61. Claim for damage sustained by a ship otherwise than on collision

1–A61

1. The Plaintiffs are and were at all material times the lawful and duly registered owners of the ship or vessel MV "YY", a motor tanker of 900 tonnes net register.
2. The Defendants are the lawful and duly registered owners of the ship or vessel MV "XX".
3. On or about [*date*], the MV "YY" was in position [*coordinates*], in Hong Kong waters. The weather at the time was fine and clear with a light easterly breeze, and the tide was nearly high water. The MV "YY" was carrying [*cargo*] and was properly laden and on even keel. The MV "YY" was being towed on the starboard side of the MV "XX" by ropes forward and aft to the MV "XX".
4. MV "XX" was observed proceeding outward bound at high speed and causing excessive swell. The MV "YY" surged heavily along the wharf and all her lines parted. As the MV "XX" was drawn away, her starboard anchor was let go but her stern grounded on the southern bank of the channel, causing damage to the MV "YY" and loss and expense to the Plaintiffs.
5. The Plaintiffs, as owners of the ship or vessel MV "YY" and her cargo, have suffered damage, loss and by reason of the negligent navigation of the Defendants' vessel MV "XX" by the Defendants, their servants or agents as hereinafter appears.
6. Those in charge of the MV "XX" were negligent in the following respects:
   (1) They failed to keep a proper look-out;
   (2) They were improperly causing an excessive swell;
   (3) They were proceeding at an excessive speed;
   (4) They failed to ease, stop or reverse their engines in due time;
   (5) They failed to keep to their starboard side of mid-channel;
   (6) They failed to comply with r 2, 5, 6 and 9 of the International Regulations for Preventing Collisions at Sea 1972 and the provisions of The Merchant Shipping (Safety) Ordinance (Cap 369).
7. The Plaintiffs further claim interest upon all sums recovered from the Defendants for such period and at such rates as the Court shall determine pursuant to s 48 of the High Court Ordinance (Cap 4) and/or under the inherent jurisdiction of the Court.

The Plaintiffs claim:

(1) Judgment against the Defendants for the damage suffered by the Plaintiffs;
(2) A reference if necessary to the Registrar to assess the amount of such damage;
(3) Interest thereon pursuant to s 48 of the High Court Ordinance (Cap 4) and/or under the inherent jurisdiction of the Court; and
(4) Costs.

62. Claim for damage sustained by a ship in defective berth

1–A62

1. The Plaintiffs are and were at all material times the lawful and duly registered owners of the ship or vessel the MV "YY" ("the Vessel"). The Vessel is a motor vessel of 194 tons gross 106 feet in length and 23 feet in beam. The draught of the MV "YY" was 6 feet 10 inches forward and 8 feet aft.
2. The Defendants are the owners of, and/or occupy and have control and possession of a wharf situated at Tuen Mun and known as King Lung Wharf and of the berth adjacent to the said wharf.
3. It was agreed that the Vessel should berth at the wharf in consideration for the payment of berthing charges. It was an express term of the berthing agreement, full terms and effect of which will be referred to at the trial of this action by the Plaintiffs, that the depth of water in the berth was 10 to 11 feet. Alternatively, it was an implied term of the berthing agreement, such term to be implied by law and/or in order to give business efficacy to the agreement, that the berth was in a safe and proper condition to be used by the Vessel and/or that the Defendants would take all reasonable steps to make or keep the berth in such condition, and/or that the Defendants would warn the Plaintiffs that the berth was not safe or that they had not taken reasonable steps to ascertain whether the berth was safe.
4. Alternatively, the Defendants owned a duty to the plaintiffs at common law and/or under the Occupiers Liability Ordinance (Cap 314) to take reasonable care to ensure that their berth was safe.
5. On [*date*], the MV "YY" berthed at King Lung Wharf to discharge a cargo of bricks.
6. On or about [*date*], at [*time*], the Vessel took ground at low water in the berth and thereby sustained damage. Full particulars of the position and dimensions of the bank and of the damage are contained in a survey report dated [ ].
7. The Plaintiffs have suffered loss and damage by reason of the breach of contract and/or warranty and/or duty and/or by reason of the negligence of the Defendants or their servants or agents as hereinafter appears.
8. The said damage loss and expense were caused by the breach of the said contract and/or warranty and/or the duty of care owed to the Plaintiffs by the Defendants, their servants or agents.

Particulars

(1) The Defendants failed to take any adequate steps to ascertain the condition of the berth, including the depth of water over the berth, before allowing the Vessel to attempt to berth;
(2) The Defendants failed to warn the Vessel that the berth was not safe and proper and/or that they taken reasonable steps to ascertain the condition of the berth.

Introduction

2–01 Arbitration is the consensual submission of a dispute or difference to the binding determination of a neutral third party. Its historical roots can be traced back to the resolution of differences in the commodities trade by an experienced and trusted individual.

2–02 The legislature and courts are supportive of the development and practice of arbitration in Hong Kong and generally take a non-interventionist stance. In November 2010, the Legislative Council approved a revised Arbitration Ordinance (Cap.609), which is reflected in this Chapter. The transitional provisions in Sch. 3 provide that the new Ordinance shall apply to all arbitrations commenced after the commencement date. The new Ordinance commenced on 1 June 2011.

The Arbitration Ordinance (Cap.609)

2–03 The structure of the new Ordinance is to create a unitary regime, merging the former domestic and international regimes. However, a number of provisions of the former domestic regime are preserved in Sch. 2 of the Ordinance as "opt in" provisions. Where an arbitration clause entered into within six years of the commencement of the Ordinance provides that the arbitration is to be a "domestic arbitration", the parties shall be deemed to have adopted all the "opt in" provisions. The Ordinance includes a deemed "opt in" in respect of certain sub-contracts relating to construction operations in s. 101, which in turn adopts the definition of "construction operation" from s. 2(1) of the Construction Industry Council Ordinance (Cap. 587).

The Courts and Arbitration

2–04 As has already been observed the general policy of the legislature and courts is to give effect to the parties' agreement and to support party autonomy in arbitration. The court's role is generally one of supporting the arbitration process.

2–05 The powers of the court in respect of arbitration are as follows:

(i) the stay of proceedings brought before it in a matter which is the subject of an arbitration agreement;
(ii) to determine a challenge to the appointment of an arbitrator (s. 26);
(iii) to grant interim measures of protection (s. 45);
(iv) to order a person to attend proceedings before an arbitral tribunal to give evidence or to produce documents or other evidence (s. 55), or for it to take evidence (ss. 58 and 59). These powers are exercisable by the Court only where no arbitral tribunal has been formed.;
(v) to extend the time to commence arbitration proceedings, or to dismiss a claim for unreasonable delay;

2–06 It is noted that the Ordinance vests a number of other powers to support arbitration in the Hong Kong International Arbitration Centre (the "HKIAC"), including the role as default appointing body. For further details of the appointment procedures and role of the HKIAC see www.hkiac.com.

The Court

2–07 The Court for the purposes of the Ordinance is the Court of First Instance (s. 2). Where the Ordinance provides for a function to be exercised by the Court of First Instance no right of appeal to a higher court will lie.

