been commenced in the Court of First Instances, section 43(1) of the DCO provides that the Court of First Instance may, either of its own motion or on the application of any party, order the transfer to the District Court of all or part of the action or proceeding. Indeed, section 43(3) of the DCO provides that The Court of First Instance is required to make an order under this section unless it is of the opinion that, by reason of the importance or complexity of any issue arising in the action or proceeding, or for any other reason, the action or proceeding ought to remain in the Court of First Instance. An order may be made under this section at any stage of the proceedings of the motion of the Court of First Instance itself or on the application of any party (Section 43(2) DCO).

3. CONSIDERATION PRIOR TO THE COMMENCEMENT OF AN ACTION: TIME LIMITATION, LEGAL AID AND JURISDICTION OF THE COURTS

Before commencing an action, there are many important considerations that should be considered.

A. LIMITATION PERIOD

A very important pre-commencement consideration is identifying whether the limitation period for the potential action has expired or will be expiring soon. If it is the case that the limitation period will be expiring soon, the solicitor has a duty to act urgently so as to ensure that the action is not time-barred.



The Limitation Ordinance (Cap 347) provides the limitation period for different types of claims. Generally, the limitation period for a contract under seal is 12 years from the date of breach of the contract and the limitation period for a simple contract is 6 years from the date of breach. In relation to torts (other than claims for personal injury and deaths), the limitation period is generally 6 years from the date of damage being sustained as a result of the tortious act. Note however there is no limitation period on claims against trustees if it is a claim by the beneficiary in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use.

B. COSTS ONLY PROCEEDINGS

Another consideration before commencing proceedings is the possibility of costs only proceedings. In the past, costs could not be recovered unless proceedings have been instituted. However it is now possible to have costs only proceedings. Section 52B(1) of the HCO and Section 53A(1) of the DCO provide that costs only proceedings apply where:

- (a) the parties to a dispute have agreed on all the issues in dispute including who is to pay the costs of and incidental to the dispute;
- (b) the agreement has been made or confirmed in writing;
- (c) no proceedings relating to the dispute have been commenced; and
- (d) the parties have failed to agree on the amount of the costs of and incidental to the dispute.

Section 52B(2) of the HCO and Section 53A(2) of the DCO provide that either party to the agreement may commence proceedings for an order for the costs of and incidental to the dispute. Section 52B(3) of the HCO and Section 53A(3) of the DCO provide that in a costs only proceeding, the court may (a) make an order for the costs of and incidental to the dispute to be taxed or assessed; (b) make an order awarding costs of the costs only proceedings to or against any party to the proceedings; and (c) make an order awarding those costs against a person who is not a party to the proceedings if it is satisfied that it is in the interests of justice to do so.

Order 62 rule 11A of the Rules provide that costs only proceedings are to be commenced by originating summons which must be accompanied by: (a) an affidavit exhibiting the agreement between the parties; and (b) the plaintiff's bill of costs or statement of costs. The plaintiff may elect in his originating summons whether he wishes to proceed by way of summary assessment (in which case a statement of costs should be attached) or by taxation (in which case a bill of costs should be attached). Once the defendant has acknowledged service of the originating summons, the master may make a summary assessment or an order for taxation of the costs on the return date.

C. LEGAL AID

A solicitor has a duty to advise client to seek legal aid where a solicitor considers that his client may be eligible for legal aid. A solicitor must inform the client of the availability of legal aid, where the client can apply for it and recommend the client to do so (Hong Kong Solicitors' Guide Principle 4.01). Legal aid is available to any natural person in Hong Kong, resident or non-resident. Section 2 of the LAO defines 'person' to exclude a body of persons corporate or unincorporated.

i. TYPE OF PROCEEDINGS

Legal Aid covers civil proceedings mentioned in Part I of Schedule 2 to LAO which includes proceedings in the District Court, High Court, Court of Final Appeal and in the Lands Tribunal under Part II of the Landlord and Tenant (Consolidation) Ordinance (Cap 7). However there are a number of proceedings where Legal aid is not available. The excluded proceedings are mentioned in Part II of Schedule 2 to the LAO and include defamation proceedings, disputes between shareholders or



business partners, claims for the recovery of a loan made in the ordinary course of the applicant's business, and proceedings where the only question before the court is as to the time and mode of payment for debt and costs.

ii. **ELIGIBILITY**

There are two Legal Aid Schemes, the Ordinary Scheme and the Supplementary Scheme. The Ordinary Scheme is for those with financial resources not exceeding \$165,700.66 as assessed under the Legal Aid (Assessment of Resources and Contributions) Regulations. The Supplementary Scheme is for those with financial resources above \$165,700 but not exceeding \$460,300 as assessed under the Legal Aid (Assessment of Resources and Contributions) Regulations. Furthermore, the Supplementary covers only claims for damages arising from personal injuries or death, or for damages for medical, dental or legal professional negligence with an amount exceeding (or likely to exceed) \$60,000.67.

On top the abovementioned means tests, the applicant must satisfy the merits test. Section 10(3) of the LAO and the case of *Ng Ai Kheng Jasmine v Master M Yuen* (2004) HCAL 46/2003 provides that Legal Aid will be refused unless the applicant shows that he has 'reasonable grounds for taking, defending, opposing or continuing the proceedings or being a party thereto'. Lastly, even if reasonable grounds are shown, the Director of Legal Aid has a residual discretion to refuse legal aid on grounds set out in sub-paragraphs (a) to (g) of section 10(3) of the LAO.



We hope you have enjoyed this short preview of the Hong Kong Civil Procedure Notes.

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