

CONTRACT LAW

IN HONG KONG

A Comparative Analysis

Neil Andrews and Fan Yang

Professional Bookshop
www.pbookshop.com

Preface
 Acknowledgements
 About the Authors

Chapter 1 Main Features of Contract Law in Hong Kong

1. Characteristics of Contract Law in Hong Kong	para 1.01	
2. The Objective Principle and 'Freedom of Contract'	para 1.05	
3. Contract and Tort Law	para 1.06	
4. Contract and Restitution or Unjust Enrichment	para 1.07	
5. Common Law and Equity	para 1.08	
6. Good Faith	para 1.10	
7. The Codification Question	para 1.14	
8. European Union Law	para 1.20	
9. Harmonisation of Contract Law in the Greater China Region	para 1.21	

Chapter 2 Abortive Negotiations and the Pre-formation Stage

1. Introduction	para 2.01	
2. Abortive Negotiations	para 2.03	
3. Negotiation Agreements	para 2.10	

Chapter 3 Establishing Consensus: Offer and Acceptance and Certainty

1. Introduction	para 3.01	
2. 'Invitations to Treat' and 'Offers' Distinguished	para 3.12	
3. Invitations to Treat	para 3.13	
4. The Process of Offer and Acceptance in General	para 3.15	
5. Acceptances	para 3.17	
6. Counter-offers, Rejection of Offers, Lapse of Time for Valid Acceptance	para 3.20	
7. Battle of the Forms	para 3.22	
8. Auctions, Tenders, and Sealed Bid Competitions	para 3.26	
9. The Objective Principle	para 3.33	
10. Problems of Uncertainty	para 3.34	
11. Establishing the Price in Contracts for the Sale of Goods	para 3.38	

Chapter 4 Consideration and Intent to Create Legal Relations

1. Introduction	para 4.01	53
2. Formalities	para 4.05	55
3. The Consideration Doctrine: Formation of Contracts	para 4.07	57
4. Consideration and Promises to Pay More than the Original Rate	para 4.11	58
5. Consideration and Promises to Reduce or Extinguish a Debt	para 4.17	61
6. Intent to Create Legal Relations	para 4.25	71

Chapter 5 Third Party Rights and Assignment

1. Introduction to Third Party Rights	para 5.01	78
2. The Common Law Doctrine of Privity	para 5.03	79
3. The Hong Kong Contracts (Rights of Third Parties) Ordinance (Cap 623)	para 5.04	80
4. Assignment of Rights	para 5.12	84
5. Modes of Assignment	para 5.16	85
6. Extent of the Assigned Right	para 5.19	87
7. Non-assignable Rights	para 5.24	88
8. Assignment Distinguished from Other Doctrines	para 5.26	89

Chapter 6 Misrepresentation and Mistake

1. Introduction to Misrepresentation and Mistake	para 6.01	91
2. Nature of a Misrepresentation	para 6.07	94
3. Tort Claims for Culpable Misrepresentations	para 6.16	97
4. Damages under Section 3(1) of the Misrepresentation Ordinance (Cap 284)	para 6.18	99
5. Rescission <i>ab initio</i>	para 6.22	102
6. Statements Becoming Contractual Terms or Collateral Warranties	para 6.23	106
7. Duties to Disclose	para 6.25	110
8. Common Law and Statutory Control of Exclusion Clauses Concerning Misrepresentation	para 6.34	113
9. Summary of Mistake	para 6.35	116
10. Shared Mistake at Common Law	para 6.40	118
11. No Rescission for Shared Mistake in Equity	para 6.54	123
12. Unilateral Error Concerning the Subject Matter	para 6.57	125
13. Mistake Concerning a Party's Identity	para 6.61	127
14. Leading Cases Concerning Mistake as to Identity	para 6.65	128

Chapter 7 Duress, Undue Influence, and Unconscionability

1. Introduction	para 7.01	133
2. Duress	para 7.05	135
3. Undue Influence	para 7.14	143
4. Unconscionability or Exploitation (Non-statutory)	para 7.23	150

Chapter 8 Express and Implied Terms and Exclusion Clauses

1. Express Terms, Including Special Terms	
2. Implied Terms in General	
3. Terms Implied in Law	para 8.01
4. Terms Implied in Fact	para 8.17
5. Implied Terms: Custom or Trade Usage	para 8.21
6. Exclusion Clauses	para 8.24
7. Incorporation of Exclusion Clauses	para 8.32
8. Control of Exclusion Clauses at Common Law	para 8.33
9. Control of Exemption Clauses Ordinance (1997)	para 8.36
10. Unconscionable Contracts Ordinance (1994)	para 8.41

Chapter 9 Interpretation of Written Contracts and Rectification

1. Interpretation of Written Contracts	para 9.01
2. Rectification	para 9.22

Chapter 10 Frustration

1. Introduction	
2. Legal and Physical Impossibility	para 10.01
3. Difficulty and 'Impracticability': No Frustration	para 10.04
4. Frustrating Delay and Frustration of the Venture	para 10.06
5. Self-Inducement and Choice	para 10.09
6. Aftermath of Frustration	para 10.12
7. Termination of Contracts of Indefinite Duration	para 10.15
	para 10.18

Chapter 11 Breach and Performance

1. Introduction	para 11.01
2. Strict or Non-strict Obligations and Deliberate Breach	para 11.02
3. Entitlement to Terminate for Breach	para 11.04
4. Renunciation and Repudiation Distinguished	para 11.06
5. Termination for Breach of Condition	para 11.11
6. Breach of an Intermediate or Innominate Term	para 11.17
7. Anticipatory Breach	para 11.20
8. Nature of Termination for Breach	para 11.30
9. The Entire Obligation Rule	para 11.39

Chapter 12 Remedies for Breach of Contract

1. Introduction	para 12.01
2. Debt	para 12.02
3. Damages for Breach of Contract	para 12.08
4. Specific Performance and Injunctions	para 12.34
5. Restitutionary Claims	para 12.44
6. Declarations	para 12.50
7. Liquidated Damages	para 12.51
8. Deposits	para 12.55

Chapter 13 Illegality and Public Policy

1. Introduction	para 13.01	302
2. Agreements to Commit a Legal Wrong	para 13.05	307
3. Incidental Illegality during Performance: A Flexible Approach	para 13.06	308
4. Agreements Prohibited by Statute	para 13.07	309
5. Gambling Contracts	para 13.10	311
6. Public Policy	para 13.11	312
7. Is the Claimant Implicated in the Unlawful Performance?	para 13.22	324
8. Consequences of Illegality	para 13.25	325

Bibliography

329

Index

331

Professional Bookshop
www.professionalbookshop.com

Third Party Rights¹ and Assignment

CONTENTS

- | | |
|--|-----------|
| 1. Introduction to Third Party Rights | |
| 2. The Common Law Doctrine of Privity | para 5.01 |
| 3. The Hong Kong Contracts (Rights of Third Parties) Ordinance (Cap 623) | para 5.03 |
| 4. Assignment of Rights | para 5.04 |
| 5. Modes of Assignment | para 5.12 |
| 6. Extent of the Assigned Right | para 5.14 |
| 7. Non-assignable Rights | para 5.16 |
| 8. Assignment Distinguished from Other Doctrines | para 5.26 |

(1) Introduction to Third Party Rights

5.01 At common law, a third party cannot enforce a contract intended by the parties to be for her benefit (see summary at 5.03 below). And so at common law, a third party, T, cannot sue A directly if A promises B that, for example, A will pay B £1000, in return for a counter-promise by B to do something. It is different if A assigns this debt to Z, because Z can then sue A. But assignment (on which 5.04ff) can only occur *after the formation of the contract between A and B*.