2–08 A right to appeal to the Court of Appeal and, where appropriate, the Court of Final Appeal exists in respect of the following applications:

(i) with leave of the Court of First Instance, in respect of a refusal by the Court to stay proceedings to arbitration (s. 20);
(ii) for Court-ordered interim measures of protection (s. 45);
(iii) with leave of the Court of First Instance, in respect of the exercise of a power in support of arbitration proceedings (s. 60);
(iv) with leave of the Court of First Instance, in respect of the setting aside of an award (s. 81);
(v) with leave of the Court of First Instance, in respect of the granting of or refusal of leave to enforce an arbitral award (ss. 84 and 87);
(vi) with leave of the Court of First Instance, the determination of a preliminary question of law under the "opt in" provisions (Sch. 2, s. 3);
(vii) with leave of the Court of First Instance or Court of Appeal, a challenge to an award on the grounds of serious irregularity under the "opt in" provisions (Schs 2, s. 4); and
(viii) with leave of the Court of First Instance or Court of Appeal, to appeal against an award on a point of law under the "opt in" provisions (Sch. 2, ss. 5 and 6).

2–09 It is noted that the ability of the courts to intervene is very limited in the normal regime but more extensive, although still very limited, under the "opt in" provisions.

2–10 According to Rules of the High Court/Cap. 48 ("RCH"). O.73 r. 6, all applications regarding arbitration are, at first instance, to be heard in the Construction and Arbitration List unless the Judge in charge of the List directs otherwise. The existence of a specialist list leads to the timely and cost effective disposal of applications.

Reporting

2–11 Generally any application under the Ordinance will be closed court proceedings and will therefore not be reported. The court may, upon the application of any party, make a direction as to what information may be published. Such order will not be made unless all the parties agree or the court is satisfied that the information, if published, would not reveal any information that any party reasonably wishes to keep confidential (s. 17(3)). The court may, however, direct that reports of a judgment may be published in law reports or professional publications if it considers the judgment to be of major legal interest under s. 17(4), a direction under this provision is not subject to appeal; such report maybe sanitised or publication delayed.

Stay of Proceedings

2–12 Where a party commences proceedings before a court in respect of a matter which is the subject of an arbitration agreement, another party to the proceedings may apply to stay the proceedings to arbitration. The court shall stay the proceedings, and is not required or able to consider whether the dispute is arguable or otherwise gives rise to a triable issue (s. 20).

2–13 A question which may arise is whether the arbitration agreement is binding. The courts have generally taken the view that if it is arguable that a provision is binding and applicable the matter should be stayed to arbitration, although there is some authority suggesting that where an argument as to validity or jurisdiction can be determined relatively easily, it is expedient for the Court to make its views known. *Tommy CP Sze & Co v Li & Fung (Trading) Ltd* [2003] 1 HKC 418 identifies four questions which a Court must generally deal with when considering an application to stay proceedings: (1) Is there

Industries (HK) Ltd [1989] 2 HKLR 276, 282; *Hyundai Engineering & Construction Co Ltd v UBAF (Hong Kong) Ltd* [2012] 5 HKLRD 620).

7–03 The same principles will not apply where the terms of the guarantee impose a primary duty upon the promisor to honour the principal debtor's obligation(s). (*Kan Bau v Yeung Man Leung Vincent*; *Vossloh Aktiengesellschaft v Alpha Trains (UK) Ltd. MS Fashions Ltd v Bank of Credit and Commerce International SA (in liq) (No 2); High Street Services Ltd v Samel Impexbond Ltd v Same* [1993] Ch 425. Conjoined cases in which the bank secured guarantees for companies' liability from its directors who executed mortgage deeds and/or letters of charge accepting liability as "*principal debtor*". Accordingly, the directors, having accepted liability as principal debtors, were under immediate liability to pay the companies' debts without a demand being made, and likewise the companies' liability was extinguished or reduced as a result of a set-off between the bank and the guarantor directors, by the amount standing to the credit of the directors' deposit accounts. *MS Fashions Ltd* [1993] was applied in Hong Kong in *William Young Hong Yui v Bank of Credit & Commerce Hong Kong Ltd (in liq)* [1994] 1 HKC 89. The decision is unreported but recorded at [1994] 2 HKC 89: HKCA 533: (Unrep) 6 May 1994 CACV185/1993, with the extension of time for compliance application recorded at [1994] HKCA 532. In *ING Bank v Mr Tsui Tsin Tong* [2000] HKEC 326 it was held that the following term had the same effect *"each guarantor irrevocably and unconditionally (a) as principal obligor guarantees to the Creditor prompt performance by the Debtor of all its obligations"*.) In such cases, the guarantee is often, in fact, in the nature of an on demand bond. For example, it is commonplace for performance bonds provided by banks to impose primary liability upon the guarantor for the performance of the underlying contract by the principal debtor. (*IIG Capital LLC v Van Der Merwe* [2008] EWCA Civ 542. *Cf. Carey Value Added , SL v Grupo Urvasco, SA* [2010] EWHC 1905; *Vossloh Aktiengesellschaft v Alpha Trains (UK) Ltd supra,* in which the English courts held that the guarantees in question did not create an obligation equivalent to an on-demand performance bond despite the inclusion of wording referring to the guarantor has having primary obligations.) In such a case, depending upon the terms of the guarantees, liability may not be contingent upon the default of the principal but will arise following the principal debtor making a demand for payment from the guarantor for the amount specified in the guarantee. A creditor can gain further protection against a guarantor by incorporating a "*conclusive evidence clause*" into the guarantee, which allow the creditor to certify the quantum owed under the guarantee (*IIG Capital LLC* [2008] *ibid.; Maple Trade Finance Inc v Huge Best International Ltd* [2011] HKEC 833).

Distinctions between contracts of guarantee and contracts of indemnity

7–04 Contracts of guarantee and contracts of indemnity perform a similar commercial function, in that both provide compensation to a creditor for the failure of a third party to perform his obligations. Nevertheless, there is a conceptual distinction between the two commercial instruments (*Duncan, Fox & Co v North and South Wales Bank* (1880) 6 App Cas 1, HL; *Tam Wing Chuen v BCCHK* [1996] 1 HKC 692. Considered in *MS Fashions v High Street Services* [1993] *Supra*; *William Young v BCCI* [1994] *supra*). In a contract of indemnity, the indemnifier undertakes an independent obligation which does not depend upon the existence of any other obligation of any other party (*State Trading Corp of India Ltd v ED&F Man Sugar Ltd* [1981] Com LR 235; *Esal (Commodities) Ltd and Reltor Ltd v Oriental Credit Ltd and Wells Fargo Bank NA* [1985] 2 Lloyd's Rep 546; *IE Contractors Ltd v Lloyds Bank Plc* [1990] 2 Lloyd's Rep 496; *Hyundai v UBAF* [2012] *Supra*). Thus, it has been observed that "*a* [contract] *of indemnity is simply a* [contract] *to hold the indemnified person harmless against a specified loss.*" (*Firma C Trade Sa v Newcastle Protection and Indemnity Association* [1991] 2 AC 1, the then Goff LJ) In contrast, there can be no

contract of guarantee unless there exists, or at least is contemplated, an obligation owed by the principal debtor to which the guarantee is secondary and subsidiary. Indeed, as set out above, the kernel of a contract of guarantee is that the guarantor assumes a secondary liability to the creditor for the default of another, the principal debtor, who remains primarily liable to the creditor (*Yeoman Credit Ltd v Latter* [1961] 1 WLR 828, 831, CA; *Goulston Discount Co Ltd v Clark* [1967] 2 QB 493; *Argo Carribbean Group Ltd v Lewis* [1976] 2 Lloyd's Rep 289, 296, CA; *Philip Securities (HK) Ltd v Choi Bun Hung*, [2004] HKEC 403, [78] and [86].).

