

Hong Kong Legal Principles

Important Topics for Students and Professionals

Second Edition

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Contents

Foreword by Sr Serena Lau	vii
Foreword by Sir Vivian Ramsey	ix
Foreword by A. T. Reyes	xi
Preface to the Second Edition	xiii
Acknowledgements	xv
Table of Cases	xvii
Table of Legislation	xxxvii
Introduction	1
Chapter One Contract	9
I. Definition	9
II. Types	10
III. Elements	18
IV. Interpretation	49
V. Vitiating Factors	70
VI. Discharge	106
VII. Breach	117
VIII. Damages and Remedies	118
IX. Conclusion	127
Chapter Two Tort	129
I. Definition	129
II. Types	136
III. Tort of Negligence	139
IV. Defences to the Tort of Negligence	171
V. Other Tortious Liabilities	184
VI. Damages	244

Chapter Three Employment	255
I. Status of a Worker	255
II. Employer's Liability	267
III. Statutory Requirements	283
IV. The Employment Contract	345
Chapter Four Property	371
I. Property Generally	371
II. Real Property: Definitions	380
III. Estates	382
IV. Fixtures	428
V. Adverse Possession	432
VI. Encumbrances	434
VII. Leasehold Ownership in Hong Kong	464
VIII. Multi-storey Buildings in Hong Kong	472
IX. Sale and Purchase Agreements	482
X. Assignment	518
XI. Completion	528
XII. Hong Kong Titles Registration: An Overview	535
Index	543

Table of Cases

<i>A v Director of Immigration</i> [2009] 3 HKLRD 44	253
<i>Achacoso v Liu Man Kuen</i> (2004) HCPI 121/2001; [2004] 2 HKLRD F17, CFI	253
<i>ACL Electronics (HK) Ltd v Bulmer</i> [1992] 1 HKC 133	139
<i>Active Keen Industries v Fok Chi Keong</i> [1994] 2 HKC 67, CA	499
<i>Alcatel Cable Contracting Norway AS & Another v Titan Logistic(s) Pte Ltd & Another</i> [2000] 3 HKLRD 720	149
<i>Aldin v Latimer Clark, Muirhead & Co</i> [1894] 2 Ch 437	410
<i>Alexander v Tse</i> [1988] 1 NZLR 318	88
<i>AMF International Ltd v Magnet Bowling Ltd</i> [1968] 1 WLR 1028	197
<i>Anns v Merton London Borough Council</i> [1977] 2 All ER 492	143, 144, 148
<i>Armory v Delamirie</i> (1722) 93 ER 664	375
<i>Artco Properties Ltd v Yau Chun Wing</i> [2000] 1 HKLRD 697	213, 215
<i>Ashburn Anstalt v WJ Arnold</i> [1988] 2 WLR 706	401
<i>Atlas Express Ltd v Kafco Ltd</i> [1989] QB 833	94
<i>Attorney General v Blake</i> [2001] 1 AC 268	119, 364
<i>Attorney General v Chiu Pak Yue</i> (No.2) [1963] HKLR 544	395
<i>Attorney General v Melhado Investments Ltd</i> [1983] HKLR 327	53
<i>Attorney General v PYA Quarries</i> [1957] 2 QB 169	219
<i>Au Wing Cheung v Roseric Ltd</i> [1992] 1 HKC 149, CA	491
<i>Australian Provincial Assurance Co Ltd v Coroneo</i> (1938) 38 SR (NSW) 700	429
<i>Bailey v Stephens</i> (1862) 12 CB (NS) 99	436
<i>Bain v Fothergill</i> (1874) 7 LR 158	513
<i>Baker v Willoughby</i> [1970] AC 467	160
<i>Balfour v Balfour</i> [1919] 2 KB 571	19

<i>Bank of China (Hong Kong) Ltd v China Hong Kong Textile Co Ltd</i> [2011] 4 HKLRD 457, CA	96
<i>Bank of China (Hong Kong) Ltd v Fung Chin Kan</i> (2002) 5 HKCFAR 515	52
<i>Bannerman v White</i> (1861) 9 WR 784	58
<i>Barrett v Ministry of Defence</i> [1995] 1 WLR 1217	150
<i>Bell v Lever Brothers</i> [1932] AC 161	90, 91
<i>Bell v Stone</i> (1798) 1 Bos & P 331	238
<i>Bestech Development Ltd v Fu Wai Loi</i> , unreported, (1992) CACV 121/1992	517
<i>Bettison v Langton</i> [2001] UKHL 24	438
<i>Blackpool and Fylde Aero Club v Blackpool Borough Council</i> [1990] 1 WLR 1195	33
<i>Blyth v Birmingham Waterworks Co</i> (1856) 11 Ex 781	140
<i>Boosey v Davis</i> (1988) 55 P & CR 83, CA	433
<i>Born Chief Co v Tsai George</i> [1996] 2 HKC 282, CA	210, 225
<i>Bowater v Rowley Regis Corporation</i> [1944] KB 476	178
<i>BP Refinery (Westernport) Pty Ltd v President, Councillors and Ratepayers of the Shire of Hastings</i> (1977) 180 CLR 266; (1977) 16 ALR 363, PC	53
<i>Branca v Cobarro</i> [1947] 2 All ER 101	489
<i>Brennan v Bolt Burdon</i> [2003] EWHC 2493, [2004] 1 WLR 1240, QB	85
<i>Bridge v Deacons</i> [1984] AC 705	367
<i>Bridle v Ruby</i> [1988] 3 WLR 191	444
<i>British Chiropractic Association v Dr Simon Singh</i> [2010] EWCA Civ 350, CA	242
<i>British Railways Board v Herrington</i> [1972] AC 877, HL	178, 207
<i>British Russian Gazette and Trade Outlook Ltd v Associated Newspapers Ltd</i> [1933] 2 KB 616	43
<i>Brown & Root Technology v Sun Alliance</i> [2000] 2 WLR 566	540
<i>Brown v Smith</i> (1853) 13 CB 596	238
<i>Buckland v Butterfield</i> (1820) 2 Brod & Bing 54	429
<i>Bull v Bull</i> [1955] 1 QB 234	390
<i>Burnie Port Authority v General Jones Pty Ltd</i> (1994) 179 CLR 520	139
<i>But Chung Yin v Billion Extension Development Ltd</i> [1997] 1 HKC 531	487
<i>Butterfield v Forrester</i> (1809) 11 East 60	173
<i>Cambridge Water Co Ltd v Eastern Counties Leather Plc</i> [1994] 2 AC 264	136, 139, 210
<i>Caparo Industries Plc v Dickman</i> [1990] 2 AC 605, HL	146, 149, 168

<i>Carlill v Carbolic Smoke Ball Co</i> [1893] 1 QB 256	14, 23, 32
<i>Cassell v Broome</i> [1972] AC 1027	134
<i>Cavalier v Pope</i> [1906] AC 428	197
<i>Cehave NV v Bremer Handelsgesellschaft mbH (The Hansa Nord)</i> [1976] 1 QB 44	62
<i>Central London Property Trust Ltd v High Trees House Ltd</i> [1947] KB 130	47
<i>Chan Chum Kam v Chu Nga Kam & Others</i> , unreported, (2001) DCPI 46/2001	200
<i>Chan Ho Yuen v Multi-Circuit Board (China) Ltd</i> [2011] 5 HKLRD 554; [2011] 5 HKC 565, CA	333
<i>Chan Kam Hung v Light Ltd</i> , unreported, (1993) DCCI 16919/1992	509
<i>Chan Kin Leung v Lok Kar Cheong</i> , unreported, (1998) HCMP 3993/1997	509
<i>Chan Kwok Kin v Kwok Kwan Hing</i> [1991] HKLR 631	266
<i>Chan Kwong Wai v Lo Sau King</i> [1963] HKLR 692	238
<i>Chan Shui Man v Tsang Hing Shan</i> [1991] 2 HKC 243, CA	264
<i>Chan Sik Cheung v Director of Lands</i> [1995] 3 HKC 199	436
<i>Chan Sik Pan v Wylam's Services Ltd</i> [2000] 1 HKLRD 687	257
<i>Chan Yan Nam v Hui Ka Ming t/a Kar Lee Engineering</i> [2003] 1 HKC 341	208
<i>Chan Yeuk Yu v Church Body of the Hong Kong Sheng Kung Hui</i> [2001] 1 HKC 621	57
<i>Chan Yiu-ming v L & D Associates</i> [1992] HKDCLR 1	487
<i>Chan Yock Kwong v Wong Hee Mao</i> [1962] HKLR 480	489
<i>Charles Hunt Ltd v Palmer</i> [1931] All ER Rep 815	508
<i>Chau Fung Yee v Lee Chi Ming</i> [2000] 3 HKC 601	176
<i>Check Chor-ching v Wik Far East Ltd</i> [1991] 2 HKLR 224	332
<i>Cheerup Ltd v Wong Sau Fong</i> [1996] 4 HKC 92	516
<i>Cheng Kwok Fai v Mok Yiu Wah Peter</i> [1990] 2 HKLR 440	486
<i>Cheng Albert v Tse Wai Chun Paul</i> [2000] 4 HKC 1	242
<i>Cheng Wai Keung Daniel v Chui Ka Yuen Danny</i> , unreported, (1987) HCA 3766/1985	512
<i>Cheng Yuen v Royal Hong Kong Golf Club</i> [1997] 2 HKC 426	262, 264
<i>Cheong Pik Shan v Lee Bun</i> , unreported, (1994) HCA 3113/1992	517
<i>Chesterton Petty Ltd v Groeneveld</i> (2000) CACV 69/2000; [2000] HKEC 1138	486
<i>Cheung Bing Sum Juana v Lee Leo</i> [1994] 3 HKC 132; [1996] 4 HKC 130	516

<i>Cheung Sau-ching v Fashion Garment Manufactory Ltd</i> [1988] 2 HKLR 430	296
<i>Cheung Shuk Wah Jessica v Wong Kang Hung Darwin</i> (2009) DCEC 842/2007; [2009] HKEC 1105, DC	331
<i>Cheung Shuk Wah Jessica v Wong Kang Hung Darwin</i> (2010) HCPI 12/2009; [2010] HKEC 909, CFI	331
<i>Cheung Yeung Kan v Lui Kwan</i> [1973–1976] HKC 237	412
<i>Chi Kit Co Ltd v Lucky Health International Enterprise Ltd</i> [2000] 3 HKC 143, CFA	504
<i>Chinachem Investment Co Ltd v Chung Wah Weaving and Dyeing Factory Ltd</i> [1978] HKLR 83	422
<i>Chiu Wing Hang v BG Lighting Co Ltd</i> , unreported, HCLA 67/1999	45
<i>Choi Hung Investment Co Ltd v Chinco Investment Ltd</i> [1995] 1 HKC 203	521
<i>Chong Kai Tai v Lee Gee Kee</i> [1996] 1 HKC 105, CA; on further appeal [1997] 1 HKC 359, PC	499, 528
<i>Chow Po v Chow Hau Man</i> [2010] HKEC 349	268
<i>Chu Kit Yuk v Country Wide Industrial Ltd</i> [1995] 1 HKC 363	508
<i>Chu Siu Kuk Yuen v Apple Daily Ltd</i> [2002] 1 HKLRD 1	238
<i>Chu Wing Nin v Ngan Hing Cheung</i> , unreported, (1992) HCA 9409/1991	493
<i>Chui Yu Yau v Chan Pak Luk</i> [1987] 3 HKC 339	269
<i>Chun Yat-Nam v A-G for and on behalf of the Commissioner of Police</i> [1995] 1 HKLR 390	167
<i>Chung Man Yau v Sihon Co Ltd</i> [1996] 3 HKC 614	133, 157, 220
<i>Chung Mui Teck v Hang Tak Buddhist Hall Association Ltd</i> [2001] 2 HKLRD 471, CA	466
<i>Chwee Kin Keong v Digilandmall.com Pte Ltd</i> [2005] 1 SLR 502	86
<i>Citilite Properties Ltd v Innovative Development Co Ltd</i> [1997] 2 HKC 74	510
<i>Citilite Properties Ltd v Innovative Development Co Ltd</i> [1998] 4 HKC 62	88
<i>Citizens' Life Assurance Co Ltd v Brown</i> [1904] AC 423	240
<i>City & Westminster Properties v Mudd</i> [1958] 2 All ER 733	14
<i>City Polytechnic of Hong Kong v Blue Cross (Asia-Pacific) Insurance Ltd</i> [1994] 3 HKC 425	33
<i>City University of Hong Kong v Blue Cross (Asia-Pacific) Insurance Ltd</i> [2001] 1 HKC 463	33
<i>Clegg v Dearden</i> (1848) 12 QB 576	231

<i>Codelfa Construction Proprietary Ltd v State Rail Authority of NSW</i> (1982) 149 CLR 337	84
<i>Cohen v Nessdale Ltd</i> [1981] 3 All ER 118	491
<i>Collier v Anglian Water Authority</i> (1983) <i>The Times</i> , March 26	197
<i>Collier v P & M J Wright (Holdings) Ltd</i> [2007] EWCA 1329; [2008] 1 WLR 643	48
<i>Construction Industry Training Board v Labour Force Ltd</i> [1970] 3 All ER 220	264
<i>Cook v Cox</i> (1814) 3 M & S 110	236
<i>Cook v Mayor & Corp of Bath</i> (1868) LR 6 Eq 177	446
<i>Cory v Davies</i> [1923] 2 Ch 95	443
<i>Courtney and Fairbairn v Tolaini Bros (Hotels) Ltd</i> [1975] 1 All ER 716	484
<i>Cox v Moulsey</i> (1848) 5 CB 533	232
<i>Craig Joseph v Jason Spiller</i> [2009] EWCA Civ 1075; [2010] ICR 642; on appeal [2011] AC 852; [2001] ICR 1	104
<i>Crawley v AG</i> [1987] HKLR 379	228
<i>Creatiles Building Materials Ltd v To's Universe Construction Co Ltd</i> [2003] 2 HKLRD 309	112
<i>Crocodile Garments Ltd v Prudential Enterprise Ltd</i> [1989] 1 HKC 474	505
<i>Cross-Harbour Tunnel Co Ltd v Commissioner of Rating and Valuation</i> [1977–1979] HKC 81	439
<i>Currie v Misa</i> (1875) LR 10 Ex 153	34
<i>Cutler v United Dairies (London) Ltd</i> [1933] 2 KB 297	151
<i>Cutler v Vauxhall Motors Ltd</i> [1971] 1 QB 418	160
<i>Cutler v Wandsworth Stadium Ltd</i> [1949] AC 398	188
<i>D & C Builders Ltd v Rees</i> [1966] 2 QB 617	44
<i>Daiman Development Sdn Bhd v Mathew Chin Teck</i> [1981] 1 MLJ 56	488
<i>Dann v Hamilton</i> [1939] 1 KB 509	177, 178
<i>Davis Contractors Ltd v Fareham Urban District Council</i> [1956] AC 696	114
<i>Dawson Enterprises Ltd v Talisteam Ltd</i> [1994] 2 HKC 327	506, 514
<i>De Crespigny v Wellesley</i> (1829) 5 Bing 392	240
<i>De Lassalle v Guildford</i> [1901] 2 KB 215	485
<i>Debenhams Retail Plc v Commissioners of Customs and Excise</i> [2005] EWCA Civ 892	31
<i>Deen v Andrews</i> [1986] 1 EGLR 262	429
<i>Derry v Peek</i> (1889) 14 App Cas 337	80, 170

<i>Dimmock v Hallett</i> (1886) LR 2 Ch App 21	75
<i>Diners Club International v Ng Chi-sing</i> [1987] 1 HKC 78	97
<i>Dixie Engineering Company Ltd v Vernaltex Company Ltd</i> (<i>t/a Wing Wo Engineering Company</i>) (2003) CACV 344/2002; [2003] HKCU 136, CA	47
<i>Donoghue v Stevenson</i> [1932] AC 562, HL	139, 142, 149, 184, 187
<i>Donpower Trading Ltd v Apexcom Ltd</i> [2010] 1 HKLRD 915, CA	499
<i>Dr Ki Ping Ki v Next Magazine Publishing Ltd</i> [2004] 1 HKLRD B21	240
<i>Drummond v Kwaku</i> [2000] 1 HKLRD 604	240
<i>Duke of Sutherland v Heathcote</i> [1892] 1 Ch 475	437
<i>Dulieu v White & Sons</i> [1901] 2 KB 669	157
<i>Dunlop Pneumatic Tyre Co v New Garage Co</i> [1915] AC 79	122
<i>Dunlop Pneumatic Tyre Co v Selfridge & Co</i> [1915] AC 847	34
<i>Dwek v Macmillan Publishers Ltd</i> [2000] EMLR 284	239
<i>Edgington v Fitzmaurice</i> (1885) 29 Ch D 459	74
<i>Edward Wong Finance Co Ltd v Johnson Stokes & Master</i> [1984] AC 296, PC	155, 497
<i>Elitestone Ltd v Morris</i> [1997] 2 All ER 513	429
<i>Elsley v JG Collins Insurance Agencies Ltd</i> (1978) 83 DLR (3d) 1	123
<i>Errington v Errington and Woods</i> [1952] 1 KB 290	403
<i>Experience Hendrix LLC v PPX Enterprises Inc and Another</i> (2003) <i>The Times</i> , April 19, CA	364
<i>Faccenda Chicken Ltd v Fowler</i> [1986] 1 All ER 617	363
<i>Feerni Development Ltd v Daniel Wong & Partners</i> [2001] 2 HKLRD 13	154
<i>Ferguson v Welsh</i> [1987] 1 WLR 1553	201
<i>Fisher v Bell</i> [1961] 1 QB 394	31
<i>Flureau v Thornhill</i> (1776) Win BI 1078	514
<i>Foakes v Beer</i> (1884) 9 App Cas 605	41, 42, 48
<i>Fong Anne v Hong Kong Adventist Hospital</i> [2010] HKEC 985	294
<i>Ford Joint Ltd v Keen Lloyd (Holdings) Ltd</i> , unreported, (1999) HCA 21393/1998	509
<i>Foshan Hua Da Industrial Co v Johnson Stokes & Master</i> [1999] 1 HKLRD 418	154
<i>Fujitsu Hong Kong Ltd v Kwan Sit-cham</i> [1991] HKDCLR 23	415
<i>G Scammell & Nephew Ltd v HC and JG Ouston</i> [1941] AC 251	50

<i>Gauchan Som Prasad v Hin Wah Construction Co Ltd</i> [2011] HKEC 1011	193, 196
<i>Giant River Ltd v Asie Marketing Ltd</i> [1990] 1 HKLR 297	504
<i>Gilman Engineering Ltd v Simon Ho Shek-on</i> (1986) 8 IPR 313	366
<i>Gitsham v CH Pearce & Sons plc</i> (1991) <i>The Times</i> , February 11	190
<i>Gold Check Investments Ltd v Star Investment Ltd</i> , unreported, (1992) HCMP 592/1992	500
<i>Goldful Way Development Ltd v Wellstable Development Ltd</i> [1998] 4 HKC 679	429
<i>Goldjet International Investment Ltd v Ling Ki Wai</i> [1997] 3 HKC 503	527
<i>Goldspeed Investment Ltd v Easy Success Enterprises Ltd</i> [2000] 2 HKC 183	515, 518
<i>Goldsteady Investment Ltd v Fatima Estates Ltd</i> (1995) MP 2943/95	526
<i>Gorris v Scott</i> (1874) LR 9 Ex 125	190
<i>Grand Trade Development Ltd v Bonance International Ltd</i> [2001] 3 HKC 137, CA	513
<i>Grandwide Ltd v Bonaventure Textiles Ltd</i> [1990] 2 HKC 154	498
<i>Gray v Thames Trains</i> [2009] 1 AC 1339	183
<i>Great Peace Shipping Ltd v Tsavlis (International) Ltd</i> [2002] 4 All ER 689	89, 90
<i>Green Park Properties Ltd v Dorku Ltd</i> [2000] 4 HKC 538	75
<i>Greenock Corp v Caledonian Railway</i> [1917] AC 556	224
<i>Gregory v Duke of Brunswick</i> (1844) 6 Man & G 953	236
<i>GSL Engineering Ltd v Yau Hon-yin Sammon</i> [1991] 1 HKLR 199	354, 355
<i>Hadley v Baxendale</i> (1854) 9 Ex 341	120, 511
<i>Hall v Lorimer</i> [1994] 1 All ER 250	264
<i>Hamlyn & Co v Wood & Co</i> [1891] 2 QB 488	408
<i>Hang Fook Lau Seafood Restaurant v Kwok Sik Yuen</i> [2001] 2 HKC 69	296
<i>Hang Seng Credit Card Ltd v Tsang Nga Lee</i> [2000] 3 HKC 269	101
<i>Hang Tak Co Ltd v Attorney General</i> , unreported, (1986) HCA 2567/1983	408
<i>Hare v Nicoll</i> [1966] 2 QB 130	88
<i>Harmony Fit Co Ltd v Jade Fit Co Ltd</i> , unreported, (1998) HCA 13040/1997	513
<i>Harrison v Duke of Rutland</i> [1893] 1 QB 142	234
<i>Harrison v Southwark and Vauxhall Water Co</i> [1891] 2 Ch 409	214
<i>Hartley v Ponsonby</i> (1857) 7 E&B 872	40
<i>Hartog v Colin and Shields</i> [1939] 3 All ER 566	86
<i>Harvey v Facey</i> [1893] AC 552	21

<i>HKSAR v Ma Hoi Ching</i> [2003] HKEC 975	229
<i>HKSAR v Wan Hon Sik</i> [2001] 3 HKLRD 283	31
<i>HKSAR v Yu Wai Chuen</i> [2002] 2 HKLRD 347	31
<i>Haw Hong International Ltd v Kei Oi Wah Linia</i> [1990] HKLRD 502	511
<i>Head v Tattersall</i> (1871–72) LR 7 Exch 7	55
<i>Heaven v Pender</i> (1883) 11 QBD 503	143
<i>Hedley Byrne & Co Ltd v Heller & Partners Ltd</i> [1964] AC 465, HL	170
<i>Hee Tak Lee Co Ltd v Keen Lloyd (Holdings) Ltd</i> (1999) HCA 20799/1998	511
<i>Hewett v First Plus Financial Group</i> [2010] EWCA Civ 312	96
<i>Hickman v Maisey</i> [1900] 1 QB 752	231
<i>Hill v Tupper</i> (1863) 2 H & C 121	436
<i>Hillas & Co Ltd v Arcos Ltd</i> (1932) 43 Ll L Rep 359	51
<i>Hillier Development Ltd v Tread East Ltd</i> [1993] 1 HKC 285, CA	509
<i>Ho Ka Yin v Express Security Ltd</i> [2011] HKEC 975	156
<i>Ho Nga Sheung v Ma Fook Leung</i> [1993] 2 HKC 647	387
<i>Ho Sang v The Hong Kong & Kowloon European Style Tailors Union</i> [1953–1955] HKDCLR 121	52
<i>Ho Wing-cheong v Graham Margot</i> [1991] 1 HKLR 245	355
<i>Ho Ying Wai v Keliston Marine (Far East) Limited & Another</i> [2003] 1 HKLRD 343	192, 267
<i>Hoie Sook Fong v Ismail Halima</i> [2009] 1 HKC 326	33
<i>Holland v Hodgson</i> (1872) LR 7 CP 328	429
<i>Hollywood Silver Fox Farm Ltd v Emmett</i> [1936] 2 KB 468	215
<i>Holmes v Wilson</i> (1839) 10 A & E 503	231
<i>Homyip Investment Ltd v Chu Kang Ming Trade Development Co Ltd</i> [1995] 2 HKC 458	504
<i>Hong Kong Fir Shipping Co v Kawasaki Kisen Kaisha</i> [1962] 2 QB 26	60
<i>Hong Kong Housing Authority v Hung Pui</i> [1987] 3 HKC 495	491
<i>Hong Kong Wing On Travel Service Ltd v Hong Thai Citizens</i> <i>Travel Services Ltd</i> [2001] 2 HKLRD 481	236
<i>Hounslow London Borough Council v Twickenham Garden</i> <i>Development Ltd</i> [1971] Ch 233	396
<i>HSBC Bank Plc v Wallace</i> [2008] 1 HKLRD 613	367
<i>Hu Wei Hsin v Ma Hung Wing</i> [2011] HKEC 736	216
<i>Hua Chiao Commercial Bank Ltd v Chiaphua Industries Ltd</i> [1987] 1 All ER 1110, PC	505
<i>Hung Yuen Chan Robert v Hongkong Standard Newspapers Ltd</i> [1996] 4 HKC 519	239