5.02 In Hong Kong, the Law Reform Commission successfully recommended a legislative system of third party rights.³ This is now the Contracts (Rights of Third Parties) Ordinance (No 17 of 2014) (Cap 623) (5.04ff). The ordinance (Cap 623) enables a third party to acquire a direct right of action (or the right to benefit from an exclusion clause) either by explicit language or by implication (5.08ff).

¹ M Furnston and G Tolhurst, *Privity of Contract* (OUP, 2015); R Merkin (ed), *Privity of Contract* (Lloyd's of London Press, 2000); for theoretical discussion, P Kincaid (ed), *Privity* (Aldershot, 2000); V V Palmer, *The Paths to Privity* (Austin and Winfield, 1992) examines the history of this doctrine; N Andrews (1995) 69 Tulane LR 1393; for comparative discussion, V V Palmer, 'Contracts in Favour of Third Persons in Europe' (2003) 11 Eur Rev of Private Law 8-27.

² See literature cited at 5.12 on this doctrine.

³ 'Privity of Contract'. The Law Reform Commission of Hong Kong Report (September 2005), available at <http://www.hkreform.gov.hk/en/publications/rprivity.htm>.

(2) The Common Law Doctrine of Privity

5.03 At common law A and B cannot confer on T, the third party, a direct right of action against A. There was a tangle of earlier authorities,⁴ but in *Tweddle v Atkinson* (1861) it was eventually established at common law that a third party could not sue for breach of promise. The reason given in that case was that the third party had not provided consideration (generally on that doctrine, see chapter 4) for the promise, that is, he had not bought the right to sue.⁵ The next development occurred in *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* (1915). Here, Viscount Haldane LC, having endorsed the 'consideration' requirement established in the *Tweddle* case (1861), just examined, gave a second explanation, on which the *Tweddle* case (1861) (see above) had been silent. In *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* (1915), Viscount Haldane said that the third party could not sue because he was not an addressee of the promise made by A to B. In other words, *the third party was not a promisee*; A was committing himself only to an obligation towards B but not to the third party.⁶ As Treitel observes, the 'new point', that 'only a party can sue on a contract', is merely a restatement of the privity doctrine, rather than an independent and satisfactory reason for adopting that doctrine.⁷ In other words, the requirement of 'pure privity' rests on a dogma and is conspicuously circular: a third party cannot sue on a contract; this is because only a party can do so; and a third party is not a party. The Hong Kong Law Reform Commission agreed with this critique.⁸ It should also be noted that the common law takes a narrow approach to the promisee's capacity to obtain remedies in respect of breach: the promisee can sue only in respect of his personal loss and not for the third party's separate loss.⁹ This means that, unless the promisee can show personal loss, the party in breach is effectively let off the hook. Although criticised,¹⁰ this rule remains the orthodox starting point in this field.¹¹ However, this rule is hedged round with numerous exceptions.¹² The overall picture is complex and untidy. Exceptionally, as in *Beswick v Beswick*

⁴ V V Palmer, *The Paths to Privity* (San Francisco, 1992) examines the history of this doctrine; for a review of this book, N Andrews (1995) 69 Tulane LR 1393.

⁵ (1861) 1 B & S 393; 30 LJQB 265; 4 LT 468; cf *Lawrence v Fox* 20 NY 268 (1859) (New York Court of Appeals decided, two years before the *Tweddle* case, that a third party beneficiary did have a right of action).

⁶ [1915] AC 847, 853, HL, *per* Viscount Haldane LC; cited in *Mandarin Container, Re* [2004] 3 HKLRD 554.

⁷ The 'only a party can sue' argument 'begs the question': G H Treitel, *The Law of Contract*, edited by E Peel (13th edn, Sweet & Maxwell, 2011) 14-015.

⁸ The Law Reform Commission of Hong Kong, *Privity of Contract*, Recommendation 1 at 25.

⁹ Affirmed by *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 WLR 227, 283-84, 291, 293, 297, 300, HL; cited in *Creatiles Building Materials Co Ltd v To's Universe Construction Co Ltd* [2003] 2 HKLRD 309 and *Keung Shiu Tang v DH Shuttlecocks Ltd* [1994] 1 HKC 286.

¹⁰ In *Alfred McAlpine Construction Ltd v Panatown* [2001] 1 AC 518, 538, 544 D, Lord Goff, drawing upon G H Treitel (1998) 114 LQR 527.

¹¹ A Burrows, 'No Damages for a Third Party's Loss' (2001) 1 Oxford University Commonwealth LJ 107, 108 cites *Beswick v Beswick* [1968] AC 58, HL and *White v Jones* [1995] 2 AC 207, HL as other instances of the *Woodar* rule.

¹² In *Alfred McAlpine Construction Ltd v Panatown* [2001] 1 AC 518, 581-82, HL, Lord Millett considered these exceptional situations.

(1968),¹³ the promisee might obtain an order for specific performance from the promisor to perform, and this order will benefit the third party, since he who practically gains from that performance. Finally, it should be noted that the greatest challenge to the common law privity rule (summarised in the paragraph) was equity's invention (on equity in general, 1.08) in the eighteenth century of 'trusts of promises'.¹⁴ The benefit of A's promise to pay money or to grant property to T (such promises are known as 'choses in action') can be held in trust for T, B thereupon becoming obliged in equity to sue A for T's benefit if B fails to sue A, T (as the 'beneficiary' of the trust) can take the judgment to sue A for default in performance (a plain reversal by equity of the common law privity doctrine). However, the English Court of Appeal in *Re Schebsman* (1974) held that the courts would no longer benevolently imply such a trust of a promise. This 1944 English Court of Appeal decision was a 'tipping point': after it, a promise had to be based on *explicit language* indicating the contracting parties' shared intention to confer on T an *irrevocable* entitlement to the benefit of A's promised performance.

In *B & B Construction Ltd v Sun Alliance and London Insurance Plc* (2001) the Hong Kong courts considered the decision of the High Court of Australia in *Trident General Insurance Co Ltd v McNiece Bros Proprietary* (1985) which has relaxed the strictness of the privity doctrine in Australia. In the *Construction* case, Godfrey VP (with whom Ribeiro JA agreed) commented

[the court is] aware of the judicial abrogation of the rule effected in Australia by the decision of the High Court (split 4 to 3) in [the Trident case], a case the facts of which bear many similarities to our own. . . . But here, in Hong Kong, the law remains as magisterially stated by Viscount Haldane LC in *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847 at 853: 'only a person who is a party to a contract can sue on it. Our law knows nothing of a *jus quaesitum tertio*'.