Guarantees and "*letters of comfort*"

7–05 A contract of guarantee also must be distinguished from the once commonplace "*letter of comfort*" or "*letter of intention*" given by a party (eg a parent company), indicating in general terms that it would financially support a third party (eg a subsidiary company) (*Commonwealth Bank v TLI Management Pty Ltd* [1990] VR 510). It has been held that such documents create no legally enforceable obligations to anyone who negotiates with the third party upon the strength of the mere reassurance contained therein (*Kleinwort Benson Ltd v Malaysian Mining Corporation Berhad* [1989] 1 WLR 379; *Bouygues SA v Shanghai Links Executive Community Ltd* [1998] 2 HKLRD 479).

The form of the contract of guarantee

7–06 The Statute of Frauds (1677) requires that all guarantees under English law be in writing. However, under Hong Kong law most of the terms of the Statute have been repealed (Law Amendment and Reform (Consolidation) Ordinance (Cap 23) (1972) s 12; *Global Bridge Assets Ltd v Sun Hung Kai Securities Ltd* [2009] 3 HKC 445), therefore there is no bar to a guarantee taking the form of an oral contract (*Brilliant (Man Sau) Engineering Ltd v Prosperity Construction and Decoration Ltd*, (Unrep.) 07 July 2006, HCA 38/2004; *Global Bridge Assets Ltd v Sun Hung Kai Securities Ltd* [2010] HKCU 417; Wilkinson and Sihombling, *Hong Kong Conveyancing Law and Practice* at Vol 1B, [403]). The position reflects the fact that the English courts have mitigated the seemingly unfair results which can flow from the strict application of the Statute through recognising countervailing exceptions and equitable doctrines, which limit the effect of the Statute (*The Modern Law of Guarantees* (2nd ed.), *Supra* [3-55]–[3-78]. But see *Action strength Ltd v International Glass Engineering* [2003] AC 541). A guarantee can likewise be part oral, and part written. For example, a written guarantee with blank sections for material information (such as, the name of the promisor and the amount of the debt) can bind the parties where subsequent oral negotiations determine the terms of the blank parts of the guarantee (*Bank of America National Trust and Savings Association v Fountain* [1990] HKLR 115 at *inter alia* [117B-C], the then Justice Bokhary). Where an oral guarantee is alleged, the applicant should seek to adduce extrinsic evidence to clarify the terms of the guarantee. Ideally, this should be through affidavit or affirmation evidence, or alternatively during the examination in chief (*Bank of America National Trust and Savings Association v Fountain*).

Contra proferentem principle

7–07 The courts continue to apply the *contra proferentem* principle; *viz.*, that ambiguous terms will be construed against the drafter of the contract. (*Jiangsu Golden Civil Building Group (Hong Kong) Co Ltd v Chau Wa Kin* [2007] 1 HKLRD 1, citing *Hongkong and Shanghai Banking Corp v Martel* [2003] 1 HKLRD 497, 505, as an illustration of the principle. See

C. Claims by Debtor or Hirer against Creditor

Hire-purchase and conditional sale agreements

Claim by the hirer for rescission on the ground of total failure of consideration

8–E14

1. The Plaintiff was at all material times [*describe nature of business*].
2. The Defendant was at all material times a finance company.
3. In or about [*date*], the Plaintiff was minded to acquire [*identify the goods*] ("the goods") offered for sale by [XY] Limited ("the supplier") at a price of $[ ].
4. The Plaintiff agreed to a transaction whereby the supplier sold the goods to the Defendant and the Plaintiff entered into a hire-purchase with the Defendant to take the goods on hire-purchase.
5. By a written agreement dated [*date*] ("hire-purchase agreement"), the Defendant let the goods on hire-purchase to the Plaintiff.
6. The cash price of the goods was $[ ], the deposit was $[ ] and the balance of $[ ] with charges of $[ ] was payable by [x] equal consecutive monthly instalments of $[ ]. The total purchase price was $[ ].
7. Pursuant to clause [ ] of the hire-purchase agreement, the Plaintiff paid a deposit in the sum of $[ ] to the Defendant.
8. Clause [X] of the hire-purchase agreement provides that the supplier shall deliver the goods to the Plaintiff on behalf of the Defendant. In breach of the said clause, the supplier refused or failed to deliver such goods and absconded with the goods.
9. In the premises, the consideration for the payment of the deposit has wholly failed or alternatively, the Defendant has had and received the said deposit to the use of the Plaintiff.
10. Despite repeated demands, the Defendant refused or failed to return the said deposit to the Plaintiff.

AND the plaintiff claims:

(1) Rescission of the hire-purchase agreement;
(2) Repayment of the said sum of $[ ];
(3) Interest on such sums as awarded by the Court at such rate and for such period as the Court thinks fit pursuant to s.49 of the District Court Ordinance (Cap. 336) / s.48 of the High Court Ordinance (Cap. 4);
(4) Costs.

Dated the ____ day of _____ , _____

[Statement of truth]

Claim by the hirer for rescission on the ground of mistake or fraud and for damages

8–E15

1. The Plaintiff was at all material times and is [*describe nature of business*].
2. The Defendant was at all material times and is a finance company.
3. In or about [*date*], the Plaintiff was minded to acquire [*identify the good*] ("the goods") offered for sale by [XY] Limited ("the supplier") at a price of $[ ].
4. By a conversation between [PQ] of the Plaintiff and [AB] of the supplier on [*date*], the Plaintiff agreed with the Defendant to buy the goods on hire-purchase terms for a price of $[ ]. The Defendant through AB offered the following terms of hire-purchase which the Plaintiff accepted ("Agreed Terms"):
   (a) a deposit of $[ ] shall be paid to the finance company; and
   (b) the balance shall be paid by monthly instalments of $[ ], the first payment to be made by [*date*].
5. In furtherance of the said transaction:
   (a) The Plaintiff signed in blank the Defendant's standard form of hire-purchase agreement produced by the supplier, leaving the supplier to fill in the details;
   (b) The Plaintiff paid the said deposit of $[ ] to the supplier which received the same on behalf of the Defendant.
6. Other terms of the hire-purchase agreement are:
   (a) [*Set out the other terms*]
7. By reason of the matters pleaded in paragraphs 4 and 5 above, the supplier was an agent of the Defendant in agreeing to the terms of the hire-purchase agreement (including the Agreed Terms) with the Plaintiff.
8. The supplier, by mistake or fraud, inserted a price of $[ ] and monthly instalments of $[ ] on the Defendant's standard form of hire-purchase agreement executed by the Plaintiff, which was higher than the Agreed Terms by $[ ] and $[ ] respectively ("Discrepancies"). The supplier delivered the said form to the Defendant and the Defendant signed on it ("Signed Form").

[9. On or about [*date*], the Defendant sent a copy of the Signed Form to the Plaintiff, whereupon the Plaintiff came to knowledge of the Discrepancies. By letter dated [*date*], the Plaintiff advised the Defendant of the Discrepancies and demanded that the Signed Form be rectified to reflect the Agreed Terms.