<i>Hunter v Canary Wharf Ltd</i> [1997] 2 All ER 426	212, 213, 215
<i>Hussain & Another v Lancaster City Council</i> [1999] 4 All ER 125	215
<i>Ian Hung Wai v Cheung Sau Kuen</i> [2011] 3 HKLRD 458, CA	38, 54
<i>ICI Swire Paints Ltd v Techii Motor Engineering and Trading Co</i> [2003] 3 HKC 432, CFI	118
<i>Ideal Consolidators Ltd v Maeda Corporation</i> [1992] 1 HKC 528	225
<i>Inglefield v Macey</i> (1967) 2 KIR 146	193, 269
<i>Investasia Ltd v Kodansha Co Ltd</i> [1999] 3 HKC 515	240
<i>Ireland v Canton Fitzgerald (HK) Ltd</i> [1988] HKC 493	310
<i>Jardine Engineering Corporation Ltd v Shimizu Corporation</i> [1992] 2 HKC 271	84
<i>Jobling v Associated Dairies</i> [1982] AC 794, HL	160
<i>Jones v Padavatton</i> [1969] 1 WLR 328	19
<i>Jones v Skelton</i> [1963] 3 All ER 952; [1963] 1 WLR 1362, PC	240
<i>Jones v Wright</i> [1991] 1 All ER 353; [1991] 3 All ER 88	167
<i>Jumbo King Ltd v Faithful Properties Ltd</i> [1999] 4 HKC 707, CFA	527
<i>Junior Books v Veitchi</i> [1982] 3 All ER 201, HL	170
<i>Kao, Lee & Yip v John Richard Edwards</i> [1993] 1 HKC 314, CA	367
<i>Keep Point Development Ltd v Chan Chi Yim & Others and</i> <i>Full Country Development Ltd & Another (Third Parties)</i> [2000] 3 HKLRD 166	151
<i>Kelsen v Imperial Tobacco Co Ltd</i> [1957] 2 QB 334	232
<i>Kenny v Preen</i> [1963] 1 QB 499, CA	408
<i>Kentex Investment Ltd v Hui Lap Ping Sam</i> , unreported, (1992) MP 3447/1991	516
<i>Keung Shiu Tang v DH Shuttlecocks Ltd</i> [1994] 1 HKC 286, CA	493
<i>Khorasandjian v Bush</i> [1993] QB 727	212
<i>King's Motors (Oxford) Ltd v Lax</i> [1970] 1 WLR 426	484
<i>Kleinwort Benson Ltd v Lincoln City Council</i> [1999] 2 AC 349	85
<i>Knupffer v London Express Newspaper Ltd</i> [1944] 1 All ER 495	240
<i>Kwan Lai Kit Eddie v Leung Muk Lan</i> , unreported, (2000) HCA 2179/1998	488
<i>Kwan Siu Man Joshua v Yaacov Ozer</i> [1999] 1 HKC 150	485
<i>Kwok Chung Hon v Lo On Wa</i> [1996] 4 HKC 191	512
<i>Kwok Wai Kong v Luk Ping Hung</i> (1999) HCA 4447/98; [1999] HKCU 1273	513

<i>Kwong Chiu v Sunshine Heights Limited & Others</i> (2001) HCPI 77/2000; [2001] HKEC 1562	200
<i>Kwong Kwok Kin v Observatory Watch & Jewellery Co Ltd</i> [1987] 3 HKC 138	187
<i>LEstrange v F Graucob Ltd</i> [1934] 2 KB 394	52
<i>Lace v Chantler</i> [1944] KB 368	400, 401
<i>Lady Gwendolen, The</i> [1965] P 294	154
<i>Lai Tai Tai v Lam Pak Lo</i> [2000] 1 HKLRD 499	151
<i>Lai Wing Ho v Chan Siu Fong</i> [1993] 1 HKLR 319	527
<i>Lake v Gibson</i> (1729) 1 Eq Ca Abr 290	390
<i>Lam Che v Founng Sheu Kwun</i> , unreported, CFI HCA 486/2010, [2010] HKEC 1252	434
<i>Lam Fong & Ho Kok Keong v So Hoo Yuen</i> [1990] HKLY 1209	268
<i>Lam Kin Ping v Tsang Kam Cheong</i> , unreported, (2002) HCPI 1458/2000; assessment of damages at [2003] 3 HKLRD 501	133
<i>Lam Kwok-leung v Attorney General</i> [1979] HKLR 145	410
<i>Lam Man-yuen v Lucky Apartment</i> [1964] HKLR 689	399, 400
<i>Lam Mean-soon v Luk Fuk Enterprises Ltd</i> [1980] HKLR 741	489
<i>Lam Tam Yi v Chak Wai Man</i> [1993] 1 HKC 537	488
<i>Lam Tin Hing v Lam Kwai Choi</i> [2009] 3 HKC 1	127
<i>Lam Wa Leung v So Chung Shek</i> [1983] 2 HKC 630	489
<i>Lam Wing Ching & Others v Chow Kum Wing</i> [1985] 1 HKC 189	231
<i>Lam Wing Ming v Dragages et Travaux Publics (HK) Ltd</i> [1998] 2018 HKCU 1	167
<i>Lau Chun Wing v Incorporated Owners of Po On Building</i> [2006] HKEC 1516	210
<i>Lau Kam Tai v United Soundfair Engineering Co Ltd & Others</i> [1999] 2 HKC 299	201
<i>Launchbury v Morgans</i> [1973] AC 127	187
<i>Law v Jones</i> [1973] 2 All ER 437	491
<i>Le Lievre v Gould</i> [1893] 1 QB 491	142
<i>Leaf v International Galleries</i> [1950] 2 KB 86	79
<i>Lee Hon Kai v Wellsburg Industrial Ltd</i> (1995) HCA A1485/1994; [1996] HKLY 657	513
<i>Lee King v Gammon-Leighton Joint Venture</i> LT Appeal 29 of 1982	296
<i>Lee Siu Fong Mary v Ngai Yee Chai</i> [2006] 1 HKC 157	25
<i>Lee Siu Wai Florence v Priway Investments Ltd</i> [1998] 1 HKC 228	513
<i>Lee Tak Chun v East Weal International Ltd</i> [1994] 1 HKC 722	527
<i>Lee Tat Kwong v Choi Pui Kei Stephen</i> [1991] 2 HKC 109	516

<i>Lee Theatre Realty Ltd v Tong Wah Jor</i> , unreported, [2009] HKEC 1950	434
<i>Lee Ting Sang v Chung Chi-Keung</i> [1990] 2 AC 374, PC	262, 264
<i>Lee York Fai v Ho Hau Cheung</i> [2007] 4 HKC 455	241
<i>Lee-Parker v Izzet</i> [1972] 1 WLR 775	490
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<i>Leigh v Gladstone</i> (1909) 26 TLR 139	233
<i>Leung Suk Fong Peggy v Prudential Assurance Co Ltd</i> [2011] HKEC 1297	266
<i>Leung Tsang Hung v Incorporated Owners of Kwok Wing House</i> [2007] 5 HKC 227, CFA	211, 220
<i>Leung Tsang Hung v Tse Yiu Pui</i> [2004] HKCU 515; [2004] HKEC 565; on appeal [2006] 4 HKLRD 714, CA; further appeal [2007] 5 HKC 227, CFA	183
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<i>Li Ching Wing v Xuan Yi Xiong</i> [2004] 1 HKC 353	115
<i>Li Chung-i v Li Man-yuen</i> [1991] 2 HKLR 138	264
<i>Li Kai Cheong v Lam Ying Wai</i> [2001] HKLRD (Yrbk) 636	156
<i>Li Mun Chung v East Asia Steam Laundry Co</i> [1961] HKDCLR 28	53
<i>Li Sau Ying v Bank of China (Hong Kong) Ltd</i> [2005] 1 HKLRD 106, CFA	96
<i>Li Yau Wai, Eric v Genesis Films Ltd</i> [1987] HKLR 711, HC	238
<i>Liesbosch Dredger v SS Edison</i> [1933] AC 449	164
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<i>Link Brain Ltd v Fujian Finance Co Ltd</i> [1990] 2 HKLR 353	492
<i>Link Folk Ltd v Glorious Motors Ltd</i> [2011] HKEC 1237, DC	59, 63, 81
<i>Lister & Others v Hesley Hall Ltd</i> [2001] 2 WLR 1311	276
<i>Liu Moon Ping v Wong Kwok Tung</i> [2006] 1 HKLRD 358	521
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<i>Lo Wo v Cheung Chan Ka, Joseph and Bond Star Development Ltd</i> [2001] 3 HKC 70	100
<i>Lobley Co Ltd v Tsang Yuk Kiu</i> [1997] 2 HKC 442	33
<i>Long v Lloyd</i> [1958] 2 All ER 402	113
<i>Lonrho Ltd v Shell Petroleum Co Ltd (No 2)</i> [1982] AC 173	189
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<i>Lord Bernstein of Leigh v Skyviews & General Ltd</i> [1978] QB 479	232
<i>Luen Wai Crane Engineering Co v Ajax Pong Construction Equipment Ltd</i> , unreported, (1994) HCA 5972/1992	506, 514
<i>Lung Yuk-lun v Gratefulfit Industrial Ltd</i> [1992] 1 HKLR 1	490

<i>Ma Hon Ming v Lee Tsan Sum</i> , unreported, (2000) HCA 1620/1998	513
<i>Mak Lai Man v Lam Siu Yiu Peter</i> [1993] 1 HKC 452	493
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<i>Malhotra v Choudhury</i> [1980] Ch 52	514
<i>Malone v Laskey</i> [1907] 2 KB 141	212
<i>Marchant v Charters</i> [1977] 1 WLR 1181	400
<i>Mareva Compania Naviera SA v International Bulk Carriers SA</i> [1980] 1 All ER 213	310
<i>Market Investigations Ltd v Minister of Social Security</i> [1969] 2 QB 173	262, 264
<i>Markfaith Investment Ltd v Chiap Hua Flashlights Ltd</i> [1990] 1 WLR 1451	532
<i>Marking Ltd v Cheerifat Investment Ltd</i> , unreported, (1995) HCMP 2727/1995	527
<i>Marlene Susanne Courbet v Mandarin Divers Marine Services Limited</i> & Others (2001) HCPI 677/2000	194
<i>Mauriello (HK) Ltd v Julie Chen Soo-lee (t/a The Bohemian Shop)</i> , unreported, (1989) A7088/87	361
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<i>McGinlay v British Railways Board</i> [1983] 1 WLR 1427	178
<i>McLoughlin v O'Brian</i> [1982] 2 All ER 298, HL	167
<i>Mersey Docks & Harbour Board v Coggins & Griffith</i> [1947] AC 1	259
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<i>Michael Richards Properties Ltd v Corporation of Wardens of St</i> <i>Saviour's Parish, Southwark</i> [1975] 3 All ER 416	491
<i>Ming An Insurance Co (HK) Ltd v Ritz-Carlton Ltd</i> [2002] 3 HKLRD 844, CFA	276
<i>Ming Kee Manufactory Ltd v Man Shing Electrical Manufactory</i> <i>Ltd</i> [1992] 2 HKLR 357	239
<i>Modern Sino Ltd v Art Fair Co Ltd</i> [1999] 3 HKLRD 847	527
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<i>Moorcock, The</i> (1889) 14 PD 64	53, 54
<i>Moore v Rawson</i> (1824) 3 B & C 332	446
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<i>Morris v Murray</i> [1990] 3 All ER 801, CA	178
<i>Motherwell v Motherwell</i> (1976) 73 DLR (3d) 62	212

<i>MTM Construction Ltd v William Reid Engineering Ltd</i>	190
1997 SCLR 778; (1997) <i>The Times</i> , April 22	
<i>Murphy v Brentwood District Council</i>	146, 149, 168, 169
[1990] 2 All ER 908, HL	
<i>Nance v British Columbia Electric Railway Co Ltd</i> [1951] AC 601	175
<i>National Carriers Ltd v Panalpina (Northern) Ltd</i> [1981] AC 675, HL	114
<i>National Guaranteed Manure Co v Donald</i> (1859) 4 H & N 8	447
<i>Neaverson v Peterborough RDC</i> [1902] 1 Ch 557	444
<i>Nettleship v Weston</i> [1971] 2 QB 691	155, 179
<i>New World Development Co Ltd v Sun Hung Kai Securities Ltd</i>	50
[2006] 3 HKLRD 345, CFA	
<i>Next Magazine Publishing Ltd v Ma Ching Fat</i> [2003] 1 HKLRD 751	238
<i>Ng Chun Mo v Waihong Environment Services Ltd</i>	272
[2011] HKEC 897, CFI	
<i>Ng Ching Ying v Lee Siu Yeung & Another</i> [2002] 1 HKC 154	228
<i>Ng Kam Ha v Vincent Sina Traders</i> [1987] HKLR 1193	535
<i>Ng Shou Chun v Hung Chun San</i> [1994] 1 HKC 155	452
<i>Nichols v Marsland</i> (1876) 2 Ex D 1	225
<i>Nickerson v Barraclough</i> [1981] 2 WLR 773	442
<i>Noble v Harrison</i> [1926] 2 KB 332	225
<i>North Ocean Shipping v Hyundai Construction: The Atlantic Baron</i>	94
[1979] QB 705	
<i>Occidental Worldwide Investment Corp v Skibs A/S Avanti</i>	93
(The “Siboen” and the “Sibotre”) [1976] 1 Lloyd’s Rep 293	
<i>Ocean Tramp Tankers Corp v V/O Soyfracht, The Eugenia</i>	114
[1964] 2 QB 226	
<i>On Park Parking Ltd v Secretary of Justice</i> [2004] 3 HKC 476	53
<i>Orient Leasing (Hong Kong) Ltd v NP Etches</i> [1985] HKLR 292	430
<i>Oriental Daily Publisher Ltd v Easy Finder Ltd</i> [1998] 1 HKC 546	239
<i>Oriental Daily Publisher Ltd v Ming Pao Holdings Ltd</i>	238
[2011] 3 HKLRD 393	
<i>Otto v Bolton</i> [1936] 2 KB 46	485
<i>Overseas Tankship (UK) Ltd v Miller Steamship Co Pty</i>	136
(<i>The Wagon Mound (No 2)</i>) [1967] 1 AC 617	
<i>Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co</i>	165
(<i>The Wagon Mound (No 1)</i>) [1961] AC 388	
<i>Owen v Gadd</i> [1956] 2 QB 99	409, 525

<i>Page v Smith</i> [1996] 1 AC 155, HL	166
<i>Palk v Mortgage Services Funding PLC</i> [1993] 2 WLR 415	458
<i>Pankhania v The London Borough of Hackney</i> [2002] EWHC 2441	85
<i>Pao On v Lau Yiu Long</i> [1980] AC 614, PC	39, 94
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<i>Parker v Taswell</i> (1858) 2 De G & J 559	519
<i>Payne v Cave</i> (1789) 3 TR 148	33
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<i>Pepper (Inspector of Taxes) v Hart</i> [1993] 1 All ER 42	189
<i>Peregrine Investments Holdings Ltd v Associated Press</i> [1997] HKLRD 1073	238
<i>Perera v Vandiyar</i> [1953] 1 WLR 672	525
<i>Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd</i> [1953] 2 WLR 427	31
<i>Philips Hong Kong Ltd v Attorney General of Hong Kong</i> (1993) 61 BLR 49, PC	123
<i>Phipps v Pears</i> [1965] 1 QB 76	448
<i>Pitts v Hunt</i> [1991] 1 QB 24	183
<i>Polemis and Furness, Withy & Co, Re</i> [1921] 3 KB 560	164, 165
<i>Polysset Ltd v Panhandat Ltd</i> [2000] 4 HKC 203	123, 514
<i>Poon Chau Nam v Yim Siu Cheung</i> [2007] 1 HKLRD 951	262, 264, 265
<i>Prime Win Enterprises Ltd v Nova Management Consultants</i> [2004] 2 HKC 587	498
<i>Professional Associates v Polytek Engineering Co Ltd</i> [1986] HKLR 20	49
<i>Pullman v Walter Hill & Co Ltd</i> [1891] 1 QB 524	240
<i>Putsman v Taylor</i> [1927] 1 KB 637	355
<i>Pwllbach Colliery Co Ltd v Woodman</i> [1915] AC 634	442
<i>Qualihold Investments Ltd v Bylax Investments Ltd</i> [1991] 2 HKC 589	522
<i>R v Chan Wing Kuen</i> [1995] 1 HKC 470	228, 229
<i>Rahman v Arearose Ltd</i> [2001] QB 351	161, 162
<i>Ram Narayan v Rishad Hussain Shah</i> [1979] 1 WLR 1349, PC	485
<i>Re 88 Berkeley Road, London NW9, Rickwood v Turnsek</i> [1971] 1 All ER 254	387
<i>Re Ellenborough Park</i> [1956] 1 Ch 131	436
<i>Re Puckett and Smith's Contract</i> [1902] 2 Ch 258	508
<i>Re Yateley Common</i> [1977] 1 All ER 505	446

<i>Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National, Insurance</i> [1968] 2 QB 497	262
<i>Regal Success Venture Ltd v Jonlin Ltd</i> [2000] 2 HKC 199, CA; on further appeal [2000] 4 HKC 143, CFA	490
<i>Ricas Properties Ltd v Armed Forces Trading</i> (2010) DCMP 75/2008; [2010] HKEC 1696; <i>corrigendum</i> [2010] HKEC 1721	395
<i>Richard Ellis Ltd v Van Hong Tuon</i> [1988] 1 HKLR 169, CA	486
<i>Rigby v Chief Constable of Northamptonshire</i> [1985] 2 All ER 985	233
<i>Robinson v Kilvert</i> (1889) 41 Ch D 88	214
<i>Robson v Hallett</i> [1967] 2 QB 939	231
<i>Rockeagle Ltd v Alsop Wilkinson</i> [1991] 3 WLR 573	496
<i>Roe v Minister of Health</i> [1954] 2 QB 66	153
<i>Timmings v Moreland Street Property Co Ltd</i> [1958] 1 Ch 110	492
<i>Roseric Ltd v West River Development</i> [1993] 2 HKC 404	513
<i>Royal Bank of Scotland v Etridge</i> [2001] 4 All ER 449	96, 97
<i>Rylands v Fletcher</i> (1868) LR 3 HL 330	136, 138, 139, 140, 281
<i>Sanfield Building Contractors Ltd v Li Kai Cheong</i> [2003] 3 HKLRD 48	195
<i>Saunders v Anglia Building Society</i> [1971] AC 1004	92
<i>Semana Bachicha v Poon Shiu Man</i> [2000] 3 HKC 452	101
<i>Selectmove, Re</i> [1995] 2 All ER 531	42
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<i>Shanklin Pier v Detel Products</i> [1951] 2 KB 854	125
<i>Shiu Ying-kwong v Po On</i> [1990] HKDCLR 15	336
<i>Shogun Finance Ltd v Hudson</i> [2004] 1 All ER 215	87
<i>Shum Kit Ching v Caesar Beauty Centre Ltd</i> [2003] 3 HKC 235	103
<i>Shum Kong v Chui Ting Lin</i> (2001) HCA 16227/1999; [2001] HKCU 531	75
<i>Shun Shing Hing Investment Co Ltd v Attorney General</i> [1983] HKLR 432	53
<i>Silverpole Ltd v China Pride Investments Ltd</i> [1994] 2 HKC 341	506, 514
<i>Simmons v British Steel Plc</i> [2004] ICR 585	166
<i>Smith v Land and House Property Corp</i> (1884) LR 28 Ch D 7	76
<i>Smith v Leech Brain and Co Ltd</i> [1962] 2 QB 405	157
<i>Southport Corporation v Esso Petroleum</i> [1954] 2 All ER 561	214
<i>Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd</i> [1973] 1 QB 27, CA	168

<i>Spice Girls Ltd v Aprilia World Service BV</i> [2000] EMLR 478; on appeal [2002] EWCA Civ 15; [2002] EMLR 27	74
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<i>Stanley v Powell</i> [1891] 1 QB 86	182
<i>Steadman v Steadman</i> [1976] AC 536	127
<i>Stephens v Avery</i> [1988] Ch 449	238
<i>Stevenson, Jaques & Co v McLean</i> (1880) 5 QB 346	30
<i>Stevenson, Jordan & Harrison Ltd v MacDonald & Evans</i> [1952] 1 TLR 101	259, 260
<i>Stilk v Myrick</i> (1809) 2 Camp 317	40, 42
<i>Stone & Rolls Ltd v Moore Stephens</i> [2009] 1 AC 1391, HL	183
<i>Street v Mountford</i> [1985] AC 809	393, 395, 398, 425
<i>Sudbrook Trading Estate Ltd v Eggleton</i> [1983] 1 AC 444	484
<i>Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale</i> [1967] AC 361	59
<i>Sun Er Jo v Lo Ching</i> [1996] 1 HKC 1	19
<i>Sung Wai Kiu v Wong Mei Yin</i> [1997] 1 HKC 288	514
<i>Sunluck International Development Ltd v Hing King Development Ltd</i> [1997] 4 HKC 34	521
<i>Supreme Honour Development Ltd v Lamaya Ltd</i> [1991] 1 HKC 198	480
<i>Susanto-Wing Sun Co Ltd v Yung Chi Hardware Machinery Co Ltd</i> [1989] 2 HKC 504	28
<i>T v Kan Ki Leung</i> [2002] 1 HKLRD 29	151, 167
<i>Ta Xuong v Incorporated Owners of Sun Hing Building</i> [1997] 4 HKC 171	195
<i>Tai Yip Dyeing Factory Ltd v Kong Hoi Sang</i> [2007] 1 HKLRD 608	236
<i>Tam Lup Wai Franky v Vong Shi Ming Nicolas</i> [2002] 4 HKC 135	93
<i>Tam Moon Tong v Lucky Dragon Restaurant Ltd</i> (2001) DCCJ 1706/2001; [2001] HKEC 968	45
<i>Tang Tim-fat v Chan Fok-kei</i> [1993] 2 HKLR 373	444
<i>Tarpley v Blabey</i> (1836) 2 Bing NC 437	240
<i>Tarry v Ashton</i> (1875–76) LR 1 QB 314	219, 221
<i>The Incorporated Owners of Viking Garden v Golden Brains Ltd</i> [1991] 1 HKC 353	480
<i>The Thompsett Mind Ltd v Triumph Field Ltd</i> , unreported, (1993) HCA 1826/1992	517
<i>Thomas v Sorrell</i> (1673) Vaugh 330	394
<i>Thomas v Thomas</i> (1842) 2 QB 851; 114 ER 330	35, 37, 38
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<i>Thornton v Shoe Lane Parking Ltd</i> [1971] 2 QB 163	65

<i>Timmins v Moreland Street Property Co Ltd</i> [1958] 1 Ch 110	492
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<i>Transco Plc v Stockport Metropolitan Borough Council</i> [2004] 2 AC 1	139
<i>Tread East Ltd v Hillier Development Ltd</i> [1993] 1 HKC 285, CA	501
<i>Tsang Bing Kwan Andes v Korea Marvel Co</i> [1997] 3 HKC 565	521
<i>Tsang Siu Hong v Kong Hoi For</i> [2003] 1 HKLRD D22	183
<i>Tse Chun Hung Herby v Chang Chung Paul</i> (1999) HCA 9293/91; [1999] HKCU 375	529
<i>Tse Fook Choy, Joey Callan v Kwong On Bank Ltd</i> [1999] 3 HKC 126	535
<i>Tse Kwong Lam v Wong Chit Sen</i> [1983] 3 All ER 54	460
<i>Tulk v Moxhay</i> (1848) 41 ER 1143	447, 448
<i>Tweddell v Henderson</i> [1975] 2 All ER 1096	484
<i>Twinkle Step Investment Ltd v Smart International Industrial Ltd</i> [1999] 4 HKC 441, CFA	53
<i>UBC (Constuction) Ltd v Sung Foo Kee Ltd</i> [1993] 2 HKC 458	42
<i>Union Assurance Society of Canton v Hong Kong Land Co Ltd</i> [1977] HKLR 597	409
<i>Victoria Laundry (Windsor) Ltd v Newman Industries Ltd</i> [1949] 2 KB 528	511
<i>Walford v Miles</i> [1992] 2 AC 128	493
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<i>Walsh v Lonsdale</i> (1882) 21 Ch D 9	519
<i>Wan Moon Ling Wandy v Sino Gain Investment Ltd</i> [1997] 2 HKC 592	506
<i>Wan Tsz Nok v Hung Fai Electrical Engineering Ltd</i> [2008] HKEC 1939	198
<i>Warham v Cathay Pacific Airways Ltd</i> [2009] HKEC 1848	308
<i>Watkin v Hall</i> (1868) LR 3 QB 396	238
<i>Watson v Burton</i> [1957] 1 WLR 19	510
<i>WE Cox Toner (International) Ltd v Crook</i> [1981] ICR 823	509
<i>Wealthy China Trading Ltd v Huie Man Kit</i> [1999] 3 HKC 832	498
<i>Wealthy Realty Ltd v Cheng Yung</i> [2008] 2 HKLRD 425	368
<i>Wellfit Investments Ltd v Poly Commence Ltd</i> [1995] 3 HKC 56	508
<i>Westripp v Baldock</i> [1938] 2 All ER 779	231
<i>Whale View Investment Ltd v Kensland Realty Ltd</i> [2000] 2 HKLRD 261	154
<i>Wharf Properties Ltd v Eric Cumine Associates, Architects, Engineers & Surveyors</i> [1991] 2 HKLR 6, PC	155