(3) The Hong Kong Contracts (Rights of Third Parties) Ordinance (Cap 623)¹⁹

5.04 The ordinance (Cap 623) enables a third party, i.e. a person not a party to a contract, to enforce the contractual terms subject to contracting parties'

intention. As we shall see (5.08ff), this direct right of action arises if (1) the contract contains an express term to that effect, or (2) if the contract contains a term which purports to confer a benefit on the third party, that party has that right unless on a proper construction of the contract, the parties to the contract do not intend that party to have that right.²⁰

5.05 The ordinance (Cap 623) applies to most transactions. But certain classes of contract are excluded: (1) a third party already has an enforceable right under existing rules reflecting international conventions. This includes a bill of exchange, a promissory note, a contract on a negotiable instrument, a contract for the carriage of goods by sea and by air and a contract on a letter of credit;²¹ and (2) a third party has no enforceable right under existing rules but there are sound policy reasons for maintaining that position. This includes the memorandum and articles of a company having effect as a contract under section 86 of the Companies Ordinance (Cap 622) and a contract of employment against an employee.²² In the case of a contract of carriage within the meaning of the Bills of Lading and Analogous Shipping Documents Ordinance (Cap 440), terms conferring the benefit of exemption clauses that exclude or limit liability on third parties are covered by the ordinance.²³ Contracts entered into before the commencement of the ordinance would be excluded from the application of the ordinance so that existing rights or remedies of a third party will be not affected by the ordinance.²⁴

5.06 *Naming or Other Identification of Third Parties:* Section 4 (1) of the Contracts (Rights of Third Parties) Ordinance (Cap 623) is modelled on section 1(3) of the Contracts (Rights of Third Parties) Act (England and Wales) 1999 (see below), which recognises three modes of identifying T: where T is: (1) 'expressly identified in the contract by name'; or (2) 'as a member of a class'; or (3) 'as answering a particular description', for example, 'employees of B' or 'sub-contractors and agents of B'. Modes (2) and (3) were considered by the English Court of Appeal in *Avraamides v Colwill* (2006), where it was held that the court will not engage in liberal construction to make good a defective or vague description.²⁵ Section 4 (1) of the Hong Kong Contracts (Rights of Third Parties) Ordinance (Cap 623), which is the same as section 1(3) of the Contracts (Rights of Third Parties) Act (England and Wales) 1999, provides that a third party should be *expressly identified by name, as a member of a class or as answering a particular description in a contract*. Section 4 (3) of the ordinance (Cap 623) continues to state that rights may also be conferred on a third party who is not in existence when the contract is entered into.

5.07 *Test for Identifying Third Party's Rights:* Subsections 4(1) and 4(2) of the ordinance (Cap 623) state:

¹¹ Eur Rev of Private Law 8–27. For a recent and insightful journal article on the Hong Kong reform, see M Lee, 'Enforcing Contracts for the Benefit of Third Parties: Recent Reform of the Doctrine of Privity', *Hong Kong Law Journal* (2015) Volume 45, Part 1, 13–28.

²⁰ Section 4, the Contracts (Rights of Third Parties) Ordinance (Cap 623).

²¹ Section 3, the Contracts (Rights of Third Parties) Ordinance (Cap 623).

²² Section 3, the Contracts (Rights of Third Parties) Ordinance (Cap 623).

²³ Section 3(3), the Contracts (Rights of Third Parties) Ordinance (Cap 623).

²⁴ Section 3, the Contracts (Rights of Third Parties) Ordinance (Cap 623).

²⁵ [2006] EWCA Civ 1533; [2007] BLR 76.

¹³ [1968] AC 58, HL.

¹⁴ *Tomlinson v Gill* (1756) Ambler 330; V V Palmer, *The Paths to Privity* (San Francisco, 1992) 136.

¹⁵ [1944] Ch 83, CA.

¹⁶ [2000] 2 HKC 295.

¹⁷ [1987–88] 165 CLR 107.

¹⁸ [2000] 2 HKC 295.

¹⁹ M J Fisher and D G Greenwood, *Contract Law in Hong Kong* (Hong Kong UP, expanded 2nd edn, 2011) ch 16; S Hall, *Law of Contract in Hong Kong: Cases and Commentary* (3rd edn, Lexis Butterworths, 2011) ch 16; L Mason, *Contract Law in Hong Kong* (Sweet & Maxwell, 2011) ch 7.

²⁰ The Contracts (Rights of Third Parties) Act 1999 (England and Wales), see A S Burrows [2000] *Legal & Commercial LJ* 540–54; N Andrews [2001] *CLJ* 353–81; C MacMillan (2000) 63 *Legal & Commercial LJ* 540–54; N Andrews [2001] *CLJ* 353–81; C MacMillan (2000) 63 *Legal & Commercial LJ* 540–54.

²¹ 38 R Stevens (2004) 126 *LJR* 292–323 (who bemoans its enactment); 'Privity of Contract: Contracts for the Benefit of Third Parties', Law Commission Report No 242 (1996) notably parts VII and VIII; and for comparative observations, V V Palmer, 'Contracts in Favour of Third Persons in Europe' (2001) 13 *Legal & Commercial LJ* 540–54.

- (1) (a 'third party') may enforce a term of the contract (including a term that excludes or limits liability) if—(a) the contract expressly provides that the third party may, or (b) the term purports to confer a benefit on the third party.
- (2) Subsection (1)(b) does not apply if, on a proper construction of the contract, the term is not intended to be enforceable by the third party.

Subsection (4) further provides that the enforcement of a term of a contract under subsection (1) is subject to and must be in accordance with any other term of the contract relevant to the term being enforced. Subsection (5) provides that subsection (1) applies irrespective of whether the third party has given to the promisor consideration for the term, as long as the promisee has given consideration for the contract or the contract is made by deed.

5.08 As recommended by the Law Reform Commission of Hong Kong, the Ordinance (Cap 623) adopts the two-limb test in the sections 1(1) and (2) of the Contracts (Rights of Third Parties) Act 1999 (England and Wales). Thus, a statutory third party right will arise if either

- (i) *limb 1*: A and B have expressly stated that T may enforce a contractual term or
- (ii) *limb 2*: the contractual term between A and B purports to confer a benefit on the third party unless on a proper construction, A and B did not intend the term to be enforceable by T.

As for limb 2, subsections 4(1)(b) and 4(2) are in line with the two-stage test as acknowledged by Colman J in *Nisshin Shipping Co Ltd v Cleaves & Co* (2004),²⁶ and by the English Court of Appeal in the *Laemthong* case (2005),²⁷ (1) where A and B's contract purports to confer on T a benefit, this clause or clause is deemed to give T a right of action against A (or, in the case of an exclusion clause, T can take advantage of an exclusion clause); unless (2) on a 'proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party'.

5.09 In *Dolphin Maritime & Aviation Services Ltd v Sveriges Angfartygs Aktieforening* (2009)²⁸ Christopher Clarke J said:²⁹ 'purporting to "confer" a benefit seems to me to connote that the language used by the parties shows that the purposes of their bargain (rather than one of its incidental effects if performed) was to benefit the third party'. Christopher Clarke J distinguished³⁰ between (i) an arrangement whereby A was obliged to pay B, or to make payment to X, B's agent and (ii) a situation where A and B agreed that A should pay T. In situation (i) B's agent was not a beneficiary under limb 2 of the 1999 Act (England and Wales) but merely a conduit for possible payment, for the intended and lasting benefit of B, the principal. In the *Dolphin* case A's sole obligation was to pay money to B, and so X (B's agent) could not complain under the 1999 Act.

²⁶ [2004] EWHC 2602 (Comm); [2004] 1 Lloyd's Rep 38.

²⁷ *Laemthong International Lines Co Ltd v Abdullah Mohammed Fahem & Co* [2005] EWCA Civ 167.

²⁸ [2009] EWHC 716 (Comm); [2010] 1 All ER (Comm) 473; [2009] 2 Lloyd's Rep 125.

²⁹ CLC 460, at [74]–[84].

³⁰ *ibid.*, at [74].

³¹ *ibid.*, at [76].

direct payment from A so that X could cream off his commission (X had hoped, as such a conduit, to pass the money to B, its principal, after deducting X's commission). From A's perspective, the commission due to X was *res inter alios acta*. The 'incidental benefit' problem, according to the English Law Commission,³¹ would mean that limb 2 would not be satisfied on facts similar to *White v Jones* (1995) (which antedated the Act).³²

5.10 *Third Party's Remedies*: If T has a right of action under the Bill, he can employ (as appropriate) the remedies of debt, specific performance, damages, etc (on the judicial remedies for breach of contract, see chapter 12), provided these remedies apply to the relevant facts, in accordance with common law and equitable principles (and T can take advantage of any restrictions on his liability towards A contained in the promise made by A to B for T's benefit).³³ Section 5 (1) of the Contracts (Rights of Third Parties) Ordinance (Cap 623) states:

- (1) There is available to a third party who enforces a term of a contract under section 4 any remedy that would have been available to the third party in an action for breach of contract had the third party been a party to the contract, and any rule of law relating to the remedy applies accordingly.
- (2) Nothing in this Ordinance affects any right or remedy of a third party that exists or is available apart from this Ordinance.