10. The Defendant refused or failed to rectify the Signed Form to reflect the Agreed Terms or at all.]

[9. On [*date*], the Plaintiff paid a sum of $[ ] to the Defendant in settlement of the first instalment in accordance with the Agreed Terms. The Defendant accepted the said sum but, on the pretext that the Plaintiff had failed to pay the full amount of the instalment as stated on the Signed Form, repossessed the goods in breach of contract.]

11[10]. By reason of the said mistake or fraud and/or breach of the hire-purchase agreement, the Plaintiff was entitled to and did by letter dated [*date*] rescind the hire-purchase agreement and/or treat it as having been repudiated by the Defendant.

may, or may not, entitle the innocent party to treat the contract as at end, depending on the effect of breach (*Hong Kong Fir Shipping v Kawasaki Kisen Kaisha* [1962] 2 QB 26). Whether a stipulation in a contract is a condition, a warranty or an innominate/intermediate term depends in each case on the construction of the contract. A stipulation may be a condition even though it is labeled a warranty in the contract.

12–15 Unless a different intention appears from the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale (s.12(1), (Cap.26)). In a contract of sale, "month" means *prima facie* calendar month (s.12(2), *ibid.*).

Implied Undertaking as to Title

12–16 The general rule is that there is an implied condition on the part of the seller to a contract for sale that he has a right to sell the goods and, in the case of an agreement to sell, he will have the right to sell the goods at the time when the property is to pass. The Ordinance also implies into contracts of sale warranties that the goods are free from all charge or encumbrance not disclosed or known to the buyer and the buyer will enjoy quiet possession of the goods (s.14(1), *ibid.*).

12–17 In case where the seller is transferring only such title as he or a third person may have, there are warranties that (i) all charges or encumbrances known to the seller and not known to the buyer have been disclosed to the buyer; (ii) the buyer will enjoy quiet possession of the goods against the seller, in the case where the seller is transferring only such title as a third person may have, that person and anyone claiming through or under the seller or that third person otherwise than under a charge or encumbrance disclosed or known to the buyer before the contract is made (s.14(2), *ibid.*).

12–18 The seller's liability as to title in a contract of sale cannot be excluded or restricted by reference to any contract terms (s.11(1), Control of Exemption Clauses Ordinance (Cap.71).

Sale by Description

12–19 The Ordinance implies into a contract for sale by description a condition that the goods will correspond with the description. In the event the sale is by sample as well as by description, it is not sufficient that the bulk of the goods correspond with the sample if the goods do not also correspond with the description (See s.15(1) of (Cap. 26)).

12–20 A sale is not prevented from being a sale by description by reason only that the goods has been exposed for sale or hire and they are selected by the buyer (s.15(2), *ibid.*). This condition is not confined to sales made in the course of a business.

Implied Undertaking as to quality or fitness

12–21 Section 16 implies conditions of merchantable quality and reasonable fitness into contract for sale. Such implied conditions may be annexed to a contract of sale by usage (s.16(4), *ibid.*). The conditions will be implied only if the seller sells goods in the course of a business. In addition, the condition of merchantable quality will not be implied if the relevant defects was already drawn to the buyer's attention before the contract is made, or

if the buyer has examined the goods prior to the contract and such examination should have revealed the relevant defects, or in the case of contract by sample, the defect would have been apparent on a reasonable examination of the sample.

12–22 To enjoy the protection of reasonable fitness under the Ordinance, it is a pre-requisite for the buyer to first make known to the seller the particular purpose for which the goods are being bought and rely on the seller's skill or judgment (s.16 (3), *ibid.*).

12–23 Where the seller is an agent for another, the conditions will be equally applicable unless the agent's principal is not selling in the course of a business and this is known by the buyer or reasonable steps are taken to bring it to his attention (s.16(5), *ibid.*).

12–24 In practice, there can be an overlap between breach of the condition of correspondence with description and breach of the condition of merchantable quality and reasonable fitness. See *Chan Yin Kwan v Glory Trading (HK) Ltd* (unrep., DCCJ 7851/2002, [2005] HKEC 536) where the buyer sued the seller for loss suffered from the sale of skinless chicken drumsticks. The breach of condition of sale by description and the breach of condition of quality and fitness were both considered by the court.

Sale by Sample

12–25 A contract of sale is a contract for sale by sample where there is an express or implied term in the contract to that effect (s.15(1), (Cap.26)).

12–26 In case of a contract for sale by sample, the Ordinance implies conditions that (i) the bulk will correspond with the sample in quality; (ii) the buyer will have a reasonable opportunity of comparing the bulk with the sample; and (iii) the goods will be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample (s.15(2), *ibid.*).

12–27 Similar to the sale by description, the condition in this provision is not confined to sales made in the course of a business.

The Control of Exemption Clauses Ordinance (Cap.71)

12–28 Similar to seller's liability as to title, the seller's implied undertakings as to conformity of goods with description or sample and as to quality or fitness for a particular purpose cannot be excluded or restricted by reference to any term in the contract where the buyer is dealing as consumer. Where the buyer deals otherwise than as consumer, such liabilities can only be excluded or restricted to the extent such term satisfies the reasonableness test under (Cap.71) (s.11(2) and (3), (Cap.71)).

12–29 The Control of Exemption Clauses Ordinance also regulates exemption clauses occurring in other types of contracts for the supply of goods under which the possession or ownership of goods passes but which are not governed by the Sale of Goods Ordinance. The Control of Exemption Clauses Ordinance confers some limited protection which restricts a supplier's liability to exclude or restrict his liability for breaching his obligation.

12–30 Similar to protection afforded to contracts covered by (Cap.26), liability in respect of the goods' correspondence with description or sample, or quality or fitness arising by implication of law as against a person dealing as consumer, cannot be excluded or restricted (s.12(2), *ibid.*).

any consequential damages that are not too remote to be recoverable in law (*General and Finance Facilities Ltd v Cook's Cars (Romford) Ltd* [1963] 2 All ER 314). The value of the goods is the market price of the goods at the date of conversion (*J & E Hall Ltd v Barclay* [1937] 3 All ER 620). However, there is no set general or universal rule for assessing damages and normally the claimant will obtain damages based on the actual loss suffered (*BBMB Finance (Hong Kong) Ltd v Eda Holdings (In liquidation) & Others* [1991] 2 All ER 129. See also *Heung-a-Shipping Co Ltd v New Rank (Holdings) Ltd & Others* [2001] HKEC 144).

13–36 If the value of the goods has declined, the claimant may recover damages assessed by reference to the value at the date of conversion thereby preventing the tortfeasor profiting from his wrongdoing (*BBMB Finance (Hong Kong) Ltd v Eda Holdings (In liquidation) & Others*, following *Solloway v McLaughlin* [1938] AC 247). On the other hand, a claimant is under a duty to take reasonable steps to mitigate his loss, so if the value of the goods has increased between the date of conversion and the date of judgment, the claimant may be awarded additional damages but he needs to take steps to reduce his loss (*Sachs v Miklos* [1948] 2 KB 23).

13–37 If the value of the goods has been increased by the wrongdoer before or after he had converted them (eg by repairing or improving the goods), the claimant cannot profit from that increase (*Reid v Fairbanks* (1853) 13 CB 692; *Greenwood v Bennett* [1973] QB 195).