<i>Wheat v E Lacon and Co Ltd</i> [1966] AC 552, HL	197
<i>Wheeldon v Burrows</i> (1879) 12 Ch D 31	440, 441
<i>White v Chief Constable of the South Yorkshire Police</i> [1999] 1 All ER 1	166, 168
<i>White v Jones</i> [1995] 2 AC 207	170
<i>Williams v Hensman</i> (1861) 1 John & H 546	386
<i>Williams v Roffey Bros</i> [1991] 1 QB 1	41, 42
<i>Wilson v Pringle</i> [1986] 2 All ER 440	228
<i>Wilson v Tyneside Window Cleaning Co</i> [1958] 2 QB 110	269
<i>Wilson & Clyde Coal Co Ltd v English</i> [1937] 3 All ER 628	192, 267
<i>Wing Wong Co Ltd v Chui Yuk Ming</i> , unreported, (1988) HCA 10099/1983	513
<i>Wise Stand Ltd v United Pentecostal Church of Hong Kong Ltd</i> (2003) DCCJ 19369/2001; [2003] HKEC 296	409
<i>Wisename Ltd v Secretary for Justice</i> [1998] 1 HKC 128	410
<i>With v O'Flanagan</i> [1936] Ch 575	75
<i>Wong Chi Wing v Chun Wo Building Construction Ltd</i> , unreported, (2001) HCPI 1476/2000; on appeal [2003] HKEC 329	190, 193, 268
<i>Wong Chick v Swire Pacific Ltd</i> [1992] 1 HKC 571	269
<i>Wong Chim Ying v Cheng Kam Wing</i> [1991] 2 HKLR 253	537, 540
<i>Wong Ching Chi v Full Yue Bleaching and Dyeing Co Ltd</i> [1994] 3 HKC 606	139
<i>Wong Kam Wing v Cyril Murkin (HK) Ltd</i> [1989] 2 HKC 603	534
<i>Wong Ki v Shun Tak Electrical Mechanical and Engineering</i> (Hong Kong) Co Ltd [2009] HKEC 595	265
<i>Wong Kwok Tung v Tsang Hin Ping & Others</i> , unreported, (2000) HCPI 725/1997	201
<i>Wong Lai-fan v Lee Ha</i> [1992] 1 HKLR 125, CA	516
<i>Wong Man-luen v Hong Kong Wah Tung Stevedore Co</i> [1971] HKLR 390	262
<i>Wong Po-sin v New Universal Paper Co Ltd</i> [1973] HKLR 59	260, 264
<i>Wong Sai-ye v Kong Kwan</i> [1988] 1 HKLR 367	264
<i>Wong Sau Chun v Ho Kam Chiu</i> (2000) HCPI 872/1996; [2000] HKEC 109	133, 157
<i>Wong Shui Kee Roger v Victor LL Chu</i> [2001] 3 HKC 589	241
<i>Wong Tak-sing v Amertex International</i> [1988] HKLR 98	86
<i>Wong Tung Ming v Kwok Chiu Hung & Others</i> [2000] 1 HKLRD C16	200
<i>Wong v Beaumont Property Trust Ltd</i> [1965] 1 QB 173	441

<i>Wong Wai Ming v Hospital Authority</i> [2000] 3 HKLRD 612	151
<i>Wong Wing Ho v Housing Authority</i> [2008] 1 HKLRD 352, CA	208
<i>Wong Wing Ho v The Hong Kong Housing Authority and Kai Shin Management Services Ltd</i> (2006) HCPI 558/2004; [2006] HKEC 2355	208
<i>Wong Yiu Ming v To Chark Wah</i> [1993] 1 HKC 510, DC	133, 156
<i>Workers Trust and Merchant Bank Ltd v Dojap Investments Ltd</i> [1993] 2 WLR 702, PC	506, 514
<i>World Ford Development Ltd v Ip Ming Wai</i> [1993] 1 HKC 98, CA	499
<i>World Realty v Kwan Ngai Kin</i> [1987] 3 HKC 148	409
<i>World Wide Stationery Manufacturing Co Ltd v Fong Chi Leung</i> [1994] 2 HKC 449	137
<i>Wroth v Tyler</i> [1974] Ch 30	514
<i>Wu Chiu Kuen v Chu Shui Ching</i> (1992) HCA 4081/1991; [1992] HKCU 29	18
<i>Wu Koon Tai v Wu Yau Loi</i> [1995] 2 HKC 732, CA; [1996] 3 WLR 778	518, 519
<i>Yau Siu Yeung v Wing Sum Lo</i> [1988] HKC 693	535
<i>Yeung Kam Fuk v Len Shing Construction Co Ltd</i> [1986] HKC 160	271
<i>Yeung Siu Hong v Chan Siu Mee Sandie</i> [1992] 2 HKC 559	488
<i>Yeung Wah James v Alfa Sea Ltd</i> [1993] 1 HKC 440	230, 409, 525
<i>Ying Wei (Hop Yick) Cargo Service v Nanyang Credit Card Co Ltd</i> [1993] 1 HKC 56	65
<i>Yip Mau Leung v University of Hong Kong</i> [2000] 3 HKLRD 198	167
<i>Yiu Ping Fong v Lam Lai Hing Lana</i> [1998] 4 HKC 476	499
<i>Yiu Yau-ping v Fong Yee-lan</i> [1992] 2 HKLR 167	492
<i>Young and Woods Ltd v West</i> [1980] IRLR 201	262
<i>Yu Kam Por v New Central Ltd</i> [2005] 1 HKC 77	87
<i>Yu Kwong Chiu v Consolidated Newspapers Ltd</i> [1987] 2 HKC 351	236
<i>Yu Yiu Kong Samuel v Kobylanski Stephen Andre</i> (2001) DCCJ No 15371/2000; [2001] HKEC 821	429
<i>Yuen Kong Ling Cana v Lai Kam Hon</i> [1993] 2 HKC 728	513
<i>Yuen Kun Yeu v Attorney-General of Hong Kong</i> [1988] AC 175, PC	145

Table of Legislation

<i>Age of Majority (Related Provisions) Ordinance (Cap 410)</i>	
s 2	71
s 4	72
<i>Air Pollution Control Ordinance (Cap 311)</i>	224
<i>Application of English Law Ordinance (Cap 88)</i>	445
<i>Apprenticeship Ordinance (Cap 47)</i>	
Generally	284, 290, 350
s 8	17
<i>Arbitration Ordinance (Cap 609)</i>	17
<i>Bankruptcy Ordinance (Cap 6)</i>	
Generally	255
s 2	45
s 6(2)(a)	342
s 38	257
s 38(1)(ca)	344
s 59	518
<i>The Basic Law of the Hong Kong Special Administrative Region</i>	
Article 7	539
Article 121	468
Article 122	468
<i>Bills of Exchange Ordinance (Cap 19)</i>	
Generally	17
s 27	39
<i>Building Management Ordinance (Cap 344)</i>	
Generally	472
s 8	475
s 33(1)	475

s 34E	481
s 34E(2)	482
Schedule 7	482
Schedule 8	480
<i>Buildings Ordinance</i> (Cap 123)	466, 504
<i>Civil Liability (Contribution) Ordinance</i> (Cap 377)	
Generally	135, 163, 273
s 3(1)	251, 275
s 4(1)	251, 275
<i>Companies Ordinance</i> (Cap 32)	
Generally	17, 255, 345, 475
s 5	73
s 5A	73
s 5B	73
s 5C	73
s 87	458
s 265(1)(ca)	344
s 268	518
<i>Construction Sites (Safety) Regulations</i> (Cap 59I)	
Generally	273
Regulation 38AA	270
Regulation 56	319
<i>Contracts (Rights of Third Parties) Act</i> 1999 (UK)	16
<i>Contracts for Employment Outside Hong Kong Ordinance</i> (Cap 78)	
Generally	17, 289, 290
s 4	350
<i>Control of Exemption Clauses Ordinance</i> (Cap 71)	
Generally	66, 67, 69, 70, 126, 177, 204, 205
s 2	179
s 2(1)	66
s 2(2)	179
s 3	180, 204, 205
s 3(1)	69
s 3(2)	205
s 5	180
s 7	181, 204
s 7(1)	67, 180, 204
s 7(2)	180
s 7(3)	179, 180

s 8	67
s 10	181
s 11	181
s 12	181
Schedule 1	67
Schedule 2	181, 205
<i>Conveyancing and Property Ordinance (Cap 219)</i>	
Generally	127, 381, 389, 415, 421, 450, 451, 452, 453, 459, 463, 477, 523, 538
s 2	380, 417, 476
s 3	482
s 3(1)	71, 406, 483, 485
s 3(2)	486
s 4	405, 518
s 4(1)	407, 518
s 4(2)	17, 518
s 4(2)(d)	405, 407, 417
s 5	417
s 5(1)(a)	483, 519
s 6	402, 483
s 6(2)	483, 520
s 8	386
s 9	388, 389
s 14	465, 466
s 16	440
s 19	16
s 20	16
s 26	477
s 34A	503
s 35	456
s 35(1)	477, 524
s 35(1)(a)	477, 524
s 35(1)(c)	526
s 35(1)(d)	526
s 36	495
s 39	449, 477, 478
s 39(1)	477, 520
s 40(1)	477, 520
s 41	449, 478
s 41(2)	477, 480

s 41(2)(c)	477
s 41(5)	477
s 41(7)	477
s 41(8)	477
s 42	449
s 42(1)	478
s 42(2)	478
s 42(3)	478
s 44(1)	451
s 44(2)	451, 457
s 46	455
s 47	464
s 48	391
s 50	461
s 50(1)	455
s 50(2)	458
s 51	459, 460
s 51(1)	462
s 51(4)	460
s 52	460
s 53(2)	458
s 54	461
s 55(1)	461
s 58	420
s 58(1)	420
s 58(2)	420
s 58(4)	421
s 58(5)	419
s 62(1)	417
Schedule 1	
Generally	477
Part I	477
Part I(B)	477
Schedule 2	
Part A	495, 497
Clause 1	497
Clause 3	502
Clause 5	498
Clause 6	498, 502
Clause 7	499, 501

Clause 8	499
Clause 10	506, 514
Clause 11	508
Clause 12	507
Clause 13	496
Schedule 3	
Form 1	520
Form 2	495
Clause 1	495
Clause 2	496
Clause 3	496
Clause 4	497
Clause 6	498
Clause 11	503
Schedule 4	
Paragraph 8	460
Paragraph 11	460
<i>Crown Leases Ordinance (Cap 40), see also Government Leases Ordinance</i>	
s 15	447
<i>Crown Proceedings Ordinance (Cap 300)</i>	
s 2(2)	188
<i>Defamation Ordinance (Cap 21)</i>	
s 2	236
s 21	237
s 22	240
s 23	237
s 24	237
s 25	240, 242, 243
<i>Deposit-taking Companies Ordinance (Cap 328) (repealed)</i>	145
<i>Disability Discrimination Ordinance (Cap 487)</i>	291, 346
<i>District Court Ordinance (Cap 336)</i>	
s 46	72
s 49(4)	248
s 69	420
s 73B	256
s 73C	256
s 73D	256
s 73E	256

<i>Electricity Networks (Statutory Easements) Ordinance (Cap 357)</i>	439
<i>Electronic Transactions Ordinance (Cap 553)</i>	28
<i>Employees' Compensation Assistance Ordinance (Cap 365)</i>	290
<i>Employees' Compensation Insurance Levies Ordinance (Cap 411)</i>	290
<i>Employees' Compensation Ordinance (Cap 282)</i>	
Generally	135, 255, 258, 269, 270, 291, 320, 327, 329, 331
s 2(2)	349
s 5(2)(a)	339
s 5(4)	329
s 5(4)(d)	332
s 5(4)(g)	333
s 6	338, 340
s 7	337, 340, 341
s 8	340
s 9	336, 340, 341
s 10	301, 302, 303, 304, 338, 341
s 10(1)	338, 341
s 10A	339
s 15	320
s 30B	327
s 31	334, 335, 336
s 31(1)	336
s 31(2)	335
s 31(1)	336
s 36B	339
s 36C	339
s 38	327
s 40	327, 328
s 42	328
s 43	328
s 44	328
s 44B	327
Schedule 1	336
Schedule 6	337, 340
<i>Employees' Compensation Regulations (Cap 282A)</i>	
Regulation 4	321
<i>Employees' Retraining Ordinance (Cap 423)</i>	290, 345
<i>Employment of Children Regulations (Cap 57B)</i>	350
<i>Employment of Young Persons and Children at Sea Ordinance (Cap 58)</i>	290, 345, 352

Employment of Young Persons (Industry) Regulations (Cap 57C)	350
<i>Employment Ordinance</i> (Cap 57)	
Generally	255, 256, 283, 286
s 2(1)	289
s 3	291, 294
s 3(2)	294
s 4	289
s 4(2)	284
s 6	300
s 6(1)	300
s 6(2)	300
s 7	301
s 8(a)	296
s 8A	305
s 9	298, 304, 306, 354, 357
s 10	298
s 11	306
s 11E	296
s 21B	348
s 21C	348
s 25(3)	283
s 31B	295
s 31D	298
s 31E	293, 296
s 31(G)(1)	295
s 31K(5)	293
s 33	319
s 33(2)	320
s 33(2A)	320
s 33(4B)	301, 320
s 33(4BAAA)–s 33(4BAB)	303
s 33(4BB)	320
s 33(5)(e)	320
s 41AA	308
s 41AA(6)	309
s 41AA(7)	310
s 63(3)	310
s 67	310
s 67(1)	310
s 67(2)	310

s 67(3)	310
s 69	289
s 70	296, 307
Schedule 1	
Paragraph 2	291
Paragraph 3	292
Paragraph 5	292
Paragraph 6	292
Paragraph 7	292
Schedule 2	310
Part III	287
Part IV	288
Part IVA	289
Part VA	287, 289
Part VB	287, 289
<i>Estate Duty Ordinance (Cap 111)</i>	540
<i>Evidence Ordinance (Cap 8)</i>	
s 62	134
<i>Factories Act 1961 (UK)</i>	
s 29	191
<i>Factories and Industrial Undertakings (Guarding and Operation of Machinery) Regulations (Cap 59Q)</i>	
Generally	188
Regulation 4	137
<i>Factories and Industrial Undertakings Ordinance (Cap 59)</i>	
Generally	290, 315, 316
s 6A	317
s 6B	318
s 7(1)	315
s 7(4)	319
s 7(4A)	319
<i>Factories and Industrial Undertakings Regulations (Cap 59A)</i>	
Regulation 21	318
<i>Family Status Discrimination Ordinance (Cap 527)</i>	
Generally	291
s 8	347
s 31	347

<i>Fatal Accidents Ordinance (Cap 22)</i>	
Generally	135, 168, 174, 324
s 3	323
s 4	322, 323
s 6	324
<i>Government Leases Ordinance [formerly Crown Leases Ordinance] (Cap 40)</i>	
s 3	467
s 4	467, 469
s 5	467, 469
s 9	469
<i>High Court Ordinance (Cap 4)</i>	
s 17	510
s 48(c)	248
s 21F–21H	420
<i>Inland Revenue Ordinance (Cap 112)</i>	
Part III	256
Part IV	256
<i>Interpretation and General Clauses Ordinance (Cap 1)</i>	
s 3	71, 372, 375, 380
s 66	290
<i>Intestates' Estates Ordinance (Cap 73)</i>	
Generally	373
s 2	387
s 2(1)	373
<i>Labour Relations Ordinance (Cap 55)</i>	
	345
<i>Labour Tribunal Ordinance (Cap 25)</i>	
Generally	291
s 3	287
s 7	256
<i>Land Acquisition (Possessory Title) Ordinance (Cap 130)</i>	
	470
<i>Land Registration Ordinance (Cap 128)</i>	
Generally	467, 478, 529, 531, 536
s 1A	532
s 2	532
s 2A	532
s 3	455
s 3(1)	534, 537

s 3(2)	532, 534, 537
s 4	406
s 5	406, 534
<i>Land Registration Regulations (Cap 128A)</i>	
Regulation 5	533
Regulation 7	534
<i>Lands Resumption Ordinance (Cap 124)</i>	
Generally	504
<i>Land Titles Ordinance (Cap 585)</i>	
Generally	535, 536, 537, 538
s 20	538, 539
s 24	539
s 25	539
s 25(1)	539
s 25(2)(b)	540
s 25(2)(c)	540
s 26	539
s 26(1)	539
s 26(2)(b)	540
s 26(2)(c)	540
s 26(3)	540
s 27	540
s 28(2)–28(6)	540
s 32(2)	540
s 35	540
Schedule 1	539
Schedule 3	540
<i>Landlord and Tenant (Consolidation) (Amendment) Ordinance 2004</i>	
Generally	403, 425
s 2	426
s 5(1)	425
s 5(2)	425
s 9	427
Part IV	425, 426
Part V	427
<i>Landlord and Tenant (Consolidation) Ordinance (Cap 7)</i>	
Generally	403, 417
s 2	406, 424, 426
s 6(1)	405
s 93	424

s 95	424
s 115(1)	424
s 116(3)	426
s 116(4)	426
s 116(4A)	426
s 117	419
s 117(1)	426
s 117(2)	426
s 117(3)	426
s 118	426
s 119K	426
s 119L	406, 426
s 119M–119Q	426
s 119V	408
s 121(1)	426
s 126	419, 427
Part III	423
Part IV	419, 424, 426
Part V	405, 419, 426, 427
<i>Law Amendment and Reform (Consolidation) Ordinance (Cap 23)</i>	
Generally	175, 324
s 16	116
s 17	116
s 18	116
s 20	172, 322, 325
s 20C(1)	323
s 21(1)	174, 175
s 21(10)	174
<i>Law of Property (Enforcement of Covenants) Ordinance (1956)</i>	478
<i>Law of Property Act 1925 (UK)</i>	
s 53(1)(c)	519
<i>Limitation Ordinance (Cap 347)</i>	
Generally	17, 126, 184, 326, 432, 434
s 4	171
s 4(1)	184
s 4(1)(a)	376
s 5	376
s 7	433
s 8	433
s 27	171, 184, 325

s 27	184
s 28	325
s 31	171
s 32	171, 173
<i>Mandatory Provident Fund Schemes Ordinance (Cap 485)</i>	256
<i>Marine Insurance Ordinance (Cap 329)</i>	18
<i>Married Persons Status Ordinance (Cap 182)</i>	16
<i>Mental Health Ordinance (Cap 136)</i>	
s 2	71
<i>Minimum Wage Ordinance (Cap 608)</i>	
Generally	283
s 1	284
s 2	283, 284
s 3	285
s 6	283
s 7	284, 285
s 15	285
s 16	284
Part III	284
Schedule 2	285
Schedule 3	284
Schedule 4	284
<i>Minor Employment Claims Adjudication Board Ordinance (Cap 453)</i>	291
<i>Misrepresentation Act 1967 (UK)</i>	77
<i>Misrepresentation Ordinance (Cap 284)</i>	
Generally	68, 77, 82, 126
s 2	77, 79
s 3(1)	77
s 3(2)	77
s 4	68, 69
<i>Money Lenders Ordinance (Cap 163)</i>	
Generally	18
s 24(1)	104
s 25(3)	104
<i>Motor Vehicles Insurance (Third Party Risks) Ordinance (Cap 272)</i>	
s 12(2)	177
<i>Multi-Storey Buildings (Owners Incorporation) (Amendment) Ordinance (No. 27 of 1993)</i>	481
<i>Multi-Storey Buildings (Owners Incorporation) Ordinance</i>	482

<i>New Territories (Renewable Crown Leases) Ordinance (Cap 152), see also New Territories (Renewable Government Leases) Ordinance</i>	433
<i>New Territories Leases (Extension) Ordinance (Cap 150)</i>	
s 5	468
s 5(1)	468
s 6	468
s 7	447
<i>New Territories (Renewable Government Leases) Ordinance (Cap 152) [formerly New Territories (Renewable Crown Leases) Ordinance]</i>	433
<i>Noise Control Ordinance (Cap 400)</i>	224
<i>Occupational Safety and Health Ordinance (Cap 509)</i>	
Generally	291
s 5	311
s 6(1)–6(2)	311
s 28	311
<i>Occupational Safety and Health Regulation (Cap 509A)</i>	311
<i>Occupiers Liability Ordinance (Cap 314)</i>	
Generally	135, 151, 180, 194, 195
s 2(2)	195, 200
s 3	198, 199, 200
s 3(1)	197, 200
s 3(2)	200, 201
s 3(3)	200
s 3(4)(a)	201
s 3(6)	202
s 4	198, 202
s 5	200, 202
<i>Ocean Park Bylaw (Cap 388B)</i>	
s 5	229
<i>Ocean Park Corporation Ordinance (Cap 388)</i>	
s 39	229
<i>Official Secrets Act 1989 (UK)</i>	119
<i>Official Solicitor Ordinance (Cap 416)</i>	
s 2(6)	372
<i>Partition Ordinance (Cap 352)</i>	
Generally	392
s 4	392
<i>Personal Data (Privacy) Ordinance (Cap 486)</i>	291

<i>Pneumoconiosis and Mesothelioma (Compensation) Ordinance</i> (Cap 360)	135, 291
<i>Powers of Attorney Ordinance</i> (Cap 31)	
s 2(2)	17
<i>Prescription Act 1832</i> (UK)	445
<i>Probate and Administration Ordinance</i> (Cap 10)	519
<i>Protection of Wages on Insolvency Ordinance</i> (Cap 380)	
Generally	291
s 3	343
s 4	343
s 6	341
s 15	342
s 16	342, 345
s 16(2)	344
s 24	344
<i>Public Health and Municipal Services Ordinance</i> (Cap 132)	218, 224
<i>Race Discrimination Ordinance</i> (Cap 602)	291, 346
<i>Rehabilitation of Offenders Ordinance</i> (Cap 297)	
s 2(1)	348
<i>Restriction of Offensive Weapons Act 1959</i> (UK)	31
Rules of the High Court	
Order 88	457
<i>Sale of Goods Ordinance</i> (Cap 26)	
Generally	33, 53, 70, 126
s 8	89
s 57	69, 205
s 60	33
<i>Sale of Lands by Auction Ordinance</i> (Cap 27)	33
Securities and Futures (Client Money) Rules (Cap 571I)	
s 2	98
Securities and Futures (Client Securities) Rules (Cap 571H)	
s 2	98
<i>Sex Discrimination Ordinance</i> (Cap 480)	
Generally	291, 346
s 11	346
Solicitors' Practice Rules	
Rule 5C	474

<i>Stamp Duty Ordinance</i> (Cap 117)	
Generally	405
s 2	452, 530
s 29B(5)	505
s 29C(5A)	531
s 29C(5B)	531
Schedule 1	405, 530
<i>Statute of Westminster I 1275</i> (UK)	444
<i>Summary Offences Ordinance</i> (Cap 228)	
Generally	218
s 4	223, 229
s 4(7)	223
s 4B(1)	223
s 4B(2)	223
<i>Supply of Services (Implied Terms) Ordinance</i> (Cap 457)	
Generally	53, 102
s 8	69
<i>Tenancy (Notice of Termination) (Exclusion) (Consolidation) Order</i> (Cap 7A)	
Paragraph 2	402
<i>Trade Union Ordinance</i> (Cap 332)	
Generally	291, 292, 348
s 2	287, 289
<i>Traffic Accident Victims (Assistance Fund) Ordinance</i> (Cap 229)	135
<i>Unconscionable Contracts Ordinance</i> (Cap 458)	
Generally	98
s 5(1)	102
s 6	99
<i>Waste Disposal Ordinance</i> (Cap 354)	224
<i>Water Pollution Control Ordinance</i> (Cap 358)	224
<i>Wills Ordinance</i> (Cap 30)	
s 2	372

Chapter One

Contract

This chapter is concerned with the law that governs an agreement between parties. In particular, this chapter intends to review the common law principles relating to contracts. Consequently, less emphasis is placed on contracts regulated by legislation as to form or as to content. Likewise, little emphasis is placed on contracts which are highly specialized, such as an agreement which involves matters concerning employment which are generally categorized as employment law.

The Contract chapter is organized into three general sections. The first section provides the definition of the term “contract” in general and reviews the different types of contract. The next section presents an analysis concerning the creation of a contract and its legal application to the parties. The third and final section assesses the manners in which a contract may be terminated.

I. DEFINITION

A contract is a legally binding agreement between the parties to that agreement. The term “contract” has been described as referring to one or more of the following situations:

- a series of promises or acts that constitute a legally binding agreement, *e.g.*, a promise or a set of promises which the law will enforce;
- the legal relationship that results from a series of promises or acts; or,
- the document which embodies that series of promises or acts or the performance of that series of promises or acts.¹

1. 7(2) HALSBURY'S LAWS OF HONG KONG para. 115.002 (2007) (citations omitted) [hereinafter 7(2) HALSBURY'S].

Contract law is concerned with the validity and enforceability of that agreement.² The law of contract consists of case law which serves as precedent and which applies generally to all types of contracts. Unlike tort law, one's liability under contract law depends on promises the parties have made to each other. Through their agreement, the parties make legally binding arrangements which will govern their relationship. Enforcement of a contract is effected through the law and the courts.

The basis of contract law can also be seen as reliance: to rely on receiving some future benefits as part of an agreed exchange and to reduce uncertainties associated with the exchange. One purpose of contract law is to provide a structure within which parties can organize their relationships, particularly commercial ones, with a high degree of certainty.³ Thus, a contract can be seen as an allocation of risk between the parties, that is, an agreement determining which party will bear the risk of any loss in the transaction.⁴ For example, the parties may agree that a seller in Hong Kong will bear the risk of loss of a shipment of goods until it is delivered to the buyer's warehouse in the United States.

II. TYPES

As mentioned above, a contract is a legally binding agreement. Some of the reasons for creating a contract have been discussed. In this section, some of the various types of legally binding agreements are presented, although some of these agreements may fall into more than one category.⁵

2. For an exhaustive discussion of the dichotomy of these two definitions of the term "contract", see, e.g., 1 CHITTY ON CONTRACTS para. 1-001 (H.G. BEALE, *et al.* eds., 30th ed. 2008) [hereinafter CHITTY].

The Hong Kong government's Bilingual Laws Information System's *The English-Chinese Glossary of Legal Terms* [hereinafter *BLIS Glossary*] translates "legal contracts" as 合法合同 and "legally binding" as 具法律約束力. See the *BLIS Glossary* website at: <http://www.legislation.gov.hk/eng/glossary/homeglos.htm> (last visited 1 Feb. 2011).

3. CAROLE CHUI & DEREK ROEBUCK, HONG KONG CONTRACTS para. 1.3 (2nd ed. 1991) [herein after CHUI & ROEBUCK].

See also STEPHEN HALL, LAW OF CONTRACT IN HONG KONG: CASES AND COMMENTARY 2-7 (revised 2nd ed. 2009) [hereinafter HALL].

4. CHUI & ROEBUCK, *supra* note 3, at paras. 1.3; 2.1.

5. See 7(2) HALSBURY'S, *supra* note 1, at paras. 115.011-115.012. The Property chapter of this work will discuss contracts which must be in writing or which must be evidenced by writing.

