# HIGHER RIGHTS OF AUDIENCE ASSESSMENT

# IN RESPECT OF CIVIL PROCEEDINGS

# THE PRACTICAL ASSESSMENT

## Instructions to candidates for the practical assessment

### Introduction

This document and its attachments comprise your instructions for the two parts of the practical assessment. The following are attached:

1. Instructions in relation to the Interim Application (including copy case law)
2. Instructions in relation to the Mini-Trial
3. Trial bundle for Mini-Trial

In the accompanying email you have been advised which party you are representing.

### Dress

You will be expected to dress appropriately, that is, as a solicitor would dress when appearing in open court in the High Court: you should therefore wear a gown and bands.

## Getting to the heart of the matter

It is important to note that, with each candidate given only a limited time span to complete each allocated exercise, it is important to adhere strictly to the following guidelines:

- Addresses to the court must be structured and succinct, getting to the heart of the matter without delay.

- It is to be assumed that the court has a very good understanding of the background facts and accordingly, while arguments must of course be put into factual context, there is no need for long, time-consuming recitations of the background facts.

## Analysis and structure

Candidates are expected to demonstrate a structured and analytical approach in all of the exercises required of them. The Examining Panels are required to pay special attention to whether or not a structured approach has been clearly evidenced, that is, a presentation which demonstrates that it is based on careful analysis and a choice of approach best suited in the limited time available to advancing the case that is advocated.

# HIGHER RIGHTS OF AUDIENCE ASSESSMENT

# IN RESPECT OF CIVIL PROCEEDINGS

# THE PRACTICAL ASSESSMENT

## Candidate Instructions for the Interim Application

Julia Tang is the owner of a plot of land in the New Territories known as "Serenity Garden" located at No.345, Mei Tin Road, Sha Tin. Serenity Garden is situated next to a residential property known as "Serenity House", which is where Rex Lai lives.

Serenity Garden is the subject matter of an adverse possession claim in HCA1342/2019 to which Julia is the Defendant and Rex is the Plaintiff. In the action, the Plaintiff seeks declarations that (1) the Defendant's title in Serenity Garden had been extinguished by adverse possession; and (2) the Plaintiff in his personal capacity holds possessory title in Serenity Garden.

The Plaintiff, through his solicitors, served the Writ in HCA1342/2019 on the Defendant's address at Flat 5A, Wisdom Court, 5 Hatton Road, Mid-Levels. No acknowledgement of service was filed. Accordingly, the Plaintiff proceeded to apply for and obtained default judgment against Julia on 8 May 2019.

Having discovered the default judgment on her return to Hong Kong on 3 April 2020, the Defendant made an application to set aside the default judgment.

The bases of the Defendant's application are:-

(A) Service was irregular because the address is not her usual or last known address;

(B) Service was irregular because she was out of jurisdiction at the time of service; and

(C) Even if the judgment is regular, the judgment ought to be set aside on the basis that the defence has a real prospect of success.

The evidential material to be used consists of the following affirmations

1. Affirmation of Rex Lai, the Plaintiff
2. Affirmation of Collins Tong, clerk of Bridget & Co Solicitors, for the Plaintiff
3. Affirmation of Julia Tang, the Defendant

For the purpose of this application, you may refer to the following, all of which will be available to the Judge and your opponent in the hearing:

i. The Affirmations listed above.

ii. The following case authorities, copies of which are attached
   a. **Honest Billion Investment Ltd v Wang Xian Chou** [1997] 3 HKC 161
   b. **Lu Wen Yun and Chen Ching Chih** [2006] 3 HKLRD 663
   c. **O Mark Polythylene Products Fty Ltd v. Reap Star Ltd** [2000] 3 HKLRD 144

iii. Hong Kong Civil Procedure (the Hong Kong White Book)

## Evidential Material

**HCA 1342/2019**

**Rex Lai v Julia Tang**

**Affirmation of Rex Lai**

I, Rex Lai, of Serenity House, No.344 Mei Tin Road, Sha Tin, do solemnly, sincerely and truthfully affirm and say as follows:-

1. I am the Plaintiff in this action. I make this affirmation in support of my application for default judgment.

2. Unless otherwise stated, the matters deposed to herein are true to the best of my knowledge information and belief.

***My Adverse Possession of Serenity Garden***

3. I was born in Serenity House in 1950. Serenity House is adjacent to Serenity Garden, which is located at 345 Mei Tin Road, Sha Tin. At the time of my birth, my father, Mr Man Lai, and my mother, Ms Sylvia Lai, were employed as domestic staff in the household of Mr Daniel Tang (whom they always called "**Mr Daniel**"). They had been employed by Mr Daniel for more than 20 years when I was born. Serenity House was in fact a gift from Mr Daniel to my parents to celebrate my birth and as a token of his appreciation for my parents' hard work for him and his family over the years. After finishing secondary school, I too joined my parents and worked in Mr Daniel's household.

4. From the time of my birth until 1975, Mr Daniel and his family lived in Wuthering Mansions, No. 346 Mei Tin Road, Sha Tin. In 1975, Mr Daniel's wife gave birth to a boy, Sebastian, and Mr Daniel decided to sell Wuthering Mansions to a developer and move to Canada with his family.

5. It was sad for my family and I to see Mr Daniel sell Wuthering Mansions and leave Hong Kong. We were also sad to think that Serenity Garden would be sold to the developers, given that it had many exotic trees which had been planted by my parents at Mr Daniel's request.

6. On his last day in Hong Kong, however, Mr Daniel surprised us by saying that Serenity Garden had not, in fact, been sold to the developers. He told us that he

too felt a lot of sentiment for it and had decided to keep it under his own name. He asked us to look after Serenity Garden for him, handing us a piece of paper with handwritten Chinese characters, a rough translation of which reads "*For a rent of HK$20 dollars each year, to be paid by post, I, Daniel Tang, shall rent you, Mr Man Lai and Mr Rex Lai, Serenity Garden*".

7. My parents were naturally moved to be able to still use Serenity Garden after Mr Daniel's departure. They were very grateful to Mr Daniel for this keepsake to remember the many years they spent with him and his family.

8. Sadly, my father passed away in 1981 and my mother in 1992. Mr Daniel also sadly passed away in 2000. Prior to Mr Daniel's passing away, my parents and I kept up the HK$20 rent payment to Mr Daniel by posting a banknote to his address in Montreal, Canada.

9. When I attended the funeral in Montreal, I met Mr Daniel's heir, Mr Sebastian. He was grown up now and was very different from the baby I saw in 1975. I asked Mr Sebastian for his address so that I could keep sending the HK$20 rent payment to Mr Sebastian after Mr Daniel's passing.

10. Tragically, Mr Sebastian died in a car accident in Wan Chai in 2005, just after his marriage to Julia Tang, the Defendant.

11. At Mr Sebastian's funeral, I asked the Defendant for her address so that I could keep mailing the HK$20 rent to her. The Defendant said there was no need for me to do so, saying that Serenity Garden is "no more hers than mine". She did however give me her address, which is "*Flat 5A, Wisdom Court, 5 Hatton Rd, Mid-Levels*".

12. In view of the Defendant's statement, I did not pay rent to her (or anyone else) for Serenity Garden for 15 years. During those 15 years, the Defendant would sometimes come and visit Serenity Garden, but always by arrangement with me and as my visitor. She would sometimes bring visitors over for tea in my house and to talk about Mr Sebastian.

13. Over the years, I have spent a lot of time and energy cultivating the flora and fauna in Serenity Garden. Many people from Howards House (the estate which was built on the plot that used to be occupied by Wuthering Mansions) would come and visit me there. The Defendant's words at Mr Sebastien's funeral sunk in and since then I saw Serenity Garden as a place that belongs to me.

***The Defendants' Last Known or Usual Address***

14. For the purpose of this action, the address for the Defendant that I provided to my solicitors was "*Flat 5A, Wisdom Court, 5 Hatton Rd, Mid-Levels*".

15. While I have not visited the address myself, I have heard the Defendant mention it many times before during her visits to Serenity Garden. I am advised and believe that it is the last or usual address of the Defendant.