B. Trespass to goods

13–38 The overlapping nature of torts relating to goods, may have largely deprived the tort of trespass to goods, of an independent existence. The fact, however, that the circumstances giving rise to a claim in trespass, should not blur the essential differences in the two claims. Similarly, where goods are damaged by the careless act of the defendant, the same facts may give rise both to a claim in negligence and a claim in trespass.

13–39 Trespass to goods is a tort of far greater importance to legal historians than to present day practitioners. Unlike conversion, trespass to goods is primary a tort against the possession of the goods.

13–40 A deliberate taking away, out of possession, from the claimant is the most obvious form of trespass to goods, as is any unpermitted contact or damage to another's goods. Both are direct and immediate interference. It is not clear whether the tort is actionable without damage. The defendant's conduct must be blameworthy so that in the absence of negligence, accidental damage will not amount to trespass *(National Coal Board v JE Evans & Co* [I951] 2 *KB* 861 – the case of damage to an underground cable caused without negligence). However, deliberate conduct (in the erroneous belief held by the defendant that he was acting lawfully) does not amount to a defence if the act otherwise amounts to trespass *(Wilson v Lombank Ltd* [1963]1 WLR 1294).

The right to sue

13–41 The only person who can normally sue is the person in possession (*factum animus)* of the goods at the time of trespass. In certain cases, there may not even be an immediate control over the goods but an intention to so exercise physical control must be obvious. A trustee with legal title to the goods is treated as being in possession although physical possession may be with the beneficiary (*White v Morris* (1852) 11 CB 1015). A bailment at will confers a joint possession on bailor and bailee and either may sue. An owner may be in possession through a servant or agent. The personal representatives of a deceased

may sue in trespass notwithstanding the fact that probate or letters of administration have not been granted.

Relief and Damages

13–42 A claimant succeeding in an action of trespass of goods may be entitled to general or nominal damages. The claimant will be entitled to full value of the goods (*Wilson v Lombank Ltd*) or at least minimal nominal damages. The claimant may be allowed to receive full market price or the cost of replacement (*Hall v Barclay* [1937] 3 All ER 620). The claimant may also be entitled to loss of profits or loss of use of such goods where the damages to the goods are not too remote (*Page v Ratcliff* (1852) 1 LJCP 57).

C. Detinue

13–43 Detinue is one of the oldest actions in common law. Generally speaking, it is the wrongful retention of the possession of a goods or the failure to deliver up the goods when demanded. (*Jones v Dowle* (1841) 9 M & W 19) Merely keeping another's goods does not amount to detinue, it requires proof of demand and refusal, after reasonable time, to comply with the demand (*Clayton v Le Roy*).

13–44 An action for detinue lies where a person takes possession of the goods of another and a valid demand is made for them by the owner, an unqualified and unjustified refusal to deliver them up entitles the owner to sue in detinue (*Baldwin v Cole* (1704) 6 Mod Rep 212). A person cannot be sued where he does not have a duty to return the goods, or where he does not withhold or detain goods in defiance of the claimant (*Clements v Flight* (1846) 16 M & W 42). A bailee may also be liable for detinue where he negligently or unlawfully parts with possession of the goods and cannot return it to the bailor after a demand for its return is made by the bailor (*Reeve v Palmer* (1858) 5 CB (NS) 84).

The right to sue

13–45 A person whose goods have been detained by another, and who has made a specific demand for the goods followed by a refusal of return has the right to sue the defendant. The claimant must make a specific demand (*Nixon v Sedger* (1890) 7 TLR 112). A demand is specific if it states where and to whom the goods must be returned (*Gunton v Nurse* (1821) 2 Brod & Bing 447). On the other hand, the refusal to deliver the goods must be unqualified and unjustified (*Solomons v Dawes* (1794) 1 Esp 81).

Relief and Damages

13–46 Under the common law, if goods have been wrongfully taken out of possession of the owner by detinue, the claimant can ask for specific restitution, delivery of goods or payment of its value at the date of the judgment along with damages for its detention. Unlike conversion, the measure of damages is the value of the goods, not at the date of detinue, rather, it is the market value of the goods at the date of judgment (*BBMB Finance (Hong Kong) Ltd v Eda Holdings (In liquidation) & Others*). The claimant may also claim any consequential damages which is not remote or in the reasonable contemplation of the parties at the date of the judgment. (*Phillips v Jones* (1850) 15 QB 859).

defendant must also plead with sufficient precision the comment relied upon as constituting the defence so that the plaintiff knows the case he has to meet (*Control Risks v New Library Ltd* [1990] 1 WLR 183; *Eastern Express Publisher Ltd v Mo Man Ching Claudia* [1998] 2 HKC 593; *Cheng v Tse Wai Chun* (2000) 3 HKCFAR 339, 347C–348A and *Lam Yi Lai v Ip Kwok Chung* [2010] HKCA 60).

16–46 Defamatory charges to which the defendant may plead fair comment: limits of the defence. The principles applicable to justification (*see* "Justification – The charges which the defendant may justify – the limits of the defence" above) apply equally to fair comment (see *Polly Peck v Trelford*, 1038).

16–47 Section 27 of the Defamation Ordinance. This section provides that a defence of fair comment "shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved". Formerly, at common law, every fact stated in the words complained of had to be proved for the defence of fair comment to succeed. This section must be specifically pleaded (*Moore v News of the World Ltd*, 448).

Absolute privilege: libel and slander

16–48 Generally. If the words complained of were published on an occasion of absolute privilege, no action will lie, even if the defendant published the words maliciously. If it is beyond doubt that the publication complained of is protected by absolute privilege, the statement of claim will be struck out (*Merricks v Nott-Bower* [1965] 1 QB 57). The ambit of the defence is determined by the public interest. The defence applies to proceedings in the Legislative Council (ss 3 and 4, Legislative Council (Powers and Privileges) Ordinance; *Church of Scientology v Johnson Smith* [1972] 1 QB 522). The defence also applies to statements made in the course of judicial (*Royal Aquarium and Summer and Winter Gardens Society v Parkinson* [1892] 1 QB 431) or quasi-judicial proceedings (for the criteria to be applied to tribunals, *see Trapp v Mackie* [1979] 1 WLR 377 and *Gray v Avadis* [2003] EWHC 1830, QB, and for the extent to which the proceedings are protected, *see Lincoln v Daniels* [1962] 1 QB 237, 257 and the cases there cited), communications between informants and the police and regulatory bodies in the course of an investigation (*Taylor v Director of the Serious Fraud Office* [1999] 2 AC 177; *Mahon v Rahn (No.2)* [2000] 1 WLR 2150), communications between officers of state in the course of their duties (*Chatterton v Secretary of State for India in Council* [1895] 2 QB 189), and the internal documents of a foreign embassy (*Fayed v Al-Tajir* [1988] QB 712). By statute, fair and accurate reports of proceedings in public heard before any court (s 13 of the Defamation Ordinance) that are published contemporaneously are protected by absolute privilege.

Absolute and qualified privilege: libel and slander

Pleading

16–49 The defence must be specifically pleaded with the grounds on which the privilege is claimed. Where an appeal on the point is not particularly likely and a decision in favour of the defendants would avert a long trial on justification a judge may decide that the existence of privilege should be tried as a preliminary issue, but it is a matter within his discretion and there is no strict rule to this effect: *Macintyre v Phillips* [2003] EMLR 9.