A. Generally

A legally binding agreement may have many different forms and may have several classifications.⁶ Thus, a contract may be a completely oral agreement; a completely written agreement; or, a partly oral and partly written agreement. As their classifications imply, oral contracts are legally binding verbal agreements; written contracts are legally binding agreements in writing.

Another classification places agreements which are enforceable legally into three different categories: contracts of record; simple contracts; and, contracts made by deed.⁷ “Contracts of record” are not contracts in the sense in which that term is usually used but are judgments and recognizances⁸ enrolled in the record of a court and in law imply an obligation arising from the entry on the record and not from any agreement between the parties.⁹

“Simple contracts” are contracts without a seal and thus require consideration. Simple contracts are all contracts other than contracts of record or contracts under seal.

Simple contracts may be express or implied, or partly express and partly implied. Contracts are express to the extent that their terms are set out distinctly either by word of mouth or in writing. They are implied to the extent, if any, to which their terms are a necessary inference from the words or conduct of the parties.¹⁰

Another form of contract is known as a “contract under seal”, sometimes referred to as a “contract made by deed”, a “deed”, or a “specialty contract”.¹¹

6. CHITTY, *supra* note 2, at para. 1–067 notes that contracts:

may be classified in a variety of ways: according to their subject-matter; according to their parties; according to their form (whether contained in deeds or in writing, whether express or implied) or according to their effect (whether bilateral or unilateral, whether valid, void, voidable or unenforceable). (citations omitted)

This work is not intended to examine these categories in such depth; only the more common types or categories of contract will be introduced. For a detailed discussion of the myriad of contract types, *see, e.g., id.* at paras. 1–068 to 1–084.

7. 7(2) HALSBURY’S, *supra* note 1, at para. 115.010.

The *BLIS Glossary*, *supra* note 2, translates “deed” as 契據.

8. The *BLIS Glossary*, *supra* note 2, translates “recognizance” as 擔保.

9. 7(2) HALSBURY’S, *supra* note 1, at para. 115.010.

10. *Id.* at para. 115.013 (citations omitted).

11. *See* the discussion of this topic in sections II.C and III.C and the accompanying footnotes. *See also* 7(2) HALSBURY’S, *supra* note 1, at para. 115.011.

A specialty contract must be signed, sealed, and delivered.¹² A specialty contract requires no consideration and has the seal of the signer attached. A contract under seal must be in writing and is conclusive between the parties when signed, sealed and delivered. Delivery is made either by actually presenting the document to the other party or by stating an intention that the deed be operative even though the deed is retained in the possession of the party that signed the deed.¹³ In Hong Kong, contracts under seal are found mainly in real property transactions, government construction contracts and certain insurance contracts. One purpose of a deed is set out as follows:

The basis of the common law of contract is bargain. A party who wants to enforce a contract must show that he or she has given consideration. If A says to B “On your twenty-first birthday, I will give you \$100,000 to set you up in life” and B says “Thank you. ...”, there is certainly an agreement between them. But there is no contract ... because B has not given anything in return for A’s promise. Each party to a contract must

The *BLIS Glossary*, *supra* note 2, translates “specialty” as 蓋印文據. “A deed is a document which takes its effect from its formal nature.” CHUI & ROEBUCK, *supra* note 3, at para. 11.1.

At common law, contracts under seal, or specialties, were an important example of deeds and at common law a deed was an instrument which was not merely in writing, but which was sealed by the party bound thereby, and delivered by him to or for the benefit of the person to whom the liability was incurred. In no other way than by the use of this form could validity be given ... At common law, all deeds were documents under seal, but not all documents under seal were and are deeds. A deed must either:

- (a) effect the transference of an interest, right or property;
- (b) create an obligation binding on some person or persons;
- (c) confirm some act whereby an interest, right or property has already passed.

CHITTY, *supra* note 2, at para. 1–085.

12. BLACK’S LAW DICTIONARY 1350 (7th ed. 1999) [hereinafter BLACK’S LAW DICTIONARY] defines “seal” to be an “impression or sign that has legal consequence when applied to an instrument”.

13. One authority expounds upon this requirement of delivery:

“Where a contract is to be by deed, there must be a delivery to perfect it.” “Delivered”, however, in this connection does not mean “handed over” to the other party. It means delivered in the old legal sense, namely, an act done so as to evince an intention to be bound. Any act of the party which shows that he intended to deliver the deed as an instrument binding on him is enough. He must make it his deed and recognise it as presently binding on him. Delivery is effective even though the grantor retains the deed in his own possession. There need be no actual transfer of possession to the other party ...

CHITTY, *supra* note 2, at para. 1–093 (citations omitted).

See also BETTY M. HO, HONG KONG CONTRACT LAW 77–79 (2nd ed. 1994) (citation omitted) [hereinafter Ho].

give something (which may be a promise) to the other in exchange for what he or she gets. It is not a contract if one party takes rights without incurring corresponding duties. But consideration is not necessary if the contract is by deed.

...

Moreover, it is possible to make a gift ... which will be binding without consideration. It is the promise which is not binding without consideration, not the transfer of property. ... if the subject matter is of such a nature that delivery is not possible, such as a promise, then a deed must be used.¹⁴

Contracts under seal will be discussed further in section II.C.

Another form of contract is referred to as a “unilateral contract”. This is a contract where one party makes a promise or several promises in return for an act, as opposed to a promise, of another party. For example, where a person makes an offer of a reward for the return of a lost item, the person making the offer (known as the “offeror”) will be the only one bound by the offer. No one is obligated to conduct a search for the lost item. However, if upon learning of the offer, someone recovers and returns the lost item, that individual is entitled to the reward.¹⁵ In this type of contract, the offeror makes a promise while the person receiving the offer (known as the “offeree”) is expected to perform an act rather than to make one promise in return. Therefore, this is a:

contract under which only one party undertakes an obligation. ... It is to be noted, though, that the unilateral nature of the contract does not ... mean that there is only one party, nor that there is no need for an acceptance or the provision of consideration by the other party. An example of a unilateral contract may be found in the case of an offer for a reward for the return of lost property: here, a contract is formed (at the latest) on the return of the property, this constituting the offeree’s acceptance of the offer and the furnishing of consideration for the creation of the contract. Bilateral contracts comprise the exchange of a promise for a promise, e.g. if you promise to pay me £1,000, I promise to sell you my car.¹⁶

14. CHUI & ROEBUCK, *supra* note 3, at para. 2.2.

15. 7(2) HALSBURY’S, *supra* note 1, at para. 115.048 explains that the mode of acceptance in a unilateral contract is the performance of his side of the contract by the offeree. The real distinction between bilateral and unilateral contracts lies not in the nature of the act of acceptance, but in whether there is a contract before performance of that act. In a bilateral contract there will be an executory promise by the offeree; in a unilateral contract the promise will be executed the moment it is made.

16. CHITTY, *supra* note 2, at para. 1–079.

One commonly cited example of a unilateral contract is the case of *Carlill v Carbolic Smoke Ball Co*, which is discussed in section III.B.ii.c.

Another type of legally binding agreement is referred to as a “collateral contract”.¹⁷ This type of contract may arise in the course of negotiation of a main contract. A collateral contract is a subsidiary agreement which stands alongside the main contract, in which a party is promised something as an inducement to enter into the main contract.¹⁸ Thus, a collateral contract arises out of, or from, another legally binding agreement, the main contract, and is related to that contract.¹⁹

A collateral contract takes the form of a unilateral contract, under which one party offers that if the second party enters into the main contract, the first party will promise something else to the second party. The consideration for the promise is the making of the main contract.²⁰ In *City & Westminster Properties v Mudd* [1958] 2 All ER 733, the tenant had been sleeping in the shop which he rented. During lease renewal negotiations, the landlord attempted to include a clause stating that the premises should not be used for lodging, dwelling or sleeping. The tenant objected, but was verbally informed that if he signed the lease, he could continue living in the basement. The landlord then attempted to rely on the contract clause to terminate the lease, claiming that the tenant breached the lease agreement by sleeping in the premises.²¹ The court held that the tenant established that the oral promise made to him was part of a collateral contract. Because of the oral promise and in reliance upon it, the tenant had signed the main contract with the landlord.

17. “The word collateral in this context simply indicates a contract which exists alongside a main contract. For instance, a contract of guarantee cannot exist without something to guarantee.” CHUI & ROEBUCK, *supra* note 3, at para. 4.8.

See also MICHAEL J. FISHER & DESMOND G. GREENWOOD, *CONTRACT LAW IN HONG KONG* 166–167 (2nd ed. 2011) [hereinafter FISHER & GREENWOOD].

18. CHUI & ROEBUCK, *supra* note 3, at para. 9.2.6.

19. See 7(2) HALSBURY’S, *supra* note 1, at para. 115.133 which explains a collateral contract thus:

A contract between A and B may be accompanied by a collateral contract between B and C, whereby C makes a promise to B in return for B entering into the contract with A or doing some other act for the benefit of C. Before B can succeed in an action against C for breach of C’s promise, B must prove the following: (1) that C made a promise to B *animo contrahendi* [with the intent of a contracting party]; (2) in reliance on that promise, B entered into the contract with A or did the other requested act. (citations omitted)

20. RICHARD STONE, *THE MODERN LAW OF CONTRACT* 206–207 (8th ed. 2009) [hereinafter STONE].

21. *Id.* at 251.

B. Third Party Contracts and Privity

As discussed below in the section on Consideration, the benefit or the obligation of a contract may be directed to a third party, that is, someone not a party to the contract. A situation such as this might raise enforcement difficulties due to the principle of privity of contract. “Privity” refers to being a party to a contract.

The common law doctrine of privity of contract means that a contract cannot (as a general rule) confer rights or impose obligations arising under it on any person except the parties to it.²²

Thus, the general rule is that no one can sue or be sued on a contract to which that person is not a party. In other words, the provisions of a contract are only applicable to the parties to that contract.

As privity of contract dictates that only a party to a contract can sue or be sued on that contract, this doctrine will not allow a third party, *i.e.*, in other words, a party not involved in the legally binding contractual relationship, to sue either party to the contract. A commonly used example to demonstrate this doctrine assumes that Alan owes a debt to Bob. Alan enters into a valid contract with Calvin to pay Bob. Calvin fails to pay Bob. Under the principle of privity of contract, Bob cannot sue Calvin. Rather, Bob would need to sue Alan who would then sue Calvin.²³

Much has been written about the purpose and application of this principle along with the recourse available to parties such as Bob. Conceptually, the privity doctrine has engendered some debate amongst legal writers.²⁴ This theoretical debate has carried over to the courts which have created ways to circumvent this doctrine, such as the notion of an agent, a trust, and, the application of certain land covenants. Legislation has also been

22. CHITTY, *supra* note 2, at para. 18–003. *Id.* at para. 18–021 states further:

The common law doctrine of privity means ... that a person cannot acquire rights, or be subjected to liabilities, *arising under* a contract to which he is not a party. For example, it means that, if A promises B to pay a sum of money to C, then C cannot sue A for that sum. Similarly, if a contract between A and B contains a term purporting to exempt C from tortious liability to A, the doctrine of privity may prevent C from relying on that term in an action in tort brought against him by A. [emphasis in original]

23. FISHER & GREENWOOD, *supra* note 17, at 432–433, 446.

For a full discussion of this topic, see, *e.g.*, *id.* at Chapter 16 (“Privity of Contract”); CHITTY, *supra* note 2, at Chapter 18 (“Third Parties”).

24. FISHER & GREENWOOD, *supra* note 17, at 431–433.

enacted in order to limit the application of the privity doctrine. For example, in the United Kingdom there is the *Contracts (Rights of Third Parties) Act* 1999. In Hong Kong there is the *Married Persons Status Ordinance* (Cap 182). Additionally, in Hong Kong, the Law Reform Commission has issued a Consultation Paper²⁵ in 2004 and a Report on Privity of Contract²⁶ in 2005 suggesting that Hong Kong consider similar legislation to that found in the UK although to date no action has been taken by the legislature.

C. Formalities/Contracts Required to be in Writing

The most common forms or types of contracts have been discussed above. However, there are other types which, although perhaps not as common as the types of legally binding agreements above, should be mentioned. For these contracts, certain formalities need to be followed as to form or content, a requirement to be in writing or in the execution.

One type of contract requiring particular formalities has been introduced earlier: a contract under seal, also known as a contract made by deed, deed or specialty contract.²⁷ This type of legally binding agreement takes effect through its solemn form rather than through general contract principles. Therefore, a specialty contract must be signed, sealed, and delivered.²⁸ One reason for requiring this form is that a contract made by deed requires no consideration and has the seal of the signer attached. A contract under seal must be in writing and is conclusive between the parties when signed, sealed and delivered. Delivery is made either by actually handing the document to the other party or by stating an intention that the deed be operative even though the deed is kept in the possession of the party signing this document.

25. The Consultation Paper may be found at the following two web sites: <http://www.hkreform.gov.hk> (last visited 1 Feb. 2011) or <http://www.hklii.hk/eng/hk/other/hklrc/cp/2004/2.html> (last visited 1 Feb. 2011). See FISHER & GREENWOOD, *supra* note 17, at 444–449 for a review of the Consultation Paper.

26. The Report may be found at the following two web sites: <http://www.hkreform.gov.hk> (last visited 1 Feb. 2011) or <http://www.hklii.hk/eng/hk/other/hklrc/reports/2005/3.html> (last visited 1 Feb. 2011).

27. See the discussion of this topic on “Consideration” in section III.C and the accompanying footnotes. See also 7(2) HALSBURY’S, *supra* note 1, at para. 115.011.

28. “Delivered” is defined in CHITTY, *supra* note 2, at para. 1–093. See *supra* note 13; HALL, *supra* note 3, at 21. For example, the *Conveyancing and Property Ordinance* (Cap 219) sections 19 and 20, respectively, provide the legal requirements for executing a deed by an individual or by a corporation.

Earlier, a deed was explained as being a legally enforceable agreement without consideration. A contract under seal may also be used where there is consideration.

This has traditionally been done in relation to complex contracts in the engineering and construction industries. This is probably because, by virtue [of the law], the period within which an action for breach of an obligation contained in a deed is 12 years, whereas for a “simple” contract it is only six years. The longer period is clearly an advantage in a contract where problems may not become apparent for a number of years.²⁹

Another category pertains to contracts which must observe some kind of formality (usually that the agreement be written or be written in a particular way) in order to be valid. Thus, for the purposes of this section, these are referred to as “contracts required to be in writing”. These are contracts which are required by law either to be in writing or to be evidenced in writing, *i.e.*, something in writing which proves the existence of the agreement. One of the most common contracts required to be in writing is a legally binding agreement that affects land, *e.g.*, purchase and sale agreements, certain leases, easements and mortgages.³⁰

Examples of contracts which require both a particular formality and a particular content can be found in situations involving a power of attorney (a document which gives one person the right to act on another individual’s behalf) or the employment of an apprentice. The *Powers of Attorney Ordinance* (Cap 31) requires that, under certain circumstances, a written document, such as the form set out in the Schedule, be signed and sealed in the presence of two attesting witnesses.³¹ The *Apprenticeship Ordinance* (Cap 47) requires a contract of apprenticeship to be in writing and in a particular form.³²

Other Hong Kong ordinances which require a legally binding agreement to be in writing or evidenced in writing include the following examples:

- *Arbitration Ordinance* (Cap 609);
- *Bills of Exchange Ordinance* (Cap 19);
- *Companies Ordinance* (Cap 32);
- *Contracts for Employment Outside Hong Kong Ordinance* (Cap 78);

29. STONE, *supra* note 20, at 109. This subject is discussed in terms of the *Limitation Ordinance* (Cap 347) in section VIII.D.

30. *Conveyancing and Property Ordinance*, *supra* note 28, at section 4(2).

31. *Powers of Attorney Ordinance*, at section 2(2).

32. *Apprenticeship Ordinance* (Cap 47) section 8.

- *Marine Insurance Ordinance* (Cap 329); and,
- *Money Lenders Ordinance* (Cap 163).

III. ELEMENTS

In order to have a legally binding agreement, certain requirements must be fulfilled. Those requirements are that:

- the parties must have the intention to create a legal relationship;
- the parties must be in agreement;
- the parties' agreement must be supported by consideration or be made under seal;
- the agreement's terms must be sufficiently certain to enable enforcement; and,
- the parties must have the capacity to enter into a contract.³³

The first three requirements are presented below. The last two requirements of a contract, *i.e.*, certainty of terms and capacity, are discussed in sections IV and V respectively.

A. Intent

For an agreement to be an enforceable contract, the parties must have the intention to create a legally binding relationship. In other words, the parties to the agreement intend it to be enforceable in court. Intention is determined objectively from the circumstances, including the nature of the words used or the conduct of the party making the offer.

In business transactions, there is a presumption that the agreement is intended to be legally binding.

Indeed, the presumption in favour of intention in commercial agreements is so strong that it is rarely challenged. The presumption will be rebutted, however where the commercial agreement clearly states that it does not create legally binding obligations.³⁴

In social or domestic situations, unless the parties state otherwise, the law presumes that such agreements are not intended to be legally binding. *Wu Chiu Kuen v Chu Shui Ching* (1992) HCA 4081/1991, [1992] HKCU 29

33. See, *e.g.*, CHARLES WILD & STUART WEINSTEIN, SMITH AND KEENAN'S ENGLISH LAW: TEXT AND CASES 288 (16th ed. 2010) [hereinafter SMITH AND KEENAN].

34. HALL, *supra* note 3, at 310.

is an example of a social situation where the plaintiff successfully asserted the existence of an intent to create a legal relationship. The case revolved around a *mah jong* parlour patron who purportedly agreed to share any Mark Six lottery winnings with the *mah jong* parlour employee sent to purchase the tickets. The employee contributed one-half the purchase price of the tickets. The court held that the plaintiff rebutted the presumption that this was a social arrangement and found in favour of the plaintiff.³⁵

In the case of *Balfour v Balfour* [1919] 2 KB 571, the court found an agreement for the payment of maintenance between spouses to be unenforceable as it was a domestic agreement. The court presumed that the parties did not intend to create any legal relationship. In the case of *Jones v Padavatton* [1969] 1 WLR 328, the court held that family agreements were dependent upon the good faith of the parties in keeping the promises made and that the parties did not intend to make binding agreements. The case of *Sun Er Jo v Lo Ching* [1996] 1 HKC 1 involved the mother suing her children, particularly one claim for the expenses incurred in raising the youngest child. The court held in relation to the plaintiff's claim for rearing expenses that:

it was right and proper that parents bring up their children and this did not form a basis for a compensation claim. Family arrangements made between parents and children, husband and wife, or brothers and sisters were generally not legally binding, unless it was shown that they have clearly intended to enter into legal relations.³⁶

B. Agreement

There must be an agreement between the parties to a contract before one party can enforce another party's promise.

Agreement is usually reached by the process of offer and acceptance ... the law requires that there be an offer on ascertainable terms which receives an unqualified acceptance from the person to whom it is made.³⁷

Thus, at times, courts will use the offer-and-acceptance approach to determine the existence and also the terms of a contract. Some courts are willing to be flexible where the words and conduct are unclear. These courts would

35. See *id.* at 306–309 for a discussion of this case.

36. [1996] 1 HKC at 3. (Headnotes)

See discussion in HALL, *supra* note 3, at 296–304.

37. 7(2) HALSBURY'S, *supra* note 1, at para. 115.026 (citations omitted).

look at all the circumstances at the time of the agreement to determine whether a contract was formed. However, for certain particular agreements, such as contracts under seal, the identification of offer and acceptance is not necessary.³⁸

Consequently, this chapter uses this offer-and-acceptance approach. The following section concentrates on an offer-and-acceptance analysis. As contracts under seal are, comparatively, less commonly encountered, this type of legally binding agreement is presented in a later section.

i. Offer

An “offer” is a promise to do, or to refrain from doing, something in the future. An offer is also a display of willingness to enter into a contract on specified terms, made in such a way that a reasonable person would understand that an acceptance will result in a legally binding agreement.³⁹ Consequently, once an offer is accepted, a contract exists between the parties.

The party making an offer is the “offeror”, also referred to as the “promisor”. The party to whom this offer is made is the “offeree”, also referred to as the “promisee”. An offer may be made expressly, *i.e.*, by spoken or written words. An offer may also be made impliedly, *i.e.*, by conduct of the parties or by law.

An example of an implied contract by conduct is provided in the following example. A bus arrives at one of its designated stops along its route. A person gets on the bus and pays the specified bus fare. By conduct, the individual and the bus company have entered into a legally binding agreement (exceptions to creating a legally enforceable agreement are discussed later). The agreement in this example is that the person will pay the specified fare and the bus company will convey the person to one of the designated bus stops near the person’s destination.⁴⁰ No words need to be spoken or written in this example.

38. If the contract is a formal written agreement, such as an agreement under seal, it would then be unnecessary to identify the offer and the acceptance. Contracts under seal are comparatively less frequently used and will be discussed later. Also note that the offer-and-acceptance examination by the courts sometimes remain important in determining the terms, rather than the existence, of a written contract.

See CHITTY, *supra* note 2, at para. 2–110 for a discussion of the difficulty in applying an offer-and-acceptance analysis.

39. BLACK’S LAW DICTIONARY, *supra* note 12, at 1111.

40. CHITTY, *supra* note 2, at para. 1–076.

An implied contract by law would involve contract terms imposed by statute rather than negotiated by the parties. Such terms may involve matters such as employment (anti-discrimination), consumer protection, etc.

An offer must be made with the intention that upon acceptance, the offer and acceptance shall become binding in law.

When determining whether an offer had been made, one should identify “an expression of willingness to contract on certain terms made with the intention that it shall become binding as soon as it is accepted by the person to whom it is addressed”. The person effecting such expression is the offeror even though he may not have initiated the contact.

It is difficult at times to determine which statements or which acts constitute an offer. It is particularly difficult where the parties are indiscriminate with the use of words. The test of an offer is the intention of an expression and not the words used.⁴¹

Thus, a statement will not be an offer if it is merely intended to supply information. Merely fixing a price does not imply an offer to buy or sell.

In the case of *Harvey v Facey* [1893] AC 552, Harvey sought specific performance⁴² of an agreement for the sale of a property named *Bumper*

41. Ho, *supra* note 13, at 6.

42. “Specific performance” is defined as an equitable remedy whereby a court orders a party to a contract to specifically perform its obligations under the contract. This type of remedy for breach of contract is discussed later in this chapter.

BLACK’S LAW DICTIONARY, *supra* note 12, at 1297 defines “equitable remedy” as “a non-monetary remedy, such as an injunction or specific performance, obtained when monetary damages cannot adequately redress the injury”.

Id. at 560 defines “equity” as:

- (1) Fairness; impartiality; evenhanded dealing.
- (2) The body of principles constituting what is fair and right; natural law.
- (3) The recourse to principles of justice to correct or supplement the law as applied to particular circumstances.
- (4) The system of law or body of principles originating in the English Court of Chancery and superseding the common and statute law when the two conflict.

As explained by FISHER & GREENWOOD, *supra* note 17, at 13:

The maxims of equity still direct the courts in the exercise of their discretion whether or not to grant equitable relief. The principle that “he who comes to equity must come with clean hands” means that equitable remedies or “relief”, will only be granted to those who have acted fairly in respect of the contract. The principle that “he who seeks equity must do equity” means that equitable relief will be granted only where the claimant is prepared to comply with the requirements of the court to do justice to the other party.

The *BLIS Glossary*, *supra* note 2, translates “equity” as 衡平法, “equitable relief” as 衡平法濟助. “Equitable remedy” is translated as 衡平法補救.

Hall Pen. The issue in this case involved the question of whether a legally binding sale and purchase agreement existed. The events transpired in the following sequence:

- Harvey telegraphs Facey, asking, “Will you sell Bumper Hall Pen? Telegraph lowest price for Bumper Hall Pen.”
- Facey answers, “Lowest price for Bumper Hall Pen [would be] £900.”
- Harvey responds by agreeing to buy the property for Facey’s asking price of £900.

All these telegrams are duly received by Harvey and Facey so that there are no difficulties with communications.

Harvey argued that the telegraph correspondence was an implied acceptance of the first question in the first telegram. The court, however, decided that any contract must be determined from the telegrams, that Facey’s response was a statement of the lowest price at which he would sell, and that the telegrams contained no implied contract to sell to the person making the inquiry.

The court held that there was no contract between these parties for the following reasons:

- The first telegram asked two questions. The first question concerned the willingness of Facey to sell the property to Harvey. The second question asked the lowest price. The word “telegraph” was addressed to only the second question.
- Facey replied to the second question only. By stating that £900 was the lowest price, Facey gave a precise answer to a precise question—the selling price.

Harvey’s next telegram treated Facey’s statement of a £900 sale price as an unconditional offer to sell to Harvey at that stated price.

