was unenforceable, on the ground that it had been entered into by the managing director in breach of duty and that Stratford had notice of the improper purpose. Stratford served notice to exercise its option to be bought out. Both Criterion Properties and Stratford applied for summary judgment in respect of their claims. The trial judge concluded that the execution of the agreement could not be justified as a proper exercise by the board of its powers and that as Stratford had actual knowledge of the improper purpose of the agreement and that it was in excess of the actual and ostensible authority of the board, it was disabled from relying on it. Accordingly, he held that Stratford did not have any realistic prospect of resisting the claim and granted Criterion Properties' application for summary judgment. Criterion Properties appealed. The Court of Appeal allowed the appeal and held that although the managing director was in breach of his duty, the breach itself was not sufficient to fix Stratford with notice and knowledge of the breach so as to preclude it from holding Criterion Properties to the agreement. Thus, Criterion Properties' summary judgment had to be dismissed and the matter had to go to trial to determine whether it was unconscionable for Stratford to enforce the agreement.

[6-56] *Injunction.* In *Nishimatsu-Costain-China Harbour Joint Venture v Ip Kwan & Co (a firm)*,[156] the solicitors were acting in conflict of interest for the insurer in the arbitration proceedings and for both the joint venture and the insurer in the personal injury proceedings. The question arose as to how the court should act where an insured did not wish a solicitor with whom there was such a conflict of interest to act for him. The Court of Appeal held that it should only intervene if the objection was not frivolous and the joint venture could show that a probability of mischief or the appearance of impropriety would result. This was such a case and the court granted injunctions to restrain the solicitors from acting for the joint venture in the personal injury action.

156 [2000] 2 HKC 445.

CHAPTER 7

Unconscionable Transactions

Equitable Fraud, Mistake and Misrepresentation

[7-1] Common law fraud in its modern form is fraudulent misrepresentation where the representor makes a representation knowing that it is false or being recklessly indifferent about the truthfulness of the fact contained in the representation.[1] It is an intentional dishonest act or omission done with the purpose of deceiving. It is notoriously difficult to prove common law fraud.

[7-2] Equitable fraud embraces the notion of common law fraud but extends to any conduct that is unconscionable or morally reprehensible.[2] It is therefore wider than the common law notion of fraud and conduct that falls short of common law fraud may be bound to be a fraud in equity. Generally, conduct offending the conscience would qualify as equitable fraud. It is unnecessary to prove actual intent to deceive or reckless indifference to establish equitable fraud.[3] Equitable fraud is also known as constructive fraud as opposed to actual fraud, which is common law fraud. The notion of equitable fraud embraces four doctrines:

(a) undue influence;[4]
(b) breach of confidence;
(c) unconscionable bargains; and[5]
(d) fraud on a power.

[7-3] The making of a mistake itself is not unconscionable and it only becomes unconscionable when a defendant seeks to derive an unfair benefit from that mistake and hence justify the intervention of equity. Equity is primarily concerned with the consequences of mistake; for example, to require that money be returned to the true owner transferred by mistake or to allow rescission of a contract entered under mutual or common mistake.[6]

[7-4] Misrepresentation is also a common law doctrine and equity is relevant where it grants remedies of rescission, specific performance and injunction. The effect of proving common law fraud (or what is now fraudulent misrepresentation) renders the transaction voidable at the election of the plaintiff because consent originally moved from the plaintiff and the plaintiff, upon discovery of the fraud, is at liberty to either accept the transaction, or rescind it and be restored to the original position before the fraud was inflicted.[7] Thus the transaction is only voidable and not void. Compare this with a mistake, where there is no consent at all when the transaction is given and therefore the transaction is void *ab initio*.

1 *Derry v Peek* (1889) 14 AC 337.
2 *Hart v O'Connor* [1985] AC 1000 at p 1024, [1985] 2 All ER 880 at pp 891–892.
3 *Nocton v Lord Ashburton* [1914] AC 932; *Heart v O'Connor* [1985] AC 1000; *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447.

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[7-5] The notion of unconscionability may differ between jurisdictions. Australian law requires the existence of a 'special disability', including poverty, sickness, age, sex, infirmity of body and mind, drunkenness, illiteracy and lack of education, such that the claimant is placed at a serious disadvantage.[8] English law, however, does not demand such clear-cut categories of special disability. In *Irvani v Irvani*,[9] Buxton LJ said that one of the circumstances which will attract relief for unconscionability is where one party to the contract was suffering from mental incapacity or addiction to drink or drugs. A recent Hong Kong case on unconscionable contract *Citibank (Hong Kong) Ltd v Au Wai Lun*[10] referred not to the existence of a defined special disability, but rather, to a 'bargaining weakness'.