Qualified privilege: libel and slander

At common law: generally

16–50 The defence of qualified privilege recognises that on certain occasions a person should be free to publish defamatory matter, provided he acts in good faith, even though it may prove to be false. There is no exhaustive definition for the circumstances in which the defence arises (*London Association for the Protection of Trade v Greenlands Ltd*), save that normally publisher and publishee must share a common and corresponding interest in the subject matter of the publication. The defence is founded on public policy (*see Davies v Snead* [1870] LR5 QB 608, 611). In general terms, an occasion will enjoy 8. The Plaintiffs claim interest pursuant to s 48 of the High Court Ordinance (Cap. 4 of the Laws of Hong Kong) on the sums claimed under para 7 above for such period and at such rate as the Court may determine, where the defendant makes the statement in pursuance of a legal, social or moral duty, or in the protection or furtherance of a legitimate interest, to a person with a like duty or interest to receive it. This reciprocity of interest is essential (*Adam v Ward* [1917] AC 309, 314). It is not enough that the publisher honestly and reasonably believes that the publishee has a corresponding duty or interest, if in fact he has none (*Hebditch v Macllwaine* [1894] 2 QB 54, 59 and *Beach v Freeson* [1972] 1 QB 14). There may be an exception to this rule where the defendant replies to an inquiry in the honest but erroneous, belief that the inquirer had a sufficient interest (*London Association for Protection of Trade v Greenlands* [1916] 2 AC 15). Where the defendant and publishee stand in an "existing and established" relationship, the existence of qualified privilege will be determined by reference to the nature of that relationship and the relevance to it of the communication in question. Where they do not, it may additionally be necessary to consider what steps the defendant took to verify the truth of the statement communicated: *Kearns v General Council of the Bar* [2003] 1 WLR 1357. At common law, a fair and accurate report of judicial proceedings is protected by qualified privilege, although this may have largely been superseded by the provisions of s 14 and the Schedule to the Defamation Ordinance. If the report is published contemporaneously with the judicial proceedings it will attract statutory absolute privilege as set out above pursuant to s 13 to the Defamation Ordinance. Similarly a balanced report or sketch of parliamentary proceedings (in Hong Kong, Legislative Council proceedings) will enjoy a qualified privilege (*Cook v Alexander* [1974] QB 279). The defence is qualified in that it is defeated where the plaintiff pleads (by way of Reply, see below) and proves that the defendant published the words complained of maliciously, ie where the occasion is abused for an improper motive (*see Horrocks v Lowe* [1975] AC 135). Generally the inclusion of irrelevant defamatory matter on an otherwise privileged occasion does not of itself deprive the defendant of a defence, although it would be material in determining whether or not the defendant was malicious (*Adam v Ward*, 326–327; *see Horrocks v Lowe*, 151). Publications incidental to a privileged communication and made in the ordinary course of business, such as to a secretary, are also protected (*Osborn v Thomas Boulter & Son*; *Bryanston Finance v de Vries* [1975] QB 703).

16–51 In contrast to communications of limited scope where the duty and interest test is more easily satisfied, privilege for publication in the media is harder to establish at common law. Reciprocity may be conferred where a person whose character or conduct has been attacked in the national media, seeks to defend himself in the same media: readers or listeners will generally have a sufficient reciprocal interest to hear the refutation by the person defamed provided it is published bona fide and is germane to the accusations made: *see Laughton v Bishop of Sodor and Man* [1872] LR 4 PC 495. *See* also *Watts v Times Newspapers* [1996] 2 WLR 427 and *Regan v Taylor* [2000] EMLR 549; (2000) 150 NLJ

tion and does not give rise to apportionment of damages in a claim in deceit (*Redgrave v Hurd* (1881) 20 Ch D 1 at 13 (Eng CA); *Dr Koh Kee Suan Andrew v Dr Ip Kay Lo Vincent* (HCA 699/1992) [1999] HKCFI 54; *Aarons Reefs v Twiss* [1896] AC 273 at 279 (Eng HL); *Standard Chartered Bank v Pakistan National Shipping Corp.* [2002] 3 WLR 1547 (Eng HL) approved *Alliance & Leicester Building Society v Edgestop Ltd* [1993] 1 WLR 1462 (Eng CA). Note, however, that the reasoning in *Williams v Natural Life Health Foods* [1998] 2 All ER 577 (Eng HL) on negligent misrepresentation did not apply to liability for fraud: see *Alliance & Leicester Building Society v Edgestop Ltd*, at 1477; *Standard Chartered Bank v Pakistan National Shipping Corp. (Nos.2 and 4)* [2003] 1 AC 959 at [10]–[18] (Lord Hoffmann), approving the majority of the Court of Appeal; see also *Formosa Taffeta Co Ltd v Banque Indosuez* [2009] 1 HKLRD 568 (CFI), and *Silverlink (Hong Kong) Finance Ltd v Zhang Sabine Soi Fan* (HCA 2783/1998, 23 October 2003) [2003] HKCFI 896).

5. Damage

18–07 The claimant must prove that as a consequence of acting upon the misrepresentation he has suffered damage, which is the gist of the action (see *Smith v Chadwick* (1884) 9 App Cas 187, 196 (Eng HL), (Lord Blackburn)). The applicable measure of damages is the tort measure and not the contract measure (ie not the "bargain" or "expectation" measure). The court compares the position the claimant was in before the fraudulent inducement to that which he is in after the fraudulent inducement. The measure of damages is all the loss which directly flows from the fraud perpetrated, whether or not foreseeable, and includes consequential losses (*Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 153 (Eng QB), followed in *Long Year Development Ltd v Tse Fuk Man, Norman* [1991] 2 HKC 393 (HC); *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254 (Eng HL); see also *Sunchase International Group (China) Ltd v Chik Wai Wan Stephen* [1999] 1 HKC 671 (CA), and *Dr Koh Kee Suan Andrew v Dr Ip Kay Lo Vincent* (HCA699/1992, 13 January 2000) [2000] HKCFI 975). However, this may involve difficult questions of causation. The defendant is not liable for losses which the claimant would have suffered even if he had not entered into the transaction or for losses attributable to causes which negative the causal effect of the misrepresentation (*Banque Bruxelles Lambert SA v Eagle Star Asset Management* [1997] AC 191 at 216 (Eng CA), (Lord Hoffmann); see also *Chu Chit v Bank of China (Hong Kong) Ltd* (DCCJ 4041/2007, 27 January 2010) [2010] HKDC 15). Once the fraud has been discovered the claimant is obliged reasonably to mitigate its loss; and in any case where the person deceived has not himself behaved with reasonable prudence, reasonable common sense or can in any true sense be said to have been the author of his own misfortune, he will not recover those losses attributable to his own conduct (*Doyle v Olby (Ironmongers) Ltd*, followed in *Long Year Development Ltd v Tse Fuk Man, Norman*; *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd*; see also *Sunchase International Group (China) Ltd v Chik Wai Wan Stephen*, and *Dr Koh Kee Suan Andrew v Dr Ip Kay Lo Vincent*). *P v B* (2001) 1 FLR 1641 sort of deceit applies between cohabiting couples. In assessing the measure of his loss, a claimant will also be required to give credit for any benefit received from the fraud (*Midco Holdings v Piper* [2004] EWCA Civ 476 (Eng CA)).