The court found that Facey’s telegram was only binding on him as to the £900 sale price and that the telegram was merely an offer to sell the property at a price of £900 because all the other terms of purchase were yet to be negotiated. Harvey’s reply telegram could only be treated as an acceptance of Facey’s offer to sell the property at a price of £900. Harvey’s telegram was an offer to purchase the property for £900 to be accepted by Facey. Thus, the contract could only be completed if Facey had accepted Harvey’s last telegram.

a. Bilateral and Unilateral Contract

An offer can be made to a particular person, a particular group of persons or to the public at large. Where it is made to a particular person or a particular group of persons, a contract is formed when the offeree accepts the offer. Such a contract is known as a “bilateral contract”. Bilateral contracts thus are generally formed after negotiations have taken place resulting in a promise in exchange for another party’s promise. Both parties make binding promises, and one promise is consideration for the other promise. As succinctly and simply summarized by one author:

A bilateral contract consists of an exchange of promises. A “bilateral” offer, therefore, seeks a *promise* in return, eg Offer–“I [promise that I] will sell you my car for £500.” Acceptance–“I [promise that I] will pay £500 for your car.”⁴³

As presented earlier, a unilateral contract involves a promise by the offeror followed by performance by the offeree, rather than an exchange of promises. Unilateral contracts may arise in advertisements of rewards, or agreements for contingency fees, e.g., estate broker’s contract. Where an offer is made to the public at large, a contract is formed when anyone performs the act requested in the offer. A contract thus formed is known as a unilateral contract. An offer arising from an advertisement may be an example of a unilateral contract where the offeror may be unaware of acceptance, until an offeree has performed according to the terms of the offer contained in the advertisement. In a unilateral contract only one party makes a promise; the offer is accepted by performing the requested act specified in the offer. The offeree does not make any promise(s). Compare this to a bilateral contract, where negotiations have taken place resulting in a promise in exchange for another’s promise.⁴⁴

43. MARNAH SUFF, *ESSENTIAL CONTRACT LAW 2* (2nd ed. 1997) [hereinafter SUFF].

44. *Id.*

See section III.B.ii.c, “Invitation to Treat”, and the discussion of *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256.

As presented in Ho, *supra* note 13, at 45:

A unilateral contract is a contract whereby one party promises certain consideration to another where such other makes no counter promise and has no obligations but would be entitled to the consideration promised by the offeror if he satisfied the terms of the promise. The common example is the promise of a reward for the return of lost articles or provision of information.

Traditional theory was that the offeror may revoke the offer at any time prior to complete performance, even after the offeree has commenced performance. Today, the commonly accepted view is that the offeror cannot withdraw the offer once the offeree has started to perform the required act.⁴⁵ Further, the offeree is not required to notify the offeror of performance, unless the offeror is located at a distance and would be unaware of the performance. This notice prevents the offeror from entering a contract with another person for the same purpose.

In bilateral, or even multilateral, contract situations, an offer must be communicated to an offeree and an acceptance must be communicated to the offeror. Generally, one cannot accept an offer unless one has knowledge of the offer.⁴⁶ The offer must be directed to a party entitled to accept; others who learn of the offer are not entitled to accept.

b. Termination of Offer

An offer is terminated by:

- revocation by the offeror;
- rejection by the offeree;
- lapse of time;
- death or other incapacity of one of the parties; or,
- where the offer is conditional, failure of the condition to materialize.

The offeror can revoke or withdraw the offer at any time before acceptance is made by the offeree. If the offeror decides to revoke the offer, the notice of revocation must be communicated to the offeree before acceptance.⁴⁷ The offeror, as part of the offer, may dictate the manner through which the offeree must make acceptance.⁴⁸ The general rule is that an acceptance of an offer must be communicated to the offeror before revocation of the offer or before the offer terminates through the lapse of time or

45. FISHER & GREENWOOD, *supra* note 17, at 71–73.

See CHESHIRE, FIFOOT & FURMSTON'S LAW OF CONTRACT 75–78 (M. P. FURMSTON, ed., 15th ed. 2007) [hereinafter FURMSTON].

46. This acceptance must be made with the knowledge of the existence of the offer. The offer must be the reason for the acceptance, and there must be a “meeting of the minds” prior to performance. For example, identical offers, one to buy and one to sell, that “cross” in the mail do not create a contract if neither offer was accepted with the knowledge of its existence. CHITTY, *supra* note 2, at para. 2–027.

47. For further discussion, see, e.g., 7(2) HALSBURY'S, *supra* note 1, at para. 115.039; CHITTY, *supra* note 2, at paras. 2–087 to 2–091.

48. For a detailed discussion, see, e.g., 7(2) HALSBURY'S, *supra* note 1, at para. 115.054; CHITTY, *supra* note 2, at paras. 2–027 to 2–086.

otherwise. (An exception to this general rule is where there is an offer of reward.) Revocation is effective if it is communicated in a manner equal to or greater than the way the offer was publicized, even though the offeree has no knowledge of the revocation.

If an offer has been rejected by the offeree, the offer cannot be later accepted. *Lee Siu Fong Mary v Ngai Yee Chai* [2006] 1 HKC 157 is a recent case upholding this principle. In this case, Lee made loans to Ngai which were only partially repaid. Ngai offered to repay the outstanding amount over six years. Lee rejected the offer. Seven years later, Lee brought a court action to recover the outstanding amount of the loans. Ngai's defence was that Lee waited too long to take court action so that the plaintiff is now time-barred from suing. Lee's counter-argument was that Ngai's offer to repay the loans prevented the defendant from claiming this defence. The court held:

The truth of the matter is that having rejected this offer ... on 21 May 1995 there was no further offer ... from the defendant for the plaintiff to accept later on. There was no evidence that the defendant had intended to leave the offer open so that it may be accepted by the plaintiff at some later time. There was also no evidence that the parties had discussed the time of repayment again after the offer was rejected by the plaintiff.

An offer ... is simply an expression of willingness to contract made with the intention that it is to become binding on the person making it as soon as it is accepted by the person to whom it is addressed ... If the offer was rejected by the plaintiff, she could not unilaterally revive it by saying that she had later accepted it. ...

... the fundamental point is that there must be an offer or representation made by one party for the other party to accept or relied [*sic*] upon. The so-called representation by the defendant in this case was exactly the same offer he had made and rejected by the plaintiff. Once this was rejected then there was nothing for the plaintiff to rely upon ...⁴⁹

c. Options

An "option" is where an offeror promises to keep the offer open for a specified time and the offeree pays for this promise. This is a separate contract, known as a "collateral contract", between the promisor and the promisee

49. [2006] 1 HKC at 161.

that the offer would be kept open for that stated period of time.⁵⁰ The mere promise by an offeror to keep the offer open is not legally binding, as the offeror's promise requires consideration unless the promise is made by deed.

ii. Acceptance

“Acceptance” is the unqualified agreement to the terms made in the offer.⁵¹ Acceptance may be communicated to the offeror orally, in writing, by conduct, or a combination of these. If the offer prescribes a certain method of acceptance, acceptance must be made in the required manner. However, an offeror cannot impose silence as the prescribed method of acceptance. Acceptance of an offer by the offeree must be by genuine consent, *i.e.*, given voluntarily and freely. Acceptance must be unequivocal and unqualified. Any form of conditional acceptance is not acceptance according to the terms of the offer and consequently is not acceptance but is either a rejection of the offer or a counter-offer.⁵²

a. Postal Rule

An exception to the rules of acceptance is the Postal Rule (also known as the Mailbox Rule),⁵³ by which acceptance of an offer by post is deemed

50. The topic of “collateral contract” is discussed in section II.A.

BLACK'S LAW DICTIONARY, *supra* note 12, at 319 defines this term as: “A side agreement that relates to a contract ... an agreement made before or at the same time as, but separately from, another contract.”

51. CHITTY, *supra* note 2, at para. 2–027 (citations omitted).

52. One source notes:

An offer cannot be accepted conditionally; the offeree has power to accept only on the terms stated in the offer and nobody else has any power of acceptance whatsoever. Thus, an attempted acceptance cannot operate as such where it is made subject to some condition, or includes some new or different term; or where the offer is only meant to be accepted by offerees jointly, and is not accepted by all of them. In each of these cases, however, the purported acceptance may amount to a counter-offer, though it will not necessarily do so.

The rule that an acceptance must be unconditional does not necessarily require that there must be a precise verbal correspondence between offer and acceptance. But an acceptance must not introduce any new or different terms; nor leave any material term yet to be agreed; nor may it be made in any manner other than that prescribed in the offer.

7(2) HALSBURY'S, *supra* note 1, at para. 115.056 (citations omitted).

See also HO, *supra* note 13, at 14–16.

53. Although simple in concept, the application of the Postal Rule can become complicated when the time of an offer's acceptance or revocation is at issue, particularly where the letter is mis-directed, delayed or lost. See 7(2) HALSBURY'S, *supra* note 1, at paras. 115.071 to 115.081; CHITTY, *supra* note 2, at paras. 2–048 to 2–050.

to be communicated at the moment the letter containing the acceptance is posted, *i.e.*, placed in the control of the postal service.⁵⁴ This rule also applies to the use of telegrams.⁵⁵ Should the message never arrive, an agreement is nevertheless concluded provided there is no fault on the part of the promisee. An acceptance posted after a rejection (*i.e.*, the offeree had a change of mind) is not effective, until it is actually received by the offeror.

The application of the Postal Rule can become complicated when the time of acceptance or revocation of an offer is in dispute, particularly where the letter is incorrectly addressed, delayed or lost.⁵⁶

However, the Postal Rule does not apply to an acceptance made by methods of instantaneous communication, *e.g.*, e-mail, telephone, telex or facsimile. The rationale for this distinction is that an acceptance of an offer made by such instantaneous or near instantaneous communication methods are usually acknowledged by the recipient.⁵⁷ Further, another authority posits the rationale to be that the offeree would know that the attempt to make acceptance was unsuccessful.⁵⁸ By comparison, a person who makes acceptance by post may never be aware of any loss or delay, and

54. 7(2) HALSBURY'S, *supra* note 1, at para. 115.075 notes:

Ordinarily, a letter is not "posted" until it is put in a Post Office letter box. Thus, the delivery of a letter to a postman outside the course of his ordinary duties is not a posting of the letter, nor will such a letter be assumed to be in the lawful custody of the Post Office as soon as the postman enters the post office. (citations omitted)

Thus, for the purposes of this rule, the acceptance of an offer must be placed in the "control of the Post Office or of one of its employees authorized to *receive* letters. Handing letters to a postman authorised to *deliver* letters is not posting." CHITTY, *supra* note 2, at para. 2-048 (emphasis in original) (citation omitted).

55. For discussion of telegrams, see 7(2) HALSBURY'S, *supra* note 1, at para. 115.080; CHITTY, *supra* note 2, at paras. 2-049, 2-051.

56. See, *e.g.*, FISHER & GREENWOOD, *supra* note 17, at 65-67; STONE, *supra* note 20, at 72-84; CHITTY, *supra* note 2, at paras. 2-058 to 2-064.

57. 7(2) HALSBURY'S, *supra* note 1, at para. 115.072 (citations omitted).

FISHER & GREENWOOD, *supra* note 17, at 65 states:

Email may be thought of as being an instantaneous communication. However, this is not strictly the case, as a message will have to pass through at least one server to reach its target destination. The sender knows that the recipient will only check his mail inbox from time to time. This means there will usually be a delay before it is read. Similarly, with telephone answering machines, the sender knows that the message has not been instantaneously received by the offeror. ... given that the courts have shown a reluctance to extend the postal rule to other areas, it is far more likely that emails and similar will be viewed as subject to the normal rules; acceptance taking effect when and where notice of acceptance is received.

58. CHITTY, *supra* note 2, at para. 2-050.

may not have the opportunity to correct the problem in time. Therefore, instantaneous communications are normally governed by the general rule that an acceptance must be actually communicated to and received by the offeror.⁵⁹

An application of these principles is found in *Susanto-Wing Sun Co Ltd v Yung Chi Hardware Machinery Co Ltd* [1989] 2 HKC 504. This case involved two contracts for the sale of products by the defendant to the plaintiff. The defendant in Taiwan faxed each of the two agreements to the plaintiff in Hong Kong. Immediately upon receipt of each agreement, the plaintiff accepted the agreement by signing and faxing it back to the defendant.

59. In relation to acceptance made by e-mails, see Hong Kong's *Electronic Transactions Ordinance* (Cap 553) which provides that acceptance by e-mail will be effective only when received, unless the parties have agreed otherwise. In particular, section 19 of this Ordinance states in full:

- (1) Unless otherwise agreed between the originator and the addressee of an electronic record, an electronic record is sent when it is accepted by an information system outside the control of the originator or of the person who sent the electronic record on behalf of the originator.
- (2) Unless otherwise agreed between the originator and the addressee of an electronic record, the time of receipt of an electronic record is determined as follows—
 - (a) if the addressee has designated an information system for the purpose of receiving electronic records, receipt occurs—
 - (i) at the time when the electronic record is accepted by the designated information system; or
 - (ii) if the electronic record is sent to an information system of the addressee that is not the designated information system, at the time when the electronic record comes to the knowledge of the addressee;
 - (b) if the addressee has not designated an information system, receipt occurs when the electronic record comes to the knowledge of the addressee.
- (3) Subsections (1) and (2) apply notwithstanding that the place where the information system is located is different from the place where the electronic record is taken to have been sent or received under subsection (4).
- (4) Unless otherwise agreed between the originator and the addressee, an electronic record is taken to have been—
 - (a) sent at the place of business of the originator; and
 - (b) received at the place of business of the addressee.
- (5) For the purposes of subsection (4)—
 - (a) if the originator or the addressee has more than one place of business, the place of business is that which has the closest relationship to the underlying transaction, or where there is no underlying transaction, the principal place of business of the originator or the addressee, as the case may be;
 - (b) if the originator or the addressee does not have a place of business, the place of business is the place where the originator or the addressee ordinarily resides.

The court held that:

It appears however, that the contracts were concluded in Taiwan and not in Hong Kong; because it was in Taiwan that the communication of the plaintiff's acceptance of the offer was received by the defendant. The rule relating to communications by telex is now well settled and the same rule must ... apply to communications by facsimile. The general rule is that as between ... [the parties] the contract, if any, is made when and where the acceptance is received ... the rule to which I have referred applies to instantaneous communication between principals.⁶⁰

The Postal Rule can be excluded by the offeror expressly or impliedly.

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- (6) Where the originator and the addressee are in different time zones, time refers to Universal Standard Time.

CHITTY, *supra* note 2, at paras. 2-050 to 2-051 states:

The posting rule does not apply to acceptances made by some "instantaneous" mode of communication, e.g. by telephone or by telex. The reason ... is that the acceptor will often know at once that his attempt to communicate was unsuccessful, so that he has the opportunity of making a proper communication. A person who accepts by a letter which goes astray, on the other hand, may not know of the loss or delay until it is too late to make another communication. Such instantaneous communications are therefore governed by the general rule that an acceptance must be actually communicated, subject to the other exceptions to that rule stated in para. 2-047 above.

It is now uncommon for acceptances to be made by telegram or telemessage dictated over the telephone and there is no authority on the question whether such an acceptance takes effect when the message is dictated by the sender or when it is communicated to the addressee. It is submitted that such an acceptance should, in accordance with the above reasoning, take effect as soon as it is dictated; for if it later goes astray, the acceptor is unlikely to have any means of knowing this fact until it is too late to make a further communication. Fax messages seem to occupy an intermediate position between postal and instantaneous communications. The sender will know at once if his message has not been received at all, or if it has been received only in part, and in such situations the mere sending of the message should not amount to an effective acceptance. It is also possible for the entire message to have been received, but in such a form as to be wholly or partly illegible. Since the sender is unlikely to know, or to have means of knowing, this at once, it is suggested that an acceptance sent by fax might well be effective in such circumstances. The same reasoning should apply to messages sent by electronic means, e.g. by e-mail or in the course of website trading; here again the effects of unsuccessful attempts to communicate should depend on whether the sender of the message knows (or has the means of knowing) at once of any failure in communication. (citations omitted)

See also HALL, *supra* note 3, at 35-36.

60. [1989] 2 HKC at 506.

b. Counter-offer

A “counter-offer” usually operates as a rejection of the original offer and the making of a new offer by the offeree. Withdrawal of the counter-offer does not revive the original offer such as to enable the offeree to accept the same. However, a request for information by the offeree is not a counter-offer. As the court explained in *Stevenson, Jaques & Co v McLean* (1880) 5 QB 346, the solicitation of information is “a mere inquiry which should have been answered and not treated as a rejection of the offer.”⁶¹ In this case, the defendant offered to sell 3,000 tonnes of iron at forty shillings per tonne. The offer remained valid until Monday. The plaintiff sent its first telegram early Monday requesting, “Please wire whether you would accept forty [shillings per tonne] for delivery over two months, or if not what is the longest limit you would accept.” Receiving no reply, the plaintiff later that day sent a second telegram indicating acceptance at forty shillings cash. In the interim, the defendant had sold the goods elsewhere without informing the plaintiff until after the plaintiff had sent the second telegram. The court found that a contract existed between the plaintiff and the defendant.

c. Invitation to Treat

An “invitation to treat” is a request for an offer, *i.e.*, an invitation to make an offer.⁶² An invitation to treat is a negotiating statement which does not show an offeror’s intent to give an offeree the power to create a contract. For example, customers are invited to offer to buy, and traders keep to themselves the power to choose whether to accept that offer. Merely fixing a

61. (1880) 5 QB at 350.

62. One source explains:

An invitation to treat is a mere declaration of willingness to enter into negotiations; it is not an offer, and cannot be accepted so as to form a binding contract.

In practice, the formation of a contract is frequently preceded by preliminary negotiations. Some of the exchanges in these negotiations contain no declaration at all, as where one party simply asks for information. Others may amount to invitations to the recipient to make an offer, these being invitations to treat.

Thus, a distinction must be drawn between those declarations which amount to offers, and those which only amount to invitations to treat. Sometimes, a particular type of declaration is, at least *prima facie*, put into one or the other category by statute or by common law; but in all other cases it is a question of intention. An express statement that a declaration is not an offer is effective to prevent it being an offer ...

7(2) HALSBURY’S, *supra* note 1, at para. 115.028 (citations omitted).

price does not imply an offer to buy or to sell. Consequently, the display of goods by a merchant, price-lists, circulars and advertisements for goods and services are normally construed as invitations to treat.⁶³

The *BLIS Glossary*, *supra* note 2, translates “common law” as 普通法 and “rules of the common law” as 普通法規則.

Similarly, *CHITTY*, *supra* note 2, at paras. 2–008 to 2–010 states:

A communication by which a party is invited to make an offer is commonly called an invitation to treat. It is distinguishable from an offer primarily on the ground that it is not made with the intention that it is to become binding as soon as the person to whom it is addressed simply communicates his assent to its terms. A statement is clearly not an offer if it expressly provides that the person who makes it is *not* to be bound merely by the other party’s notification of assent but only when he himself has signed the document in which the statement is contained.

Apart from cases of the kind just described, the wording of a statement does not conclusively determine the distinction between an offer and an invitation to treat. Thus a statement may be an invitation to treat although it contains the word “offer”; while a statement may *be* an offer although it is expressed as an “acceptance,” or although it requests the person to whom it is addressed to make an “offer.” ...

... the distinction between offer and invitation to treat is often hard to draw, as it depends ... on the intention of the person making the statement in question. (emphasis in original)

63. In the case of *Fisher v Bell* [1961] 1 QB 394 the court held that the display of a knife in the shop’s window was an invitation to treat. If the display were an offer, the shopkeeper would have been in violation of the *Restriction of Offensive Weapons Act*.

A similar situation arose in the earlier case of *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd* [1953] 2 WLR 427. The facts of this case involved customers selecting goods from the shelves and going to the cashier to make payment. By the check-out was a registered pharmacist who could prevent the removal of certain drugs from the store. Boots Cash Chemists was charged under an English statute requiring a registered pharmacist to “supervise sale”. The issue in this case was whether the display of goods on the shelves of this self-service store was an offer or an invitation to treat. If the display were an offer, then a customer’s act of removing the goods from the shelf and placing them in the shopping basket would constitute acceptance. The sale would, therefore, take place without the requisite supervision so an offence would be committed under the statute. The court held that the display amounted only to an invitation to treat. The court reasoned that if the display of goods were an offer, a customer, upon placing the goods in the basket, could not then have a change of mind and substitute the goods for other goods without being liable to pay for the goods originally chosen. This would not be viable commercially for self-service stores as customers would be too afraid to patronize them. Moreover, in theory, the shopkeeper should be able to refuse to sell the goods when presented to the cashier since shops were places to bargain over prices. However, this view was overruled in the case of *Debenhams Retail Plc v Commissioners of Customs and Excise* [2005] EWCA Civ 892. *FISHER & GREENWOOD*, *supra* note 17, at 46–49. See *HALL*, *supra* note 3, at 53–55 for discussion of two similar cases in Hong Kong: *HKSAR v Wan Hon Sik* [2001] 3 HKLRD 283; and, *HKSAR v Yu Wai Chuen* [2002] 2 HKLRD 347. Further examples may be found in 7(2) *HALSBURY’S*, *supra* note 1, at para. 115.029; *Ho*, *supra* note 13, at 7; *FURMSTON*, *supra* note 45, at 39–47; *CHITTY*, *supra* note 2, at paras. 2–011 to 2–024.

The distinction between an offer and an invitation to treat lies in the intention or absence of intention to be bound as soon as the addressee accepts the terms stated. The distinction is that the offeror in making an offer shows an intention to be bound. An individual issuing an invitation to treat is making an invitation to the addressee to negotiate rather than an invitation to communicate an acceptance.⁶⁴

At times it may be difficult to distinguish an offer from an invitation to treat. In *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256 a manufacturer published an advertisement during an influenza epidemic, proclaiming the virtues of its product for curing ailments. The manufacturer further stated that anyone who bought one of its smoke balls, used it as directed, and then caught influenza, would be paid £100. Mrs. Carlill bought and used a smoke ball, but nevertheless caught influenza. She claimed £100 from the company. The defendant argued that the advertisement should not be considered to be an offer which would create a contract upon acceptance. The court, however, considered that since the advertisement stated the company had deposited £1,000 in its bank in order to show its sincerity, reasonable people could consider this as indicating the promise to pay £100 was serious, and that this act created a binding obligation.

Thus, whether an advertisement constitutes an offer will depend upon its wording and its natural meaning. If an advertisement is very specific and clear, it may amount to an offer, which may be accepted without qualification. An offer in this manner may be accepted by anyone, unless there is some restricted class of persons to whom the advertisement is directed. Even then, any member of that class may accept.

However, one source notes:

Some recent developments have had the effect of altering traditional rules, as for example as has occurred in the case of a tender. Generally, the tender process is treated as three distinct parts: the invitation to treat by the party inviting tenders, the offers from those interested and the acceptance by the invitor of one of those offers. Acceptance results in a binding contract on the terms set out in the invitation to treat. In several cases, various courts have re-categorised the invitation to treat as an offer. This means there are two possible contracts. The first is the traditional contract which arises under the tender. The second is a collateral contract under which the invitor acts as an offeror because he expressly or by implication agreed to consider all offers. Failure to do

64. Ho, *supra* note 13, at 7.

so gives rise to action for damages for loss of chance. As a corollary, the party submitting the tender may not be able to withdraw.⁶⁵

Similarly, in auctions, the auctioneer invites bids. Each potential buyer makes an offer by making a bid, which the auctioneer must accept when the auctioneer's hammer falls. A buyer may withdraw the offer at any time before the hammer falls.⁶⁶ If the bid is withdrawn, it does not revive an earlier bid by another buyer. Thus, the bidding must restart. At an auction, the auctioneer's invitation for bids is impliedly made "with reserve" allowing the auctioneer to remove the item for auction if a sufficient price is not bid. If, however, an auction is expressly made "without reserve", the auctioneer cannot withdraw the item unless no bid was made.⁶⁷

A recent case demonstrates these principles as well as offering a preview of the principles reviewed in the following sections of this chapter and the Property chapter. *Hoie Sook Fong v Ismail Halima* [2009] 1 HKC 326 involved the sale of land by an auctioneer whose authority to sell the property had been revoked for advertising the property below the owner's stated minimum price, also known as the "reserve" price. The plaintiff was the successful bidder of that flat being sold by the auctioneer on behalf of the owner. The plaintiff's successful bid was HK\$1.88 million while the owner had set a reserve price of HK\$1.98 million. The plaintiff sought to

65. 16 HALSBURY'S LAWS OF HONG KONG para. 230.147 (2010) (citing *Lobley Co Ltd v Tsang Yuk Kiu* [1997] 2 HKC 442; *Blackpool and Fylde Aero Club v Blackpool Borough Council* [1990] 1 WLR 1195; *City Polytechnic of Hong Kong v Blue Cross (Asia-Pacific) Insurance Ltd* [1994] 3 HKC 423; *City University of Hong Kong v Blue Cross (Asia-Pacific) Insurance Ltd* [2001] 1 HKC 463).

66. *Payne v Cave* (1789) 3 TR 148. In Hong Kong, auctions are regulated by two ordinances: *Sale of Goods Ordinance* (Cap 26) and *Sale of Land by Auction Ordinance* (Cap 27). Section 60 of the *Sale of Goods Ordinance* provides:

In the case of a sale by auction—

- (a) where goods are put up for sale by auction in lots, each lot is prima facie deemed to be the subject of a separate contract of sale;
- (b) a sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made any bidder may retract his bid;
- (c) where a sale by auction is not notified to be subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ any person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller or any such person. Any sale contravening this rule may be treated as fraudulent by the buyer;
- (d) a sale by auction may be notified to be subject to a reserve or upset price, and a right to bid may also be reserved expressly [by] ... seller.

67. For further discussion, see, e.g., HALL, *supra* note 3, at 63–67.

enforce the purported purchase and sale agreement signed with the auctioneer at the conclusion of the bidding.

In deciding this case, the court relied upon these legal principles:

1. An agent, including an auctioneer, who sells property without or in excess of authority will be liable to the purchaser in damages for breach of the implied warranty that he possesses the authority exercised.
2. It is trite that if the authority of the auctioneer to sell a property has in fact been revoked by the vendor before the auction, the auctioneer can give the highest bidder no right to the property, even though the bidder is unaware of the revocation.
3. Where a reserve price has been fixed by the seller and the sale is subject to a reserve, the auctioneer has no authority to sell below that reserve price. If the auctioneer does so, no contract is concluded as all bids amount to conditional offers and any acceptance is similarly conditional on the reserve price being reached or exceeded.⁶⁸

The court held that the owner revoked the auctioneer's authority to sell the property; therefore, the auctioneer did not have the capacity to enter into a purchase and sale contract with the plaintiff on the owner's behalf. The judge also found the auctioneer liable to the plaintiff in damages for the breach of warranty of authority to sell the flat. Finally, this case demonstrates that a dispute can involve overlapping fields of law, in this instance: contract, agency and conveyancing.

