

LEGISLATIVE COUNCIL BRIEF

High Court Ordinance (Cap. 4)
District Court Ordinance (Cap. 336)

RULES OF THE HIGH COURT (AMENDMENT) RULES 2021 RULES OF THE DISTRICT COURT (AMENDMENT) (NO. 2) RULES 2021

INTRODUCTION

This note sets out the proposed legislative amendments to the Rules of the High Court (“the RHC”) (Cap. 4A) and the Rules of the District Court (“the RDC”) (Cap. 336H) to make summary judgment available for an action begun by writ which includes a claim based on an allegation of fraud

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A (a) Rules of the High Court (Amendment) Rules 2021 (“RHC Amendment Rules”) (**Annex A**); and

B (b) Rules of the District Court (Amendment) (No. 2) Rules 2021 (“RDC Amendment Rules”) (**Annex B**).

BACKGROUND

2. Pursuant to Order 14, rule 1 and rule 5 of the RHC and the RDC, the plaintiff in an action begun by writ, or the defendant in the case of a counterclaim, may apply for summary judgment against the other party, i.e. judgment without a full trial and at an early stage of the proceedings, on the basis that the other party has no defence, thereby enabling the plaintiff or defendant to obtain judgment as quickly as possible and minimise legal costs. However, currently, as per Order 14, rule 1(2) of the RHC and the RDC, the summary judgment procedure does not apply to an action begun by writ which includes a claim based on an allegation of fraud.

3. Following the remarks by the Hon Mr Justice Lam VP (as he then was) made in the judgment of *Zimmer Sweden AB v KPN Hong Kong Limited & Brand Trading Ltd* [2016] 1 HKLRD 1016 (“*Zimmer*”), which questioned the fraud exception rule’s continued existence in Hong Kong’s modern litigation landscape, the Judiciary has reviewed the appropriateness of the relevant procedural rules in Order 14 of the RHC and the RDC which render the option of summary judgment not available for an action begun by writ which includes a claim based on an allegation of fraud (commonly known as the “fraud exception rule”). It is recommended that legislative amendments be introduced to remove the fraud exception rule.

JUSTIFICATIONS

4. The legislative amendments aim at enhancing the summary judgment regime and aligning with evolving legal practice in the interests of the parties to litigation. Detailed justifications for the amendments are set out in paragraphs 5 to 8 below.

5. Firstly, the fraud exception rule was historically linked with the right to have a trial by jury in fraud cases¹. However, there is no right to trial by jury in a fraud case in Hong Kong². From this perspective, there is no practical need to retain the fraud exception rule.

6. Secondly, in Hong Kong, the Court has held in *Zimmer* that when deciding whether the fraud exception rule applies, the proper question to be asked is “does this action include a claim for which an allegation of fraud would have to be made by the plaintiff in order to establish or maintain that claim?”. This question is intended to be a re-formulation of the test in *Pacific Electric Wire & Cable Ltd v Harmutty Ltd* [2009] 3 HKLRD 94³. Subsequent to *Zimmer*, this reformulated test has been applied in other cases in Hong Kong, such as *Universal Capital Bank v Hong Kong Heya Co Ltd* [2016] 2 HKLRD 757 and *Arrow ECS Norway AS v M Yang Trading Ltd and Others*, unreported, HCA 239/2016 (22 September 2016). This notwithstanding, the Hon Mr Justice Lam VP’s observation in *Zimmer* that

¹ Re. the discussion of Stocker LJ in *Newton Chemical v Arsenis* [1989] 1 WLR 1297 at p.1307.

² See paragraph 12.1 of *Zimmer*.

³ See paragraph 18(2) of *Zimmer*.

the fraud exception rule cannot be justified in the modern litigation environment in Hong Kong is still valid and needs to be addressed.

7. Furthermore, while there may be arguments to justify the fraud exception rule in view of the potential vindication of a defendant at trial if he is alleged of fraud⁴, it is questionable whether this justification, in modern litigation settings in Hong Kong, warrants the deprivation of a plaintiff the right to seek summary judgment even in cases where a defendant only puts forward a token defence and thus obliging the plaintiff to incur all the expenses in respect of a full trial to get relief. It is worthwhile to note that the removal of the fraud exception rule does not mean that summary judgment would be granted in fraud cases where there are serious defences or triable issues of fact or law. The usual criteria for deciding if summary judgment should be given would still apply.