6. Fraudulent misrepresentation as to credit

18–08 Any claim in deceit (or under s.3(1) of the Misrepresentation Ordinance (Cap.284)) where a representation is alleged to have been made as to the credit or creditworthiness of

a third party is only actionable if the representation has been made in writing, signed by the defendant. Section 13 of the Law Amendment and Reform (Consolidation) Ordinance (Cap.23) provides that:

> "No action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any person, to the intent or purpose that such other person may obtain credit, money, or goods thereupon, unless such representation or assurance is made in writing, signed by the party to be charged therewith".

18–09 The scope of the Law Amendment and Reform (Consolidation) Ordinance s.13 applies only to fraudulent representations (*Behn v Kemble* (1859) 7 CB (NS) 260; *Banbury v Bank of Montreal* [1918] AC 626 (HL) considering s.6 of the Statute of Frauds Amendment Act, 1828 or the "Lord Tenterden's Act", which is similar in wording to the Law Amendment and Reform (Consolidation) Ordinance s.13; applied and confirmed in *Choy v Nissei Sangyo America Ltd* [1992] 1 HKLR 237 (CA)) which relates in some way to the credit or creditworthiness of a person, but not one based on negligence (see *WB Anderson & Sons Ltd v Rhodes (Liverpool) Ltd* [1967] 2 All ER 850 at 865E (Eng HL)). However, it seems that the defence applies to an action brought under s.2 of Misrepresentation Ordinance (*UBAF Ltd v European American Banking Corporation* [1984] QB 713 (Eng CA)); see also *Royscot Trust Ltd v Rogerson* [1991] 2 QB 297; [1991] 3 All ER 294 (Eng CA). The section applies only to representation as to a person's "*character, conduct, credit, ability, trade, or dealings*" and does not cover, eg a representation as to the availability of a quantity of sugar for sale (*Diamond v Bank of London & Montreal Ltd* [1979] 1 Lloyd's Rep. 335, 338, 340 (Eng QB)).

18–10 The signature of an agent of an individual will not satisfy the section; it must be a personal signature (*Swift v Jewsbury and Goddard* (1874) LR 9 QB 301 (Eng QB); *UBAF Ltd v European American Banking Corporation*). Nor will the signature of a non-signing partner be sufficient against his co-partner (*Williams v Mason* (1873) 28 LT 232). However, a representation signed on behalf of a limited company by its duly authorised agent acting within the scope of his authority constitutes the company's signature for the purposes of the section (*UBAF Ltd v European American Banking Corporation*; considered in *Emperor Finance Ltd v La Belle Fashions Ltd* [2003] 3 HKLRD 995 (CFA), in which Ribeiro PJ (as he then was) applied the "directing mind and will" doctrine by referring a number of cases along the line of *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705 (Eng HL), and held that where a natural person qualifies as a corporation's directing mind and will, his act of signing should, in law, be imputed to the corporation directly, and such a person would not be regarded, for this purpose, as acting merely as the corporation's agent but signing as the corporation itself – which is no different from saying "*as the corporation signing personally*"). However, the defence may remain valid if the principal does not profit from the fraud (*Lloyd v Grace, Smith & Co* [1912] AC 716 (Eng HL); see also *Swift v Jewsbury and Goddard*).

7. Frauds by agents

18–11 The fraud alleged in the pleading must be the fraud of the defendant, and not of a third person (*Staffordshire Financial Co v Hill* (1909) 53 SJ 446). In addition to the servant or agent, who will be personally responsible for his own fraud (*Weir v Bell* (1878) 3 Ex D 238, 48; *Eaglesfield v Marquess of Londonderry* (1876) 4 Ch D 693, 708 (Eng CA);

(5) On about [date] the Claimant acting by the First Defendant entered into a contract with [name of contractor], a company manufacturing [description of goods] (the "Manufacturer"), for the purchase of [quantity and nature of goods] by the Claimant from Manufacturer (the "Purchase Contract") at a total price of [HK$X].

(6) On [date], pursuant to the terms of the Purchase Contract, the Manufacturer delivered to the Claimant the [description of quantity and nature the goods delivered]. On the same day the Manufacturer invoiced the Claimant for the sum of [HK$X].

(7) By a [fax/email/letter] dated [date] sent by [name of sender] to [name of receiver], the Second Defendant instructed the Claimant's bankers, [name of Claimant's bankers], to pay to the Manufacturer [HK$X] from the Claimant's account number [number] in respect of the Purchase Contract. However, owing to an administrative error, [HK$X+Y] was paid from the Claimant's account to the Manufacturer on [date].

(8) Thereafter, on or before [date], the First, Second, Third and Fourth Defendants (or any two or more together) wrongfully and with intent to injure the Claimant by unlawful means conspired and combined together to defraud the Claimant and to conceal such fraud and the proceeds of such fraud from the Claimant.

(9) Pursuant to and in furtherance of the conspiracy pleaded in para.8 above, the First, Second, Third and Fourth Defendants carried out the following unlawful acts and means by which the Claimant was injured:

(9.1) On or about [date], the First and Second Defendants instructed the Manufacturer to make a payment of [HK$Y], purportedly by way of reimbursement to the Claimant of the Claimant's mistaken overpayment in respect of the Purchase Contract. However, in breach of their fiduciary, equitable and contractual duties set out in paras.(2)–(4) above, the First and Second Defendants procured that this payment was not made to the Claimant (which they knew to be the party entitled to it) but to the Fourth Defendant.

(9.2) The Fourth Defendant received the sum of [HK$Y] from the Manufacturer on about [date], knowing (by its agent, ie the Third Defendant) that the sum had been paid to it in breach of the First and Second Defendant's fiduciary duties to the Claimant.

(9.3) On about [date], the Third Defendant instructed the Fourth Defendant's bank to make two payments each of [HK$Z] from the account of the Fourth Defendant to the First Defendant at his account no. [*] held with [name of bank] and the Second Defendant at his account no. [*] held with [name of bank]. In doing so the Third Defendant acted dishonestly and in the knowledge that the sum of [HK$Y] had been paid to the Fourth Defendant in breach of the First and Second Defendant's duties to the Claimant as set out above.

(9.4) The First and Second Defendants received the payments of [HK$Z] each in further breach of their fiduciary, equitable and contractual duties set out in paras.2–4 above and in fraud of the Claimant.

(9.5) Throughout, the First, Second, Third and Fourth Defendants have concealed and continue to conceal the matters set out in this paragraph and the fact of and the whereabouts of the proceeds of their fraud from the Claimant.

(10) As a result of the matters set out in paras.(8) and (9) above the Claimant has suffered loss and damage.

(11) By reason of the conspiracy to defraud and injure the Claimant and by reason of the unlawful means as pleaded in paras.(8) and (9) above:

(11.1) The First and Second Defendants:

(a) are each liable to compensate the Claimant in equity for their breaches of fiduciary duty and the breach of their equitable duty of fidelity;

(b) are each liable to account to the Claimant for the sums misappropriated by them and paid away by them or at their direction from the Claimant;

(c) are each liable to account to the Claimant for the sums received by them and/or the Fourth Defendant which were secret profits received in fraud of the Claimant;

(d) hold all sums received by them in fraud of the Claimant as resulting or constructive trustees for the Claimant;

(e) are liable to reconstitute those assets which they hold on trust for the Claimant; and

(f) are liable to the Claimant in damages for breach of contract.