16. I am also advised by my legal advisors and believe:-

16.1. My long occupation of Serenity Garden is in law an adverse possession against the Defendant;

16.2. The Defendant has not responded to any of the legal documents sent to her; and

16.3. As a result, I am entitled to default judgment.

17. For the above reasons, I humbly pray the Court grant default judgment and make the declarations sought.

**HCA 1342/2019**

**Rex Lai v Julia Tang**

**Affirmation of Collins Tong**

I, Collins Tong, of 345 Chancery Lane, Central, Hong Kong, clerk of Bridget & Co. Solicitors, do solemnly, sincerely and truthfully affirm and say as follows:-

1. I am authorised to make this Affirmation on behalf of the Plaintiff in support of his application for default judgment against the Defendant.

2. On 1 April 2019, I was directed by my principal to effect service of a Writ dated 1 April 2019 on the Defendant by inserting the same into a letterbox.

3. On Monday 1 April 2019, at around 5:20pm, I attended the usual or last known address of the Defendant, namely Flat 5A, Wisdom Court, 5 Hatton Rd, Mid-Levels.

4. Upon arrival at the lobby of Wisdom Court, I found a row of letterboxes, one of which was marked "Flat 5A". Accordingly, I inserted the Writ into the letterbox marked "Flat 5A". I left at about 5:30pm.

**HCA 1342/2019**

**Rex Lai v Julia Tang**

**Affirmation of Julia Tang**

I, Julia Tang, of the Grange, 5 Sainte Julie, Montreal, Canada, do solemnly, sincerely and truthfully affirm and say as follows:-

1. I am the Defendant herein. I make this affirmation in support of my application to set aside the default judgment entered against me by the Plaintiff on 8 May 2019.

2. Unless otherwise stated, the matters deposed to herein are true to the best of my knowledge information and belief.

3. I am advised and believe that the default judgment ought to be set aside because of (a) irregular service, and (b) good defence on the merits.

Not Aware of the Writ until a Week Ago

4. I was not aware of the Writ until I found it upon my most recent return to Hong Kong a week ago on 3 April 2020. Upon learning of the Writ, I immediately contacted my lawyers to seek their advice and assistance to bring this application to set aside the default judgment.

Flat 5A is not My Usual or Last Known Address

5. Flat 5A, Wisdom Court, 5 Hatton Rd, Mid-Levels ("**Flat 5A**") is not my usual or last known address, as the Plaintiff is well aware.

6. After my husband Sebastian's passing, I divided my time between Hong Kong and Canada. With all my children and relatives in Canada, I spend on average 9-10 months in Canada and only spend 2-3 months in total in Hong Kong each year. My time in Hong Kong is for short bursts with long gaps in between.

7. While I used to live for longer stretches in Flat 5A, especially prior to my husband's demise, it is now only a holiday home for me. All my correspondence is in fact addressed to me at my Canadian address. For this reason, I often do not check my post box when I come back, especially if I am only coming back to Hong Kong for a few days before onward travel usually around Asia.

8. This must have been well known to the Plaintiff because every time I saw him in Serenity Garden, I told him I was "*coming back from Canada*". While I might have mentioned in the passing that I was travelling from Wisdom Court *(i.e.* Flat 5A), he could not have been under any misapprehension that I was no longer living there other than on a short-term basis.

I was out of the jurisdiction by 4:17pm on 1 April 2019

9. Furthermore, looking at my travel records, I flew back to Canada from Hong Kong International Airport ("**HKIA**") on an Air Canada flight departing at 6:15pm on 1 April 2019.

10. Given that I usually leave the house at least 3 hours before my flight departs, I must have left the house by no later than 3:15pm on 1 April 2019. This is also my recollection of what occurred on that day. I have since checked my immigration records with the Hong Kong Immigration Department, and learned that I crossed the immigration checkpoint at HKIA (thereby leaving the jurisdiction) at exactly 4:17 p.m. The flight took off on time, and left Hong Kong airspace shortly after 6:25 p.m.

11. Given that I did not come back to Hong Kong until August 2019, I could not have known about the Writ or acknowledged service in time.

12. I am advised and believe that, for the above reasons, service was irregular and the default judgment ought to be set aside.

Strong Defence to the Plaintiff's Claim

13. It is true that I did not demand the HK$20 rent from the Plaintiff at my husband's funeral. But it is crystal clear that as a matter of common sense that was simply due to my grief. I find it shocking that the Plaintiff would take advantage of my situation to say that I have thereby given up my rights over Serenity Garden in favour of him.

14. Similarly, I find it shocking that the Plaintiff asserts that he had somehow occupied Serenity Garden against my wishes. Prior to discovering the default judgment, I had a most cordial relationship with him. Because our relationship was one of warmth and friendship, I did not find it necessary to ask for the HK$20 annual rent, which was always a token amount anyway. In fact, given that he always put on a show and gave us nice food and showed us around when my friends and I visited Serenity Garden, it would have been socially awkward for me to seek payment of the HK$20 annual rent.

15. As the Plaintiff admits, I often took my friends who were visiting Hong Kong to see Serenity Garden. I was always greeted and welcomed with great enthusiasm, even though I did not know the Plaintiff at all before my husband's demise. In all these social occasions, I was clearly playing the role of the hostess, with the Plaintiff playing the role of a domestic staff. Prior to the default judgment, the Plaintiff had always been very deferential to me, as I imagine he was when he was one of the domestic staff in the household of my late husband's family.

16. Furthermore, I have all the while had unobstructed access to Serenity Garden. Now produced and shown before me marked JT-1 is a photograph of the key to the gate to Serenity Garden.

17. As you can see from the ornamental design of the key, it is handcrafted, and specially designed to open the gate which has been guarding Serenity Garden for over 50 years. A photograph of the gate to Serenity Garden is now produced and shown before me marked JT-2.

18. In fact, in 2010, when I was especially missing my husband, I used the key to gain entry to Serenity Garden in the middle of the night to weep and to remember him. This was a private moment for me, and I have not mentioned it to anyone before. However, it shows that at all times I have continued to exercise possession over Serenity Garden.

19. For the above reasons, I humbly pray that the Court set aside the default judgment.

## BEFORE the Interim Application

You must prepare a skeleton argument in relation to the application supporting the position of the party you are representing. You have been advised separately which party this is.

The skeleton should be typed. It should not exceed 4 pages (A4, one-sided, 12-point font, single spaced).

You may refer to the attached case authorities as you think appropriate. You do not need to attach them to the skeleton; the Judge will have a copy of the cases at the hearing. You may also refer to the White Book as you think appropriate.

***Please note that for the purpose of this assessment, your arguments must be limited to the case authorities and the White Book only.***

You must email your skeleton argument in MS Word format to the Secretariat to the Higher Rights Assessment Board at info@hrab.org.hk by **no later than 3:00 pm of the Wednesday prior to the day of the assessment**. Upon receipt, the Secretariat will ensure that the party opposing you in the interim application is given a copy of your skeleton argument. The members of your Examining Panel will also receive copies so that they can be considered before the assessment itself takes place. If you submit your skeleton late, it may not be marked and will place you at real risk of failing the assessment.

## THE CONDUCT of the Interim Application

1. You will argue the application from the perspective of the role you have been assigned. You will have a maximum of 15 minutes to make your submissions.

2. No reply submissions will be conducted.

3. You should be prepared to deal with judicial interventions and questions in relation to your submissions.

4. You should be prepared to address the court on the issues of costs as a matter of principle.

# HONEST BILLION INVESTMENT LTD v WANG XIAN CHOU

COURT OF FIRST INSTANCE – ACTION NO 7612 OF 1996
YAM J
21 JULY 1997

**Civil Procedure – Writ – Service – Inserting writ through the letter box – Effective date of service – Whether defendant within jurisdiction at the time of insertion of writ into letter box – Rules of the High Court O 10 r 1(3)(a)**

**Civil Procedure – Default judgment – Whether judgment entered regularly – Whether defendant had a right or enjoyed only confident expectation to set aside irregularly entered judgment**

民事訴訟程序 – 令狀 – 送達 – 將令狀投入信箱 – 有效的送達日期 – 當令狀投入信箱時，被告人是否在本司法管轄範圍內 – 《最高法院規則》第10令第1(3)(a)條

民事訴訟程序 – 缺席判決 – 判決是否恰當地頒發 – 被告人有權利抑或只享有有把握的期望取消不當地頒發的判決

The plaintiff, which was the creditor of the defendant, issued a writ of summons claiming against the defendant the sum due under a deed of guarantee. The service of a sealed copy of the writ was effected by inserting the same through the letter box of the defendant's premises. The plaintiff was granted leave to enter default judgment on the defendant's failure to give notice of intention to defend. The defendant issued a summons to set aside the judgment on the grounds that he had a good defence and/or that the judgment was irregular in that it had not been duly served on him. The judgment was set aside by the master with costs in the cause. The plaintiff appealed.