[7-6] The question arises as to whether the plaintiff to an unconscionable transaction has to prove actual wrongdoing by the defendant. There are authorities suggesting that so long as the plaintiff's consent is procured by the influence of another and without full understanding of its nature and its consequences, it is sufficient to mount a successful action of fraud, notwithstanding the absence of any act of wrongdoing.[11] The other line of authority suggests that there cannot be any equitable fraud in the absence of proof of

4 See generally 'Remedies: Undue Influence' (1994) 14(8) PLB 60; Grant Holley, 'Undue Influence & the 'Special Equity Theory'' (1994) 2 APLJ 265; SM Cretney, 'Mere Puppets, Folly & Imprudence: Undue Influence for Twenty First Century' [1994] RLR 3; 'Equity: Undue Influence' (1996) 17(6) PLB 43; Matthew Tyson, 'An Analysis of the Differences between the Doctrine of Undue Influence' (1997) 5 APLJ 38; Richard Hooley and Janet O'Sullivan, 'Undue Influence and Unconscionable Bargains' [1997] LMCLQ 17; Peter Birks, 'Unjust Factors and Wrongs: Pecuniary Rescission for Undue Influence' [1997] RLR 72; NS Price, 'Undue Influence: Nullus Finis Litium' (1998) 114 LQR 186; David Capper, 'Undue Influence and Unconscionability: A Rationalisation' (1998) 114 LQR 479; Matthew DJ Conaglen, 'Duress, Undue Influence, and Unconscionable Bargains — The Theoretical Mesh' (1999) 18(4) NZULR 509; Gregory Mitchell, 'Undue Influence' (2001) 16(12) JIBL 283; Celia Hammond, 'Can a Company be 'Victim' of Undue Influence and Unconscionability?' (2001) 19(2) C&SLJ 74; KN Scott, 'Evolving Equity and the Presumption of Undue Influence' (2002) 18 JCL 236; James P Devenney, 'Issues in the Law of Undue Influence' (2003) 5(1) F&CL 1; Pauline Ridge, 'Uncertainties Surrounding Undue Influence: Its Formulation, Application, and Relationship to Other Doctrines' [2003] NZLR 329; Miles Burt, 'Undue Influence: Avoiding the Voidable' (2004) 20(4) BLB 49; Peter Birks, 'Undue Influence as Wrongful Exploitation' (2004) 120 LQR 34; 'Conveyancing: Undue Influence' (2005) 26(1) PLB 2; Paul J. Omar, 'Equitable Interests and the Secured Creditor: Determining Priorities (2006) Conveyancer and Property Lawyer NOV/DEC, 509-525; James Devenney & Adrian Chandler, 'Unconscionability and the Taxonomy of Undue Influence' (2007) Aug Journal of Business Law 541-568; Leon Swerling, 'Undue influence in will cases and Royal Bank of Scotland v Etridge (No.2)' (2007) 5(3) Property Service 66-69. For the Malaysian position, see Noor Inayah Yaakub & Andrew McGee, 'Undue Influence in Three-Party Bank-Lending Transactions in Malaysia: Why is Reform needed' (2007) 22(1) Journal of International Banking Law and Regulation 53-66. For a comparative analysis of English and French law on undue influence, see Andrew P. Bell, 'Abuse of a relationship: undue influence in English law and French law' (2007) 15(4) European Review of Private Law 555-599. For New Zealand, see Rachel Gowing, 'New Zealand: Guarantees - Undue Influence' (2006) 21(9) Journal of International Banking Law and Regulation N67-68.

5 See David Capper, 'Unconscionable Bargains and Unconscionable Gifts' (1996) Conv Jul/Aug308; Richard Hooley and Janet O'Sullivan, 'Undue Influence and Unconscionable Bargains' [1997] LMCLQ 17; David Capper, 'Undue Influence and Unconscionability: A Rationalisation' (1998) 114 LQR 479; Matthew DJ Conaglen, 'Duress, Undue Influence, and Unconscionable Bargains — The Theoretical Mesh' (1999) 18(4) NZULR 509.

6 R Meagher, D Heydon, M Leeming, *Meagher Gummow & Lehane's Equity: Doctrines & Remedies* (4th ed, Sydney: LexisNexis Butterworths, 2002) at para [14–005].

7 *Redgrave v Hurd* (1881) 20 Ch D 1.

8 *Commercial Bank of Australia v Amadio* (1983).

9 [2000] 1 Lloyds Rep 412.

10 [2006] HKCU 42.

actual wrongdoing and rejected the notion that liability can be found on the basis of the absence of consent only.[12] The CFA now has now clearly stated the position for Hong Kong: a plaintiff cannot rely on the existence of special disability alone without proving any actual wrongdoing in the hope to attract the intervention from equity. He has to bring himself within one or more of the heads of equitable fraud before equity will intervene.[13] In *Ming Shiu Chung v Ming Shiu Sum*,[14] an elderly father held signed a number of legal documents but were not aware that they were share certificates of shares of his family company. The CFA found that even if the father had been unaware of the contents of the document, such fact, without more, did not invalidate them; that the father of full age and ordinary understanding would be held to documents which he had chosen to sign unless there was a recognised legal basis for concluding that his apparent consent had been vitiated; or that reliance on that document by some other person fell into some category of unconscionable conduct justifying relief in equity.[15]

Undue Influence

[7-7] *Meaning of undue influence*. If a party enters into a transaction not under free will, or the party does not give a free and voluntary consent but instead, consent was obtained by unfair means such that he or she cannot freely exercise his or her own judgment in his or her best interests, there is undue influence. The modern meaning of undue influence has been stated by Lord Nicholls in *Royal Bank of Scotland v Etridge (No 2)*:

> 'Undue influence is one of the grounds of relief developed by courts of equity as a court of conscience. The objective is to ensure that the influence of one person over another is not abused ... The law will investigate the manner in which the intention to enter into the transaction was secured: 'how the intention was produced' in the often repeated words of Lord Eldon ... If the intention was produced by unacceptable means, the law will not permit the transaction to stand. The means used is regarded as an exercise of improper or 'undue influence', and hence unacceptable, whenever the consent thus procured ought not fairly to be treated as the expression of a person's free will.[16]

[7-8] On the meaning of 'undue', Waung J in *Esquire (Electronics) Ltd v Hong Kong and Shanghai Banking Corporation Ltd* said:

> 'Unfortunately, there is very little analysis or discussion in the decided case or even in the textbook as to what is meant by Undue and what is the scope of Undue. Undue is the opposite of due. Due means proper, appropriate or what ought to be done. Undue suggests improper, inappropriate or what ought not to be done and these are all qualities in equity relating to use of undue influence which is against the conscience of the court. ... As I see it, what equity as a court of conscience seeks to protect is the abuse of relationship where one party has the capacity to influence the other party to enter into a transaction which is not the result of free exercise of

11 *Barclay's Bank Plc v O'Brien* [1994] 1 AC 180.See also, *Semana Bachicha v Poon Shiu Man* [2000] 2 HKLRD 833 (CA) (a domestic helper was oppressively exploited by her employer and left her employment after six months. She reached a settlement agreement with her employer at the Labour Department that the employer paid her $975 as compensation, on the basis that she mistakenly believed that she was in law taken to have walked out on her job and hence had incurred a net liability to her employer and she signed the agreement in the mistaken belief that it represented a concession by her employer beyond anything she was entitled to. On her appeal the CFI awarded her $51,629 for the remaining 18 months of the contract. The employer appealed to the Court of Appeal and argued that the settlement agreement estopped her claim. The Court of Appeal found that the employer was taking advantage of the helper's ignorance to secure for herself an oppressive bargain by unconscionable means; and that the employer's appeal was dismissed).

12 *Royal Bank of Scotland Plc v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773.

13 See *Ming Shiu Chung v Ming Shiu Sum* [2006] 2 HKLRD 831 (CFA) at 859 B-I.

14 [2006] 2 HKLRD 831 (CFA).

15 At 856C-H.

16 [2002] 2 AC 773 at pp 794G–795C.

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independent and informed judgment and in situation where the transaction is not what the other party wanted to do but did it unwillingly and because of the dominant party. The essence of Undue Influence is the unfair exploitation of the ascendancy in the language of Lord Hoffman in *A-G v R*. Once ascendancy is established, the key words are unfair exploitation … Was there exploitation and was it unfair. Unfairness generally comes with exploitation … [a]nother way of looking at it is to ask … was there some unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating.[17]

[7-9] As a species of equitable fraud, there is no question as to whether undue influence can be a cause of action. Waung J in *Esquire (Electronics) Ltd v Hong Kong and Shanghai Banking Corporation Ltd* said:

Undue influence lies at the heart of the equitable jurisdiction of the court and because it is considered a species of fraud, setting aside of transaction was a matter of right and when such is not possible, then question of remedy has to be carefully considered.[18]

[7-10] Undue influence is common in a relationship where there is domination by one party over the other and equity will presume that parties in certain categories of these relationships have misused their position in order to obtain an unfair advantage or that the other party has suffered manifest disadvantage.[19] The Court will first look to find any inequities or unfair advantage in the plaintiff's complaint; if there is no inequity or unfair advantage, the plaintiff would simply have failed to prove his or her case. This is so notwithstanding that the relationship falls within any of the presumed categories.[20] Disadvantages are usually measured in financial terms. There is no difficulty in showing disadvantage in a case of a gift where it is undeniable that the donor is now worse off than before. For instance, where husband and wife together mortgaged their matrimonial home to secure the debts owed by a company in which they both had an interest, there is no inequity for the wife to complain that she was unduly influenced by the husband, acting as agent for the bank, to enter into the transaction.[21] The previous position was that a plaintiff, in all of the classes, must also prove that the transaction is manifestly disadvantageous to him or her. However, since *CIBC Mortgages plc v Pitt*,[22] the House of Lords decided that in cases of undue influence, disadvantage is not a necessary element of the cause of action. It is not essential that the transaction should be disadvantageous to the person who was pressured or influenced, either in financial terms or in another way. This was doubted by Lord Nicholls in *Etridge (No 2)*, who argued that disadvantage must be an element because where the transaction is innocuous, undue influence is unlikely to occur.[23]

[7-11] Since *Barclay's Bank plc v O'Brien*,[24] the two forms of undue influence — (1) actual undue influence: where the claim of undue influence is established upon cogent

17 [2005] 3 HKLRD 358 at pp 517–518.

18 [2005] 3 HKLRD 358 at p 520. See also *CIBC Mortgages v Pitt* [1994] 1 AC 200 at p 208H per Lord Browne-Wilkinson; *Royal Bank of Scotland v Etridge (No 2)* [2002] 2 AC 773 at p 796A per Lord Nicholls.