C. Consideration

The case of *Currie v Misa* (1875) LR 10 Ex 153 defined "consideration" as some right, interest, profit or benefit accruing to one party; or, some forbearance, detriment, loss or responsibility given, incurred or undertaken by the opposite party.⁶⁹ In other words, consideration may be a party's promise to perform some act or to refrain from performing some act. The case of *Dunlop Pneumatic Tyre Co v Selfridge & Co* [1915] AC 847 also defined "consideration" as:

68. [2009] 1 HKC at 330 (citations omitted).

69. (1875) LR 10 Ex at 162.

For examples of benefits to the promisor or detriments to the promisee, see 7(2) HALSBURY'S, *supra* note 1, at paras. 115.112–115.113 respectively.

The *BLIS Glossary*, *supra* note 2, translates "consideration" as 代價.

Chapter Three

Employment

This chapter considers several matters relating to employment law.¹ The first concerns the classification of a worker as an employee, for this classification governs the responsibilities and liabilities of the parties between themselves and others. The second is a review of relevant ordinances and their subsidiary regulations controlling the employer-employee relationship. Finally, this chapter proffers some general comments concerning employment contracts.

I. STATUS OF A WORKER

The status of a worker as an employee or as an independent contractor is important as this distinction determines an employer's obligations and responsibilities to those retained by the employer, and to those affected by the employee's acts. The parties in an employer-employee relationship are also affected by the application of certain ordinances,² the jurisdiction of

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1. This work will not consider agency law, that is, the law regulating the relationship between a principal and its agent who may act on behalf of and bind the principal. For a review of agency law in Hong Kong, see, e.g., 1(2) HALSBURY'S LAWS OF HONG KONG paras. 15.001–15.108 (2008); BETTY HO, HONG KONG AGENCY LAW (1991). For an analysis of the impact of vicarious liability upon an agency relationship, see, e.g., RICK GLOFCHESKI, TORT LAW IN HONG KONG 439–442 (2nd ed. 2007) [hereinafter GLOFCHESKI–TORT]. The Hong Kong government's Bilingual Laws Information System's *The English-Chinese Glossary of Legal Terms* [hereinafter *BLIS Glossary*] translates “law of agency” as 代理法; and, “agents” as 代理人. See the *BLIS Glossary* website at: <http://www.legislation.gov.hk/eng/glossary/homeglos.htm> (last visited 26 Feb. 2011).
 2. For example, the *Employment Ordinance* (Cap 57); the *Employees' Compensation Ordinance* (Cap 282); the *Companies Ordinance* (Cap 32); and, the *Bankruptcy Ordinance* (Cap 6) only apply to instances where an employer-employee relationship exists.

the employment regulatory agencies,³ the higher duty of care which exists towards employees under the law of tort,⁴ the existence of vicarious liability,⁵ the terms of the employment contract,⁶ the taxation system,⁷ the operation of the Mandatory Provident Fund Schemes,⁸ and, an employer's insolvency.⁹

3. For instance, the Labour Tribunal can only hear claims relating to a contract of employment. The *Labour Tribunal Ordinance* (Cap 25) section 7 provides that the Tribunal has exclusive jurisdiction to hear the claims specified in the Schedule, which relates to employment contracts only.

Section 7 provides:

- (1) The tribunal shall have jurisdiction to inquire into, hear and determine the claims specified in the Schedule.
 - (2) Save as is provided in this Ordinance, no claim within the jurisdiction of the tribunal shall be actionable in any court in Hong Kong.
 - (3) Subsection (2) shall not operate to prevent the transfer of any claim to the tribunal in accordance with any rules made under section 73B of the District Court Ordinance (Cap 336).
 - (4) Subsection (2) shall not operate to prevent the transfer of any claim to the tribunal in accordance with any rules made under section 73C of the District Court Ordinance (Cap 336).
 - (5) Subsection (2) shall not operate to prevent the transfer of any claim to the tribunal in accordance with any rules made under section 73D of the District Court Ordinance (Cap 336).
 - (6) Subsection (2) shall not operate to prevent the transfer of any claim to the tribunal in accordance with any rules made under section 73E of the District Court Ordinance (Cap 336).
4. Common law requires an employer to take reasonable care for the employee's safety, whereas these duties are not normally applicable to independent contractors. The *BLIS Glossary*, *supra* note 1, translates "common law" as 普通法; "employee" as 僱員; and, "independent contractor" as 獨立承辦商.
5. Employers are vicariously liable for the tortious acts of their employees if these acts occur while the employees are serving in the course of their employment. The *BLIS Glossary*, *supra* note 1, translates "tortious act" as 侵權作為; "tort" as 侵權; and, "vicariously" as 因他人作為而.
6. Implied terms of an employment contract impose obligations upon employers and upon employees which obligations may not be owed to or by an independent contractor. See also the obligations imposed by the *Employment Ordinance*, *supra* note 2.
7. Different assessments and different reporting requirements are imposed upon the parties, e.g., an employee is liable to pay salaries tax whereas an independent contractor is liable to pay profits tax. For details, see Part 3 ("Salaries Tax") and Part 4 ("Profits Tax") of the *Inland Revenue Ordinance* (Cap 112).
8. Under an employer-employee relationship, both the employer and the employee must contribute to the employee's Mandatory Provident Fund Scheme. An independent contractor is a self-employed person, and is required to contribute to the Mandatory Provident Fund Scheme. For details, see the *Mandatory Provident Fund Schemes Ordinance* (Cap 485).

For example, the Hong Kong government's web site contains the following definitions:

Relevant Employee: A relevant employee means an employee aged 18 to aged below 65. A relevant employee may be a regular employee or a casual employee.

The classification of a worker as either an employee or as an independent contractor is therefore an important matter for the parties involved. Distinguishing between an employee and an independent contractor can be a difficult task.¹⁰ This section sets out the differentiation between the

Regular Employee: A regular employee refers to any full-time and part-time worker who is aged 18 to aged below 65 employed under an employment contract for a continuous period of not less than 60 days.

Casual Employee: A casual employee is an employee aged 18 to aged below 65 working in the construction or catering industries under an employment contract of less than 60 days. Industry Schemes of the MPF System are established specially for employees in the two industries.

Employer: An employer means a person who has entered into a contract of employment to employ another person as his or her employee.

Self-Employed Person (SEP): A self-employed person is a person aged 18 to aged below 65 whose income is derived from the production of goods or services in Hong Kong, or from trading in goods or services in or from Hong Kong. To put it simply, a self-employed person is one that works for himself or herself and is not employed as an employee. Essentially, if you are a sole proprietor, or partner of a partnership type business, you will be regarded as a self-employed person covered by the MPF System.

http://www.mpfa.org.hk/english/abt_mpfs/abt_mpfs_fms/abt_mpfs_fms_def/abt_mpfs_fms_def.html (last visited 6 Jan. 2011).

9. When an employer becomes insolvent, the unpaid wages and salary of its employees stand in priority to other debts, that is, the employees will be paid out of the employer's assets before other creditors. The contract fees for independent contractors, if unsecured, will have the lowest priority in cases of insolvency. *See, e.g., the Bankruptcy Ordinance, supra* note 2, at section 38.
10. For example, in the case of *Chan Sik Pan v Wylam's Services Ltd* [2000] 1 HKLRD 687, 689 the court stated that this case "would be a mundane personal injury claim but for issues relating to employment of the plaintiff at the time of the accident." The judge continued:

... Windsor House in Causeway Bay, was being re-fitted ... The general contractor had a main sub-contractor for electrical and mechanical work. This main sub-contractor further sub-contracted the fire installation work to the first defendant. According to the first defendant, it appointed one Joe Wong trading in the name of United Company as its agent for such work. Joe Wong on behalf of the first defendant "sub-delegated" part of the work to the second defendant. The second defendant says that he sub-sub-contracted work to the third defendant and so he (the second defendant) had no relationship with the workers like the plaintiff. The third defendant says he was at the material time not a sub-sub-contractor. He (the third defendant) merely supervised the workers like the plaintiff and the work at site.

The plaintiff ... had no idea as to all the contractual relationships between the defendants and other superior contractors. According to him, an old friend telephoned him about work available at the site. He went and reported to the third defendant. He regarded the third defendant as the foreman. It was the third defendant who handed him wages in cash twice a month on pay day. The plaintiff had no dealing or knowledge of the other defendants until after the accident. It is undisputed fact that after the accident the first defendant filed a statutory industrial accident report (Form II) with the Labour Department.

two classifications and the guidelines for determining the actual status of a worker.¹¹

A. Employee or Independent Contractor

Historically, an employer and an employee were considered to have a master-servant relationship, but today this affiliation has become commonly

This Form II is the form that an employer must file on every industrial accident that has occurred to a worker under his employ. After filing the report, months later, the first defendant twice reached a written agreement with the plaintiff on the amount of allowance payable under the Employees' Compensation Ordinance (Cap 282). And the allowance was paid to the plaintiff as agreed.

...

To complicate matters further, neither the second defendant nor the third defendant is covered by any employee compensation insurance. Only the first defendant took out compulsory employee compensation insurance; but because there is evidence that the first defendant sub-contracted work to other parties, the insurers of the first defendant deny that the plaintiff is covered by the insurance of the first defendant. ...

Id. at 690–691.

For a practical guide to employment agreements, see, e.g., *DRAFTING EMPLOYMENT CONTRACTS* (MICHAEL PATTERSON, ed., 1993).

11. As noted earlier in this work, frequently the fields of law, in this instance contract, tort and employment, overlap and each should not be viewed in isolation. This section is a prime example in that while discussing employment relationships in order to determine tort liability, contract matters arise:

A point that should not be overlooked in the contract of service/independent contract determination is the intention of the parties. A contract for work, whether as servant or independent contractor, is a contract all the same. The intention of the parties in forming their legal relationship will be given due and normally considerable weight. Where the parties have entered into a written contract, the determination is, in the first instance at least, one of construction of the contract. However ... it is the substance of the agreement that will be determinative, so much so that even an apparently agreed designation as independent contractor will, in appropriate circumstances, be set aside by the court ...

GLOFCHESKI–TORT, *supra* note 1, at 413.

Likewise, 10(2) HALSBURY'S LAWS OF HONG KONG para. 145.001 (2009) [hereinafter 10(2) HALSBURY'S] notes that the:

legal basis of employment remains the contractual relationship between the employer and the employee. The contract of employment is important in itself, in that it may give rise to a common law or equitable action for its enforcement or for damages for its breach but it is equally important in areas of statutory employment law because the expressions 'employee', 'employer' and 'contract of employment' are defined by reference to the contractual relationship between the parties as recognized at common law. (citations omitted)

See 10(2) HALSBURY'S, *supra*, at paras. 145.019–145.026 for a review of the formalities of an employment contract and paras. 145.027–145.033 concerning the terms of employment.

known as an employer-employee relationship. In this relationship, the employee undertakes to provide labour or services in exchange for regular remuneration by the employer. This relationship is created by a contract of service through which the employer retains the worker. Employees dedicate themselves exclusively to their employer's business for the duration of the employment contract.¹²

An independent contractor is retained under a contract *for* services, e.g., for the provision of a particular service. The independent contractor is employed from outside the employer's organization for the purpose of producing a specific result, for which the independent contractor is generally paid a lump sum fee. The independent contractor's performance of the assigned task need not be supervised by the employer. Generally, there is no obligation upon the independent contractor to provide services exclusively to the employer.¹³

B. Criteria for Determining Status

Several criteria are used to distinguish between an employee and an independent contractor. Nevertheless, despite these indicators, ascertaining the parties' relationship can be complicated. At times, it is difficult to draw a distinction between an employee and an independent contractor. For example, chauffeurs, ships' captains, or staff reporters on a newspaper are generally considered to be employees. Yet taxi drivers, ship's pilots, or newspaper columnists who contribute regular articles may be independent contractors.¹⁴

Several court cases demonstrate the difficulty in determining whether a worker is an employee or is an independent contractor. The first of these cases is *Mersey Docks & Harbour Board v Coggins & Griffith* [1947] AC 1. The court used the control test to ascertain the employment relationship between the parties. According to this test, there is an employer-employee relationship if an employer exercises control over what a worker can do and how that work is done. An independent contractor relationship exists where an employer assigns a task to a person but does not determine the manner in which the work is executed. The control test is whether the

12. See HONG KONG EMPLOYMENT LAW MANUAL (MICHAEL DOWNEY, gen. ed., 2010) [hereinafter DOWNEY] §§A.7–A.12 (“Who Is An Employee?”) and §§A.13–A.15 (“Who Is An Employer?”). See also EMPLOYMENT LAW AND PRACTICE IN HONG KONG para. 2.005 (RICK GLOFCHESKI, et al. eds., 2010) [hereinafter GLOFCHESKI–EMPLOYMENT].

13. See, e.g., GLOFCHESKI–EMPLOYMENT, *supra* note 12, at paras. 2.006, 2.010.

14. *Stevenson, Jordan & Harrison v McDonald & Evans* [1952] 1 TLR 101, 111.

employer has the right of ultimate control in instances where the nature of a person's work is too technical or skilful for an employer to exercise day-to-day control.¹⁵

The second case is *Stevenson, Jordan & Harrison v McDonald & Evans* [1952] 1 TLR 101, where the court used the integration test, also known as the organization test, to determine the parties' relationship.

His Lordship pointed out that under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business; whereas under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it.¹⁶

Thus, under a contract of service, the person is employed as part of the business organization; under a contract for services, the worker is not integrated into the business but is only supplementary thereto.

In the third case, *Wong Po-Sin v New Universal Paper Co Ltd* [1973] HKLR 59, 72–73, the court provided factors to be considered in ascertaining the type of employment relationship between the parties:

- Selection: if an employer has the power or the right to select the individual to work for the employer, whether the selection is made personally by the employer or through the hiring party's agent, the relationship is likely to be that of a master-servant.

15. For further discussion of the control test, see, e.g., GLOFCHESKI—EMPLOYMENT, *supra* note 12, at para. 2.015.

16. KRISHNAN ARJUNAN & ABDUL MAJID BIN NABI BAKSH, *BUSINESS LAW IN HONG KONG* 561–562 (2nd ed. 2009) [hereinafter ARJUNAN & NABI BAKSH].

As noted by one authority:

Subsequently, the “organisation” approach came to be preferred by the courts, partly as a response to changes in management and organisational structures. Many workers in more advanced work settings exercised a high degree of independence and judgment in their work, but nonetheless did not enjoy the kind of managerial autonomy and self-determination associated with true independent contractors. Under the organisation approach, a contract of service would be found if the work was done as “part and parcel of the employer's organisation” subject perhaps to control of the employer as to when and where, although not necessarily as to how, the work would be done. ... This approach, although a helpful addendum to the control approach, ran the risk of including too many, for example, subcontractors repeatedly employed on the employer's building sites.

GLOFCHESKI—EMPLOYMENT, *supra* note 12, at para. 2.016 (citations omitted). See also GLOFCHESKI—TORT, *supra* note 1, at 409.

- Power of dismissal: if an employer has the power to dismiss a person, this power is more likely to indicate an employer-employee relationship.
- Remuneration: if a worker is paid periodic wages or a salary which is calculated by reference to piece work or time worked, the relationship is likely to be that of an employer-employee. If a worker is paid a commission or a lump sum, that person is more likely to be considered to be an independent contractor.
- Performance: if at least part of the work is performed by the individual alone or independently, *i.e.*, if a worker could delegate the entire performance of work to another person, this would indicate the existence of a contract for services.
- Exclusive services: an employer may require the exclusive services of its employees. A person is thus likely to be an employee if while at work there is only one employer. If an individual simultaneously works for several employers, that person is likely to be an independent contractor.
- Place of work: if an individual's services are to be performed at the employer's premises rather than at the worker's premises, the individual is more likely to be an employee.
- Where a person's services cannot be considered to be conducted as part of an independent business would suggest the status of an employee rather than an independent contractor.
- Supply of equipment: the obligation to provide tools or equipment for a worker indicates an employer-employee relationship whereas an independent contractor would provide its own tools.
- Hours of work: if the employer determines the working hours, the worker is likely to be an employee. If the individual determines the working hours, the worker is likely to be an independent contractor.
- Type of work: where the worker is engaged generally without reference to any particular task or outcome, the relationship is more likely to be that of an employer-employee.¹⁷

17. To this list, one might add another factor: internal rules such as a personnel manual. If the worker is subjected to the internal rules of the business organization, then that person is likely to be an employee.

For another, but similar, list of factors or guidelines, see GLOFCHESKI-EMPLOYMENT, *supra* note 12, at paras. 2.021-2.041; 10(2) HALSBURY'S, *supra* note 11, at para. 145.003; DMITRI M.A. HUBBARD, HONG KONG EMPLOYMENT LAW 32 (2009) [hereinafter HUBBARD].

The classification which the parties give to their relationship may also be a factor which courts may consider in establishing the employment relationship. The parties' contract might contain terms which would indicate the intention to create either a contract of service or a contract for services. However, the classification is not conclusive unless the labelling indicates the parties' genuine intention at the time of making the contract.

Although a term in a written contract will carry considerable weight in the court's determination of the plaintiff's status, it will not be conclusive. The court will look to the substance of the arrangement, and have close regard to the circumstances of the making of the contract. The court will not enforce a sham contract, particularly where the sole purpose appears to be the employer's avoidance of liabilities.¹⁸

Whether part-time interviewers of a company were employees of that company was the issue in the case of *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173. The judge introduced the economic reality test: whether the person engaged to perform services will be performing these services as a person in business on his/her own account. The Hong Kong Court of Appeal in *Wong Man-luen v Hong Kong Wah Tung Stevedore Co* [1971] HKLR 390 followed the decision in *Market Investigations*. Control of the individual, although a factor, was not decisive. The fundamental test was whether a person was performing the services as a "person in business on his own account" and thus under a contract for services. The status of being in business on one's own account implies the possibility of loss as well as profit in the enterprise.

These criteria do not provide definitive determinations; the criteria serve merely as guidelines. A court needs to consider all the relevant factors,

18. GLOFCHESKI—TORT, *supra* note 1, at 349. See, e.g., GLOFCHESKI—EMPLOYMENT, *supra* note 12, at paras. 2.004, 2.039–2.041.

In the case of *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497, 512, the court stated that whether:

the relation between the parties to the contract is that of master and servant or otherwise is a conclusion of law dependent upon the rights conferred and the duties imposed by the contract ... it is irrelevant that the parties have declared it to be something else ... If it were doubtful what rights and duties the parties wished to provide for, a declaration of this kind might help in resolving the doubt and fixing them in the sense required to give effect to that intention.

See also the Hong Kong case *Young and Woods Ltd v West* [1980] IRLR 201. However, note that the matter remains unsettled as two Privy Council cases each came to a different conclusion. See the cases of *Lee Ting Sang v Chung Chi-keung* [1990] 2 AC 374; *Cheng Yuen v Royal Hong Kong Golf Club* [1997] 2 HKC 426. See also the case of *Poon Chau Nam v Yim Siu Cheung* [2007] 1 HKLRD 951; ARJUNAN & NABI BAKSH, *supra* note 16, at 566–572.

including the totality of the facts of each particular case.¹⁹ Courts emphasize that there is no comprehensive list of factors and that this list excludes other considerations or indicia.²⁰ Ascertaining a worker's employment status cannot be made by compiling a checklist or by tallying the factors falling in one category or the other.²¹

19. As noted by one authority:

Today, the courts are inclined toward a more flexible, pragmatic approach in characterising the relationship as one of contract of service or independent contract. The court will look into the substance of the relationship, taking into consideration the peculiarities of the work and the realities of the workplace, even to the point where apparent "agreements" between worker and employer, purporting to designate the relationship as one of independent contract, will be disregarded. Control is probably in most cases still the single most important consideration, but the court will look at all the circumstances of the relationship between defendant and worker in deciding this issue. ... Particular attention will be paid to economic considerations, such as the worker's opportunity to control the rate of income or profit by virtue of his/her own efforts. The relevant question becomes: Is the worker a businessperson? Is the worker in business on his/her own account?

GLOFCHESKI—TORT, *supra* note 1, at 409–410.

GLOFCHESKI—EMPLOYMENT, *supra* note 12, at para. 2.027 provides clarification of "being in business on one's own account":

Financial risk and the prospect of profit is an often misunderstood head. It does not normally include a piece-worker's opportunity to increase his income by working harder. Nor should it be understood as meaning that a worker with management responsibilities is self-employed. It means expending one's own energies and putting one's own financial resources as risk in the business enterprise, with the possibility of financially benefitting or suffering from one's own management decisions. (citations omitted)

In determining whether a worker is an employee or an independent contractor, another authority opines:

There is no single test for determining whether a person is an employee. The test which used to be considered adequate, that is to say the control test, can no longer be considered sufficient, especially in the case of the employment of highly skilled individuals. The control test is now only one of the particular factors which may assist a court or tribunal in deciding the point. The question whether the person was integrated into the enterprise or remained apart from and independent of it has been suggested as an appropriate test, but is likewise only one of the relevant factors, for the modern approach is to examine all the features of their relationship against the background of the indicia of employment with a view to deciding whether, as a matter of overall impression, the relationship was one of employment.

10(2) HALSBURY'S, *supra* note 11, at para. 145.003 (citations omitted).

20. GLOFCHESKI—EMPLOYMENT, *supra* note 12, at para. 2.017.

21. *Id.*

it is impossible to *define* a contract of service in the sense of stating a number of conditions which are both necessary to, and sufficient for, the existence of such a contract.²²

After the decision in *Wong Sai-yee v Kong Kwan* [1988] 1 HKLR 367, the Court of Appeal seems to emphasize the following criteria as the more important of the many tests for ascertaining contracts of service:

- the power of control, as distinct from the actual exercise in fact of control;
- the “part and parcel of the organization” test;
- the financial risk, if any, of the worker; and,
- as a corollary of the financial risk aspect, any indicia as to whether the worker was carrying on business for his/her own account.²³

Courts presently adopt a pragmatic test of considering all features of the particular relationship in determining the parties’ employment relationship. Some Hong Kong court cases follow the approach in *Wong Po-sin v New Universal Paper* of examining all the indicia as a whole rather than applying any particular test.²⁴ However, other court decisions, such as *Lee Ting Sang v Chung Chi-keung* [1990] 2 AC 374, PC and *Chan Shui Man v Tsang Hing Shan* [1991] 2 HKC 243, CA, suggest that the economic reality test used in the *Market Investigations* case represents the correct current approach. The economic reality test contributes to the task of distinguishing between employees with contracts of service and independent contractors with contracts for services. In the circumstances of individuals carrying on a profession or vocation, the courts will review the extent to which an individual relies upon a particular paymaster for the financial exploitation of the worker’s talents.²⁵ Since the importance to be given to the various factors depends on the facts of each case, the approach is therefore flexible, but vague.

The case of *Cheng Yuen v Royal Hong Kong Golf Club* [1997] 2 HKC 426 is an example illustrating the difficulty in classifying a worker’s status. The golf club assigned a number, a locker and a uniform to the plaintiff caddie. He could work when he wished. However, the plaintiff caddie went to the

22. P.S. ATIYAH, VICARIOUS LIABILITY IN THE LAW OF TORTS 38 (1967) [hereinafter ATIYAH] (approved in *Construction Industry Training Board v Labour Force Ltd* [1970] 3 All ER 220, 226).

23. G.R. McCORMICK, *Employees’ Compensation: Employee or Independent Contractor*, 21 HKLJ 109, 111 (1991).

24. See the cases of *Poon Chau Nam v Yim Siu Cheung*, *supra* note 18; *Li Chung-i v Li Man-yuen* [1991] 2 HKLR 138; *Wong Sai-yee v Kong Kwan* [1988] 1 HKLR 367.

25. *Hall v Lorimer* [1994] 1 All ER 250.

club daily where he offered his services to golfers. The golf club did not guarantee that the caddie would receive any work, although it was agreed that he would average two rounds a day. At the end of each day he was paid in cash by the club. The club then debited the member concerned who repaid the club.

The Labour Tribunal determined that the golf club exercised control over the caddie by providing him a uniform, giving instructions as to his duties and the disciplinary power to reduce a caddie in grade or to dismiss him. The club benefited indirectly from the payment and collection of fees paid to the caddie. These factors outweighed the inference to be drawn from the fact that he did not receive benefits normally provided by an employer to an employee, e.g., insurance coverage, holidays, sick leave, and, pension scheme. The Labour Tribunal concluded that the caddie was an employee of the golf club.

Ultimately, the Privy Council determined the arrangement between the parties to be a licence by the club to allow the caddie to offer his services on terms dictated by the administrative convenience of the club and its members. The controls were merely the club's administrative measures. There was no obligation between the parties such that the club would employ the caddie and that he would work for the club in return for a wage. On the contrary, the individual golfers were responsible for the caddie's fees; although as a convenience the club collected the fees and paid them to the caddie. It was the golfers who instructed the caddie as to his tasks during the round of golf. Therefore, the Privy Council held the caddie to be an independent contractor rather than a club employee. Lord Hoffmann dissented from the majority opinion, stating that the caddie, though not under continuous employment, ought to be considered a casual employee rather than an independent contractor as the caddie could claim payment from the golf club even if the golfer did not pay the club.