**Held, allowing the appeal:**

(1) The service of the writ was regular as, according to the immigration records produced, the defendant was within the jurisdiction at the time of insertion of the writ into the letter box. The 'contrary', as far as O 10 r 1(3) of the Rules of the High Court was concerned, had been shown and thus the effective date of service was not deemed to be the seventh day after the writ was inserted through the letter box, but was the day of service when the defendant was within the jurisdiction (at 164C-E).

(2) If the defendant was not within the jurisdiction and if the effective date of service should be on the seventh day thereafter, ie the judgment was entered irregularly, the defendant enjoyed only a confident expectation that the judgment would be set aside but not a right. *Honour Finance Co Ltd v Choi Mei Mei* [1989] 2 HKLR 146 applied (at 164F-G).

(3) The defendant did not show any reasonable chance of success, triable issue or defence he might have had as a guarantor of the debt (at 166I-167A).

**Cases referred to**

*Barclays Bank of Swaziland Ltd v Hahn* [1989] 2 All ER 398, [1989] 1 WLR 506

*Fok Chun Hung v Lo Yuk Shi* [1995] 2 HKC 648

*Honour Finance Co Ltd v Chui Mei Mei* [1989] 2 HKLR 146

**Legislation referred to**

Rules of the High Court (Cap 4 sub leg) O 10 r 1(2)(b), O 10 r 1(3)(a), O 13 rr 7, 9, O 83A r 4

[*Editorial note*: see further Halsbury's Laws of Hong Kong Vol 5, Civil Procedure, as to service of process generally [90.0131]-[90.0139] and service by insertion through letter box [90.0140].]

**Appeal**

This was an appeal by the plaintiff against the judgment of Master Jennings dated 10 June 1997 whereby the default judgment granted on 5 August 1996 in favour of the plaintiff was set aside with costs in the cause. The facts appear sufficiently in the following judgment.

*Lisa Wong (Tsang, Chau & Shuen) for the plaintiff.*

*Respondent in person (absent).*

**Yam J:** This case raised a few interesting points of law concerning service of the writs of summons by the plaintiff's solicitors on the defendant. The plaintiff is the creditor of the defendant's company, one Kong Tai (Holdings) Co Ltd (Kong Tai). The defendant was the chairman of Kong Tai and he was the guarantor for the aforesaid debt.

On 20 May 1996, the defendant resigned as the chairman of Kong Tai and he moved out of the company's property at Flat A, 5th Floor, Tower 2, Parc Oasis, Kowloon, Hong Kong (the premises).

On 25 June 1996, the plaintiff sent a letter before action to the defendant. The defendant, in his two affirmations before this court, did not say he had not received this letter. However, on 29 June 1996 the defendant had left Hong Kong, as evidenced by his immigration record, but he returned on 3 July 1996. He left this territory again on 6 July 1996 for Shenzhen.

On 5 July 1996, the plaintiff issued a writ of summons claiming against the defendant for a sum of $1,485,600 due under a deed of guarantee dated 30 September 1995, with interests and costs. On the same day, a clerk of the plaintiff's solicitors served a sealed copy of the writ on the defendant by inserting the same through the letter box for the premises, being the usual and last known address known to the plaintiff according to the then latest company search made by the plaintiff's solicitors.

The defendant said in his affidavits that when he returned to Hong Kong, he resided in a hotel on Hong Kong island and had not gone to his previous address at all. Therefore he did not know that a writ has been

served on him at his previous address. In fact, shortly afterwards on 18 July 1996 Kong Tai had entered into an agreement to sell the premises and the transaction was completed on 5 August 1996.

On 27 July 1996, the plaintiff issued summons under O 83A r 4, for leave to enter judgment on the defendant's failure to give notice of intention to defend. On 5 August 1996, Mr Registrar Betts granted the plaintiff leave to enter default judgment and the same was entered pursuant to such leave on the same day.

The defendant issued a summons to set aside the judgment on 27 January 1997 on the grounds that he had a good defence and/or that judgment was irregular in that it had not been duly served on him. The matter came before Master Jennings on 10 June 1997, and according to Ms Lisa Wong, appearing for the plaintiff today, the only point put forward before Master Jennings was that the judgment was irregularly entered and according to all the affidavits filed, the defendant has not shown any good defence. Master Jennings set aside the judgment with costs in the cause. The plaintiff appealed against this order to this court today.

From the events as disclosed in all the affirmations before me, it is quite clear that that address was the last known address of the defendant. In fact, the defendant, on 12 December 1996, had issued a writ of summons in A 14256/96 against one Wong Wai Chi. The address of the premises was put down as his address when, at that time, the premises had already been sold and the transaction had already been completed.

The service relied on by the plaintiff was O 10 r 1(2) where it is provided that:

> A writ for service on a defendant within the jurisdiction may, instead of being served personally on him, be served —
>
> (a) by sending a copy of the writ by registered post to the defendant at his usual or last known address, or
>
> (b) if there is a letter box for that address, by inserting through the letter box a copy of the writ enclosed in a sealed envelope addressed to the defendant.

The plaintiff's solicitors obviously relied on sub-para (b).

The next question to decide was whether the defendant was within this jurisdiction at the time of service. The time of service was provided by the next para (3), where it is provided that:

> Where a Writ is served in accordance with paragraph (2) —
>
> (a) the date of service shall, unless the contrary is shown, be deemed to be the seventh day (ignoring Order 3 rule 2(5) ) after the date on which the copy was sent to, or as the case may be, inserted through the letter box for, the address in question; ...

Obviously, according to this paragraph, the date of service was the seventh day after the insertion of the writ through the letter box, ie 12 July 1996,

*unless the contrary is shown.* If it was 12 July 1996, the defendant had already left Hong Kong and he was not within the jurisdiction, however he was within the jurisdiction at the time of insertion of the writ into the aforesaid letter box. A

It has been decided in the case of *Barclays Bank of Swaziland Ltd v Hahn* [1989] 2 All ER 398, [1989] 1 WLR 506, that the defendant was within the jurisdiction at the time of service when the letter had been inserted into his letter box as he had been warned that the envelope had been put through the letter box but he did not go to the flat and returned to Geneva the next day. B

This case, of course, is distinguishable from our case where the defendant here was not warned that the said writ had been inserted through his letter box and he was not given due notice of the same. However, O 10 was concerned also with the situation of whether he was within the jurisdiction or not at the time of service. I consider that the phrase *unless the contrary is shown* concerns with both whether he knew service of writ was effected on him, ie the existence of the writ, and/or secondly, whether the contrary is shown as far as the fact that he was within the jurisdiction is concerned. Undoubtedly, from the evidence produced by the defendant according to the immigration records, which the plaintiff could not dispute, the defendant was within the jurisdiction at the time of insertion of the writ into the letter box. C D E

Accordingly as far as O 10 is concerned, the service was regular.

Further assuming I am wrong on this point, the service was irregular in the sense that para (3) only covered the situation where the defendant knew of the existence of the writ when he was within the jurisdiction at the time of insertion of the letter box or shortly thereafter but before the expiration of the seven days, I then have to decide what should this court do on a judgment entered irregularly. F

I am afraid in this area there are apparently conflicting authorities in the Court of Appeal. In *Honour Finance Co Ltd v Chui Mei Mei* [1989] 2 HKLR 146, per Cons VP, Hunter JA and Mortimer J (as he then was), on appeal from Godfrey J (as he then was), it was decided that: G

> The victim of an irregular judgment enjoys a confident expectation that it will be set aside but not a right. The mere fact that a defendant was able to show lack of notice of the writ was not sufficient to entitle him to set aside the judgment and to defend the actions he was required in addition to show a good ground of defence. Here, service was effected by ordinary post to the last known address of the defendant. It was not returned by the Post Office and no notice of intention to defend having been given by the defendant, the plaintiff entered judgment. The defendant was unaware of the existence of the writ and only in June 1988, after the judgment had been entered, did she become aware of the writ which she then gave to her solicitors. Here, the Court of Appeal decided that service by post was a permissible variance to personal service and was not a second-class variance but an effective variance, given proper H I

A compliance with the rules. A default judgment entered pursuant to such service was regular and would only be set aside upon proof both of lack of timeliness, receipt and on the merits.