5.11 *Rescission and Variation of the Contract*: Section 6 of the ordinance (Cap 623) provides:

- (1) If a third party has a right under section 4 to enforce a term of a contract, the parties to the contract may not, by agreement, rescind the contract, or vary it in such a way that extinguishes or alters the third party's entitlement under that right without the third party's consent if—(a) the third party has by words or conduct assented to the term and communicated the assent to the promisor, or (b) the third party has relied on the term and—(i) the promisor is aware of the reliance; or (ii) the promisor can reasonably be expected to have foreseen that the third party would rely on the term.

And so, in general, A and B will retain the *consensual* power to vary or 'rescind' the contract without T's consent. But the two cut-off points, at which stage T's rights are 'crystallised': when (i) T communicates 'assent to the term' to A; or (ii) T relies on A's promise; T's reliance will count if A knew that it had occurred, or at least if it was reasonably foreseeable by A. The English Law Commission's report states that there is no need for T's reliance to be 'detrimental'.³⁴ As for (i) (T communicates 'assent to the term' to A), it is important to note that the assent must be communicated not to the promisee but directly to the promisor.

According to the recommendation of the Law Reform Commission of Hong Kong, the restriction to rescind or vary the terms can be overridden by an express term

³¹ Law Commission (England and Wales), *Privity of Contract: Contracts for the Benefit of Third Parties* (Law Commission Report No 242, Cm 3329, London, 1996) 7.19ff.

³² [1995] 2 AC 207, HL.

³³ eg (although the English Court of Appeal held that T in fact acquired no such immunity on the facts), *Prudential Assurance Co Ltd v Ayres* [2008] EWCA Civ 52; [2008] 1 All ER 1266.

³⁴ Law Commission (England and Wales) Report No 242 (Cm 3329: 1996) 9.19.

under which a party to the contract can rescind or vary the contract without the third party's consent, or an express term that specifies the circumstances in which the third party's consent is required. However, for such an express term to have effect, before the third party's rights are crystallised, the third party must be aware of it or reasonable steps have been taken to notify the third party of the express term.³⁵

Furthermore, section 7 of the ordinance (Cap 623) provides the court with a discretion to authorise rescission or variation of the contract without the consent of the third party if it is just and practicable to do so. The court may make an order with such conditions, including a condition requiring the payment of compensation to the third party, as it may think fit.³⁶

(4) Assignment of Rights³⁷

5.12 Outline: The holder of certain contractual rights (the promisee, and assignor ('A')) can transfer the right to a third party (the assignee ('C')), without the assignor's ('A') consent. Thus, where A owes B a debt, or other *chose in action*, right-holder B can assign the benefit of this right to C. In the case of a statutory assignment,³⁹ the assignment by B to C must be in writing, and B or C must give notice of the assignment. Such notice is also desirable in the case of equitable assignments. Certain rights are intrinsically incapable of being assigned because they are personal to the A/B relationship. A can preclude an assignment by including a prohibitory clause in his contract with B.

5.13 Effects of Assignment: Assignment has four effects. First, A, once assigned, is obliged to pay C. Secondly, to enforce the obligation just mentioned, C can sue A directly, without joining B as a party to the claim. This is true of a statutory assignment and of equitable assignment of *choses in action*. In the case of equitable assignment of a legal *chose in action*, such as a debt, the assignee ('C') must join the assignor ('B') as party to the claim: although there are exceptions where this is unnecessary or waived.⁴⁰ Thirdly, if A pays C, A's obligation is discharged.

tion to B is discharged. Finally, if, after B's assignment of the right to C, A instead pays B, this payment is ineffective to discharge A's newly transferred obligation towards C.

5.14 No Assignment of Duties: Vicarious Performance Contrasted: A promisor cannot assign the 'burden' of his obligation to another. Only rights can be assigned, and not duties. Thus one cannot, without the promisee's consent (that is, the party entitled to contractual performance), transfer the burden of a contract from one promisor to a new party. The explanation is that the principle of 'freedom of contract' gives the promisee the right to choose 'who the promisor will be', that is, A can decide who will owe him a contractual duty. But there are situations where a party cannot complain if another in fact performs another's contractual duty. This is known as 'vicarious performance'. Technically, vicarious performance is consistent with the principle, stated above, that duties cannot be transferred without the consent of the person who holds the relevant right. The reason there is no inconsistency is that, where vicarious performance occurs, the duty is not transferred. In fact, the original contractual obligation remains intact. A legal change occurs only because A's obligation to B is discharged by C's performance.

5.15 Thus, it might be possible under a contract between A and B for A to subcontract performance to a third party, C. C does not have this burden thrust upon him: he has assented with A to perform the job. Nor does B lose his contractual rights against A. Thus, if C performs satisfactorily, A's duty to B is discharged. But if C performs badly, A will be in breach of his contract towards B. C might also be in breach of a tortious (or delictual) duty of care towards B. Nor can B legitimately complain that the job has been done by C and not by A. Such an objection would be valid only if A's personal identity was crucial to the transaction. The assumption for the moment is that A's identity was not crucial: a reasonable person in B's position would not object to such subcontracting by A of the performance by C.

(5) Modes of Assignment⁴¹

5.16 Statutory Assignment:⁴² The requirements for assignment of a debt or other *chose in action* under section 9 Assignment of debt or chose in action, Law Amendment and Reform (Consolidation) Ordinance (Cap 23), the equivalent legislation of section 136(1) of the England's Law of Property Act 1925 are as follows. First, B must assign *in writing* the right to C, that is, B notifies C, and so B effects the transfer of the contractual right, in written form. B must sign this document. There is no need for C to provide consideration for this transfer. Secondly, there must be written notice to A of the assignment (notice can be given by B or C). The assignment takes effect 'from the date of such notice'. Thirdly, the assignment must be 'absolute'. This means that A's duty to pay C should not be dependent on A discovering the balance of entitlement between B and C. For example, where B purports to assign so much of A's debt as is necessary to satisfy outstanding

³⁵ The Law Reform Commission of Hong Kong, *Privity of Contract*, Recommendation 7.

³⁶ The Law Reform Commission of Hong Kong, *Privity of Contract*, Recommendation 8.

³⁷ Main sources: A G Guest, *Guest on the Law of Assignment* (2nd edn, Sweet & Maxwell, 2010) ch 22; A P Bell, *Modern Law of Personal Property* (Butterworths, 1989) ch 15; M Smith and N Leslie, *The Law of Assignment* (2nd edn, OUP, 2013); G Tolhurst, *The Assignment of Contractual Rights* (Hart, 2006) (including Australian material); Anson's *Law of Contract* (29th edn, OUP, 2010) ch 22; A P Bell, *Modern Law of Personal Property* (Butterworths, 1989) ch 15; 'Choses in Action and Obligations', in J W Neyers, R Bronaugh, and S G A Pitel (eds), *Exploring Contract Law* (OUP, 2009) 267ff; A M Tettenborn, 'Problems in Assignment Law', in A S Burrows and E Peel (eds), *Contract Formation and Parties* (OUP, 2010); and C H Tham, 'The Nature of Equitable Assignment and Assignment Clauses', in J W Neyers, R Bronaugh, and S G A Pitel (eds), *Exploring Contract Law* (OUP, 2009) 283ff.