8. Moreover, it is of interest to note that the fraud exception rule had been abrogated in England since 1992. As remarked by the Hon Mr Justice Lam VP in *Zimmer*, the reason for the abrogation was that the English Courts had interpreted the fraud exception rule in a narrow way, pursuant to a definition of fraud given in an old English case of *Derry v Peek* (1889) 14 App Cas 337⁵, leading to an anomaly that applications for summary judgment not being available for a specific type of fraud, but being available for all other types of dishonest conduct. The anomaly identified in the English Courts regarding the fraud exception rule did not exist in Hong Kong. This is because the Hong Kong Courts have all along been adopting another test to decide whether the fraud exception rule applies (please see paragraph 6 above), and that test represents a wider interpretation of the fraud exception rule compared with that provided in the United Kingdom under *Derry v Peek*.

THE AMENDMENT RULES

9. The legislative amendments to remove the fraud exception rule will be made through introducing the RHC Amendment Rules and the RDC Amendment Rules. They are respectively made by the High Court Rules

⁴ See Kaplan J in *Skink Ltd v Comtowell Ltd* [1994] 2 HKLR 26 at p.36-37.

⁵ In *Derry v Peek*, the House of Lords set out the requirements for fraud and held that fraud is proved when it is shown that a false representation has been made knowingly or without belief in its truth or recklessly without caring whether it be true or false.

Committee⁶ under section 54 of the High Court Ordinance (Cap. 4) and the District Court Rules Committee⁷ under section 72 of the District Court Ordinance (Cap. 336) on 16 August 2021. These Amendment Rules are subsidiary legislation subject to the scrutiny of the Legislative Council (“LegCo”) by negative vetting.

10. The main provisions of the RHC Amendment Rules and the RDC Amendment Rules are set out as follows –

- (a) Rule 3 of the RHC Amendment Rules and Rule 3 of the RDC Amendment Rules repeal the relevant parts of the existing Order 14, rule 1(2) of the RHC and Order 14, rule 1(2) of the RDC respectively. The repealed parts stipulate that the summary judgment procedure does not apply to an action begun by writ which includes a claim based on an allegation of fraud; and
- (b) Rule 4 of the RHC Amendment Rules and Rule 4 of the RDC Amendment Rules add a new rule 12 to Order 14 of the RHC and Order 14 of the RDC respectively to provide that the prevailing Order 14 of the RHC and the RDC (under which the fraud exception rule remains in effect) continue to apply in relation to an application for summary judgment by the plaintiff, or the defendant in the case of a counterclaim, that is pending immediately before the commencement dates of the RHC Amendment Rules and the RDC Amendment Rules. Pursuant to Rule 1 of the RHC Amendment Rules and Rule 1 of the RDC

⁶ The High Court Rules Committee is established under section 55 of the High Court Ordinance to make rules of court regulating and prescribing the procedure and practice to be followed in the High Court (including the procedure and practice to be followed in the Registries of the High Court). The Committee is chaired by the Chief Judge of the High Court and comprises, among others, two barristers nominated by the Hong Kong Bar Association and two solicitors nominated by the Law Society of Hong Kong.

⁷ The District Court Rules Committee is established under section 17 of the District Court Ordinance to make rules of court regulating and prescribing the procedure and practice to be followed in the District Court (including the procedure and practice to be followed in the Registries of the District Court). The Committee is chaired by the Chief Judge of the High Court and comprises, among others, a barrister nominated by the Hong Kong Bar Association and a solicitor nominated by the Law Society of Hong Kong.

Amendment Rules, the commencement dates are set for 1 December 2021.

LEGISLATIVE TIMETABLE

11. The legislative timetable is as follows –
- | | |
|---|-----------------|
| Publication in the Gazette | 20 August 2021 |
| Tabling in the LegCo (for negative vetting) | 25 August 2021 |
| Commencement | 1 December 2021 |

IMPLICATIONS OF THE PROPOSALS

12. The RHC Amendment Rules and the RDC Amendment Rules are in conformity with the Basic Law, including the provisions concerning human rights, and will not affect the current binding effect of the High Court Ordinance (Cap. 4) and the District Court Ordinance (Cap. 336). They have no economic, environmental, sustainability, family or gender implications. As the amendments are procedural in nature, the proposals have insignificant financial or manpower implications for the Judiciary.

PUBLIC CONSULTATION

13. In October 2019, we consulted the Hong Kong Bar Association and the Law Society of Hong Kong on the legislative proposals to remove the fraud exception rule. They indicated support to the proposed amendments.

14. On 12 August 2021, we issued an information note to the Legislative Council Panel on Administration of Justice and Legal Services with regard to the proposed legislative amendments to remove the fraud exception rule.