In *Fok Chun Hung v Lo Yuk Shi* [1995] 2 HKC 648, per Power VP, Mortimer and Godfrey JJA, the writ was issued and served on the defendant B by registered post on 24 May 1994. By 14 June 1994 when the appellant's time for acknowledging service of the writ and for giving notice of intention to defend the action had expired, the appellant had not given such notice. The reason for such a failure was that the respondent's attempts to serve the copy writ by registered post had not succeeded. On C 22 June 1994, the respondent obtained judgment against the appellant as no notice of the intention to defend had been given by the appellant. However, on 1 July 1994 the copy writ was returned undelivered by the Post Office. A charging order was obtained on 6 July 1994 on the basis of the judgment obtained on 22 June.

D The appellant applied to have the said judgment set aside unconditionally by reason of his not having been served with the writ. The judge set aside the judgment and discharged the charging order on condition that the appellant made a number of undertakings and paid the respondent's costs of the application. The appellant appealed. The Court of Appeal allowed E the appeal and decided that the respondent should have made an application under O 13 r 7(3) as soon as the copy of the writ was returned to him undelivered on 1 July 1994 and before taking any further step in the action for enforcement of the judgment, either requesting that the judgment should be set aside on the ground that the writ had not been duly served, F or for directions that notwithstanding the return of the copy of writ, it should be treated as having been duly served.

It is provided in O 13 r 7(3) that:

> Where, after a judgment has been entered under this Order against a defendant purporting to have been served by post under Order 10 rule 1 (2)(a), the copy G of the writ sent to defendant is returned to the plaintiff through the post undelivered to the addressee, the plaintiff shall, before taking any step or further step in the action or the enforcement of a judgment, either —
>
> (a) make a request for the judgment to be set aside on the ground that the writ has not been duly served, or
> H (b) apply to the court for directions.

This case obviously is distinguishable from our case since the service was not effected by post but by hand, by inserting the writ into the letter box of the defendant's last known address and obviously it would not have I been returned undelivered through the post to the addressee. In other words, O 13 r 7(3) has no application here.

However, in the aforesaid case of *Fok Chun Hung*, Godfrey JA said, at 653E-H, that:

In support of his argument that we should take the opposite view, counsel for the plaintiff cited to us the local case of *Honour Finance Co Ltd v Chui Mei Mei* [1989] 2 HKLR 146, in the Court of Appeal (in which the court did not have the benefits of adversary argument). To that, counsel for the defendant reported that the case could not stand with the subsequent decision of the House of Lords in *Barclays Bank of Swaziland Ltd v Hahn* [1989] 1 WLR 506. I think there is much force in this, but the question does not arise for decision in the instant case and should be led to be considered on some other occasion. It does not arise for decision in the instant case because, in the local case, the service had been by ordinary post (as it was then allowed) and the copy of the writ had not in fact been returned, so the case is distinguishable both on its facts and because the provisions of O 13 r 7(3) did not fall to be considered by the court. It is, however, worth adding that part of the court's reasoning in the local case is inconsistent with that of the English Court of Appeal in *Willowgreen Ltd v Smithers* (cited above) [1994] 2 All ER 533] in which Nourse LJ (with whom Thorpe J agreed) said this (at p 539):

> The judgment having been obtained in proceedings initiated by a summons which was not properly served on the defendant, it seems plain that it must be set aside *ex debito justitiae*. [Counsel] has submitted that there is some sort of discretion in the matter but it is clear both on principle and from *White v Weston* that it was not the case.

Apparently the paragraph cited hereinbefore was an obiter. Both decisions in *Honour Finance* and *Fok Chun Hung* were based on a different matrix of facts, ie where the writ was not returned by the Post Office after judgment had been entered in *Honour Finance* even though the defendant was actually unaware of the existence of the writ, whereas in *Fok Chun Hung* the writ was returned undelivered by the Post Office after judgment had been entered and O 13 r 7(3) came into play and thus the plaintiff therein must, according to the Rule, take either step (a) or (b)

As far as I am concerned, in this case I consider the service was a regular one and the defendant was within jurisdiction at the time the writ was inserted into the letter box of his last known address. Even if the defendant was not within the jurisdiction if the effective date of service should be on the seventh day thereafter, the case of *Honour Finance* decided that 'victim of an irregular judgment enjoys only a confident expectation that it will be set aside but not a right'.

The application of the defendant herein was taken out pursuant to O 13 r 9 which provided that:

> Without prejudice to Rules 7(3) and (4), the Court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order.

This gives the courts a discretion to set aside the judgment entered pursuant to O 13. The discretion must of course be exercised judicially.

In this case the defendant did not show any reasonable chance of success at all. In fact the defendant did not show even a triable issue or did

A not give any indication what defence he would have as a guarantor of the debt. For that reason I consider that the plaintiff is entitled to judgment and it should not be set aside.

Accordingly, the appeal is allowed with costs to the plaintiff here and in the court below.

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Reported by Chris Cheng

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I

A **Lu Wen Yun** Applicant

**and**

**Chen Ching Chih** Respondent

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B

(Court of First Instance)
(Miscellaneous Proceedings No 715 of 2006)

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C Barma J in Chambers
24 August 2006

*Civil procedure — service — originating process — necessary for defendant to be physically within jurisdiction at time of service — "service" not complete*
D *until writ actually received or deemed to have been received — Rules of the High Court (Cap.4, Sub.Leg.) O.10 r.1, 1(2), (3)(a)*

[Rules of the High Court (Cap.4, Sub.Leg.) O.10 r.1, 1(2), 1(3)(a)]

E *民事訴訟程序—送達法律程序文件—原訴法律程序文件—送達文件之時，被告人須身在本司法管轄區內—直到被告人確實或被視作收到令狀之時，"送達"過程方告完成—《高等法院規則》(第4章，附屬法例)第10號命令第1、1(2)、(3)(a)條規則*

[《高等法院規則》(第4章，附屬法例)第10號命令第1、1(2)、1(3)(a)條
F 規則]

By originating summons, P, a shareholder, brought proceedings pursuant to s.152FA of the Companies Ordinance (Cap.32) for inspection of documents and records of a company and was subsequently granted an
G order (the Judgment) to this effect after a hearing at which D did not appear. The originating summons was sent to the last known or usual address of D by registered post on 20 April 2006. D was not in Hong Kong at any time between 13 April 2006 till about the end of April 2006, except for a period of some 24 hours between about 5:45 pm on 19 April
H to 5:45 pm on 20 April 2006. D sought to set aside the Judgment on the basis that the attempted service was invalid and ineffective.

**Held**, setting aside the Judgment, that:

(1) Under O.10 r.1 of the Rules of the High Court (Cap.4, Sub.Leg.),
I a writ or originating summons must generally be served personally on the defendant. However, under O.10 r.1(2), a writ for service on a defendant within the jurisdiction might instead be served either by sending a copy of it by registered post to the defendant at his usual or last known address, or by inserting it through the
J letterbox for that address. Where a writ was served in accordance with O.10 r.1(2), under O.10 r.1(3)(a), the date of service, unless

the contrary was shown, be deemed to be the seventh day after the date on which the copy was sent or inserted through the letterbox. In the context of service of a writ, the process of "service" was not complete until the writ was actually received or deemed to have been received under the Rules of the High Court (*Austin Rover Group v Crouch Butler Savage Associates & Others* [1986] 1 WLR 1102 applied). (See paras.15–17.)

(2) In order for service by post or insertion through a letterbox to be effective, it was necessary for the defendant to be physically within the jurisdiction at the time of service. Here, under O.10 r.1(2), r.1(3)(a), the date of service of the originating summons would be 27 April 2006, unless the contrary was shown, which it had not been. On 27 April 2006, D was not in Hong Kong, and so the attempted service was invalid and ineffective (*Honest Billion Investment Ltd v Wang Xian Chou* [1997] 3 HKC 161 doubted). (See paras.15–19.)