³⁸ For classification of choses in action, M Smith and N Leslie, *The Law of Assignment* (2nd edn, OUP, 2013).

³⁹ Section 90ets f 2 AC 1, HL, Assignment of Debt or Chose in Action, Law Amendment and Reform (Consolidation) Ordinance (Cap 23).

⁴⁰ *Chitty on Contracts* (31st edn, Sweet & Maxwell, 2012) 19-038, 19-039.

⁴¹ *ibid.*

⁴² G H Treitel, *The Law of Contract*, edited by E Peel (13th edn, Sweet & Maxwell, 2011) 15-010ff, for exposition of section 136(1), Law of Property Act (England and Wales) 1925 (formerly section 25(6) Judicature Act (England and Wales) 1873).

(6) Extent of the Assigned Right

- obligations owed by B to C. In this situation, the objection is that A cannot cover readily whether A, following the purported assignment, still owes to C, the assignee, because that question depends on the state of accounts between A and C.⁴³ Fourthly, there are further restrictions on what can be assigned by statute. Thus, one cannot assign part of the debt owed by A to B (but if B has transferred all that remains of A's debt and, in this sense, the unpaid balance of A's debt, the assignment can be a valid statutory assignment because B has transferred all that remains of A's debt and, in this sense, the partial assignment of A's debt). Nor can there be a statutory assignment by charge upon a fund or account owed by A to B. The right assigned must be (i) an existing obligation; or (ii) a contractual entitlement which will arise from a contract, provided the latter contract is already operative, because there can be a statutory assignment of a wholly prospective right.⁴⁴
- 5.17 Equitable Assignment:** If, for some reason, an attempted statutory assignment fails, a valid equitable assignment might nevertheless arise. If the right assigned is a legal debt or obligation (as opposed to a purely equitable right, for example a right arising by trust or entitlement to a legacy), equitable assignment requires C to join B in any litigation to enforce A's duty. Under the Law of Property Act (England and Wales) 1925, writing is required where the equitable assignment concerns a disposition of a subsisting equitable interest.⁴⁵ The Hong Kong Conveyancing and Property Ordinance (Cap 219) section 5 'Certain instruments to be in writing', seems to be the equivalent provision of section 53(1) of the Law of Property Act 1925. However, section 5 does not contain a mirror image that addresses subsisting equitable interest. Subject to that, equitable assignments can be oral (by notification of the transfer to the assignee). Equitable assignments can be gratuitous. There is no need for 'consideration' (on which see chapter 4) in the case of a perfected equitable assignment in equity (although here writing is required). As for gratuitous equitable assignments, the legal chose in action, the better view is that a perfected assignment in equity can be valid even though there is no consideration, and despite non-compliance with the statutory mode of assignment.⁴⁶ An equitable assignment of a prospective right is possible. It will take effect as an agreement to assign. But will require C to have provided consideration to B. An equitable assignment is also effective even though notice is not given to A, the debtor (contrast assignment where such notice must be given to A). Nevertheless, notice to A in case of equitable assignment is highly desirable for two reasons: first, because then required to pay C directly (A's payment to B, after notice of the assignment does not discharge A's liability to pay the assignee); secondly, notice determines priority as between successive assignees.
- 5.18 Specific Statutory Contexts:** Assignments of patents and copyright and other special types of right are subject to specific rules.⁴⁷
- 5.19** C's claim as assignee can be defeated if A, the main debtor, has a right as against B to rescind the relevant obligation on the basis of B's misrepresentation, non-disclosure, or fraud, etc. This limitation is expressed by saying that C's assigned rights are subject to any 'equities' pertaining as between A and B.⁴⁸ More generally, C cannot receive as assignee a right or an interest greater than that (purportedly) transferred. For example, if B's 'right' is in fact void for mistake or illegality, C cannot be placed in any superior position vis-à-vis A.
- 5.20** Furthermore, C's rights against A are also subject to any right of set-off which A has against B arising out of the transaction between A and B.⁴⁹ However, if the right of set-off is personal to B, C will not be subject to it, at any rate if the set-off has arisen after notice of assignment to A.⁵⁰
- 5.21** If A pays money to C, a valid assignee, but this money was not owing by A to B (so that A has 'overpaid' by paying money to the assignee, C), A cannot recover this payment from C if the contract between A and B provided expressly for adjustment of overpayments directly as between A and B. A's inability to obtain repayment from the assignee C extends to the situation where B cannot repay A because B has become insolvent. In *Pan Ocean Shipping Ltd v Creditcorp Ltd, 'The Trident Beauty'* (1994)⁵¹ a charter party between A, the charterer, and B, owner, entitled B to recover hire from A. B assigned to C these rights to hire. The right assigned was for payment in advance of each period of hire. A paid C, in accordance with assignment. C's receipt from A of hire covered the period when the vessel was in fact 'off-hire'. A surviving contractual clause between A and B provided that B would repay or make allowance for any overpayment. B had become impecunious. The House of Lords held that A could not recover payment from C, the assignee.
- 5.22** The assignee, C, can recover damages no less extensive than those to which the assignor, B, would have been entitled if the assignment had not taken place. The English Court of Appeal's decision in *Offer-Hoar v Larkstore Ltd* (2006)⁵² acknowledges that, following an assignment of a cause of action by a former land owner to the present owner, the assignee's claim for damages is not 'capped' by the amount to which the assignor has suffered loss. Thus, the assignee can recover damages no less extensive than those to which the assignor would have been entitled if the assignment had not taken place. However, the assignee cannot augment the liability by bringing to the quantification of the claim factors peculiar to the assignee.⁵³

⁴⁸ *Chitty on Contracts* (31st edn, Sweet & Maxwell, 2012) 19-070ff.

⁴⁹ *Sun Legend Investments Ltd v Ho Yuk Wah David (No 1)* [2010] 2 HKLRD 424.

⁵⁰ *Anson's Law of Contract* (28th edn, OUP, 2002, by Sir Jack Beatson) 480-81 (see now 29th edn, 2010, ch 22).

⁵¹ [1994] 1 WLR 161, HL, applied in *Sun Legend Investments Ltd v Ho Yuk Wah David (No 1)* [2010] 2 HKLRD 424.

⁵² [2006] EWCA 1079; [2006] 1 WLR 2926; applied in *Landfast (Anglia) Ltd v Cameron Taylor One Ltd* [2008] EWHC 343 (TCC), Akenhead J.

⁵³ *Dawson v Great Northern and City Railway Co* [1905] 1 KB 260, CA (considered in the present

⁴³ *Treitel*, *ibid.*, 15-012, explaining case law on this point.

⁴⁴ *ibid.*, 15-025.

⁴⁵ Section 53(1), Law of Property Act (England and Wales) 1925.

⁴⁶ As G. H. Treitel, *The Law of Contract* (13th edn, Sweet & Maxwell, 2011) 15-035, attractively citing Sections 50, 52 Patents Ordinance (Cap 514); sections 101, Copyright Ordinance (Cap 528).

5.23 *Offer-Hoar v Larkstore Ltd* (2006)⁵⁴ concerned these facts. In 1998 A, the assignor, had made a soil report on a site for B, the eventual assignee. The report contained no clause prohibiting assignment. In 1999, B transferred the site to C, a developer. In 2001, damage occurred when there was a landslide on the site. A's failure in its report to alert B to this danger was a breach of contract. In 2004, B assigned to C the benefit of B's cause of action in respect of the breach of contract. The Court of Appeal held that A could not defeat C's claim for damages by B. The rights assigned included the right to compensation in respect of loss as they might unfold from the time the breach of contract had occurred, and liability might emerge after the transfer of the site and either after or before these facts) the assignment. Of course, this decision does not affect any claim A might have as against C based on the rules of limitation of action, causation, remoteness of damage, etc.