PUBLICITY

15. A press release will be issued and a spokesperson will be available for answering media enquiries.

ENQUIRIES

16. Any enquiries on this brief should be directed to Mr James Chan, Senior Administrative Officer (Development) 2, at 2867 5206.

Judiciary Administration
August 2021

Rules of the High Court (Amendment) Rules 2021

(Made by the Rules Committee of the High Court under section 54 of the High Court Ordinance (Cap. 4))

1. Commencement

These Rules come into operation on 1 December 2021.

2. Rules of the High Court amended

The Rules of the High Court (Cap. 4 sub. leg. A) are amended as set out in rules 3 and 4.

3. Order 14, rule 1 amended (application by plaintiff for summary judgment)

(1) Order 14, rule 1(2)(a)—

Repeal

“seduction;”

Substitute

“seduction; or”.

(2) Order 14, rule 1(2)—

Repeal subparagraph (b).

4. Order 14, rule 12 added

Order 14, after rule 11—

Add

“12. Transitional provision relating to Rules of the High Court (Amendment) Rules 2021 (O. 14, r. 12)

This Order as in force immediately before the Rules of the High Court (Amendment) Rules 2021 come into operation on 1

December 2021 continues to apply in relation to an application under rule 1 or 5 that is pending immediately before that date as if rule 3 of those Rules had not been made.”.

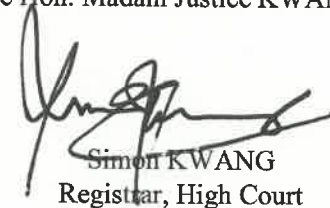
Made this 16th day of August 2021.



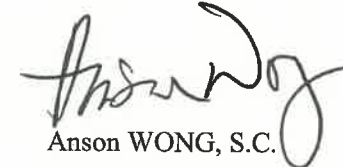
The Hon. Mr. Justice POON
Chief Judge of the High Court



The Hon. Madam Justice KWAN, VP



Simon KWANG
Registrar, High Court



Anson WONG, S.C.



Brian GILCHRIST



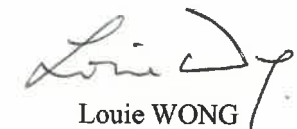
The Hon. Mr Justice CHOW, JA



José-Antonio MAURELLET, S.C.



Amirali NASIR



Louie WONG

Explanatory Note

These Rules amend Order 14 of the Rules of the High Court (Cap. 4 sub. leg. A) to allow the giving of summary judgment in civil actions brought in the Court of First Instance for fraud and to provide for transitional arrangement.

Rules of the District Court (Amendment) (No. 2) Rules 2021

(Made by the District Court Rules Committee under section 72 of the
District Court Ordinance (Cap. 336))

1. Commencement

These Rules come into operation on 1 December 2021.

2. Rules of the District Court amended

The Rules of the District Court (Cap. 336 sub. leg. H) are amended
as set out in rules 3 and 4.

3. Order 14, rule 1 amended (application by plaintiff for summary judgment)

Order 14, rule 1(2)—

Repeal

everything after “other than”

Substitute

“an action which includes a claim by the plaintiff for libel,
slander, malicious prosecution, false imprisonment or
seduction.”

4. Order 14, rule 12 added

Order 14, after rule 11—

Add

“12. Transitional provision relating to Rules of the District Court (Amendment) (No. 2) Rules 2021 (O. 14, r. 12)

This Order as in force immediately before the Rules of the
District Court (Amendment) (No. 2) Rules 2021 come into
operation on 1 December 2021 continues to apply in relation to
an application under rule 1 or 5 that is pending immediately
before that date as if rule 3 of those Rules had not been made.”.

Made this 16th day of August 2021.



The Hon. Mr. Justice POON
Chief Judge of the High Court



H.H. Judge KO
Chief District Judge



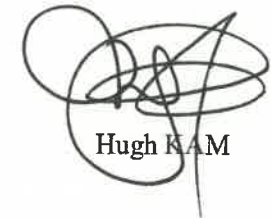
H.H. Judge LIU



H.H. Judge YEE



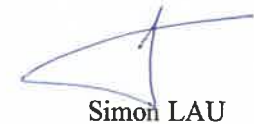
Simon LUI
Registrar, District Court



Hugh KAM



Calvin CHENG



Simon LAU

Explanatory Note

These Rules amend Order 14 of the Rules of the District Court (Cap. 336 sub. leg. H) to allow the giving of summary judgment in civil actions brought in the District Court for fraud and to provide for transitional arrangement.