(3) The Judgment obtained was irregular and whilst there was a residual discretion in relation to setting aside an irregular default judgment, here there was no basis on which to exercise the discretion so as to allow the default judgment to stand (*Po Kwong Marble Factory Ltd v Wah Yee Decoration Co Ltd* [1996] 4 HKC 157 applied). (See para.23.)

**Application to set aside judgment**

This was an application by the respondent to set aside a default judgment made against him on 17 May 2006. The facts are set out in the judgment.

Mr Kevin Pun, instructed by Stephen Lo & PY Tse, for the applicant.
Mr Douglas Lam, instructed by Holman, Fenwick & Willan, for the respondent.

**Legislation mentioned in the judgment**

Companies Ordinance (Cap.32) ss.121, 152FA
Rules of the High Court (Cap.4, Sub.Leg.) O.10 r.1, 1(2), 1(3)(a)

**Cases cited in the judgment**

Austin Rover Group v Crouch Butler Savage Associates & Others [1986] 1 WLR 1102, [1986] 3 All ER 50
Honest Billion Investment Ltd v Wang Xian Chou [1997] 3 HKC 161
Po Kwong Marble Factory Ltd v Wah Yee Decoration Co Ltd [1996] 4 HKC 157

**Barma J in Chambers**

1. This is an application by the respondent to these proceedings, Dr Chen Ching Chih, seeking to set aside an order that I made against him on 17 May 2006, by which I ordered that the applicant in these

proceedings, Ms Lu Wen Yun, Jenny, should be allowed to inspect certain records and other relevant documents of J & D Industrial Hong Kong Ltd (the Company) on giving 21 days' advance notice in writing to Dr Chen at his last known address.

2. The records and documents in question were described in the schedule to that order. They related to records and documentation relating to three particular transactions in which the company had been involved, all tax returns and supporting documents that the company had filed with the Inland Revenue Department, and correspondence with its auditors or tax representatives.

3. There is something of a background to these proceedings. It appears that Ms Lu and Dr Chen are directly or indirectly shareholders in, and were at some time directors of, the Company. They have had various disputes in relation to the way in which the Company has been run over the last few years. This has led to various negotiations and attempts to resolve the differences either by one party buying out the other or by legal proceedings to deal with the matter.

4. In an attempt to ascertain information as to the transactions undertaken by the Company, and as to its financial position, proceedings were earlier taken out by both Ms Lu and Dr Chen against each other in which they sought inspection of accounting records of the Company pursuant to s.121 of the Companies Ordinance (Cap.32). These proceedings came before Deputy Judge Chan earlier this year. However, he dismissed both sets of proceedings on the grounds that because, at the time when these proceedings were taken out, the Company had not held any annual general meetings for some considerable time, its directors were deemed to have retired, so that at the time of the proceedings neither Dr Chen nor Ms Lu could be regarded a director of the company and accordingly neither of them had *locus* to bring an application under s.121.

5. Thereafter, Ms Lu brought these proceedings, making an application pursuant to s.152FA of the Ordinance, which provides a shareholder of the company with a right to inspect documents and records of the company in the circumstances set out in the section.

6. At the time when these proceedings were issued Ms Lu's solicitors wrote to the solicitors who had been acting for Dr Chen in the other proceedings, enquiring whether they had instructions to accept service in these proceedings. Those solicitors replied that they did not have instructions to accept service on his behalf.

7. Accordingly, those acting for Ms Lu took steps to try to effect service of the proceedings on Dr Chen. They attempted, first, to effect personal service of the originating summons in these proceedings on him on 13 April 2006, when a process server visited an office address which was understood to be the last known or usual address of Dr Chen in Hong Kong. However, personal service could not be effected as it was said that Dr Chen was not in the office on that day. It appears that, subsequently, further attempts at personal service were made but these,

too, were unsuccessful, although on the second occasion two offices were visited and it was said in both places Dr Chen was not known to the staff there.

8. Apart from attempts at personal service, it was sought to serve the originating summons in these proceedings by registered post. A copy of the originating summons was sent by registered post to what is said to have been the last known or usual address of Dr Chen on 20 April 2006. There was no indication from the post office that the originating summons had been returned through the dead letter service.

9. Accordingly, the applicant, Ms Lu, proceeded with the proceedings and was represented on the first hearing date of the originating summons. As Dr Chen did not appear on that occasion, she asked for and obtained an order granting substantially the relief which she sought together with an order for costs in her favour against Dr Chen.

10. Prior to this, there had been some correspondence from the solicitors now acting for Dr Chen (Messrs Holman, Fenwick & Willan) in which, while stating that they had no instructions to accept service and did not accept that there had yet been any proper service of documents on Dr Chen, they enquired whether or not the hearing on 17 May 2006 was intended to be only a call-over hearing. As it turns out, it was not, although this does not seem to have been notified to Messrs Holman, Fenwick & Willan prior to the hearing.

11. I also note that, apart from these proceedings, a company associated with Dr Chen, and which is also a shareholder in the Company, has also taken out very similar proceedings against Ms Lu, an originating summons having been issued on 21 April 2006. That originating summons bears a close resemblance to Ms Lu's originating summons, a feature upon which Mr Pun, appearing for Ms Lu today, has remarked.

12. The principal ground on which it was argued that the judgment which was entered against Dr Chen should be set aside was that the service of the originating summons had not been validly effected and accordingly, the judgment entered against Dr Chen in his absence was an irregular judgment. This was the focus of the argument although it was also submitted by Mr Lam, who appeared for Dr Chen, that he had a defence to these proceedings on the merits, the argument being principally that he did not, in fact, object to the provision of the documents sought insofar as they were: (a) within his possession; and (b) not the subject of legal professional privilege. That said, however, he did take exception to the making of the order against him, in particular to the order that he should pay the costs of the proceedings to date.

13. The evidence now before the Court discloses that Dr Chen was not in fact in Hong Kong at any time between 13 April 2006 and about the end of April 2006, with the exception of a period of some 24 hours between about 5:45 pm on 19 April 2006 to 5:45 pm on 20 April 2006. Dr Chen has said in a recent affidavit filed on 15 July

2006 that on that occasion he was in transit in Hong Kong on his way from Taiwan, where he usually resides, to Malaysia, and that during that time he did not in fact go back to the office address, which he uses as his correspondence address in Hong Kong.

14. Be that as it may, the evidence is that from about 5:45 pm on 20 April 2006 and for at least eight or nine days thereafter, Dr Chen was not in Hong Kong. This evidence is not challenged or controverted. In those circumstances, the attempted service on him by registered post was in my view, invalid and ineffective. This is because under the Rules of the High Court (Cap.4, Sub.Leg.) O.10 r.1, which deals with the service of originating process, a writ or originating summons must generally be served personally on the defendant by the plaintiff or his agent. However, O.10 r.1(2) provides that a writ for service on a defendant within the jurisdiction may, instead of being served personally, be served either by sending a copy of it by registered post to the defendant at his usual or last known address, or if there is a letterbox for that address, by inserting it through the letterbox, enclosed in a sealed envelope addressed to the defendant.

15. It is well-established that in order for service by post or by insertion through a letterbox to be effective, it is necessary for the defendant to be physically within the jurisdiction at the time of service. In this case, the service took place by the posting of the writ by registered post on 20 April 2006. In the ordinary way, the date of service would fall to be determined by reference to the provisions of O.10 r.1(3)(a), which provides that where a writ is served in accordance with r.1(2), the date of service shall, unless the contrary is shown, be deemed to be the seventh day after the date on which the copy was sent to, or as the case may be, inserted through the letterbox, for the address in question. Ordinarily, therefore, the date of service of the writ in this case would be 27 April 2006, on which date there is no dispute that Dr Chen was not within Hong Kong.

16. However, it is possible to show that that is not in fact the date of service and the question therefore arises whether in this case the contrary had been shown. In my view, there is no evidence before me on which I can come to a view as to when precisely service was effected. There are two possible times at which service could be regarded as being effected. The first is the date on which the document actually reaches its destination, ignoring for the moment whether or not the intended recipient actually had notice of the document at that time. The second alterative might be that service is effected when the document comes to the notice of the recipient. In this particular case I do not think that it is necessary to decide which of the two alternatives it is, because it seems to me that the document having been posted on 20 April, and there being no evidence of its delivery at any time on that day, it seems to me that in the ordinary course of things the document would not have actually reached the address to which it was sent until the following day or sometime thereafter. By that time, of course, Dr Chen was no longer in Hong Kong.