(7) Non-assignable Rights

5.24 The initial agreement between A and B can validly prohibit such a transfer. There are also bars against assignment based on statute or public policy.⁵⁵ However, assignments can be valid even though the purpose of the arrangement was unattractive or a legal dodge. Thus, assignments have been upheld in the following situations: (i) assignment by B to C, when this assignment is intended to benefit A, the debtor,⁵⁷ or (ii) by a B, a company, to C, an individual, so that C (unlike B) will not be vulnerable to an application for security for costs,⁵⁸ or (iii) by a company, to C, an individual, so that C (unlike B) can seek legal aid in respect of the underlying claim.⁵⁹ The agreement between A and B can validly prohibit a transfer.⁶⁰ In *Yook Tong Electric Co Ltd v Pirelli Cavi E Sistemi Spa* (2001), the Hong Kong Court of Appeal found that a non-assignment clause in an agreement had survived the termination of the agreement.

5.25 Certain rights of action are not assignable. There are four categories:

- (1) first, most tort actions;⁶² in particular, in *Simpson v Norfolk and Norwich University Hospital NHS Trust* (2011)⁶³ the Court of Appeal held that a personal injury claim exercisable by true victim X cannot be validly assigned to Y so as to enable Y to sue the defendant for damages in the tort of negligence; the doctrine of champerty invalidates such attempted assignments; accordingly, the defendant was entitled to obtain a striking out of the assignee's claim;
- (2) a second category of non-assignable rights concerns unliquidated claims for contractual damages unless C, the purported assignee, has a 'genuine commercial interest' in taking the assignment (for example, C has made a loan to B, the assignor, and is now seeking to recoup some of this by receiving assigned rights as against A);⁶⁴ or the assignee has received a proprietary interest and the relevant claim relates to that interest;⁶⁵
- (3) a third situation where rights of action are non-assignable is a right to rescind a transaction (for example, by reason of undue influence);⁶⁶
- (4) finally, certain personal undertakings are not transferable: for example, the benefit held by a publisher of an author's agreement to publish a book with that publishing house; here the publisher cannot assign the publishing agreement to another publisher; another example is a motor insurance policy; again the identity of the relevant driver is likely to involve personal attributes peculiar to that driver; and so the named driver cannot assign the insurance cover to another.⁶⁷

(8) Assignment Distinguished from Other Doctrines

5.26 Assignment is the transfer of a contractual right. It can be distinguished from the following alternative legal situations concerning third parties.

5.27 (1) *Novation*:⁶⁸ This involves extinction of one contract (the A/B contract) and replacement by another (the A/C contract). Lord Selborne in *Scarf v Jardine* (1882)⁶⁹ distinguished novation of A/B contract no 1 by A/B contract no 2, and novation of a contract between A and B by creation of contract between A and C.

⁵² G H Treitel, *The Law of Contract*, edited by E Peel (13th edn, Sweet & Maxwell, 2011) 15-060, contending that this category should not be applied uncritically.

⁵³ [2011] EWCA Civ 1149; [2012] 1 All ER 1423.

⁵⁴ *Trendtex Trading Ltd v Crédit Suisse* [1982] AC 679, HL, cited in *Unruh v Seeberger* (2007) 10 HKCFAR 31 [2007] 2 HKLRD 414; G H Treitel, *The Law of Contract*, edited by E Peel (13th edn, Sweet & Maxwell, 2011) 15-065.

⁵⁵ Treitel, *ibid.*, 15-064.

⁵⁶ Treitel, *ibid.*, 15-006, noting *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, HL; cited in *Dixie Engineering Co Ltd v Vernaltex Co Ltd* (unrep, CACV 343 and 344/2002, [2003] HKEC 180).

⁵⁷ Treitel, *ibid.*, 15-051ff, citing, notably, *Tolhurst v Associated Portland Cement Manufacturers* [1902] 2 KB 660, 668, CA; see also *Jenkins v Young Bros Transport Ltd* [2006] EWHC 151 (QB); [2006] 1 WLR 3189, at [12].

⁵⁸ Treitel, *ibid.*, 15-003.

⁵⁹ (1882) LR 7 App Cas 345, 351, HL, Lord Selborne LC; cited in *Guangdong Native Produce Co Ltd v Tam Tze Ying* (2008) 11 HKCFAR 455.

decision [2006] EWCA 1079; [2006] 1 WLR 2926, at [38], [48], [78], [87]).

⁵⁴ [2006] EWCA 1079; [2006] 1 WLR 2926, at [80]–[87].

⁵⁵ *Zhang Qiyun v Shun Shing Construction & Engineering Co Ltd* [2010] 2 HKLRD 358, cited in *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85, HL; applied in *Tomlin & Co v Li & Fung (Trading) Ltd & Others* [2003] 1 HKC 418; Treitel (13th edn, by E Peel, Sweet & Maxwell, 2011) 15-050.

⁵⁶ G H Treitel, *The Law of Contract*, edited by E Peel (13th edn, Sweet & Maxwell, 2011) 15-006.

⁵⁷ *Fitzroy v Cave* [1905] 2 KB 364.

⁵⁸ *Norglen Ltd v Reed Rains Provincial Ltd* [1999] 2 AC 1, HL, followed in *Akai Holdings Ltd v Norglen Ltd* [2009] HKCU 172.

⁵⁹ *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85, HL.

[2003] 3 HKLRD 103.

Misrepresentation and Mistake

CONTENTS

1. Introduction to Misrepresentation and Mistake	para 6.01
2. Nature of a Misrepresentation	para 6.07
3. Tort Claims for Culpable Misrepresentations	para 6.16
4. Damages under Section 3(1) of the Misrepresentation Ordinance (Cap 284)	para 6.18
5. Rescission <i>ab initio</i>	para 6.22
6. Statements Becoming Contractual Terms or Collateral Warranties	para 6.23
7. Duties to Disclose	para 6.25
8. Common Law and Statutory Control of Exclusion Clauses Concerning Misrepresentation	para 6.34
9. Summary of Mistake	para 6.35
10. Shared Mistake at Common Law	para 6.40
11. No Rescission for Shared Mistake in Equity	para 6.54
12. Unilateral Error Concerning the Subject Matter	para 6.57
13. Mistake Concerning a Party's Identity	para 6.61
14. Leading Cases Concerning Mistake as to Identity	para 6.65

(1) Introduction to Misrepresentation and Mistake

- 6.01** A 'misrepresentation'¹ is an inaccurate statement of fact which induces the other party to enter into the contract. The two remedies applicable to misrepresentations are damages and the mutual dismantling of the parties' benefits received under the contract (known as 'rescission *ab initio*'). Rescission is subject to four general equitable 'bars', any of which will be sufficient to preclude rescission: (i) inability

¹ J Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (3rd edn, Sweet & Maxwell, 2012); *Spencer Bower and Handley, Actionable Misrepresentation* (5th edn, London, 2014); P S Atiyah and G H Treitel, 'Misrepresentation Act 1967 [England and Wales]' (1967) 30 MLR 369; 'Innocent Misrepresentation' Law Reform Committee 10th Report (Cmnd 1782: 1962); cf New Zealand, 'Misrepresentations and Breach of Contract' (Report of the Contracts and Commercial Law Reform Committee) (Wellington, 1967; reprinted 1978) 9.4.1.