In the case of *Wong Ki v Shun Tak Electrical Mechanical and Engineering (Hong Kong) Co Ltd* [2009] HKEC 595, the court, in deciding whether the injured plaintiff was an independent contractor or an employee, stated:

7. The parties in this case, as laymen, have expressed confusion and bewilderment over the question of when a worker is, in law, an employee, and when he is an independent contractor. They may get some comfort from the fact that often, lawyers are just as confused, and that the question cannot be easily answered by the courts.
8. The modern approach to the question whether a person is an employee, as adopted in the case of *Poon Chau Nam [v. Yim Siu Cheung]* (2007) 10 HKCFAR 156] itself, is to examine all the

features of their relationship against the background of the indicia of employment with a view to deciding whether, as a matter of overall impression, the relationship was one of employment, bearing in mind the purpose for which the question is asked.

...

42. The authorities are clear that it is for the court and not the parties to evaluate the facts and determine the legal relationship between them, such that the parties' own description of their relationship is not determinative (*Chan Kwok Kin v. Kwok Kwan Hing* [1991] HKLR 631).

The case of *Leung Suk Fong Peggy v Prudential Assurance Co Ltd* [2011] HKEC 1297 involved the issue of whether the defendant insurer's engagement of the plaintiff amounted to an employer/employee relationship. The court determined the plaintiff's status to be an independent contractor upon an analysis of the following criteria:

- extent of control;
- prospect of profit return and risk of loss;
- integral part of the organization;
- provision of equipment;
- incidence of taxation and insurance;
- the parties' view of the relationship; and,
- the traditional structure of the particular trade.

Distinguishing between an employee and an independent contractor is also important as an employer has liability for certain acts committed by its employees. This accountability rests upon one of two bases. The first basis upon which an employer might be found liable is for the breach of a non-delegable duty owed to an employee. This personal duty imposes upon an employer the obligation to take reasonable care for the employee's safety.²⁶ An employer ought to undertake precautions which a reasonable employer would assume in order to ensure that the employee is not exposed to unreasonable risks. The second basis of employer liability might arise under the head of vicarious responsibility to another party for the employee's negligence. The two following sections review these liabilities in the above order.

26. See, e.g., 10(2) HALSBURY'S, *supra* note 11, at paras. 145.051–145.053 (employers' obligations for employees' safety), 145.589–145.595 (compensation for injuries and employers' bankruptcy) and citations contained in those two sections. Vicarious liability and non-delegable duties are also discussed in the Tort chapter, sections V.A and V.C respectively. Vicarious liability is discussed in this chapter's section II.C. Non-delegable duties are discussed in this chapter's section II.D.

Chapter Four

Property

This chapter is concerned with property, its definition and the general principles of property law. Both personal and real property will be examined. The chapter consists of two major sections: The first section focuses both on personal and on real property. This discussion regarding real property includes a review of freehold and leasehold estates, and co-ownership. Subsequently, the second section focuses on land-related issues, such as fixtures, adverse possession, servitudes and mortgages. These issues are followed by a detailed reference to conveyancing: the process of creation and transfer of interests in real property. This chapter concludes with an overview of the new land registration system under development in Hong Kong.

In preparing this work, it is assumed that the reader has some knowledge of contract law as most transactions concerning property involve legally binding agreements.

I. PROPERTY GENERALLY

This section is the introduction to property in general. Here the matters relating to property are reviewed: definition of property; ownership of property; acquisition and disposition of property; and, some general rules about property. Later, the detailed aspects of what is commonly known as real estate are reviewed.

The definition of “property” used in this chapter is: title to, or, rights of, ownership in goods or other valuables. “Title” means one’s right to property, or the evidence of that right to property. “Ownership” means the complete and the exclusive right to control property, subject to law.¹

1. For a general introduction to personal property, see, e.g., BRUCE WELLING, PROPERTY IN THINGS IN THE COMMON LAW SYSTEM (1996); MICHAEL BRIDGE, PERSONAL PROPERTY LAW (3rd ed. 2002); SARAH WORTHINGTON, PERSONAL PROPERTY LAW: TEXT AND MATERIALS (2000); SIMON GLEESON, PERSONAL PROPERTY LAW (1997).

In Hong Kong, the *Interpretation and General Clauses Ordinance* (Cap 1) provides the following definitions:

“immovable property” (不動產) means –

- (a) land, whether covered by water or not;
- (b) any estate, right, interest or easement in or over any land; and
- (c) things attached to land or permanently fastened to anything attached to land;

“movable property” (動產) means property of every description except immovable property;

“property” (財產) includes –

- (a) money, goods, choses in action and land;
- (b) and obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property as defined in paragraph (a) of this definition.²

The concept of property includes the notion of ownership or title. Ownership involves certain rights.³ Someone who owns property has the following rights:

- to use the property
- to enjoy the property aesthetically (e.g., works of art)
- to destroy the property
- to dispose of the property
 - by gift
 - by succession,⁴
 - through a testamentary document known as a will made by the testator⁵ or by intestacy,⁶ through the probate court’s application of the laws of intestate succession⁷

2. *Interpretation and General Clauses Ordinance* (Cap 1) section 3.

The *Official Solicitor Ordinance* (Cap 416) section 2(6) translates “property vested in” as 轉歸予... 的財產.

3. See 20 HALSBURY’S LAWS OF HONG KONG para. 295.027 (2010) [hereinafter 20 HALSBURY’S].

4. L.B. CURZON & P.H. RICHARDS, *THE LONGMAN DICTIONARY OF LAW* 560 (7th ed. 2007) [hereinafter CURZON] defines “succession” as:

- (1) The order in which persons succeed to property, or some title.
- (2) Term applied to the estate of a deceased person.
- (3) Process of becoming entitled to property of a deceased by the operation of law or will.

5. *Wills Ordinance* (Cap 30) section 2 provides: “‘will’ (遺囑) includes a codicil and any other testamentary instrument or act, and ‘testator’ (立遺囑人) shall be construed accordingly.”

- by sale
- by abandonment⁸

These rights of ownership of property may be acquired through one of the following methods:

- original, *i.e.*, taking possession of property which has never been owned⁹
- taking property which has been abandoned by the original owner
- creation or invention, *i.e.*, creating property such as when a carpenter creates a piece of furniture from raw materials¹⁰
- derivatively:
 - by sale/purchase of the property
 - by gift of the property
- succession: either in accordance with a will or the laws of intestacy if the person died without a will

Note that some methods of disposing of property by one person may also be the manner through which property is obtained by another person. For example, property may be disposed of by gift and can be acquired by gift. The sale of property by the original owner may result in the purchase of the same property by a new owner. As a final example, a person may come into ownership of property abandoned by the original owner.

With ownership comes the right of control. However, ownership and possession may be exercised independently. Property may thus be controlled by a person who exercises fewer rights than an owner, but who nonetheless may control access to and use of the property. This person has possession of the property. This concept of possession of personal property is discussed immediately below. Real property is discussed in section II below.

6. See generally *Intestates' Estates Ordinance* (Cap 73). *Id.* at section 2(1) translates “intestate” as 無遺囑者.

7. The Hong Kong Government’s *Bilingual Laws Information System’s English-Chinese Glossary of Legal Terms* [hereinafter *BLIS Glossary*] translates the term “succession” as 死亡繼承. See <http://www.legislation.gov.hk/eng/glossary/homeglos.htm> (last visited 26 Feb. 2011).

See also the Law Reform Commission of Hong Kong, *Report on Law of Wills, Intestate Succession and Provision for Deceased Persons’ Families and Dependents* (Topic 15) (1990).

8. “Abandonment of goods takes place when possession of them is quitted voluntarily without any intention of transferring them to another.” 20 HALSBURY’S, *supra* note 3, at para. 295.025.

9. Defined as “occupancy”. See *id.* at para. 295.036.

10. See also *id.* at para. 295.037.

Index

- acceptance 13, 19–24, 26, 31 n. 62, 31 n. 63, 32, 34, 63, 65, 74, 83, 86 n. 196, 87, 91, 403, 418, 491
 - communication of 24, 26–29, 32
 - email, by 27, 28 n. 59
 - fax, by 27–29
 - implied 22
 - post, by 26–29
 - telegram, by 27, 29 n. 59, 30
 - telephone, by 27, 29 n. 59
 - of risk 180, 204
- accord and satisfaction 41 n. 86, 42–45, 46, 163 n. 103
- act of God 138, 191–192, 224–225
- act of stranger/act of trespasser 224–225
- adverse possession 371, 432–434
 - defined 432
 - dispossession of owner 232, 378, 433
 - limitation period 433
 - periodic tenancy 402–403, 416, 426, 428
 - servitudes 444–445
 - tenancy at will 401–405
 - trespass 432
- agreement
 - discharge of contract by 40, 43–45, 48, 110–111, 482
 - legally binding 9–11, 14–20, 22, 26, 37, 44, 49, 50, 53–54, 70–71, 73–74, 83, 103, 131, 177 n. 130, 346, 371, 482–483, 488–489
- air, right to flow of 410, 435
- animals, ownership of 437
- annexation, *see also* fixtures
 - degree of 429–432
 - purpose of 429, 432
- apprentices, *see* apprenticeship; *see also* contract, employment
- apprenticeship 17, 284, 350
 - compensation insurance 331, 349 n. 201
 - contract of 17, 284, 287 n. 81, 290 n. 83, 312 n. 134, 350
 - form of contract 17, 350
 - hours of employment 284, 350
 - training of apprentices 350
- assault 136, 137, 226–228, 252–253
- assignment
 - contract 110–111, 202 n. 203
 - property 380, 397, 413–415, 420, 422, 441, 448–453, 456–458, 459 n. 273, 464, 465 n. 287, 467 n. 291, 471, 473, 476–477, 479, 483 n. 331, 492, 497, 503, 505 n. 377, 506–509, 513, 515 n. 405, 518–530, 532, 534–535
- assumption of risk 177–181, 204, 206
- bailment 65, 374–375, 377
- bankruptcy
 - composition with creditors 44–45
 - voluntary arrangement 45 n. 95

- battery 133, 136, 137, 157, 226–228, 234, 252–253
- beneficial interest/beneficial owner 379, 437, 522 n. 422, 523 n. 424, 524 n. 425, 525–526
- breach of contract
 - anticipatory 111–113, 116 n. 281, 117
 - condition 54 n. 119, 55, 58, 61, 117, 353, 407, 413 n. 128, 419–420, 514
 - damages for 33–34, 54 n. 119, 55, 58, 61, 113, 117–126, 353, 407, 413 n. 128, 419–420, 514
 - discharge of contract by 111–113, 117–118
 - fundamental 56, 60, 112–113, 117 n. 283
 - minor 60, 107–108
 - warranty 61, 108, 113, 117, 410 n. 110 and n. 111
- breach of statutory duty 137, 139, 140 n. 35, 160, 174 n. 125, 184, 185 n. 151, 187–192, 267, 271–274, 281 n. 67, 316, 326
- capacity to enter into contract 18, 24, 34, 71–73, 465 n. 285, 483
- causation 150, 158–162, 163, 164, 164 n. 106, 166 n. 109 and n. 110, 167 n. 111, 175 n. 127, 176, 251, 326
- certainty of terms in contract 18, 19, 21, 49–51, 59, 70, 86 n. 196, 400–401, 483, 493 n. 358
- charge, *see also* mortgage
 - creation 450 n. 254, 451, 456
 - defined 380, 381, 451
 - distinguished from mortgage 452
 - equitable 453, 455
 - floating 532, 533 n. 443
 - legal 380, 381, 457 n. 266, 459 n. 273, 461 n. 277, 477 n. 316, 524 n. 425, 526
 - remedies on default 457 n. 266, 463
- chattels
 - defined 378
 - distinguished from fixtures 428, 429–430, 431
 - personalty 377–378, 387 n. 45, 393, 432
 - tests for 429–430, 431
- choses in action 372
- collateral contract 14, 25, 26 n. 50, 32, 52 n. 112, 55 n. 120, 78 n. 172, 105 n. 240, 125, 452, 485, 493 n. 358
- compensation, *see* damages; employees
 - compensation insurance
- competition against employer by employees 355–356, 360–369
- completion 464, 473, 492, 496, 497, 498 n. 365, 499–501, 504, 505, 506, 508, 510, 511, 513–517, 521, 521, 522 n. 422, 525, 530 n. 434, 531
 - formal 497, 528–529
 - by undertaking 497, 528–529
- composition agreement 44–45
- composition with creditors, voluntary arrangement 44–45
- concurrent condition 55 n. 119
- condition – contract
 - generally 24, 26, 34, 36 n. 79, 47, 53, 54–58, 60 n. 135, 61, 62, 69, 108, 117, 410 n. 111, 493, 495
 - concurrent 55 n. 119
 - contingent 54 n. 119
 - precedent 54 n. 119, 107, 466 n. 291, 490–491
 - subsequent 54 n. 119
- conditions – property
 - of exchange 465 n. 288
 - of extension 465 n. 288
 - of grant 465 n. 288

- of re-grant 465 n. 288
- of sale 465 n. 288, 378 n. 318
- confidential business information, protection of 360–369
- confidentiality in employment relationship 360–369
- confirmation/confirmor 498 n. 365, 515, 521, 522–523, 524 n. 425, 526
- consent scheme, *see also* ownership scheme 464 n. 283, 473–474, 482, 494
- consent to be legally bound 73–106, 483
- consideration
 - adequacy 36–38
 - defined 34–35
 - executed 35 n. 71, 38,
 - executory 35 n. 71, 38
 - existing obligations 38–42, 43
 - forbearance to sue 34, 35
 - love and affection, invalid as 38
 - nominal 124 n. 299
 - past 37 n. 77, 38–39
 - performance of existing duty 38, 39–41
 - promisee, must move from 35–36
 - promissory estoppel 46 n. 100, 47–48
 - real 35, 39–42
 - sufficiency of 36–37
- continuous employment 257 n. 8, 265, 288 n. 81, 290–296, 300–301, 304 n. 112, 308, 319, 320 n. 145
- continuous and apparent easements, *see also* easements 441
- contra proferentem* rule 59, 63, 66, 81 n. 182, 516
- contract
 - defined 9–10
 - evidenced in writing, required to be 10 n. 5, 11–12, 16–18, 110, 127, 181 n. 141, 351, 402 n. 79, 406, 483
 - types of contracts, *see* forms of contracts
- contract, employment 345–369
 - apprentices 17, 284, 287 n. 81, 290, 312, 331, 349 n. 201, 350
 - continuity 291–293, 294 n. 98, 320
 - contract for service 259–262
 - contract of service 258 n. 11, 259–260, 262–264, 331 n. 162, 349 n. 201, 353
 - effect of labour action on 293 n. 93, 305 n. 114, 357 n. 223
 - employee's obligations under 352–357, 362
 - employment outside Hong Kong 17, 289 n. 83, 290 n. 84, 350–351
 - evidenced in writing, required to be 350–351
 - restrictive covenants in 355–356, 360–369
 - termination 283, 288 n. 81, 294 n. 98, 295 n. 100, 296, 297–308, 320, 348 n. 196, 353 n. 212, 360–369
- contract for services, *see also* contract, employment 259–263
- contract of services distinguished 258 n. 11, 259–264
- contract law and tort, compared 130–132
- contract of service, *see also* contract, employment 258 n. 11, 259–264, 331 n. 162, 349 n. 201, 353
- contractors, independent 259–267, 268–269, 271, 273, 279–283, 311
 - distinction between employees and 258 n. 11, 259–264
 - exclusion from no-fault compensation scheme 270–271
 - sub-contractors, to pay employees of 334–335

- contributory negligence 137, 171–176, 177 n. 130, 178, 179 n. 135, 191, 206, 272 n. 45, 273–274
- conversion 253, 376
- co-ownership
 - creation 388–391
 - determination 391–392
 - rights 385
 - survivorship, right of 385, 387
 - unity of possession 386, 389
- corporeal, *see also* hereditament 377–378
- covenants, relating to land 434 n. 203, 447 n. 246
 - breach of 407 n. 105, 409, 414–415, 419, 421–422
 - defined 407
 - distinguished from conditions 407
 - for further assurance 525–526
 - for quiet enjoyment 408–409, 492 n. 357, 525–526
 - for title 456, 492 n. 357, 524, 526
 - restrictive 435, 447–449, 508 n. 385
 - running with the land 448–449, 478 n. 318, 480, 524 n. 425
- covenants, relating to leases
 - distinguished from conditions 407
 - usual 408, 414
- criminal law and tort 130–134, 137, 218, 220, 223, 226–229
- custodian 374
- damages
 - aggravated 162, 163 n. 103, 224, 226, 246, 247 n. 344, 253–254
 - assessment of 77, 119, 121, 122 n. 293, 324 n. 153, 161, 163, 167 n. 110, 175 n. 126, 217, 246 n. 340, 250, 253–254, 325 n. 153, 336 n. 170, 511–513
 - breach of contract, for 33, 34, 54 n. 119, 55, 56, 58, 60, 72 n. 158, 77, 78 n. 172, 79, 81, 82, 94–95, 108, 110, 111 n. 269, 112–113, 118–126, 507–518
- classification 121–124, 162–171, 244–254, 507–514
- exemplary 134 n. 12, 244, 246, 247, 254, 322 n. 151, 409
- general 168 n. 114, 246–247, 248 n. 347, 253
- mitigation of 118–120, 248–249, 513
- nominal 121, 124, 232, 249, 252, 252, 511
- punitive 121–122, 135 n. 12, 244
- remoteness of
 - in contract 119–120, 122 n. 293
 - in tort 163–165, 166 n. 109, 251 n. 360, 511
 - special 189, 211, 219, 223, 232, 236 n. 307, 237, 244, 246, 248, 253
- daylight conversion 538
- deed under seal, contract 11–13, 16–17, 18, 20, 36, 45, 124, 126, 171
- deed, property
 - mortgagee's right to hold 462
 - necessity to create legal interest 518–520
 - registration 439
- deed of mutual covenant, *see also* multi-storey buildings 472, 474, 475 n. 311, 476–482, 504, 525, 527
- deed registration system, *see also* registration 531, 535, 537–538
- defamation 135 n. 12, 139, 140 n. 35, 185, 235–244
 - causing publication 235–237, 240
 - fair comment 235, 242
 - justification 241
 - libel 235–236, 240 n. 318, 243 n. 329
 - privilege
 - absolute 241
 - qualified 235, 241
 - publication 235, 237, 239, 240, 243 n. 329, 244

- slander 235–237, 240 n. 318, 243 n. 329, 244
 - goods 235 n. 301, 237 n. 308
 - title 235 n. 301, 237 n. 308
 - malicious falsehood 235 n. 301 and n. 302, 237 n. 308
 - unintentional defamation 242–243
- defence against enforcement of
 - contract, *see* vitiating a contract, grounds for
- derogation
 - from grant 409–410, 440, 443
 - of easements from grant, *see* easements
- determination
 - easement 445–447
 - alteration, by 447
 - effluence of time, by 446–447
 - lease 401 n. 76, 402–404, 405 n. 92, 416–424, 426–428, 470 n. 298
 - licence 396–398
- discharge of contract by
 - agreement 110–111
 - frustration 114–116
 - performance 106–110
 - repudiation 111–113
- discrimination in employment 253, 285, 291 n. 84, 346–349
- dismissal from employment
 - redundancy 295 n. 100
 - summary 304, 353–354
 - wrongful 306 n. 116, 308
- doctrine of lost modern grant 444
- dominant tenement, *see also* easements 435–440, 442–447
 - alteration of, determination 447
- duress 37 n. 76, 42, 92–95, 111 n. 269
- duty of care 82, 132 n. 6, 141–152, 161–163, 165, 166 n. 109, 167 n. 111, 168 n. 112, 169 n. 115, 170, 176 n. 129, 180 n. 136, 189 n. 162, 210 n. 231, 256, 375
 - breach of 152–158, 163
 - personal duty 190, 266, 279–282
 - mitigation of 248–249
 - to employees 190 n. 165, 192–193, 267–269, 275, 281 n. 66, 326, 331 n. 161
 - to independent contractors 193, 256
 - to visitors 194, 196–197, 198 n. 190, 199, 200 n. 194, 202 n. 203, 204, 206 n. 214 and n. 219, 207–208
- duty of fidelity 354, 356, 361, 362, 364
- duty to act 150–151, 207 n. 222, 460 n. 276
- easement 17, 372, 381, 410, 432 n. 198, 434 n. 203, 435–437, 439–447
 - air, flow of 410, 435
 - common intention 442–443
 - continuous and apparent 441
 - creation 435–436
 - defined 435–436
 - derogation from grant 410, 440, 443
 - dominant tenement 435, 436–437, 440, 442, 443
 - abandonment of, determination by 445–446
 - alteration of, determination by 446, 447
 - effluence of time, determination by 446–447
 - equitable 448
 - express grant 439
 - express release 445
 - express reservation 439–440
 - extinguishments 445–447
 - implied grant 440–445
 - implied release 445–446
 - implied reservation 443
 - legislation 439, 445
 - lie in grant 437
 - light, right to 435
 - lost modern grant 444, 445

- necessity, of 440, 441–442, 443
- negative 435, 447–448
- non-use 445–446
- positive 435, 447
- prescription 443–445
- privity of contract 448
- quasi 440–441, 443
- release 445–446
- requirements 436, 437, 441
- servient tenement 435, 436, 437, 440, 443, 446
- statutory 439, 445
- support, right of land for 435
- term of years 439, 446
- unity of possession 445, 446
- unity of ownership 445, 446
- Walsh v Lonsdale*, rule in 519 n. 417
- water, right to 437–438
- wayleave 439
- Wheeldon v Burrows*, rule in 440
- economic duress 42, 93–94
- effect of labour action on employment, *see also* contract, employment 293 n. 93, 305 n. 114, 357 n. 223
- effluence of time, determination by easements, *see also* easements 446–447
- egg-shell skull rule, *see also* thin skull rule 157, 166 n. 110
- elements of a contract 18–42, 49–51, 71–73
 - capacity 33–34, 71–73
 - certainty of terms 49–51
 - consideration 34–42
 - existence of agreement 19–34
 - invitation to treat 30–34
 - offer and acceptance 20–26, 26–30
 - intention to be legally bound 18–19
 - employer's liability 192–194, 267–283
 - employee
 - competing against employer 355–356, 360–369
 - distinguished from independent contractor 186, 256 n. 4, 257–259
 - obligations to employer 352–357, 360–369
 - tests to determine status as 259–266
 - employee's obligations under employment, *see also* contract, employment 352–357, 360–369
 - employer's liability to independent contractors, *see also* contractors, independent 193–194, 256, 269, 279–283
 - employment outside Hong Kong, *see also* contract, employment 289 n. 83, 290 n. 84, 350–351
 - encumbrances, *see* charge, easement, mortgage, *profit a prendre*, restrictive covenant
 - equitable easement, *see also* easements 448
 - equitable estoppel 46–48
 - estate agent
 - generally 23, 57, 75 n. 164, 464 n. 283, 506, 512, 513 n. 400
 - role of 464 n. 283, 485, 486–487
 - estates
 - co-ownership 384–388
 - creation of 388–391
 - determination of 391–392
 - types of 384–388
 - exclusive possession 393, 395 n. 65, 396, 398–400, 425 n. 169, 434, 465 n. 287, 471, 475 n. 311, 476, 527 n. 428
 - freehold
 - conditional fee simple 383–384
 - determinable fee simple 383–384
 - fee simple 382–384
 - fee tail 384
 - land 371, 377, 378 n. 24, 380, 382–384
 - life estate 384

- leasehold, *see also* leases 392–394, 400 n. 74, 401, 406, 428, 448, 450, 452
 - privity of 413, 456
- estoppel 46–48, 420, 421 n. 154, 422, 520, 537
- exclusion from no-fault compensation scheme, *see also* contractors, independent 270–271
- exclusive possession 393, 395 n. 65, 396, 398–400, 425 n. 169, 434, 465 n. 287, 471, 475 n. 311, 476, 527 n. 428
- exemption (exclusion, exception or limitation) clause 53, 62–69, 70 n. 153, 77, 81 n. 183, 82, 119, 126, 170, 177 n. 130, 177, 179 n. 136, 180, 204–205, 207
- express grant, *see also* easements 439
- express release, *see also* easements 445
- express reservation, *see also* easements 439–440
- express terms, *see also* terms 11, 20, 49, 52–54, 70 n. 153, 111 n. 269, 117, 504, 505, 507, 509, 516–517, 518, 528 n. 429
- extinguishment of easement, *see also* easements 445–447
- false imprisonment 92, 136, 137, 226, 228–229, 234–235, 252
- fee simple 382–384, 444
- fee tail 382, 384
- Finder Doctrine 375–377
- fixtures 428–432, 505
 - distinguished from fittings 428–430
 - right to remove 430–431
 - ownership of 428, 430
- foreseeability, *see also* negligence 99 n. 228, 115 n. 279, 121, 136 n. 17, 139, 142, 143–144, 146, 148–155, 157–158, 159, 164–165, 166 n. 109, 167 n. 111, 168 n. 112 and n. 114, 169 n. 115, 176 n. 129, 182, 191, 214, 221 n. 254, 225, 226, 245 n. 337, 331 n. 161, 511
- forfeiture
 - of deposit by purchaser 123, 126, 489, 490, 496, 499, 506–507, 511, 514–516
 - as landlord's remedy 407, 414 n. 128, 415, 419–422, 426, 427, 470 n. 298
 - tenant's relief from 420–422
- formal sale and purchase agreement, *see also* sale and purchase agreement 490–492, 493–507, 514
- forms of contracts
 - collateral contract 14, 25, 32, 52 n. 112, 78 n. 172, 105 n. 240, 125, 452, 485, 493 n. 358
 - contract of record 11
 - contract under seal 11, 12, 16, 17, 36, 45
 - deed, *see also* contract under seal 405, 407 n. 103, 518
 - open contract 414, 485, 491–4 n. 240, 106, 108–109
 - severable 103, 104 n. 238, 105 n. 240, 106, 108–109
 - simple contract 11, 17, 126, 171 n. 122, 184 n. 148
 - specialty contract, *see* contract under seal
 - unilateral contract 13–14, 23, 35 n. 71
- freehold estates 371, 377, 378 n. 24, 380, 382–384, 392, 393, 403 n. 83, 428, 450, 465 n. 284, 492 n. 357, 539 n. 479
- frustration 61, 83, 106 n. 246, 114–116, 409