17. Although Mr Pun sought to contend that the act of posting was the relevant act for the purposes of effecting service, I have some difficulty with accepting that argument. In any event, it seems to me that a *dictum* of May LJ in the English Court of Appeal case of *Austin Rover Group v Crouch Butler Savage Associates & Others* [1986] 1 WLR 1102 is very much to the point in this regard. In that case, at p.1111 of the judgment, May LJ pointed out that in the context of service of a writ the rules had to be construed as involving both a server and the recipient, and the word "served" in that context must therefore be taken to mean the whole process of transmission and accordingly service could not be complete until the writ was actually received or deemed to have been received under the terms of the rules.

18. In those circumstances it seems to me that the writ could only be deemed to have been received by the intended recipient on the seventh day of the posting unless the contrary were shown. And as I have said, there is nothing in the evidence before me to indicate that it could have been received at any earlier time, whether receipt is understood as meaning arrival of the document at the address to which it is sent, or its actual coming to the notice of the recipient to whom it is addressed.

19. Mr Pun referred me to the decision in *Honest Billion Investment Ltd v Wang Xian Chou* [1997] 3 HKC 161, in which Yam J held that it was sufficient that a defendant was within the jurisdiction at the time that a writ was inserted through the letterbox at his last known address even though he was not in Hong Kong on the deemed date of service seven days thereafter.

20. It seems to me that there may be a difference between insertion through a letterbox and transmission through the post. If the relevant fact for determining when service is effected is the actual arrival of the document at the address in question, then it may be that in the case of insertion through a letterbox the relevant date is the date of the insertion through the letterbox itself and it may suffice in those circumstances if the defendant is within the jurisdiction on that date, even if he is not thereafter. However, I have to say that such a view of the matter is one which causes me a little difficulty in that it seems to me that it is far from clear that this would have the effect of bringing the document to the attention of the intended recipient. Moreover, it is difficult to see why there should be a deemed period of seven days before service in the case of insertion through the letterbox, if the relevant fact was not so much the arrival of the document at its destination but its coming to the attention of the intended recipient. That said, however, the point does not arise for decision here, because it seems to me that the evidence clearly falls short of showing that the process of transmission was completed at any time when the defendant was still in Hong Kong, and thus, on any view, it seems to me that service of the originating summons was not validly effected in this case.

21. That being so, whether or not Dr Chen might have had knowledge of the contents of the originating summons through some

other means (a matter which would seem to me to be largely a matter of speculation), it seems to me that there having been no valid postal service effected, the judgment obtained in the absence of Dr Chen on 17 May 2006 was irregular. In those circumstances, it should ordinarily be set aside. However, Mr Pun submitted that I do have a residual discretion to decline to set aside a judgment, even though it is irregular, where the circumstances make it just to do so. He submitted that in this particular case as those acting for Ms Lu had done everything that they could possibly do to seek to effect service and that Dr Chen was, in his submission, aware of the existence of and perhaps also the contents of the originating summons, it would be just to exercise that discretion and decline to set aside the judgment. With respect, I do not think that would be the appropriate course to follow in this case.

22. It is quite true there are some grounds for thinking that Dr Chen, or at least those now acting for him, and perhaps employees or other persons who have acted on his behalf in the past, may have been aware of the existence of the originating summons or its contents. However, it does not follow from this that there has been proper service, and in this case, I am quite satisfied that there has not been proper service of the originating summons.

23. In *Po Kwong Marble Factory Ltd v Wah Yee Decoration Co Ltd* [1996] 4 HKC 157, in which it was recognised that the court has a residual discretion in relation to setting aside an irregular default judgment, the circumstances which led to the discretion being exercised in that case was the fact that there had been an element of disguising of the correct address at which service was to be effected. It seems to me that that is not a factor which is present in this case, nor do I think that there is anything in the way of undue or unexplained delay or any waiver of the right to seek to set aside the irregularly obtained default judgment in this case.

24. The contention that service was not validly effected was made known from as early as 26 April 2006. Even after the order was made, those by then acting for Dr Chen continued to protest that service had not been validly effected and although it is true that his solicitors indicated that he would be prepared to comply with the order, that was expressly stated to be so long as it was in effect, and it was at the same time stated that all his rights as to the question of the validity of the service of the originating summons were reserved. In those circumstances I do not think that it can be said that Dr Chen has in any way waived his right to seek to set aside the default judgment which was entered against him.

25. In all of the circumstances, it seems to me that there is no real basis on which I should exercise my discretion so as to allow the default judgment to stand, particularly as it would result in Dr Chen being left with an order for costs against him when he had no opportunity to be heard, and where he had not been validly served with the proceedings in the first place. For those reasons, it seems to me that

the appropriate order to make in the circumstances would be to set aside the order that was made on 17 May 2006. A

(Submissions as to costs)

26. I think, although having a measure of sympathy for Ms Lu, that in relation to the argument today, the argument has really gone in favour of Dr Chen in relation to the question on whether or not service was validly effected and whether or not the judgment was regularly obtained. On that point, it seems to me that Dr Chen has been substantially successful in relation to the argument today. While I do not say that the applicant was in any way to blame for taking the steps that she did, it does seem to me that at the point when it became apparent that the respondent was not in fact in Hong Kong after 5:45 pm on 20 April, the date on which the originating summons was posted, the position was that judgment would be held to be irregular. I bear in mind that that point did not fully emerge from the documentation until the affidavit filed by Dr Chen on 15 July 2006, and in those circumstances it seems to me that the appropriate costs order to make is that the applicant should pay the respondent the costs of today's hearing only, but apart from that there should no order as to the costs of this application. As far as the costs awarded to Dr Chen are concerned, they are to be taxed on a party and party basis if not agreed. B C D E

**O Mark Polyethylene Products Fty Ltd** Plaintiff

**and**

**Reap Star Ltd** Defendant

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(Court of Appeal)
(Civil Appeal No 353 of 1999)

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Godfrey V-P and Keith JA
5 April 2000

*Civil procedure — summary judgment — setting aside — test — Rules of the High Court (Cap.4, Sub.Leg.) O.13 r.9, O.14 r.11*
[Rules of the High Court (Cap.4, Sub.Leg.) O.13 r.9, O.14 r.11]

*民事訴訟程序—簡易判決—擱置—測試—《高等法院規則》(第4章，附屬法例)第13號命令第9條規則、第14號命令第11條規則*
[《高等法院規則》(第4章，附屬法例)第13號命令第9條規則、第14號命令第11條規則]

P was awarded summary judgment against D, in D's absence, under O.14 of the Rules of the High Court (Cap.4, Sub.Leg.). D's application to set aside the judgment was granted on the condition that D pay into court the sum of $45,000, as "wasted costs". D's appeal against the imposition of the condition was dismissed and D appealed.

**Held**, allowing the appeal, that:

(1) Order 14 r.11 provided for the setting aside of a summary judgment entered under O.14 in the absence of a defendant. It removed the anomaly that a judgment under O.14 in the absence of a defendant could not be set aside. However, the question as to which test should be applied in a setting aside application under O.14 r.11 (ie the test to be applied on a summons for summary judgment under O.14 or the test to be applied on an application to set aside a judgment entered in default under O.13 r.9), would be left open (*Morigood Development Ltd v Sunny Trading Co* [1999] 2 HKC 710 followed). (See pp.147A–D, 148A–B.)

(2) Here, D had satisfied the highest test, ie the test to be applied on an application to set aside a default judgment. That test was that the defendant must at least show that his case had a real prospect of success. He must satisfy the court that his case and the evidence he had adduced in support of it carried some degree of conviction. The court had to form a provisional view of the probable outcome of the action. It followed that unconditional leave to defend should have been granted (*Premier Fashion Wears Ltd & Another v Chow Cheuk Man & Li Hing Chung (third party),*

A *sub nom Premier Fashion Wears Ltd v Lee Hing Chung* [1994] 1 HKLR 377 applied). (See pp.148B–E, 149A–B.)