⁷⁰ [2008] EWHC 2791 (Comm); [2009] Lloyd's Rep 213.
⁷¹ In reaching his decision concerning proposition (ii), Burton J said, *ibid.*, at [23]: 'The Novations are not self-standing, they simply re-people the original contracts.'
 G H Treitel, *The Law of Contract* (29th edn, Sweet & Maxwell, 2011) 15-046ff; *Anson's Law of Contract* (29th edn, Sweet & Maxwell, 2011) 15-048ff.
 G H Treitel, *The Law of Contract*, edited by E Peel (13th edn, Sweet & Maxwell, 2011) 15-048ff.

to restore the parties in a practical sense to the pre-contractual position ('*in integrum impossibile*'); (ii) the subject matter of the contract between A and B has been acquired in good faith by a sub-purchaser; (iii) affirmation of the contract by the representee; or (iv) lapse of time rendering it unjust for the contract to be dismantled by rescission (6.22 below).

6.02 Damages are available as of right only if (i) the misrepresentation is fraudulent (the tort of deceit),² or (ii) negligent at common law (the tort of negligent statement), or (iii) the representor is liable under section 3, Misrepresentation Ordinance (Cap 284): a statutory tort. These heads of liability will be explored more fully below. Rix J's remarks in *Avon Insurance plc v Swire Fraser Ltd*³ also provide a convenient summary of the development of this topic.⁴ (i) heads of claim: (iii) the Cap 284's 'tort' is the representee's most favoured head of compensation. There are two reasons for this: first, damages awarded under section 3 of the Cap 284 are equivalent to those available under (i), that is, as if a 'fiction' that the tort of deceit has occurred, without proof of dishonesty on the representor's part; secondly, once the claimant shows that the statement is false for the purpose of a claim under section 3 of the Cap 284, the burden of proof is on the representor to show he had reasonable grounds for making the statement. If the misrepresentation is not culpable in any of these ways, the court has discretion to award damages instead of allowing the contract to be rescinded (section 3, Cap 284). This discretion does not apply, however, if the statement was fraudulent.

6.03 A misrepresentation can lead a double-life: according to section 3 of the Misrepresentation Ordinance (Cap 284), even if (as occasionally occurs) a misrepresentation becomes a term of the eventual contract, it can simultaneously remain as a misrepresentation.

6.04 Misrepresentation cannot be divorced from questions of 'mistake': all heads of misrepresentation involve the inducing of an error, or misapprehension, on the part of the representee. As for duties to disclose, the general proposition is that Hong Kong law, following English law does not require a prospective party to point out to the other an ordinary bargaining mistake. Nor is there a general positive duty on a prospective party to reveal information which might be relevant to the transaction or to the fixing of its terms. However, a person cannot take unfair advantage of the other's confusion concerning the supposed terms of the agreement. And in special situations, notably contracts of insurance, the law imposes a positive duty to disclose relevant information.⁴

6.05 Nature of Mistake:⁵ 'Mistake' becomes relevant in contract law in three situations:

² *Derry v Peek* (1889) 14 App Cas 337, HL; *KBC Bank NV v Automotive Communications Ltd* [2000] 1 All ER (Comm) 573; [2000] Lloyd's Rep IR 535, at [19], [20].
³ *The United Insurance Co Ltd v Chan Park Sang* [1960] HKLR 267 (HKSC); *Lai Chui Kar Pui v AXA China Region Insurance Co (Bermuda) Ltd* [1985] 2 HKC 689 (HKHC); *Lam Chuan Ho v American International Assurance Co Ltd* [2007] 1 HKLRD 770 (HKDC).
⁴ Leading discussion includes: *General*: D Friedmann, 'The Objective Principle and Mistake' [1968] LQR 68, especially 68-84; *Bell v Lever Bros Ltd*: C MacMillan, 'How Temptation Led to Mistake' [1950] LQR 68, especially 68-84; *Bell v Lever Bros Ltd*: C MacMillan, 'How Temptation Led to Mistake' [1950] LQR 68, especially 68-84; *Bell v Lever Bros Ltd*: C MacMillan, 'How Temptation Led to Mistake' [1950] LQR 68, especially 68-84.

- (i) induced mistake: if D makes a material misrepresentation on which P relies, P can claim rescission and/or he *might* be able to claim damages at common law or under the Misrepresentation Ordinance. This forms the topic of 'misrepresentation'; induced mistake: if D makes a material misrepresentation on which P relies, P can claim rescission and/or a misrepresentation *might* entitle P to damages at common law or under the Misrepresentation Ordinance (the latter route is more attractive). Misrepresentation, a major part of contract law, receives detailed discussion at 6.07ff;
- (ii) shared or common mistake: D and P are mistaken jointly (they 'share' the mistake) about some essential feature of the subject matter of the contract;
- (iii) unilateral mistake known to the other party: (a) D is aware of P's error as to terms and fails to disabuse P of this mistake;⁶ or (b) error as to person: P makes an offer to D, P being mistaken as to D's identity (attributes will not do), and D, usually a rogue, purports to accept P's offer.

Before *The Great Peace* (2002),⁷ it was considered that, both at common law and in equity (1.08), there were doctrines applicable to (ii).⁸ But, after *The Great Peace*, only the common law applies to (ii), that is, shared mistake: equity no longer applies to that type of mistake.

6.06 In Hong Kong law, following English law, mistake is a narrow doctrine. A problem of 'mistake' only becomes an issue if, first, there is an outward appearance of an agreement, that is, a consensus which is 'objectively discernible'.⁹ No such outward appearance of accord can be identified if A and B have exchanged offers which relate to manifestly different subject matters, or ambiguously described

An Exposition of *Bell v Lever Bros Ltd* (2003) 119 LQR 625, especially (Wright J, 646-49); (Court of Appeal (649-50); (House of Lords) 91-93; *The Great Peace* [2003] QB 679, CA: case notes, F M B Reynolds (2003) 119 LQR 177, S Midwinter, *ibid*, 180 (on *Solle v Butcher* (1950), detailed discussion, C MacMillan, in C Mitchell and P Mitchell, *Landmark Cases in the Law of Restitution* (Hart, 2006); J Cartwright, '*Solle v Butcher* and the Doctrine of Mistake in Contract' (1987) 103 LQR 594; for the argument that common law and equitable doctrines of mistake should have been fused, A Phang (1989) LS 291); Pre-*Great Peace* literature: J C Smith, 'Contracts: Mistake, Frustration and Implied Terms' (1994) 110 LQR 400-419 (radical criticism of mistake doctrine) (earlier criticism along same lines: C J Slade, 'The Myth of Mistake in the English Law of Contract' (1954) 70 LQR 386); *Void contracts and mistake as to identity*: 'Transfer of Title to Chattels', Twelfth Report of the Law Reform Committee (Cmd 2958, 1966).

⁶ *OT Africa v Vickers* [1996] 1 Lloyd's Rep 700, 703, Mance J ('knowledge' includes imputed knowledge which a person might have discovered, ought to have appreciated).

⁷ *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2003] QB 679, CA, at [28], [29]; followed in *Shung King Development Co Ltd & Others v Optical Outlet (Hong Kong) Ltd* [2005] HKEC 1926; *Tony Investments Ltd (德隆投资有限公司) v Fung Sun Kwan Bernard (馮桑均)* [2006] HKCU 119; *Bank of China (Hong Kong) Limited (formerly known as Sin Hua Bank Limited) v Keen Lloyd Energy Limited (formerly known as Keen Lloyd Investments Limited)* [2012] HKCU 659; *China Taiping Insurance (HK) Co Ltd v Tang Tze Wai* [2013] HKEC 205; *Miao Zhenguo (苗振國) & ORS v Chung Winston (鍾馨稼)* [2013] HKCU 453 and *Lo Shing Kin (盧晟堅) v S Y Chin Mong Stephen (施展望)* [2013] HKCU 1041.

