

they serve to illustrate a general principle. These contracts are quite specialised, largely statute-based and, in the context of land conveyances, require specific formalities for formation. The law on such contracts is better dealt with in specific texts on Employment Law, Land Law and Commercial Law. The focus of this book is on general principles applicable to so-called simple contracts.

I would like to thank Abdul Azeem Ali and Cynthianna Yau for their editorial support in the production of this book. Any errors or omissions, of course, remain my responsibility.

Lee Mason  
August 2011

## TABLE OF CONTENTS

<i>Foreword by the Honourable Mr Justice Patrick Chan PJ</i> .....	v
<i>Preface</i> .....	vii
<i>Table of Cases</i> .....	xxi
<i>Table of Legislation</i> .....	liii
<i>Introduction</i> .....	lvii

### PART I FORMATION OF A CONTRACT

#### CHAPTER 1 OFFERS AND INVITATIONS TO TREAT

1. Distinguishing an Offer from an Invitation to Treat .....	1.001
(a) Definition of an offer .....	1.001
(b) Definition of an invitation to treat .....	1.002
(c) Was there an offer? .....	1.004
2. Established Categories of Offers and Invitations to Treat .....	1.015
(a) Advertisements, brochures, catalogues, price lists and menus .....	1.016
(b) Shop displays: supermarket shelves and shop windows .....	1.029
(c) Websites .....	1.044
(d) Tenders .....	1.047
(e) Auctions .....	1.062
3. Termination of Offers .....	1.069
(a) Revocation .....	1.070
(b) Lapse of time .....	1.085
(c) Death .....	1.087
(d) Incapacity .....	1.094
(e) Change of circumstances? .....	1.098

#### CHAPTER 2 ACCEPTANCE

1. Definition of an Acceptance .....	2.001
2. Need for Unequivocal Acceptance .....	2.005
(a) Counter-offer or request for information? .....	2.010
(b) The "battle of forms" .....	2.012
3. Communication of Acceptance .....	2.043
(a) Acceptance must be communicated to the offeror .....	2.043
(b) Exceptions to the general rule .....	2.046
(c) Acceptance by conduct .....	2.052

(d) Acceptance by post .....	2.058
(e) Instantaneous communications .....	2.079
(f) Fax .....	2.081
(g) Email .....	2.085
(h) Telephone answering machines .....	2.091
(i) Is acceptance received by a company during or after "business hours"? .....	2.093
(j) Internet contracts .....	2.096
(k) Acceptance by silence .....	2.097
(l) Acceptance in ignorance of the offer .....	2.104
(m) Acceptance in unilateral contracts .....	2.110
(n) Prescribed modes of acceptance .....	2.114

### CHAPTER 3 CONSIDERATION

1. What is Consideration? .....	3.001
(a) The need for reciprocity .....	3.002
(b) Justification? .....	3.003
(c) Benefit to promisor or detriment to promisee .....	3.005
(d) Given in exchange .....	3.006
(e) Must be provided at the promisor's request .....	3.008
(f) As distinct from a condition .....	3.010
(g) As distinct from a motive .....	3.013
(h) As distinct from a gift .....	3.016
(i) Must move from the promisee .....	3.017
(j) Confusion with the doctrine of privity .....	3.018
(k) May be executory or executed .....	3.024
(l) Must not be impossible .....	3.028
(m) Must be sufficient, but need not be adequate .....	3.030
(n) Sufficient consideration of settlement of claims .....	3.037
(o) Forbearance to sue without waiving the right of action .....	3.045
(p) The apparent ease at finding sufficient consideration .....	3.046
2. Can <i>Past</i> Consideration Constitute Valid Consideration? .....	3.048
(a) General rule .....	3.048
(b) Exceptions .....	3.052
3. Can Performance of Existing Duties Constitute Valid Consideration? .....	3.068
(a) Duties imposed by law .....	3.069
(b) Duties owed to a third party .....	3.081
(c) Existing duty owed to promisor .....	3.087
4. Agreements to Terminate or Vary the Contract .....	3.112
(a) Agreements to terminate .....	3.113
(b) Agreements to vary .....	3.114
5. Future of Consideration .....	3.132