(*Per* Godfrey V-P)

(3) (*Obiter*) The test in all cases of applications to set aside a judgment, whether made under O.13 r.9 or O.14 r.11, ought simply to be
B whether or not the applicant had shown that he had a real prospect of success in the action. That test might give rise to difficulties in application but at least as a test it was comparatively straightforward. There should be no difference in the test to be applied on an application to set aside a judgment made under
C O.14 r.11 from that to be applied on such an application made under O.13 r.9. (See pp.150I–151B.)

Mr Wu Kam Man, Managing Director, for the plaintiff.
Mr Simon Lui, Director, for the defendant.

D

**Legislation mentioned in the judgment**

Civil Procedure Rules [Eng] Pt.24 r.24.2
Rules of the High Court (Cap.4, Sub.Leg.) O.5 r.6(3), O.13, O.13 r.9, O.14, O.14 r.3, O.14 r.11

E

**Cases cited in the judgment**

Allen v Taylor [1992] PIQR P255
Alpine Bulk Transport Co Inc v Saudi Eagle Shipping Co Inc (The Saudi Eagle) [1986] 2 Lloyd's Rep 221
F Morigood Development Ltd v Sunny Trading Co (a firm) [1999] 2 HKC 710
Premier Fashion Wears Ltd & Another v Chow Cheuk Man & Li Hing Chung (third party), sub nom Premier Fashion Wears Ltd v Lee Hing Chung [1994] 1 HKLR 377, [1994] 1 HKC 213

G

**Other material mentioned in the judgment**

*Supreme Court Practice 1999, The*, Vol.1, paras.13/9/18, 14/11/1

**Keith JA**

H

## *Introduction*

This appeal arises in connection with litigation between two limited companies in Hong Kong. At different stages in the proceedings, both of them were given leave under O.5 r.6(3) to be represented by one
I of their directors. This appeal has been argued by them. All dates in this judgment refer to 1999, unless otherwise stated.

## *The nature of the dispute*

J The dispute relates to an order which the plaintiff placed with the defendant for raw materials which the plaintiff needed in order to manufacture plastic bags for some of its customers. The plaintiff's case

appears from the various affirmations of Wu Kam Man, its Managing Director. Its case is that it was permitted to pay for the goods by letter of credit, and that the goods had to be delivered by 24 April. Not only were the goods not delivered by then, but the defendant initially insisted that the plaintiff would have to pay more for the goods than had originally been agreed, and later insisted that only payment by cashier's order or telegraphic transfer would secure delivery of the goods. The plaintiff treated the contract as at an end, and sued the defendant for breach of contract.

The defendant's case appears from its defence. Its case is that it was quite content for the goods to be paid for by letter of credit. However, to secure delivery of the goods by 24 April, the plaintiff would have had to open the letter of credit in sufficient time for payment on the letter of credit to have been made by then. The plaintiff did not apply for the letter of credit until 22 April, and it was not until 27 April that the defendant was first notified that a letter of credit had been opened. Even then, there were features about the letter of credit itself which gave the defendant justifiable grounds for insisting on some other form of payment. The defendant was ready, willing and able to deliver the goods to the plaintiff then if an acceptable form of payment would have been proffered.

## *The history of the proceedings*

The plaintiff commenced the proceedings on 28 April. The defence was filed on 17 May. On 4 June, the plaintiff filed a summons for summary judgment under O.14. That summons came before Master Lok on 19 July. By then, Mr Simon Lui, one of the defendant's directors, had been given leave to represent the defendant. He did not attend the hearing on 19 July, and summary judgment was given for the plaintiff in his absence for damages to be assessed.

On 30 August, the defendant filed a summons applying for the judgment to be set aside. That summons came before Master Kwan on 5 November. She ordered the judgment to be set aside on condition that the defendant paid the sum of $45,000 into court within 28 days. The defendant appealed against the condition which had been imposed on the setting aside of the judgment. Its case was that the judgment should have been set aside unconditionally. For its part, the plaintiff cross-appealed against Master Kwan's order. Its case was that the judgment should not have been set aside at all. The appeal and cross-appeal came before Cheung J on 26 November. He dismissed both the appeal and the cross-appeal. The defendant now appeals to the Court of Appeal contending again that the judgment should have been set aside unconditionally. For its part, the plaintiff has filed a respondent's notice, contending again that the judgment should not have been set aside at all.

A ***O.14 r.11***

An application to set aside a summary judgment entered under O.14 is relatively unusual. The overwhelming majority of applications to set aside judgments relate to default judgments entered under O.13. However, O.14 r.11 provides for the setting aside of a summary judgment entered under O.14. It reads:

> Any judgment given against a party who does not appear at the hearing of an application under r.1 or r.5 may be set aside or varied by the Court on such terms as it thinks just.

This rule was considered by the Court of First Instance in *Morigood Development Ltd v Sunny Trading Co (a firm)* [1999] 2 HKC 710. At p.713E–F, it was said that the rule:

> ... removed the anomaly that, unlike any judgment in default, or even a judgment at trial in the absence of a defendant, a judgment under O.14 in the absence of a defendant could not be set aside. It had to be made the subject of an appeal. However, as *The Supreme Court Practice* (1999) Vol.1, para.14/11/1 commented on the equivalent rule in England (which is in identical terms):
>
> > ... this rule must not be used as a device for gaining time. The Court will wish to be fully satisfied as to the reason for the non-attendance at the hearing of the summons of the party against whom judgment was given under O.14.

In the present case, Mr Lui was aware that the plaintiff's summons for summary judgment was due to be heard on 19 July. However, although the plaintiff's summons had been filed on 4 June, he had only known of the date of the hearing since 6 July because that was when the plaintiff's summons had been served. He had not attended the hearing because prior to 6 July he had booked a flight to London on 16 July. Accordingly, in the affirmation which he made on 12 July in opposition to the plaintiff's summons for summary judgment, he referred to that fact and asked for the hearing to be adjourned until September when he would be back in Hong Kong — unless, of course, the Court was minded to dismiss the plaintiff's application for summary judgment even in his absence.

It is noteworthy that it was only on 8 July that the defendant applied to the Court for leave to be represented by Mr Lui. In other words, it applied to be represented by Mr Lui at a time when it knew of the hearing on 19 July, a hearing which Mr Lui would not be able to attend. On the other hand, if the defendant could not afford to be represented by solicitors, it had little option but to apply for leave to be represented by one of its directors.

## *The merits of the dispute*

A question arises as to the nature of the test on the merits which should be applied: the test to be applied on a summons for summary judgment under O.14, or the test to be applied on an application to set aside a judgment entered in default under O.13 r.9. That question was left open in *Morigood Development Ltd v Sunny Trading Co (a firm)* [1999] 2 HKC 710, and I propose to do the same today, because to the extent that there is a practical difference between the two I am satisfied that the defendant has satisfied the highest test, ie the test to be applied on an application to set aside a default judgment. That test was summarised by Godfrey JA (as he then was) in *Premier Fashion Wears Ltd v Lee Hing Chung* [1994] 1 HKC 213. At pp.219H–220A, he said:

> A defendant who seeks to set aside a regular judgment must at least show that his case has a real prospect of success. To do so, he must satisfy the court that his case and the evidence he has adduced in support of it carries some degree of conviction ... [U]nless potentially credible affidavit evidence from the defendant has demonstrated a real likelihood that he would succeed on fact, he cannot have shown that he has a real prospect of success.

Godfrey JA added at p.220B that "[t]he court ... has to form a provisional view of the probable outcome of the action".

Mr Lui's various affirmations on behalf of the defendant do not spell out the nature of the defendant's defence. However, they refer to the fact that the defendant had previously filed its defence. Although none of the affirmations expressly verified the facts pleaded in the defence, it is plain that that is what Mr Lui intended to do. Accordingly, the question is: looking at (a) the various affirmations filed on behalf of the plaintiff and (b) the defendant's defence, can a provisional view of the outcome of the action be sensibly formed? I do not think that it can be, and as was said in *Morigood Development Ltd v Sunny Trading Co (a firm)* [1999] 2 HKC 710, an appropriate test to apply in those circumstances is simply whether the defence could well be established at trial. In my view, the defence could well be established at trial.

In the light of this conclusion, and having regard to Mr Lui's reason for not attending the hearing on 19 July, I agree entirely with Master Kwan and Cheung J that this was a proper case in which to set aside the judgment. To have set the judgment aside (albeit conditionally), they must have been satisfied that the defence had merits. Indeed, in his judgment, Cheung J said so in terms.