19 *Watkins v Combes* (1922) 30 CLR 180; *National Westminster Bank plc v Morgan* [1985] AC 686, [1985] 1 All ER 821 (HL); *Allcard v Skinner* (1887) 36 Ch D 145 (CA); *Coldunell Ltd v Gallon* [1986] QB 1184, [1986] 1 All ER 429 (CA); *Goldsworthy v Brickell* [1987] Ch 378, [1987] 1 All ER 853 (CA); *Midland Bank plc v Shephard* [1988] 3 All ER 17 (CA); *Bank of Baroda v Shah* [1988] 3 All ER 24 (CA); *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923, [1989] 2 WLR 759 (CA). See Anu Arora, 'Undue Influence and the Banker-Customer Relationship' (1986) 7(2) Comp Law 63; Mark Pawlowski, 'Undue Influence: Manifest Disadvantage and Independent Legal Advice' (2000) 144 Sol Jo 376; Georgina Andrews, 'Undue Influence — Where's the Disadvantage?' Conv (2002) Sep/Oct456.

20 Mr Recorder Ma SC in *Bank of China (Hong Kong Ltd) v Wong King Sing* [2002] 1 HKC 83, [2002] 1 HKLRD 358 (CFI).

21 *Bank of China (Hong Kong Ltd) v Fung Chin Kan* [2002] HKCU 1416 (CFA).

22 [1994] 1 AC 200.

evidence and there is no special relationship between the parties; and (2) presumed undue influence: where because of the special relationship between the parties, the court will presume that undue influence has been exerted until evidence to contrary is adduced — have been denoted as Class 1, Class 2(A) and Class 2(B).[25]

[7-12] Class 1 is actual undue influence. Class 2(A) refers to persons in a special relationship with others who place reliance, trust, and confidence on them.[26] For example, the relationships between parent and child,[27] solicitor and client,[28] trustee and beneficiary,[29] doctor and patient, banker and customer, employer and employee, and landlord and tenant are all included in this class. Class 2(B) refers to cases that fall outside of Class 2(A) but where there is the de facto existence of a relationship under which the plaintiff would generally repose trust and confidence upon the defendant, and did actually

23 *Royal Bank of Scotland v Etridge (No 2)* [2002] 2 AC 773 at p 775. See generally Rick Bigwood, 'Undue Influence in the House of Lords: Principles and Proof' (2002) 65(3) MLR 435. For discussion on undue influence in bank lending transactions following the House of Lords decision in Royal Bank of Scotland Plc v Etridge (No.2), see Noor Inayah Yaakub & Andrew McGee, 'Undue Influence In Bank Lending Transactions: Confusions Continue' (2007) 22(7) Journal of International Banking Law and Regulation 394-406.

24 [1994] 1 AC 180.

25 *Barclay's Bank plc v O'Brien* [1994] 1 AC 180 at pp 189–190 per Lord Browne-Wilkinson. See also Nicky Richardson, 'Presumed Undue Influence' [1996] NZLJ 338; Nelson Eronchong, 'Presumed Undue Influence: Continuing Misconceptions' (2005) 121 LQR 29.

26 *Barclay's Bank plc v O'Brien* [1994] 1 AC 180, [1994] 4 All ER 417; *Johnson v Buttress* (1936) 56 CLR 113 at pp 134–135, [1936] ALR 390 at p 398; Pauline Ridge, 'The Equitable Doctrine of Undue Influence Considered in the Context of Spiritual Influence and Religious Faith' (2003) 26(1) UNSWLJ 66.

27 *Wright v Vanerplank* (1855) 2 K & J 1; *Re Pauling's ST (No 1)* [1964] Ch 303 at p 337; *Avon Finance Co Ltd v Bridger* [1985] 2 All ER 281; *McCreanney v McCreanney* [2003] All ER 161; *Hoghton v Hoghton* (1852) 15 Beav 278; *Archer v Hudson* (1844) 7 Beav 551; *Powell v Powell* [1900] 1 Ch 243 at p 246; *Allcard v Skinner* (1887) 36 Ch 145 at p 171; *Inche Noriah v Shaik Allie Bin Omar* [1929] AC 127 at p 133; *Lamotte v Lamotte* (1942) 42 SR (NSW) 99 at p 103; *Kerr v West Australian Trustee Executor & Agency Co Ltd* (1937) 39 WALR 34 at p 45; *Philips v Hutchinson* [1946] VLR 270 at p 273; *Union Fidelity Trustee Co of Australia Ltd v Gibson* [1971] VR 573 at p 577; *Commonwealth Bank of Australia v Ridout Nominees Pty Ltd* [2000] WASC 37 at para [200]; *Bank of New South Wales v Rogers* (1941) 65 CLR 42; *Lancashire Loans Ltd v Black* [1934] 1 KB 380; *Bainbrigge v Browne* (1881) 18 Ch 188; *West v Public Trustee* [1942] SASR 109 at pp 119–120; *Hylton v Hylton* (1754) 28 ER 349; *Hatch v Hatch* (1804) 32 ER 615, [1803–13] All ER Rep 74; *Allfrey v Allfrey* (1847) 10 Beav 353, 50 ER 618; *Maitland v Irving* (1874) 15 Sim 437, 60 ER 688; *Bullock v Lloyds Bank Ltd* [1955] Ch 317, [1954] 3 All ER 726.