### CHAPTER 4 PROMISSORY ESTOPPEL

1. Inception .....	4.001
2. Requirements for the Operation of Promissory Estoppel .....	4.009
(a) Suspensory or extinctive? .....	4.010
(b) Reasonable notice .....	4.011
(c) Lump sums and instalments .....	4.015
(d) Shield, not a sword .....	4.018
3. Promissory Estoppel's Impact on <i>Foakes v Beer</i> ? .....	4.023
(a) What does this mean for creditors? .....	4.027
4. Future Development of Promissory Estoppel .....	4.031
(a) As a cause of action? .....	4.032
(b) Does this usurp the doctrine of consideration? .....	4.036
(c) What constitutes "unconscionable conduct"? .....	4.038
5. What Remedies are Available? .....	4.039
6. A Unified Doctrine of Estoppel? .....	4.046

### CHAPTER 5 CERTAINTY

1. Ambiguous Terms .....	5.002
2. Meaningless Terms .....	5.007
3. Incomplete Agreements .....	5.011
4. Restitution After Contract Ruled Void for Uncertainty .....	5.020

### CHAPTER 6 INTENTION TO CREATE LEGAL RELATIONS

1. Introduction .....	6.001
2. Domestic and Social Agreements .....	6.002
(a) <i>Balfour v Balfour</i> .....	6.003
(b) <i>Parker v Clark</i> .....	6.005
(c) <i>Jones v Padavatton</i> .....	6.007
(d) <i>Wu Chiu Kuen v Chu Shui Ching</i> .....	6.009
(e) Rebutting the presumption .....	6.011
3. Commercial Agreements .....	6.012
(a) Advertisements .....	6.013
(b) Letters of comfort .....	6.017
(c) Letters of intent .....	6.025
(d) Signed .....	6.027
(e) Collective labour agreements .....	6.030
(f) Relationship between certainty of terms and contractual intention .....	6.037
(g) Rebutting the presumption .....	6.040

**CHAPTER 7 PRIVY AND THIRD PARTIES**

1. What is the Doctrine of Privity? .....	7.001
2. The Burden Rule .....	7.002
(a) Exceptions .....	7.003
3. The Benefit Rule .....	7.017
(a) Privity and consideration .....	7.019
4. Criticisms of the Privity Doctrine .....	7.026
(a) Potential for injustice .....	7.027
(b) Commercial inconvenience .....	7.031
5. Exemption Clauses: Protecting Third Parties .....	7.036
(a) Satisfying Lord Reid's criteria .....	7.037
6. Other Ways of Circumventing the Doctrine of Privity .....	7.054
(a) A claim in tort .....	7.055
(b) Collateral contracts .....	7.060
7. Statutory Exceptions .....	7.066
(a) Third Parties (Rights Against Insurers) Ordinance (Cap.273) .....	7.067
(b) Conveyancing and Property Ordinance (Cap.219) .....	7.068
8. Law Reform? .....	7.069
(a) Excerpt from the Law Reform Commission's report (September 2005) .....	7.070

**CHAPTER 8 AGREEMENT MISTAKE**

1. Mutual Mistake .....	8.003
(a) An objective test .....	8.009
(b) Does the court consider the fault of any of the parties? .....	8.012
2. Unilateral Mistake .....	8.014
(a) Mistake as to terms .....	8.014
(b) Mistake as to identity .....	8.036
3. <i>Non est Factum</i> .....	8.074
(a) A classic case .....	8.075
(b) The document signed must be essentially different to the transaction intended .....	8.076
(c) Negligence precludes the defence against third parties .....	8.079
(d) Signer and third party as "victims": who should bear the loss? .....	8.081
(e) Not for the lazy, too busy or those who do not understand the legal effect .....	8.082
(f) Documents signed in blank .....	8.083
(g) A Hong Kong case example .....	8.084
(h) A dead doctrine? .....	8.087

**PART II  
CONTENTS OF A CONTRACT****CHAPTER 9 EXPRESS TERMS**

1. Pre-Contractual Statements .....	9.001
2. Distinguishing a Term From a Representation .....	9.005
(a) Why distinguish? .....	9.005
(b) How to distinguish? .....	9.009
3. Contracts in Writing .....	9.031
(a) The parol evidence rule .....	9.031
(b) The binding force of a signature? .....	9.043
4. Incorporating Written Terms into Oral Contracts .....	9.054
(a) Reasonable notice .....	9.056
(b) Course of dealings .....	9.088
(c) Trade custom .....	9.091
5. Interpretation of Terms .....	9.093
(a) The general approach .....	9.093
(b) Some specific maxims of interpretation .....	9.105

**CHAPTER 10 IMPLIED TERMS**

1. Terms implied <i>in Fact</i> .....	10.002
(a) Tests for implying terms in fact .....	10.006
(b) Application in Hong Kong .....	10.025
(c) A recent clarification .....	10.030
2. Terms implied <i>in Law</i> .....	10.036
(a) At common law .....	10.037
(b) By statute .....	10.049
3. Terms implied by <i>Trade Custom</i> .....	10.052