- government leases 408 n. 106, 433
n. 198, 446, 464, 465 n. 286,
466–467, 469, 471
- health and safety at work 192–193, 272,
290 n. 84, 311–327
employee's obligations 314, 318
employer's common law obligations
192–193
employer's statutory obligations 314,
316–318, 320, 326–327
- hereditaments
defined 377–378
corporeal 377
incorporeal 377–378
- holidays with pay 286 n. 81, 291 n. 85,
294, 309
- illegal and void contracts 37 n. 77,
103–106, 349, 483, 508
- implied grant, *see also* easements
440–445
- implied release, *see also* easements
445–446
- implied reservation, *see also* easements
443
- implied term, *see also* terms 52–53,
69, 84, 102, 117, 179 n. 136,
205 n. 209, 256 n. 6, 268, 290
n. 84, 485 n. 340, 354 n. 213,
362–363, 397, 413, 529 n. 430
- in personam* 378–379, 393
- in rem* 378, 393
- incapacity, *see also* capacity to enter into
contract; vitiating a contract,
grounds for 24, 72 n. 157, 116
- incorporation of owners 472, 474–475
- incorporeal, *see also* hereditament
377–378
- independent contractor, *see also*
employee
tests to distinguish from employee
186, 256 n. 4, 257–259
- inevitable accident 182, 192, 225
- infant, *see* adverse possession; minors;
and purchasers, as
- injunction, defined 45 n. 98, 132 n. 8,
354 n. 212, 362 n. 237, 414
n. 130, 415 n. 130
- innominate term, *see also* terms 53,
56–58, 60–61
- intangible property 377
- intent to create legally binding relation-
ship 12, 14 n. 19, 16, 18–19, 21,
25, 31 n. 62, 32, 37, 70–71, 262,
483, 488–493
- intentional tort 63, 136, 137, 226–229,
229–235
- interpretation of contract 59–62
- invitation to treat 30–34
- joint tenancy
four unities 386, 389, 392
creation 388–391
jus accrescendi 385
presumption in favour of 388–391
severance of 386, 387 n. 44, 389, 392
survivorship, right of 385, 387, 388,
391, 392
- laches, doctrine of 79, 508
- land, *see* estates; property
- Lands Tribunal procedures 428 n. 182,
532 n. 440
- leasehold covenants 407–415, 447
n. 246
assignment against 413, 415
breach of
liability for 407
remedies for 407, 414–415,
419–422
defined 407
derogation from grant 409–410
entry, to allow landlord 413, 414
express 407–408
implied 408–413

- privity of estate 413, 456
- quiet enjoyment 408–409
- re-entry, right of 414, 419–420
- rent, payment of 413, 414
- repair 411–413, 414
- sub-letting against 471
- sub-letting as breach of 415
- tenant-like manner, to use in 411
- usual 414
- view, landlord's right to enter to 413, 414
- waste 411–413
- leasehold estates, *see also* leases 371, 378 n. 24, 382, 392–394, 401–404, 428, 448, 450, 452
- leasehold mortgage, *see also* mortgage, mortgagee, mortgagor 450, 456
 - assignment 456
 - charge 456
 - creation 456
 - sub-demise 456
- leasehold ownership 464–471
- leases
 - alienation of 415, 464 n. 283
 - assignment 380, 394, 413, 414, 415, 420, 422, 441 n. 225, 456, 464–471
 - certainty of duration 392, 398, 400–401, 402
 - commercial 393, 426–428
 - conditions 407, 413 n. 128, 419–421, 426 n. 178
 - covenants 407, 413 n. 128, 414–415, 419–421
 - creation of 393 n. 59, 396, 401, 402, 403, 404 n. 90, 405, 407 n. 103
 - defined 392–394, 398
 - deposit, transfer of 415–416
 - determination by
 - forfeiture 419–420
 - lapse of time 416
 - merger 418
 - notice 416–417
 - surrender 417–418
 - distress for non-payment of rent 419, 420, 422–424
 - enforcement of
 - landlord's benefits and obligations 406–411, 414–415
 - tenant's benefits and obligations 411–415
 - equitable 380, 417
 - exclusive possession 393, 395 n. 65, 396, 398–400, 425 n. 169, 434, 465 n. 287
 - fixed term 401
 - forfeiture of 407, 414 n. 128, 415, 419–420, 421, 422, 426, 427, 470 n. 298
 - licences, distinguished from 393–394, 398–400
 - notice to determine 401, 402, 403, 404 n. 87, 405 n. 91, 409, 416–417, 426, 427, 428 n. 134, 532 n. 441
 - option to renew 405, 406, 416 n. 134, 432 n. 198, 467–468, 484
 - periodic leases 402, 405
 - premiums 393, 402 n. 79, 405, 407 n. 103, 465, 466 n. 290, 467, 468 n. 292 and n. 293, 469, 470, 519 n. 414, 525
 - re-entry 414, 419, 420, 421, 470 n. 298
 - relief from 420–422
 - sub-lease 417, 421, 456, 463, 465 n. 285 and n. 287, 471
 - sub-tenant 222 n. 254, 408 n. 107, 421, 471
 - surrender of 380, 405, 407 n. 103, 415, 417–418, 462, 463, 465 n. 286, 477 n. 316, 518, 519
 - tenancy at sufferance 404, 412–413, 424, 425 n. 169

- tenancy at will 401 n. 76, 402–404, 405, 412
- term of years 381, 412 n. 119, 417 n. 141, 439, 492 n. 357, 496
- termination of 401, 402, 404, 405 n. 91, 407, 413, 416–424, 426, 427–428
- transfer of deposits 415–416
- under-lease 471, 491 n. 153
- waiver 420, 421–422
- legal charge, *see also* charge 380, 381, 451, 452, 455, 457 n. 266, 459 n. 273, 461 n. 277, 463, 477 n. 316, 524 n. 425, 526
- liability, *see* employer's liability; occupier's liability; strict liability; vicarious liability
- licence
 - bare licence 396–397
 - contractual 395 n. 65, 396, 397
 - coupled with an interest 396, 397
 - defined 393–394
 - distinguished from leases 394, 398–400
 - nature of 393–396
- licensee 195 n. 181 and n. 183, 197, 200, 212, 222 n. 254, 393–394, 395 n. 65, 396, 399, 400, 402 n. 81, 403 n. 85, 433, 504, 526
- lie in grant, *see also* easements 437
- life estate 382, 384, 417 n. 141
- limitation clause 62 n. 140
- liquidated damages clause 118, 119, 122–123, 125, 132 n. 6, 488, 506, 514, 516–517
- liquidated damages in sale and purchase agreement
 - payable by vendor 488, 516, 517
 - payable by purchaser 506, 514, 516, 517
 - penalty, as 490, 506, 514
- lis pendens* 532 n. 440, 534
- lites pendentes* 532, 532
- lock out 287 n. 81, 292 n. 88, 293 n. 93
- lock-out agreement 493 n. 358
- lost modern grant, *see also* easements 444, 445
- lum see hip yee* 489, 490
- mesne profits 232, 421
- minerals 380, 397, 437
- minor, contract by 71, 72
- misrepresentation
 - generally 52, 58, 64 n. 142, 68 n. 149, 69 n. 152, 70 n. 154, 83, 91, 106 n. 246, 111 n. 269, 410 n. 110, 493 n. 358, 502, 507 n. 382, 508
 - defined 74–76
 - fraudulent 79–81
 - innocent 78–79
 - negligent 81–82
 - representation and term distinguished 56–58
- mistake
 - generally 37, 70 n. 154, 82–85, 92, 102, 111 n. 269, 206, 502, 510, 538, 540
 - common mistake 89–90
 - mutual mistake 90–91
 - unilateral mistake 86–88
- mortgage, *see also* charge 113, 371, 380, 391, 406, 430, 434, 435
 - assignment 450, 451–452, 453, 456, 457, 458 n. 269, 459 n. 273
 - charges, distinguished 451–453
 - covenant to repay 450
 - default, remedies 457–462
 - defined 380–381, 450
 - discharge 391 n. 53, 458 n. 269, 461
 - equitable 453–456
 - equity of redemption 451–452, 453, 454 n. 260, 457 n. 266, 459, 463
 - foreclosure 452, 454 n. 260, 456, 457 n. 266, 458–459, 460
 - leasehold 456

- legal 450–453
- nature of 450
- pledge, distinguished 454 n. 260
- privity of contract 456
- privity of estate 456
- redemption 450–454, 457 n. 266, 458, 459, 462, 463, 491
- registration 453 n. 258, 455, 462, 529, 531 n. 436
- security for loan, as 450–451, 452, 453 n. 258, 454 n. 260, 456, 458 n. 268
- tacking 450
- mortgagee
 - entry into possession 452, 457–458
 - equitable, rights of 451, 452, 453 n. 257, 457, 458
 - fixtures, consent for removal 430
 - foreclosure 451–452, 454 n. 260, 456, 457 n. 266, 458–459, 460, 530 n. 432
 - insure, right to 462
 - liabilities of 456, 458, 462
 - possession, right to 452, 455, 457–458, 459
 - power of sale 459–461
 - receiver, appointment of 461–462
 - rights and remedies 456–462
 - title deeds, right to hold 462
- mortgagor
 - beneficial owner 451
 - equity of redemption 451–452, 453–454, 457 n. 266, 459
 - possession, right to 450, 463
 - quiet possession, right to 457
 - redeem, right to 450, 463
 - rights and remedies 463–464
 - title deeds, right to inspect 464
 - waste, liability for 463–464
- multi-storey buildings
 - co-ownership of 472–482
 - deed of mutual covenant
 - defined 476
 - functions 472, 479–482
 - running of covenants 476–479
 - incorporated owners 472, 474–475
 - sale of shares in 472, 475 n. 311, 476, 479
 - tenancy in common 476
- murder 226
- necessities, contract for by minor 70 n. 154, 72
- necessity, defence of 233
- negative easements, *see also* easements 447, 448
- negligence
 - assumption of risk 177–181, 204, 206
 - breach of duty 66, 152–158, 160 n. 96, 171 n. 122, 177 n. 130, 180 n. 136, 184 n. 148, 325 n. 155, 326, 331, 354, 358 n. 226
 - causation, *see also novus actus interveniens* 116 n. 281, 120 n. 290, 150, 158–162, 164, 166 n. 109, 175 n. 127, 176, 251
 - contributory negligence 137, 171–176, 177 n. 130, 178, 179 n. 135, 191, 206, 272 n. 45
 - damage from breach of duty 162–171
 - defences to tort of 171–181
 - defined 140–141
 - duty of care 141–151
 - foreseeability 143, 148–151, 152–158
 - limitation of action 171 n. 122, 183–184, 191
 - proximate cause 141, 148, 158, 159 n. 94, 161, 163 n. 103, 165 n. 107, 169 n. 115, 170
 - public policy 144, 148, 155 n. 83, 164, 165, 170, 178, 186, 208, 212 n. 240
 - res ipsa loquitur* 133 n. 10, 155–157

- standard of care 153–155, 175, 187
 - n. 158, 192, 196, 207 n. 222
 - nemo dat quod non habet* rule 395, 537
 - nomination/nominee 523–524, 530
 - non est factum*, defence of 91–92
 - non-competition clause 360–369
 - non-consent scheme, *see* ownership scheme
 - non-delegable duty 190 n. 165, 193, 221 n. 254, 267, 268 n. 30, 272, 280 n. 64, 281–283
 - non-use of easements, *see also* easements 445–446
 - novus actus interveniens* 151 n. 70, 158–159, 162, 191
 - nuisance 209–226
 - compared to trespass to land 209–210
 - damages 214–217, 218 n. 248, 219
 - defence against action for
 - act of God/act of stranger/act of trespasser 224–226
 - consent 226
 - prescription 226
 - statutory authority 224
 - defined 209–210
 - injunction against 215, 219
 - liability for 210, 211 n. 238, 213 n. 240, 214 n. 243, 215, 220, 223
 - negligence distinguished 210, 213 n. 240, 214 n. 241, 221 n. 254
 - private 211–217
 - public 218–226
 - reasonableness of 210–211, 212, 214–215
 - occupational safety and health, *see* health and safety at work
 - occupier's liability 139, 156 n. 85, 184, 194–208, 312 n. 134
 - common law 195–197, 198, 199, 200 n. 195, 207
 - contractual entrant 196
 - damages recoverable 205
 - defences 205–208
 - invitee 196
 - license/licensee 197
 - occupier, who may be 197–198
 - trespasser 197
 - visitor 197, 200, 202
 - offer
 - communication of 20, 24
 - defined 20
 - lapse 24–25
 - rejection 24
 - revocation 24–25
 - part-payment of a debt, *see also* accord and satisfaction 40–42
 - open contract 414, 485, 491–493
 - overriding interests 540–541
 - ownership schemes
 - consent scheme 464 n. 283, 473–474
 - non-consent scheme 473, 474
 - parol evidence rule 485
 - part-payment of a debt, *see also* accord and satisfaction 40–42
 - partial-performance/part-performance of contract, doctrine of 107 n. 248, 109, 117, 121, 127, 454 n. 262, 455, 486, 520
 - partition of estate 392
 - penalty clause
 - in contract 122–123, 125–126
 - in sale of real estate 490, 506, 514
 - performance of contract 9, 13, 23–24, 34, 38–39, 40–42, 43–44, 54 n. 119, 55, 56 n. 122, 60, 67 n. 147, 77, 79 n. 174, 80, 87, 89, 99, 104 n. 238, 106–117, 119, 121
 - personalty, *see also* chattels 377, 378, 387 n. 45, 393, 432
 - positive covenants 420, 448, 472, 477 n. 318

- positive easements, *see* easements
- possession 373, 374–377, 378, 382, 385–387, 392–396, 398–399, 402–404, 405, 407, 413, 417–418, 419–422, 425 n. 169, 428, 435, 443, 446, 450, 452, 455, 457–459, 461, 463, 465 n. 287, 475 n. 311, 476, 483 n. 331, 486, 492, 498, 499, 519, 525, 526, 527 n. 428
- postal rule 26–29
- preliminary agreements, *see also* sale and purchase agreement
 contents of 473, 482, 483, 484–485, 487
 enforceability of 483–485, 488–493
- prescription, *see also* easements
 443–444, 445
- privity of contract 15–16, 82, 125, 131, 142, 413, 448, 456, 480
- privity of estate 413, 456
- profit a prendre* 397, 435, 437–438
 profit appendant 438
 profit appurtenant 438
 profit in common 438
 profit in gross 438
 profit pur cause de vicinage 438
 several profit 438
- promissory estoppel 46–48, 420, 421 n. 154, 422, 520, 537
- property
 bailment 374–375
 classification of 372, 377–379
 corporeal hereditament 377–378
 defined 371–372
 evidenced in writing 17, 402 n. 79, 406, 417, 461, 462, 483, 500, 518 n. 414, 519
 incorporeal hereditament 377–378
 intangible property 377–378
 ownership 371–373
 personality 377–378
 possession 373–377
 realty, *see also* estates 377–378
 tangible property 377
- provisional agreement for sale and purchase of property 464 n. 283, 486–493
- proximate cause 158, 159 n. 94, 161, 165 n. 107
- proximity 142 n. 42, 143–144, 146, 148–150, 169 n. 115, 170
- public policy
 contract contravening 63, 105, 360
 negligence 144, 148, 155 n. 83, 164, 165, 170, 178, 186, 208, 212 n. 240
- puff 57, 58
- quantum meruit* 109
- quasi-easement, *see also* easements
 440–441
- quicquid plantatur solo, solo cedit* 428
- quiet enjoyment, *see also* leases,
 enforcement of; mortgagor
 408–409, 414, 465 n. 287, 492 n. 357, 525, 526
- rape 226
- real property 12, 147, 371, 373, 377–378, 380–381, 393
- realty, *see* real property
- reasonable man test 154
- reasonableness, test for, in contract 55, 67–69
- reasonableness, test for, in negligence
 148, 149 n. 56, 155, 180, 204–205
- rectification, *see also* remedies 84, 87–88, 481, 538–540
- registration
 constructive notice and 449, 532
 daylight conversion 538
 deeds and encumbrances 531–521
 dynamic security 536
 effect, taking 531–532, 534, 536–537

- fraud, effect of 531, 537–538, 540
- lease 466–467
- licence 532
- memorial, necessity of 473, 533–534
- non-registration, effect of 439, 532–535, 539
- notices 531–532, 537
- overriding interests 540–541
- prior unregistered deeds, notice of 531
- priority, relationship with 531, 534–535
- proof of title 464
- registrable instruments 531–532
- static security 536, 539 n. 475, 540
- statutory warranty 537 n. 460, 539, 540, 541 n. 493
- titles registration system 535, 536–541
- rehabilitation of offenders 348
- remedies in contract
 - damages 21 n. 42, 32–34, 54 n. 119, 55–56, 58, 60, 77, 78 n. 172, 79, 81, 82, 94–95, 108, 110, 112, 113, 117, 118–126
 - rectification 84, 87–88
 - repudiation 55 n. 120, 61, 108, 110, 111–113
 - rescission 55, 58, 77, 78–79, 81, 82, 87, 88, 90, 95, 106 n. 246, 110, 111 n. 269, 113, 118
 - restrictions on 125–126
 - specific performance 21 n. 42, 37 n. 76, 45, 58, 88, 118, 122, 123–124, 415, 486, 507, 508–509, 510, 511, 513, 516–518
- remedies in tort
 - damages 130, 131, 133, 134 n. 12, 136 n. 17, 157, 161, 162–171, 172 n. 122, 174–175, 205, 210, 215, 232, 237, 244–254
 - injunction 132 n. 8, 215, 219, 232, 244
 - re-entry, trespass to land 232
 - recovery of possession, trespass to land 232
 - representation 46 n. 100 and n. 102, 47 n. 103, 56–58, 64 n. 142, 74, 76, 77
 - repudiation, *see also* remedies in contract 55 n. 120, 61, 108, 110, 111–113
 - res ipsa loquitur* 133 n. 10, 155–157
 - rescission, *see also* remedies in contract 55, 58, 77, 78–79, 81, 82, 87, 88, 90, 95, 106 n. 246, 110, 111 n. 269, 113, 118
 - rest days 286 n. 81, 288 n. 81, 291 n. 85, 293 n. 93, 294, 296, 297 n. 104, 301 n. 111, 303 n. 112, 309, 350
 - restitutio in integrum* 79, 81, 163, 244, 249, 378 n. 24, 510
 - restraint of trade 355 n. 217, 360, 365, 369 n. 247
 - restrictive covenants
 - in employment 360–369
 - in property
 - defined 434–435
 - equitable easement 448
 - negative in nature 435, 447, 448–449
 - running with the land 480
 - resumption of land 470 n. 298
 - reversion 383, 411 n. 114, 415, 417–418, 423, 430
- safety at work, *see* health and safety at work
- sale and purchase agreement
 - formal agreement 493–507
 - contents 495–507
 - evidenced in writing 17, 483, 485
 - generally 494–495

- general considerations 483–486
- preliminary/provisional agreement
 - content 487
 - enforceability 488–493
 - evidenced in writing 17, 483, 485
- remedies
 - action for damages 510–514
 - liquidated damages 488, 506, 516–517
 - exclusion of common law remedies 518
 - forfeiture 514–516
 - repudiatory breach 509–510
 - rescission 509–510
 - specific performance 508–509
 - stamp duty 405 n. 95, 487, 503, 505, 512, 513, 529–531
 - ad valorem* 405 n. 95, 530
 - stamping 503 n. 375, 520, 528, 529, 530
 - seal, contract under 11–13, 16–18, 20, 36, 45, 47, 124, 126, 171 n. 122
 - security of tenure 399, 403 n. 86, 425
 - self-defence 233–234
 - servient tenement, *see also* easements 435–436, 437–438, 440, 443, 446, 447–448
 - servitudes, *see also* easements 371, 381, 435, 439, 440, 442, 445, 447
 - common intention 440, 442–443
 - creation of
 - by express grant 439
 - by express reservation 439
 - by implied grant 440
 - by statute 439
 - extinguishment of 445–447
 - severance payment 286 n. 81, 288
 - n. 81, 291 n. 85, 293, 294 n. 98, 295 n. 100, 296, 307, 342, 344 n. 186, 345
 - sic utereut tuo alienum non laedas* 209
 - simple contract 11, 17, 126, 171 n. 122, 184 n. 148
 - specialty contract 11, 12, 16
 - specific performance 21 n. 42, 37 n. 76, 45, 58, 88, 118, 122, 123–124, 415, 486, 507, 508–509, 510, 511, 513, 516–518
 - squatters, *see also* adverse possession 198 n. 190, 434
 - stakeholder 496
 - statutory authority 224, 232, 404 n. 90
 - statutory duty 137, 139, 140 n. 35, 160, 174 n. 125, 184, 185 n. 151, 187–192, 224, 267, 271–274
 - statutory warranty 536, 537 n. 460, 539, 540, 541 n. 493
 - strict liability 130 n. 3, 132 n. 10, 136, 137–139, 182, 186 n. 152, 192, 210, 212 n. 238, 219, 221 n. 254, 225, 272, 312 n. 134
 - sub-contractors, to pay employees of independent contractors, *see also* contractors, independent 334–335
 - subject to contract 485, 490, 491
 - substantial performance 107–108
 - suspension from employment 294 n. 98, 306–307
 - tacking, *see also* mortgage 450
 - tangible property 377
 - tenancies, *see also* leases
 - joint tenancy 384, 385–388, 389, 392
 - tenancy at sufferance 404, 412–413, 424
 - tenancy at will 401 n. 76, 402–404
 - tenancy in common 384, 386, 387–388, 389–391
 - termination of employment, *see also* contract, employment 283, 288
 - n. 81, 294 n. 98, 295 n. 100, 296, 297–308, 320, 348 n. 196, 353 n. 212
 - terms in contract
 - condition 54–58

- condition precedent 54 n. 119, 107, 467 n. 291, 490–491
- condition subsequent 54 n. 119
- court implied 53, 84, 408, 442, 485, 492
- expressed 52–54
- implied 52–54
- innominate 53, 56–58, 60–61
- puff/sales puff 57, 58
- representation 46 n. 100 and n. 102, 47 n. 103, 56–58, 64 n. 142, 74, 76, 77
- warranty 61, 108, 113, 117, 410 n. 110 and n. 111
- thin skull rule 157–158, 164 n. 106, 166 n. 110
- titles registration system 535–541
- tort
 - act of God 138, 191–192, 224–225
 - act of stranger 225
 - assumption of risk 177, 178 n. 131, 206
 - comparative negligence 174, 175 n. 126, 176
 - consent 177 n. 130, 178, 204, 226, 352
 - contract law and 130–131, 134
 - contributory negligence 137, 171, 172–176
 - criminal law and 132–133
 - damages, assessment of 253, 324 n. 153
 - defences 151 n. 70, 171–184
 - defined 129–130
 - ex turpi causa non oritur actio* 182–183
 - inevitable accident 182, 192, 225
 - injunction 132 n. 8, 213 n. 240, 215–217, 219, 232, 244
 - intentional 136, 137, 207, 226–230
 - limitation of action 171 n. 122, 183–184, 191
 - purpose of 129, 132, 134, 135
 - res ipsa loquitur* 133 n. 10, 156–157
 - risk, assumption of 177–181
 - Rylands v Fletcher* rule 136, 138–139, 140 n. 35
 - self-defence 233–235
 - statutory authority 224, 232
 - trade secret 355–356, 360, 361 n. 236, 362–366
 - trespass to land
 - licence 394, 395 n. 65, 396
 - tenancy at sufferance and 404
 - tenancy at will and 402 n. 81
 - trespasser to land
 - occupier's liability to 197, 207–208
 - standard of care due to 197, 200 n. 195, 207–208
 - trespass to person 226–229
 - trusts, concerning land 379, 454, 519 n. 418, 523 n. 424
 - unconscionable bargain 37 n. 76, 95, 98–103
 - undue influence 37 n. 76, 92, 95–98, 111 n. 269, 509, 510
 - unenforceable contract 19, 39, 40, 7 n. 154, 103, 121, 483 n. 331
 - unilateral contract 13, 14, 23, 35 n. 71
 - unity of possession, *see also* easements 446
 - unity of ownership, *see also* easements 446
 - vague agreements, *see also* elements of a contract, certainty of terms 49–51, 70, 124, 484, 490
 - vicarious liability 139, 184, 185–187, 255 n. 1, 256, 267, 274–270, 356
 - vitiating a contract, grounds for
 - capacity, lack of 71–73
 - consent, lack of 73–106
 - duress 92–95
 - economic duress 41–42, 93–95

- illegal contract 103–106
- misrepresentation 74–82
- mistake 82–91
- unconscionable bargain 98–103
- undue influence 95–98
- void contract 70 n. 154, 103–106
- void for uncertainty 49, 70
- voidable 70 n. 154
- volenti non fit injuria* 151 n. 70, 171, 177–181

- wages
 - payment to employees of insolvent employer 257 n. 9, 341–344
- waiver 46 n. 100, 177 n. 130, 420–422, 491, 509
- Walsh v Lonsdale*, rule in 519 n. 417
- warranties 55, 56 n. 122
- waste 411
 - ameliorating 412
 - equitable 411
 - permissive 412
 - tenant's liability for 411–413
 - voluntary 411
- water, right to 435, 437–438
 - easements relating to 435, 437–438
 - fishing, rights of 437–438
 - ownership of 437
- wayleave, *see also* easements 439
- workplace safety, *see* health and safety at work