28 *Hatch v Hatch* (1804) 9 Ves 292; *Wright v Carter* [1903] 1 Ch 27 (CA) (Eng); *Gibson v Jeyes* (1801) 6 Ves 266 at p 277; *Liles v Terry* [1895] 2 QB 679; *Willis v Barron* [1902] AC 271; *Tyrrel v Bank of London* (1862) 10 HLC 26; *Hindson v Weatherill* (1854) 5 De GM & G 301; *Ramcoomarsingh v Administrator General* [2003] WTLR 291; *Wintle v Nye* [1959] 1 WLR 284; *Tomson v Judge* (1855) 3 Drew 306; *Re a Solicitor* [1975] QB 475; *Oldham v Hand* (1751) 2 Ves Sen 259, 28 ER 167; *Welles v Middleton* (1784) 1 Cox 112 at p 125, 29 ER 1086 at pp 1091–1092; *Wood v Downes* (1811) 18 Ves 120, 34 ER 263, [1803–13] All ER Rep 575; *Montesquieu v Sandys* (1811) Ves 301, 34 ER 331; *Cane v Allen* (1814) 2 Dow 289, 2 ER 869; *Casborne v Barnsham* (1839) 2 Beav 76, 48 ER 1108; *Rhode v Bate* (1865) LR 1 Ch App 252 at p 260, [1861–73] All ER Rep 805 at p 810; *Morgan v Minett* (1877) 6 Ch D 638 at p 647; *Allison v Clayhills* (1907) 97 LT 709 at pp 711–712; *Dowsett v Reid* (1912) 15 CLR 695 at p 707, 19 ALR 15 at p 19; *Haywood v Roadknight* [1927] VLR 512 at p 520; *Multi-Span Constructions No 1 Pty Ltd v 14 Portland St Pty Ltd* (2002) ANZ ConvR 85 at paras [66]ff, [2001] NSWSC 696; *Westmelton (Vic) Pty Ltd v Archer* [1982] VR 305; *Handson v Lorenz and Jones* (1986) 136 NLJ Rep 1088; *Corley v Lord Stafford* (1857) 1 De G & J 238, 44 ER 714; *Broun v Kennedy* (1864) 4 De G J & Sm 217, 46 ER 901; *Chekiang First Bank v Fong Siu Kin* [1997] 2 HKC 302 (CA).

29 See Patrick O'Hagan, 'Undue Influence and Trustees' (1998) 2 PCB 96.

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parties did intend to create before the court can find a sham. Once it is shown that the ostensible transaction was a pretence, it is not necessary to show that the parties affirmatively intended to enter into any particular transaction.[140]

[14-54] *Effect of a Sham.* A document which can be shown to be a sham inevitably contains an artificial step or steps that will be disregarded in favour of substantive relationship, and the court will disregard the artificial transaction.[141] For example, if a document purports to create a tenancy but it is held to be a sham, then the tenancy arrangement is disregarded and no tenancy can be created by it.[142] In the context of a trust, upon finding that it is a sham, the creation of any 'trust' will be disregarded, the 'trust' set aside and no legal effect is given to it — the sham trust is treated as never having been created. Any 'trust' property will then be reverted back to that of the 'settlor' by way of a resulting trust.[143]

140 *Chase Manhattan Equities Ltd v Goodman* [1991] BCLC 897 at p 922a - b.
141 *Walsh v Griffiths-Jones* [1978] 2 All ER 1002 at pp 1003, 1008, 1010.
142 [2000] All ER (D) 857, [2001] 1 BCLC 98 at [59] per Neuberger J.
143 See Chapter 17 Resulting Trust below.

CHAPTER 15

The Variation and Termination of Trusts

Variation of Trusts[1]

Variation by all the beneficiaries

[15-1] As circumstances in which a trust operates often change, the trust deed may not provide instructions for the trustee on how to act in particular situations. There are many occasions where a variation is called for. If all the beneficiaries are of full age and capacity (*sui juris*) and consent to the change, the trustee can depart from the terms of the trust instrument. Without a fully consented variation, a trustee who strays from adherence to the terms of a trust can only escape liability by showing that, in the particular circumstances, the course of action taken was necessary and favourable.[2]

[15-2] The trustee obviously needs to consult all the beneficiaries to ascertain their full understanding and consent, rather than relying on the representations of one or a few beneficiaries. Such consent operates as a concurrence of breach of trust of which the beneficiaries could otherwise complain. Problems arise where some of the beneficiaries are still unborn or have disappeared and cannot be found; in that instance, the court's sanction of the variation will be required.[3] However, the consent of all beneficiaries that the trustee *may* act in the manner consented, does not create a compulsion or obligation on the part of the trustee to act. A trustee's full power to manage and administer the trust is respected and unfettered. However, the beneficiaries have two options when faced with an uncooperative trustee: firstly, to call for the transfer of the trust property to the beneficiaries under the rule in *Saunders v Vautier*,[4] thereby terminating the trust. Secondly, in the UK, beneficiaries can replace the trustee of their own choice and hope that the newly appointed trustee is more amendable to their wishes.[5] The position in Hong Kong with respect to the removal of the trustee by all beneficiaries is not that straightforward. Beneficiaries have no statutory right to remove a trustee. Beneficiaries also have no right in equity to remove a trustee, except under the rule in *Saunders v Vautier*. However, the court has an inherent jurisdiction to remove a trustee in an action for administration and execution of a trust. This inherent jurisdiction is enshrined in section 42 of the Trustee Ordinance (Cap 29). The only statutory right to apply to the court for a new trustee to be appointed is under the same section.

