

For information**Legislative Council
Panel on Administration of Justice and Legal Services****Proposed Amendments to the Rules of the High Court and
the Rules of the District Court
to Remove the “Fraud Exception Rule”****PURPOSE**

This paper informs Members of the Judiciary’s proposed amendments to Order 14 of 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.

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 is not available in respect of 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 to remove the fraud exception rule seek a specific procedural improvement to civil proceedings in the High Court and the District Court. They 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 Harmuttly 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 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

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*.

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 in the United Kingdom under *Derry v Peek*.

PROPOSED LEGISLATIVE AMENDMENTS

9. The proposed legislative amendments to Order 14 of the RHC and the RDC mainly seek to repeal the specific provisions which bar an application for summary judgment in an action begun by writ which includes a claim based on an allegation of fraud. Subject to completion of the legislative process, the Judiciary proposes that the legislative amendments be brought into operation on 1 December 2021 (“the commencement date”). For the sake of legal certainty, we will set out clearly in a transitional

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.

provision that the proposed legislative amendments will not apply in relation to an application for summary judgment filed before the commencement date.

10. Marked-up versions showing the proposed amendments to Order 14 of the RHC and the RDC are at Annex A and Annex B respectively.

CONSULTATION

11. We have 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.

WAY FORWARD

12. Members are invited to note the content of this paper. We intend to invite the High Court Rules Committee and the District Court Rules Committee to introduce the respective legislative amendments which will then be tabled at the Legislative Council for negative vetting as soon as practicable.

Judiciary Administration
August 2021

**Proposed Amendments to Order 14 of
the Rules of the High Court (Cap. 4A) in Marked-up Mode**

Order 14 Summary Judgment

1. Application by plaintiff for summary judgment (O. 14, r. 1)

- (1) Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has given notice of intention to defend the action, the plaintiff may, on the ground that that defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for judgment against that defendant.
- (2) Subject to paragraph (3) this rule applies to every action begun by writ other than—
 - (a) an action which includes a claim by the plaintiff for libel, slander, malicious prosecution, false imprisonment or ~~seduction~~, seduction; or,
 - ~~(b) an action which includes a claim by the plaintiff based on an allegation of fraud, or~~
 - (c) an Admiralty action in rem.
- (3) This Order shall not apply to an action to which Order 86 or Order 88 applies.

**Proposed Amendments to Order 14 of
the Rules of the District Court (Cap. 336H) in Marked-up Mode**

Order 14 Summary Judgment

1. Application by plaintiff for summary judgment (O. 14, r. 1)

- (1) Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has given notice of intention to defend the action, the plaintiff may, on the ground that that defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for judgment against that defendant.
- (2) Subject to paragraph (3), this rule applies to every action begun by writ other than—
 - ~~(a) an action which includes a claim by the plaintiff for libel, slander, malicious prosecution, false imprisonment or seduction; or~~
 - ~~(b) an action which includes a claim by the plaintiff based on an allegation of fraud.~~

an action which includes a claim by the plaintiff for libel, slander, malicious prosecution, false imprisonment or seduction.
- (3) This Order shall not apply to an action to which Order 86 or 88 applies.