

Case Bulletin: 2019/09

## The Requirement of Leave to Appeal

In a series of *China Medical* related proceedings<sup>1</sup>, the courts examined a number of important civil procedure principles. In this article, we look at the requirement to seek leave to appeal under section 14AA of the High Court Ordinance (Cap. 4) (“HCO”). The leave requirement is set up as a filtering process to save litigation costs and to promote efficient development of judicial resources. For background and the defined terms used in this article, please see our publication “Extension of Validity of a Writ”.

Section 14AA of HCO requires parties to seek leave from an interlocutory judgment or order of the Court of First Instance (“CFI”) in any civil cause or matter. However, Order 59, rule 21(1) of the Rules of High Court (“RHC”) specifies the number of cases where the substantive rights of a party are determined in a summary way, in which case leave to appeal is not required. In other words, if a case comes within the provisions of Order 59, rule 21(1) of RHC, no leave under section 14AA of HCO is required. The Court of Appeal (“CA”) in *China Medical v BOC* addressed the requirements to seek leave to appeal.

### I. Background

1. In *China Medical v BOC*, after the CFI decided to dismiss the Extension Order, P decided to appeal and it gave rise to the issue of whether leave under section 14AA of the HCO is required.
2. P’s position was that the case fell within Order 59, rule 21(1)(a) of RHC, i.e.,

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<sup>1</sup> *China Medical Technologies, Inc (in liquidation) v Bank of China (Hong Kong) Limited* [2018] HKCFI 1395, [2019] HKCA 402 & [2019] HKCA 735, and *China Medical Technologies, Inc (in liquidation) v Bank of East Asia, Limited* [2019] HKCFI 2143.

leave is not required. In fact, BOC did not take any issue in respect of whether leave is required, and on that basis, the CFI directed that no leave to appeal was required.

3. However, the CA considered the question of leave was a matter of general importance and invited the parties to make submissions on the issue.

### II. Key Points

1. There are many cases in which a party cannot proceed further or would be placed under constraints in the future conduct of an action or a set of proceedings by virtue of interlocutory decisions, e.g., decisions on security for costs, admission of evidence, refusing extension of time to do certain acts, service outside the jurisdiction, stay of proceedings, and some case management decisions.
2. The proper approach to determine if a judgment or an appeal is final or interlocutory is the “application approach”<sup>2</sup>, i.e., whether or not the decision finally determines an issue on the substantive rights (or merits) between the parties, as opposed to procedural steps.
3. An appeal brought against a judgment which did not finally determine an issue on the substantive rights between the parties is an interlocutory appeal, for which section 14AA leave is required.
4. In order to obtain leave to appeal, the court must be satisfied that “(a) *the appeal has a reasonable prospect of success; or (b) there is some other reason in the interests of justice why the appeal should be heard.*” pursuant to section 14AA(4) of HCO.

### III. Findings

The CA considered that the requirement of leave goes to its jurisdiction in entertaining an appeal, and it has to be addressed notwithstanding that a direction had already been given by the CFI judge and the parties did not take a step to challenge the direction.

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<sup>2</sup> *Bright Shipping Ltd v Changhong Group (HK) Ltd* [2019] HKCA 246.

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The setting aside of the Extension Order, which extended the validity of the Writ did not determine finally any issue on substantive rights between the parties. Order 59, rule 21(1)(a) of RHC is not applicable to this decision and on the application approach, it is an interlocutory decision. Thus notwithstanding the collateral effect of such decision is that the action had to be dismissed, P should obtain leave under section 14AA of HCO before the appeal can be entertained. By the time when the question of leave became an issue, most of the costs of the appeal had been committed or incurred and the date of the appeal hearing had been fixed. By that stage, it would not serve any good to direct a separate leave application before the substantive appeal or to spend costs and time on examining if the appeal has any reasonable prospect of success. In these circumstances, the CA granted leave to P in the interest of justice. In the end, the CA upheld the CFI's decision to dismiss the Extension Order.

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