1 See generally, Rory Mullan, 'Variations of trusts'(2007) 11(2) Personal Tax Planning Review 15-22.
2 *Harrison v Randall* (1851) 9 Hare 397, 68 ER 562.
3 See *Hong Kong Bank Trustee Ltd v Ho Shai Lai* [1985] 2 HKC 704.
4 (1841) 4 Beav 115, 49 ER 282
5 See Trustee Act 1925 (UK) sections 36, 39 and 41; Trusts of Land and Appointment of Trustees Act 1996, section 19.

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Variation by the court

[15-3] The court has no inherent power to vary the terms of a trust deed — this is so notwithstanding the agreement of both the trustee and all the beneficiaries.[6] The court honours the intention of the settlor or the testator and regards it inappropriate to arrogate itself the power to rewrite a private trust. In comparison with a public or charitable trust, which is designated for public good, the court is less reluctant to exercise power of variation, especially in relation to the mode of its attainment.[7] This settled position was reaffirmed by the House of Lords in *Chapman v Chapman*,[8] where it was held that the court had no power to sanction variation to the beneficial interests in a trust settlement,[9] unless the variation comes within the following four exceptions:[10]

1 Cases in which the court has effected changes in the nature of an infant's property; for example, by directing investment of his personalty in the purchase of freeholds;
2 Cases in which the court has allowed the trustees of settled property to enter into some business transaction which was not authorised by the settlement;
3 Cases in which the court has allowed maintenance out of income which the settlor or testator directed to be accumulated; and
4 Cases in which the court has approved a compromise on behalf of infants and possible after-born beneficiaries.

[15-4] Apparently, the significance of the first exception above is now obsolete, as the treatment of realty and personalty by the law has been assimilated. The court, under exception two above, has an inherent power to sanction deviation from the strict terms of a trust, in circumstances of emergency which are unforeseen or anticipated by the settlor and where the consent of the beneficiaries cannot be obtained as not all of them have been born or become *sui juris*. This exception is confined to cases of absolute emergency or actual salvage and this is so strict that it would not operate to vary the terms of a trust, notwithstanding that the proposed scheme would benefit all beneficiaries, particularly the minor.[11] However, under exception three, there is an inherent jurisdiction as well as a statutory jurisdiction[12] to facilitate the application of a minor beneficiary's property for the purpose of his or her maintenance, education or benefit. Under exception four, the court has inherent jurisdiction to approve compromises arising from real and genuine dispute of the destination of trust property.[13] A dispute is not genuine if it is in reality an agreed variation but disguised as a compromise of dispute. In *Re Powell-Cotton's Re-Settlement*,[14] there was merely an ambiguity in the investment clause and it was in the

6 *Letterstedt v Broers* (1884) 9 App Cas 371; *Re New* [1901] 2 Ch 534; *Re Chetwynd's Settlement* [1902] 1 Ch 692; see *Tickle v Tickle* (1987) 10 NSWLR 581. See also PH Pettit, *Equity and the Law of Trusts* (10th ed, Oxford University Press: Oxford, 2006) at p 378.
7 *Andrews v M'Guffog* (1886) 11 App Cas 313 (HL) at p 316 per Lord Watson; *Re Royal Society's Charitable Trusts, Royal Society v A-G* [1956] Ch 87, [1955] 3 All ER 14; *Re Royal Naval and Royal Marine Children's Homes, Portsmouth, Lloyds Bank Ltd v A-G* [1959] 2 All ER 716, [1959] 1 WLR 755; cf *Re Campden Charities* (1881) 18 Ch D 310 (CA).
8 [1954] AC 429.
9 See also *Re Crawshay Dennis v Crawshay* (1888) 60 LT 357; *Re Montagu, Derbyshire v Montagu* [1897] 2 Ch 8 (CA); *Re Morrison, Morrison v Morrison* [1901] 1 Ch 701 at p 707 per Buckley J.
10 *Chapman v Chapman* [1954] AC 429 at p 451.
11 *Calvert v Godfrey* (1843) 6 Beav 97; *Re De Teissier's Settled Estates* [1893] 1 Ch 153; *Re Montagu* [1897] 2 Ch 8 (CA); *Re Tollemache* [1903] 1 Ch 955 (CA); *Re Willis* [1902] 1 Ch 15. Cf *Re New* [1901] 2 Ch 534 (CA).
12 Trustee Ordinance (Cap 29), section 33; cf Trustee Act 1925 (UK), section 53. *Re Gower's Settlement* [1934] Ch 365, [1934] All ER 796; *Re Heyworth's Settlements* [1956] Ch 364, [1956] 2 All ER 21; *Re Meux's Will Trusts* [1958] Ch 154, [1957] 2 All ER 630; *Re Bristol's Settled Estates* [1964] 3 All ER 939, [1965] 1 WLR 469. See also Age of Majority (Related Provisions) Ordinance (Cap 410), section 21.
13 *Re Trenchard* [1902] 2 Ch 378; *Re Wells* [1903] 1 Ch 848; *Re Lord Hylton's Settlement* [1954] 1 WLR 1055.

common interest of all the beneficiaries to have a new clause substituted. It was held that this set of circumstances could not be regarded as a compromise of disputed rights.