## *The condition imposed*

Although there was evidence before Master Kwan and Cheung J which had not been before Master Lok when he gave the plaintiff

summary judgment on 19 July, that evidence did not relate to the merits of the case. It follows that if this was a proper case in which to set aside the judgment which had been entered, the merits of the case as revealed by the evidence before Master Lok on 19 July should have resulted in the defendant *then* being given unconditional leave to defend the action. Thus, Mr Lui's non-attendance at the hearing on 19 July should not have contributed to the grant of summary judgment because, even in his absence, the Master should have given the defendant unconditional leave to defend the action.

When analysed in this way, the justification for requiring the defendant to pay $45,000 into court as a condition of the judgment being set aside disappears. That justification was said to be the "wasted costs". If that was a reference to the plaintiff's costs of the hearing on 19 July, no such condition should have been imposed, because on the order for unconditional leave to defend the action which the Master should have made on that occasion, either the costs should have been in the cause (if the defendant was simply given leave to defend) or no order should have been made as to the plaintiff's costs (on the footing that the summons for summary judgment was filed) after the defence had been filed. Alternatively, if the reference to "wasted costs" was a reference to the plaintiff's costs of the hearing on 5 November before Master Kwan, no such condition should have been imposed, because that could have been dealt with by an order for the costs of the hearing. In any event, whatever the proper order for the costs of that hearing should have been, in view of the fact that Master Kwan must have been finding that this had not been a case for summary judgment, it would not have been proper for there to have been an order for the defendant to pay the plaintiff's costs.

In summary, the judgment was not being set aside because Mr Lui had failed to appear at the original hearing. His failure to appear at the original hearing had given the Court the power to set aside the judgment rather than require the defendant to appeal against the judgment to a judge in chambers. Once it was concluded that on the material before Master Lok on 19 July summary judgment should not have been entered for the plaintiff, there was little room left for exercising the discretion in a way which left the defendant having to pay for Mr Lui's non-attendance at the hearing of 19 July.

## *Conclusion*

For these reasons, I would allow the appeal against the condition imposed for the setting aside of the judgment, I would set aside the order requiring the defendant to pay the sum of $45,000 into court as a condition of having the judgment set aside, and I would give the defendant unconditional leave to defend the action. Since the parties are not legally represented, it may help if I indicate what I think the appropriate orders for costs should be. In my opinion, the costs of the

O.14 summons should be in the cause of the action, but no orders should be made as to the costs of the summons to set aside the judgment or of the appeal from Master Kwan or of the present appeal.

**Godfrey V-P**

I agree; but I desire to append a short judgment of my own in relation to the approach of the court to an application under O.14 r.11 of the Rules of the High Court (Cap.4, Sub.Leg.) to set aside a summary judgment made pursuant to O.14 r.3.

Order 14 r.11 enables the court to set aside a summary judgment given against a party who did not appear at the hearing of the application for summary judgment. The editors of *The Supreme Court Practice 1999* appear to suggest, at para.14/11/1, that the principles on which a judgment may be set aside under O.14 r.11 are the same as the principles on which a judgment for failure to give notice of intention to defend may be set aside under O.13 r.9. So I construe the sentence at para.14/11/1 which reads:

> As to the principles on which a judgment in default may be set aside, see commentary to O.13 r.9.

This, unfortunately, leads one into a minefield, because the principles which guide the court on an application to set aside a judgment under O.13 r.9 are themselves not entirely clear. It appears from *Alpine Bulk Transport Co Inc v Saudi Eagle Shipping Co Inc* (*The Saudi Eagle*) [1986] 2 Lloyd's Rep 221 that it is not sufficient, on an application under O.13 r.9, to show a merely "arguable" defence that would justify leave to defend under O.14; it must both have "a real prospect of success" and "carry some degree of conviction". Thus, the court must form a provisional view of the probable outcome of the action: see *The Supreme Court Practice* (1999) at para.13/9/18. Yet, as the editors add, in *Allen v Taylor* [1992] PIQR P255, the Court of Appeal, holding that:

> ... a judge had misdirected himself by giving too little weight to an assertion of a defendant on merits and too much to conduct, allowed an appeal following an analysis of the principles emerging from *The Saudi Eagle*. It qualified the requirement to form "a provisional view of the probable outcome" where assessment of facts at a trial is essential to form a view. The Court held it enough that certain exculpatory facts "could well be established".

The editors of *The Supreme Court Practice* express some reservations about that decision of the Court of Appeal.

The only way out of the minefield, as it seems to me, is to apply the same, comparatively straightforward, test in *all* these cases of applications to set aside a judgment, whether made under O.13 r.9 or O.14 r.11. The test ought simply to be whether or not the applicant has shown that he has a real prospect of success in the action. That

A test may give rise to difficulties in application, but at least as a test it is comparatively straightforward. It has the further merit that it is the test which, as I understand it, is to be applied to the defendant's case on the application for summary judgment itself, under the Civil Procedure Rules promulgated as part of the reforms initiated by Lord
B Woolf in England and Wales: see Pt.24 r.24.2.

In my view, there is or should be no difference in the test to be applied in Hong Kong on an application to set aside a judgment made under O.14 r.11 from that to be applied on such an application made under O.13 r.9. I appreciate that this was an issue which Keith JA left
C undecided in *Morigood Development Ltd & Sunny Trading Co (a firm)* [1999] 2 HKC 710, to which he has referred in his judgment today, and for the reasons he has given, I agree that, in the present case too, it is not necessary, for the resolution of the appeal before us, to decide the issue. Accordingly, while what I have said upon the matter must
D be regarded as *obiter dicta*, I express the hope that it may prove helpful for the guidance of judges of first instance in future cases.

# HIGHER RIGHTS OF AUDIENCE ASSESSMENT

# IN RESPECT OF CIVIL PROCEEDINGS

# THE PRACTICAL ASSESSMENT

## Candidate Instructions for the Mini-Trial

These instructions ask you to make certain assumptions about the witnesses who will appear at trial. Please note that, for the mini-trial conducted at the assessment, only 1 witness for each party will actually be present for examination purposes.

### Claim

The claim is for adverse possession of Serenity Garden. The default judgment in this action had been successfully set aside on the Defendant's application.

There are two main issues in the adverse possession claim:

(A) Was the Plaintiff's possession "adverse" to the Defendant or in fact with the Defendant's permission?

(B) Did the Plaintiff have possession of the land to the exclusion of the Defendant or not?

### Witnesses

The witnesses for the two parties are described below.

You will be informed which two witnesses will appear at the mini-trial on the day of the assessment itself when you arrive and register.

### Plaintiff's witnesses

The following witnesses will appear at trial to give oral evidence on behalf of the Plaintiff:

1. Rex Lai

2. Mimi Lai, wife of Rex Lai

**Defendant's witnesses**

The following witnesses will appear at trial to give oral evidence on behalf of the Defendant:

1. Julia Tang

2. John Mason, friend of Julia Tang who has visited Serenity Garden often

**You can assume:**

i. the witnesses will give evidence at trial in the order listed above.

ii. the witnesses who will not appear "live" at the mini-trial will have given/will give evidence in terms of their statements and that nothing additional or contrary came out/will come out during cross-examination.

iii. each of the annexures referred to in the Witness Statements/Affirmations has been produced and their contents are accurately described in the Witness Statements/Affirmations.

**Further, you can assume that the Judge/Assessor's finding on the interim application does not affect the evidence available for the purpose of the trial.**

**However, for the avoidance of doubt, you may make use of the Affirmations in the interim application for the purpose of this exercise.**

**DURING the Mini-Trial**

You will be required to:

- make an opening speech (max 5 minutes).
- examine in chief (max 10 minutes) the witness who will give live oral evidence at trial on behalf of your client. You should conduct a full examination-in-chief of the witness on the basis that his/her statement does not stand as evidence in chief.
- cross-examine (max 15 minutes) the opponent's witness who is attending the trial to give live oral evidence. Please note that the opponent's witness may be un-cooperative at times. The witness's statement does not stand as evidence in chief.
- deal with any intervention made by the advocate representing the opposing party.
- make any interventions, as you think appropriate, to the questioning of the witnesses by the advocate representing the opposing party.
- deal with any judicial interventions and questions as and when they arise.