**CHAPTER 11 EXEMPTION CLAUSES**

1. Definition .....	11.001
(a) Defining obligations or as a defence to breach of contract .....	11.002
2. Advantages of Exemption Clauses .....	11.004
3. Common Law Control .....	11.007
(a) Incorporation .....	11.010
(b) Construction .....	11.011
(c) Other common law controls .....	11.040
4. Statutory Control .....	11.041
(a) Control of Exemption Clauses Ordinance (Cap.71) .....	11.041
(b) Supply of Services (Implied Terms) Ordinance (Cap.457) .....	11.090
(c) Misrepresentation Ordinance (Cap.284) .....	11.092

**PART III  
VITIATING FACTORS**

**CHAPTER 12 COMMON MISTAKE**

1. Definition .....	12.001
2. Scope of the Doctrine .....	12.004
(a) Generally .....	12.004
(b) Summary of the necessary elements .....	12.006
(c) Contractual allocation of the risk .....	12.007
(d) Fault .....	12.020
3. Categories of Common Mistake .....	12.022
(a) Mistake as to subject-matter .....	12.023
(b) Mistake as to ability to perform .....	12.034
(c) Mistake as to quality .....	12.040
(d) Mistake as to law .....	12.075
4. An Equitable Jurisdiction for Common Mistake? .....	12.080
(a) <i>Solle v Butcher</i> .....	12.081
(b) Rejection of an equitable jurisdiction: <i>Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd</i> .....	12.085
(c) Some comments in response to the rejection .....	12.094

**CHAPTER 13 MISREPRESENTATION**

1. What is a Misrepresentation? .....	13.001
2. Requirements for an Actionable Misrepresentation .....	13.002
(a) "False" .....	13.003
(b) "Statement" .....	13.006
(c) "Fact" .....	13.038
(d) "Induces" .....	13.055
3. Types of Misrepresentation .....	13.080
(a) Fraudulent misrepresentation .....	13.082
(b) Negligent misrepresentation .....	13.085
(c) Innocent misrepresentation .....	13.086
4. Remedies Available for Misrepresentation .....	13.088
(a) Rescission .....	13.089
(b) Damages .....	13.119
(c) Indemnity .....	13.193
(d) Contributory negligence .....	13.198
5. Exempting Liability for Misrepresentation .....	13.204
(a) Non-reliance clauses .....	13.204
6. Can Representations become Terms? .....	13.227
7. An Overlap with Mistake? .....	13.229

**CHAPTER 14 DURESS**

1. Introduction .....	14.001
2. Types of Duress .....	14.002
(a) Duress to the person .....	14.003
(b) Duress to goods .....	14.007
(c) Economic duress .....	14.010
3. Remedies for Duress .....	14.053
(a) Rescission .....	14.053
(b) Damages? .....	14.055

**CHAPTER 15 UNDUE INFLUENCE**

1. What is Undue Influence? .....	15.001
2. Types of Undue Influence .....	15.004
(a) Actual undue influence .....	15.005
(b) Presumed undue influence .....	15.011
3. Remedies .....	15.031
4. Undue Influence and Third Parties .....	15.032
5. Undue Influence in a Common Context: Husband-Wife-Bank .....	15.039
(a) Will the third party bank be able to enforce the guarantee? .....	15.045
6. <i>Li Sau Ying v Bank of China (Hong Kong) Ltd</i> .....	15.061
(a) On the issue of undue influence .....	15.062
(b) On the issue of the bank's alleged constructive notice .....	15.067
(c) On the issue of the "reasonable steps" to be taken by a bank "put on inquiry" .....	15.070
7. Overlap With Other Doctrines .....	15.072
(a) Duress .....	15.073
(b) Unconscionability .....	15.074
8. Confused Doctrine and/or One Without Limits? .....	15.077
(a) A recent example of the doctrine's wide scope .....	15.080

**CHAPTER 16 UNCONSCIONABILITY**

1. Introduction .....	16.001
(a) The English courts' reaction to notions of "unfairness" generally .....	16.001
(b) Some early case precedents concerning "unconscionable" conduct .....	16.003
(c) A general principle of "inequality of bargaining power"? .....	16.006
(d) Modern attitudes toward "unconscionability": substantive and procedural impropriety .....	16.013
(e) Conclusion on the English law approach .....	16.019
2. Unconscionability in Hong Kong .....	16.021
(a) <i>Semana Bachicha v Poon Shiu Man</i> .....	16.026
(b) <i>Lo Wo v Cheung Chan Ka Joseph</i> .....	16.032