Section 56 of the Trustee Ordinance (Cap 29)

[15-5] Many jurisdictions have legislation circumventing the rigidness of the rule in *Chapman v Chapman* [15] to expressly confer power on the court to authorise variations to trusts, as long as the court considers it 'expedient'.[16] In Hong Kong, section 56 of the Trustee Ordinance (Cap 29) provides that:

> 56. Power of court to authorize dealing with trust property — Jurisdiction to make other Order
>
> (1) Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release, or other disposition, or any purchase, investment, acquisition, expenditure, or other transaction, is in the opinion of the court *expedient*, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument, if any, or by law, the court may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions, if any, as the court may think fit and may direct in what manner any money authorized to be expended, and the costs of any transaction, are to be paid or borne as between capital and income.
>
> (2) The court may, from time to time, rescind or vary any order under this section, or may make any new or further order.
>
> (3) An application to the court under this section may be made by the trustees, or by any of them, or by any person beneficially interested under the trust.

[15-6] To come within the ambit of section 56, the matter must be one which arises in the management or administration of trust property, and 'so long as the matter does so arise, there is nothing in those words which limit the power of the Court under [section 56]'.[17] In *Re Craven's Estate*,[18] the application to add a power of advance for the benefit of a single beneficiary was refused, as the word 'expedient' meant expedient for the trust as a whole and not for the interest of certain beneficiaries. 'Expedient' itself means 'advantageous, desirable or suitable to the circumstances of the case'.[19] Nonetheless, section 56 is not intended to reshape beneficial interests under the trust or to empower the court to rewrite the trust instrument.[20] However, section 56 is only applicable to general trusts but not to trust or property to which the New Territories Ordinance (Cap 97) has application.[21]

[15-7] *Power to invest.* Recently, the application of section 56 has been liberalised to widen investment powers. In *Anker-Petersen v Anker-Petersen*,[22] a life tenant subject to a power over the other beneficiaries in remainder, applied to the court for the approval of an extension of the power of investment and other associated powers pursuant to section 57 of the Trustee Act 1925 (UK) or alternatively, pursuant to the Variation of Trusts Act 1958 (UK). The trustees wished to invest beyond their very limited powers of investment. In granting the application, Baker J held that jurisdiction existed under section 57 of the 1925 Act (the equivalent of section 56 of the Trustee Ordinance (Cap 29)) to enlarge the

14 [1956] 1 All ER 60, [1956] 1 WLR 23 (CA).
15 [1954] AC 429.
16 UK: Trustee Act 1925, section 57; Australia: Trustee Act 1925 (NSW) section 81; Trusts Act (QLD) section 95; Trustee Act 1936 (SA) section 59C; Trustee Act 1958 (VIC) section 63A; Trustees Act 1962 (WA) section 90.
17 *Re Craven's Estate* [1937] Ch 431 at p 436 per Farwell J.
18 [1937] Ch 431. See also *Riddle v Riddle* (1952) 85 CLR 202 at pp 214 per Dixon J.
19 *Riddle v Riddle* (1952) 85 CLR 202 at pp 221 – 2 per Williams J.
20 *Re Downshire Settled Estates* [1953] Ch 218; *IRC v Bernstein* [1961] Ch 399.
21 See *Tang Kai-Chung v Tang Chik-Shang* [1970] HKLR 276, at pp 304–305 per Mills-Owens J.
22 [2000] WTLR 581.

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investment clause and that the procedure under section 57 would lead to the granting of the powers in most instances on the basis of convenience.

[15-8] *Power to sell.* Section 56 applies where the trustee, being vested with trust property, lacks the power to sell and the court may confer on the trustee the requisite power of sale, but it has no application where the judgment debtor holds her properties as a constructive trustee for the judgment creditor: *Chan Cheung Hing v Chan Tang Lan*.[23] There, a husband obtained judgment against his wife in proceedings based on the Married Persons Status Ordinance (Cap 182) and it was ordered that the wife transfer half of her properties to the husband and due to a failure to comply, the wife became a trustee of the half-interests of the properties for the husband. Counsel's argument that the court has power under section 56 to order a sale of the properties was rejected. Instead, the court appointed a receiver under section 21L of the Supreme Court Ordinance (now section 21L of the High Court Ordinance) to enforce the charge on the properties.