⁸ Common law: eg, *Smith v Hughes* (1871) LR 6 QBD 597; *Bell v Lever Bros* [1932] AC 161; *Hartog v Colin and Shields* [1939] 3 All ER 566; *OT Africa v Vickers plc* [1996] 1 Lloyd's Rep 700; Mance J: equity, *Solle v Butcher* [1950] 1 KB 671.

⁹ *Shogun Finance Ltd v Hudson* [2004] 1 AC 919, HL [81] (especially second sentence) [82].

subject matters,¹⁰ or (as in *Raffles v Wichelhaus*, 1864) an apparent agreement which, on closer inspection of the facts, turns out to be no real agreement. Furthermore, mistake will not arise if the relevant matter is 'covered by the contract', that is, this risk is allocated, expressly or otherwise, to one of the parties (as in *Jan Albert (HK) Ltd v Shu Kong Garment Factory Ltd*, 1989).¹¹ Finally, the courts have adopted a strict approach when applying the concept of 'fundamental mistake' at common law. Thus attempts to invoke the doctrine of mistake in the context of commercial agreements have been largely unsuccessful.¹²

(2) Nature of a Misrepresentation

6.07 *Nature of a 'Misrepresentation'*: The essence of a misrepresentation is a statement made by one person even if he does not know that it is false, and if he is not negligent in having made the statement. As Sir George Jessel explained in *Redgrave v Hurd* (1881),¹⁴ rescission can be granted for a 'purely innocent misrepresentation'¹⁵ (but some degree of culpability is necessary if damages are sought: see, notably, 6.18ff).

6.08 Broken down further, a misrepresentation consists of the following elements: (1) a statement by words or a representation by conduct (the representor becomes a party to the contract; the statement must be addressed (directly, sometimes indirectly) to the representee who also becomes a party to the contract;¹⁶ (2) the statement must concern a matter of past or present fact or 'law'; (3) the statement should not involve the assertion of a mere matter of opinion; (4) the statement must not be vague and unambiguous, and not a mere puff';¹⁷ (5) it must also be 'material' (that is, a comment which, objectively,

to influence a reasonable person);¹⁸ (6) it must be made before the main contract; (7) the representee must rely on the statement.¹⁹

6.09 *Falsity*: The allegedly misleading statement must not be false in a trivial sense. As Rix J said in *Avon Insurance plc v Swire Fraser Ltd* (2000):²⁰

a representation may be true without being entirely correct, provided it is substantially correct and the difference between what is represented and what is actually correct would not have been likely to induce a reasonable person in the position of the claimants to enter into the contracts.

6.10 *Mere Opinion*: The leading case is *Smith v Land and House Property Co* (1884), where the English Court of Appeal held that there had been a statement of fact, rather than a non-committal indication of opinion, on these facts. The freehold of 'The Marine Hotel' hotel at Walton-on-the-Naze was sold at auction to the claimant investment company. The particulars of the auction stated that the hotel was let for the remaining 27 years at £4,000 a year to 'Mr Fleck', a 'most desirable' tenant. This impliedly indicated that the vendor had a real basis for making this statement. In fact the vendor had glossed over the fact that Fleck had been slow to pay the last quarter's rent.²¹ The sale was completed in August, and Fleck became insolvent in September. The purchaser company then came to its senses and sought rescission of the sale, alleging a misrepresentation by the vendor concerning the tenant's punctuality in paying rent. The English Court of Appeal upheld the decision to allow rescission for misrepresentation.

6.11 A statement by a professional person, such as a solicitor, will tend to be regarded as impliedly based on reasonable factual support: that is, the implication is that the lawyer is aware of the background and has read the relevant documentation: *Brown v Raphael* (1958)²² (as explained in *Economides v Commercial Union Assurance Co plc*, 1998),²³ and *Nottingham Patent Brick & Tile Co Ltd v Butler* (1886).²⁴

6.12 But it might be clear that the representor lacks experience, or is manifestly ignorant of the surrounding facts, or has made quite clear that he has no intention to make an actionable statement. As for lack of experience, the clearest example is

¹⁰ eg. *Falck v Williams* [1900] AC 176, PC.

¹¹ (1864) 2 H & C 906, Court of Exchequer; G Gilmore, *The Death of Contract* (Columbus, OH: Ohio State University Press, 1988) 35ff; A W B Simpson, *Leading Cases in the Common Law* (OUP, 1995) 135ff; C MacMillan, *Misrepresentation and Contract Law* (OUP, 2010) 186ff; G Spark, *Vitiating of Contracts* (CUP, 2013) ch 7; on this 1864 case see *The Great Peace* [2003] QB 679, CA, at [28] and [29].

¹² [1990] 1 HKLR 317, [1989] 2 HKC 156, [1990] HKLY 163, *Associated Japanese Bank International Ltd v Credit du Nord SA* [1989] 1 WLR 255 followed.

¹³ eg. *Clarion Ltd v National Provident Institution* [2000] 1 WLR 1888; *Citilite Properties v Innovative Development Co Ltd* [1998] 4 HKC 62, [1998] 2 HKLRD 705 (HKCA); *Patel's Wholesale Exchange Ltd v SK International* [2005] 2 HKLRD 551 (HKCFI).

¹⁴ (1881) 20 Ch D 1, 12-13, CA.

¹⁵ eg. *Balchita Ltd v Kam Yuck Investment Co Ltd* [1983] 2 HKC 333; *Shum Kong v China Development Co Ltd* (unrep, HCA 16227/1999, 6 June 2001); and *Welltech Investment Ltd v Easy Fair Industries Ltd* [2001] 4 HKC 711.

¹⁶ *Cramaso LLP v Ogilvie-Grant* [2014] UKSC 9; [2014] 1 AC 1093, at [25]-[31], per Lord Reed (improvement of land).

¹⁷ *Dimmock v Hallett* (1866) LR 2 Ch App 21 (sale of land at auction; assurance that land 'flourishing' statement); see also *Chan Yeuk Yu v Church Body of the Hong Kong Baptist University* [1997] 1 HKC 621, but not pre-sales talk intended to assist prospective purchasers. *House (Developments) Limited v Lee* [2010] EWHC 1484 (Ch) at [30] (claim failed on other grounds).

¹⁸ *Chitty on Contracts* (31st edn, London, 2012) (32nd edn, due November 2015) 6-039, 6-040; *Museprime Properties Ltd v Adhill Properties Ltd* (1991) 62 P & CR 388; Mance LJ in *MCI Worldcom International Inc v Primus Telecommunications plc* [2004] EWCA Civ 957; [2004] All ER (Comm) 833, at [30]; Lam JA in *Master Yield Ltd v Ho Foon Yung Anesis* [2013] HKEC 898.

¹⁹ eg. *Wing On Properties and Securities Co Ltd v Wave Front Enterprise (HK) Ltd* [2007] 2 HKC 54.

²⁰ [2000] 1 All ER (Comm) 573; [2000] Lloyd's Rep IR 535, at [17]; note Rix J's refusal to engage in 'microscopic' scrutiny of each phrase's accuracy at [200], [201].

²¹ (1884) 28 Ch D 7, CA (considered in *ICE Fund SA v Goldman Sachs International* [2007] EWCA Civ 811; [2007] 2 Lloyd's Rep 449, citing also *Hummingbird Motors Ltd v Hobbs* [1986] RTR 276, CA, and *Sumitomo Bank Ltd v BBL* [1997] 1 Lloyd's Rep 487, Langley J; and see *Dimmock v Hallett* (1866) LR 2 Ch App 21).

²² [1958] Ch 636, 644, 649, CA, per Lord Evershed MR and Romer LJ.

²³ [1998] QB 587, 595, 599, CA; applied in *Ma Kim Ying v Manulife (International) Limited* [2012] HKCU 1295.

²⁴ (1886) 16 QBD 778, 787, CA.