- (c) *Ming Shiu Chung v Ming Shiu Sum*: a clear and authoritative endorsement of a doctrine of "unconscionability" in Hong Kong ..... 16.036  
 (d) Unconscionable Contracts Ordinance (Cap.458) ..... 16.054

#### PART IV DISCHARGE OF CONTRACT

##### CHAPTER 17 DISCHARGE BY PERFORMANCE

1. Discharge by Performance ..... 17.001  
 (a) Complete and precise performance ..... 17.002  
 (b) Partial performance ..... 17.009  
 (c) Substantial performance ..... 17.018  
 (d) Voluntary acceptance of partial performance ..... 17.024  
 (e) Wrongful prevention of performance ..... 17.030

##### CHAPTER 18 DISCHARGE BY AGREEMENT

1. The Need for Consideration ..... 18.002  
 2. Exceptions: Agreeing to Discharge without Consideration ..... 18.005

##### CHAPTER 19 DISCHARGE BY BREACH

1. Types of Breach ..... 19.001  
 (a) Actual breach of contract ..... 19.002  
 (b) Anticipatory breach of contract ..... 19.005  
 2. Consequences of Breach ..... 19.009  
 (a) Classification of terms ..... 19.010  
 (b) Damages ..... 19.030  
 (c) Choosing to terminate ..... 19.036  
 3. *Actual* (Repudiatory) Breach: Choosing to *Terminate* ..... 19.061  
 (a) Conveying the *reason* for treating the contract as terminated ..... 19.066  
 4. *Actual* (Repudiatory) Breach: Choosing to *Affirm* ..... 19.074  
 5. Can the Right to Choose Between Termination and Affirmation be Lost? ..... 19.077  
 (a) Estoppel ..... 19.077  
 (b) Sale of Goods Ordinance s.13(3) ..... 19.079  
 (c) Affirmation or termination: an irrevocable decision? ..... 19.081  
 6. *Anticipatory* (Repudiatory) Breach: Choosing to *Terminate* ..... 19.082  
 7. *Anticipatory* (Repudiatory) Breach: Choosing to *Affirm* ..... 19.089  
 (a) Limitation on the choice ..... 19.090  
 (b) Post-affirmation ..... 19.101

##### CHAPTER 20 DISCHARGE BY FRUSTRATION

1. When is a Contract Discharged by Frustration? ..... 20.001  
 2. Background ..... 20.002  
 3. Grounds for Invoking the Doctrine of Frustration ..... 20.006  
 (a) Impossibility ..... 20.006  
 (b) Frustration of purpose ..... 20.027  
 (c) Illegality ..... 20.055  
 4. Limitations on the Scope of the Doctrine ..... 20.060  
 (a) Express contractual provision ..... 20.060  
 (b) Foreseen and foreseeable events ..... 20.065  
 (c) Self-induced frustration ..... 20.069  
 5. Effects of Frustration ..... 20.085  
 (a) Money paid or payable before the frustrating event ..... 20.086  
 (b) Goods or services provided before the frustrating event ..... 20.097  
 (c) A lacuna in the statute? ..... 20.125  
 (d) Scope of the statute ..... 20.126  
 (e) Would *Appleby v Myers* be decided differently under the statute? ..... 20.128  
 6. *Justic* Bases ..... 20.130  
 (a) Implied term theory ..... 20.131  
 (b) Construction theory ..... 20.133  
 (c) Other theories ..... 20.134  
 7. A Narrow Doctrine ..... 20.135  
 (a) Frustration of leases? ..... 20.136

#### PART V REMEDIES

##### CHAPTER 21 DAMAGES

1. Introduction ..... 21.001  
 (a) A secondary obligation arising upon breach ..... 21.001  
 (b) The basic aim is to compensate, not punish ..... 21.002  
 2. Types of Loss Protected ..... 21.004  
 (a) Expectation loss ..... 21.004  
 (b) When expectation loss may appear speculative and uncertain ..... 21.041  
 (c) Reliance loss ..... 21.050  
 (d) Avoiding "double recovery" ..... 21.062  
 (e) Consequential loss ..... 21.064  
 3. Date for Assessment of Damages ..... 21.066  
 (a) *The Golden Victory* ..... 21.068  
 (b) Other exceptions to the general date-of-breach principle ..... 21.079