[15-9] The court will not vary the trust deed to add a power of sale unless it is beneficial to beneficiaries. In *Kwong Suk-Chun v Wong Fung-Ming (By Her Guardian Ad Litem, Wong Shui-Oi)*,[24] the trustee applied under section 56 of the Trustee Ordinance (Cap 29) to vary the trust instrument to add a power of sale. The trust property, a flat in Sai Yeung Choi Street, was held on trust by a declaration of trust, made by a mother, whereby she declared that she held the trust property upon trust for her daughters, as tenants in common in equal shares. The declaration of trust contained no power enabling the mother to sell the trust property and the daughter was still a minor so could not consent to the proposed sale. The declaration of trust recited, untruthfully, that the trust property was purchased out of moneys belonging to and provided by the daughters. Godfrey J granted the orders sought because the proposed sale was a beneficial one and its object was to provide a fund for the maintenance in support of the daughters. It was also held that the proceeds of sale were to be paid to the mother and another person to be appointed co-trustee and to be held on trust for the daughters as tenants in common in equal shares. Recently, in *Kain v Hutton*,[25] the Kains were beneficiaries under a discretionary family trusts. In the context of long-running litigation among the trustees and beneficiaries of the trusts, the beneficiaries sought interlocutory orders securing the sale of land held by the discretionary trusts and the payment of the proceeds to themselves. After negotiations, consent orders were made by the Court to allow distribution of the vested trusts and the securing to the beneficiaries of funds to enable them to be represented at the substantive hearing. The consent orders provided for the sale of certain trust properties to achieve these purposes but the consent orders were not implemented for around a year. Subsequently the trustees applied to enforce the consent orders but the beneficiaries opposed on the grounds that the consent of the unrepresented adult grandchildren beneficiaries have not been obtained; and that the infant grandchildren had not been separately represented. They argued, therefore, that there was no power for the Court to vary a trust unless there was a positive advantage to the beneficiaries. The New Zealand High Court found for the trustees and the beneficiaries appealed. The New Zealand Court of Appeal found that there was no evidence that the unrepresented adult grandchildren were unaware of the proceedings. As there was no obvious conflict between the infant grandchildren and their parents in relation to the consent order, the infant grandchildren's interests had been adequately represented. The consent order was beneficial to the beneficiaries in that it freed up funds to pursue the litigation which could directly or indirectly benefit them, together with obtaining access to the funds sooner rather than later and in a trust administered by their preferred trustees.

23 [1985] 2 HKC 316.
24 [1989] 2 HKLR 114, [1989] HKLY 539.
25 [2007] 3 NZLR 349 (NZCA). See also, Marilyn McKeever, 'Kain unable in the war of the vineyards' (2008) 94(Mar) Trusts and Estates Law & Tax Journal 10-14.

[15-10] *Unclaimed trust property.* Section 56 applies to cases where there is unclaimed trust property held by a trustee for third parties. In *Re Peregrine Brokerage Ltd* 2003,[26] PFL was a futures trader and PBL was a broker. Both companies were placed in voluntary liquidation. In respect of PFL, there was unclaimed cash in the sum of about $320,000, being the credit balances of twelve clients. The majority of the cash, in the amount of about $310,000, was the credit balance of JP Morgan Securities Limited. As for PBL, the unclaimed property comprised securities and cash, the combined value of which was about $610,000, and was made up as follows: (i) 23 clients with 658,016 shares in different companies, the majority of which were without scrips and held in the Hong Kong Central Clearing and Settlement System (CCASS) and other settlement systems; (ii) 41 clients with 115,594,276 shares in PIVH, which had no value and could not be sold, of which 88,203,076 were without scrips and held in CCASS; and (iii) 42 clients with cash balances totalling $102,034, comprising dividends declared and paid on shares. In the case of PFL, creditors had been paid in full and substantial distributions had been made to the shareholders. In the case of PBL, the liquidators had sufficient funds to pay creditors in full and only one claim had been held over, pending receipt of further supporting information; all other creditors had been paid in full. Both liquidations had progressed to the point that the unclaimed properties were the only substantive outstanding matter. The liquidators of PBL intended to distribute surplus in specie to the shareholders shortly. The liquidators had made repeated and extensive efforts — by letters, telephone calls and advertisements in newspapers — to trace clients, verify their claims and return cash and securities to those who responded and were able to provide sufficient evidence of ownership. Over 300 parties responded to the liquidators with satisfactory responses and the relevant securities were transferred to them. The unclaimed cash and securities were entered in the companies' books as *prima facie* belonging to clients who could not be located or had not been able to provide sufficient information for their claims to be processed. It was believed that a major factor in the liquidators not receiving responses was the low or negative value of some of the securities held. Kwan J agreed that section 56 could be invoked and ordered the properties to be sold by the liquidators, the balance to be paid into court and should there be no claim made within three months, the balance be transferred to the general revenue of the government.

Similarly, in *Re New Japan Securities International (HK) Ltd*[27] a securities broker firm had been put to liquidation for five years and there were unclaimed assets held by the liquidator for 21 former clients, who, except one, could not be found. The liquidator applied to the court for permission to realize the assets and to pay the proceeds of sale into court and, pursuant to the High Court Suitors' Fund Rules (Cap 4D), to be transferred to the General Revenue. The Rules provided for a five year waiting period[28] but the liquidator sought an automatic direction to the General Revenue if proceeds remain unclaimed after three months. The Court granted the application under section 56 of the Trustee Ordinance (Cap 29) but refused the automatic direction as the Court has no power to shorten the waiting period.

[15-11] The provision also authorises trustees to deal with unclaimed trust property where there is no trust instrument or law enabling the trustee to otherwise deal with the same. In *Re Hong Kong Metropolitan Bank (Nominees) Ltd (in liq)*,[29] the joint agents of the liquidator of the Hong Kong Metropolitan Bank (Nominees) Limited (in liquidation) (HKMBN) applied for directions as to the ownership and disposal of certain shares currently registered in the name of HKMBN. The liquidators were holding these shares on an implied trust and there was no trust instrument at all. HKMBN was wound up by the Bank of Credit and Commerce Hong Kong Limited (BCCHK) which was also in

26 [2004] 1 HKLRD 856.
27 [2007] 3 HKLRD 54.
28 High Court Suitors' Fund Rules (Cap 4D), r 23(1).
29 [2005] HKCU 1549.

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