(11.2) The Third Defendant:

(a) is liable to account to the Claimant as a constructive trustee on the ground of dishonest assistance in the breach of fiduciary duty by the First and Second Defendants;

(b) holds any commission, payment or profit received in respect of the dishonest assistance given to the First, Second and Fourth Defendants on trust for the Claimant and is liable to account to the Claimant for the same.

(11.3) The Fourth Defendant:

(a) is liable to account to the Claimant as a constructive trustee on the ground of knowing receipt of monies paid in breach of the First and Second Defendants' fiduciary duties;

(b) holds all sums received by it in fraud of the Claimant as a constructive trustee for the Claimant.

(11.4) The First, Second, Third and Fourth Defendants are jointly and severally liable to the Claimant in damages for conspiracy.

(12) Further, the Claimant claims, and is entitled to, interest, whether or not compounded, on all sums found to be due to it at such rates as the Court shall deem just, pursuant to the Court's equitable jurisdiction and/or s.48 of the High Court Ordinance (Cap.4).

(13) And the Claimant claims:

(13.1) Against the First and Second Defendants:

(a) An order that the First and Second Defendants each compensate the Claimant in equity under para.(11.1)(a) above.

the appeal at Court of Appeal and Court of Final Appeal level. The defendant's knowledge of the transaction must have been such as to render his participation contrary to normally acceptable standards of honest conduct. Such a state of mind may involve the knowledge that the transaction is one in which he cannot honestly participate (eg a misappropriation of other people's money), or it may involve suspicions combined with a conscious decision not to make enquiries which might result in knowledge: ("*blind-eye knowledge*" or "*wilful blindness*": *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd* [2003] 1 AC 469 (Eng HL); applied in *Peter Geoffrey De Krassel v Vincent Julia Chu also known as Zhu Liang* [2010] 2 HKLRD 937 (CFI); *Barlow Clowes International Ltd (in Liquidation) v Eurotrust International Ltd* [2005] UKPC 37, [2006] 1WLR. 1476 at [10] (Eng PC); *Ho Lai Ming t/a Tung Hing Transportation Co v Chu Chik Leung* (DCCJ2739/2003, 20 September 2007) [2007] HKDC 309 at [19]–[24]. It is not necessary to show that the defendant knew of the existence of the trust or at least the facts giving rise to the existence of the trust—someone can know and can certainly suspect, that he is assisting in a misappropriation of money without knowing that the money is held on trust or what a trust means: *Twinsectra Ltd v Yardley* at [19], [135], [138]; *Barlow Clowes International Ltd (in Liquidation) v Eurotrust International Ltd* at [28]; *Abou-Rahmah v Abacha* [2006] EWCA Civ 1492 (Eng CA), [2007] 1 Lloyd's Rep 115 at [19]–[21], [39]. See also *Agip (Africa) Ltd v Jackson*, 295; see also the Court of First Instance decision of *PBM (Hong Kong) Ltd v Tang Kam Lun Allan* (HCA12138/1997 & HCA13316/1997 (consolidated), 24 February 2002) [2002] HKCFI 1268 and 1295 (CFI) which still adopted the former name of "*knowing assistance*" and followed *Twinsectra Ltd v Yardley*, appeals by some of the defendants to the Court of Appeal (CACV274/2002, 25 February 2003) and Court of Final Appeal (FACV19/2003, 21 May 2004) reported in [2005] 1 HKLRD 565 were dismissed.

22–20 In the present state of the authorities, it is uncertain whether in addition to the defendant's conduct being dishonest by the ordinary standards of reasonable and honest people (an objective test), it must be shown that the defendant was aware that his conduct would be regarded as dishonest by those standards (a subjective test). In *Royal Brunei Airlines v Tan* (followed in *Peconic Industrial Development Ltd v Chio Ho Cheong*) (Lord Nicholls) (giving the opinion of the Privy Council) stated (at p.389) that for the purposes of accessory liability, dishonesty meant "*simply not acting as an honest person would in the circumstances*", which he described as "*an objective standard*". For the most part dishonesty was to be equated with conscious impropriety but that did not mean that individuals were free to set their own standards of honesty in particular circumstances: "*The standard of what constitutes honest conduct is not subjective … if a person knowingly appropriates another's property, he will not escape a finding of dishonesty simply because he sees nothing wrong in such behaviour*". In *Twinsectra* the House of Lords (Lord Millett dissenting) seemed to adopt a "*combined test*" of an objective and subjective standard, deciding that a finding of dishonest assistance required a finding that the defendant's conduct was dishonest by the ordinary standards of reasonable and honest people and that he himself realised that by those standards his conduct was dishonest. However, in *Barlow Clowes International Ltd (in Liquidation) v Eurotrust International Ltd*, the Privy Council appeared to have rowed back towards an objective test alone: "*If by ordinary standards a defendant's mental state would be characterised as dishonest, it is irrelevant that the defendant judges by different standards*" at para.10 (see also paras.15–18).

22–21 The decision in *Barlow Clowes International Ltd (in Liquidation) v Eurotrust International Ltd* is likely to be followed by the English Courts. In *Abou-Rahmah v Abacha* the majority of the English Court of Appeal declined to decide whether, following the decision of the Privy Council in *Barlow Clowes International Ltd (in Liquidation)*

v Eurotrust International Ltd, there is a requirement for subjective dishonesty in English Law relating to accessory liability but Arden LJ was prepared to hold (in obiter at para.59) that the English Court of Appeal should follow the decision of the English Privy Council in *Barlow Clowes International Ltd (in Liquidation) v Eurotrust International Ltd* and find: "*It is unnecessary to show subjective dishonesty in the sense of consciousness that a transaction is dishonest. It is sufficient if the defendant knows of the elements of the transaction which make it dishonest according to normally accepted standards of behaviour*".

22–22 In *Attorney General of Zambia v Meer Care & Desai* [2007] EWHC 952 (Eng Ch) Peter Smith J adopted at [357] the conclusions of the Right Honourable Sir Anthony Clarke MR (expressed extra-judicially in Claims against Professionals: Negligence, Dishonesty and Fraud (2006) 22 Professional Negligence pp 70–85) that the test "*required a court to assess an individual's conduct according to an objective standard of dishonesty. In doing so the court has to take account of what the individual knew, his experience, intelligence and reasons for acting as he did. Whether the individual was aware that his conduct fell below the objective standard is not part of the test*". See also *Barnes v Tomlinson* [2006] EWHC 3115 (Eng Ch).

22–23 In Hong Kong, even before the Privy Council's decision in *Barlow Clowes International Ltd (in Liquidation) v Eurotrust International Ltd*, judicial sentiments have been expressed that the dissenting views of Lord Millet in *Twinsectra* should be preferred: see for instance, *UBS AG v Stand Ford International Enterprises Ltd* [2003] 3 HKC 621 at 627I to 628E (CFI) (Stone J (as he then was)). Subsequently, the Court of First Instance (A Cheung J as he then was) in *Peconic Industrial Development Ltd v Chio Ho Cheong* expressed its preference to the views of Lord Millett in *Twinsectra*, and whilst noting that the decision of *Barlow Clowes International Ltd (in Liquidation) v Eurotrust International Ltd* is strictly speaking not binding in Hong Kong, followed the Privy Council's decision to disown the combined test and revert to the objective test for dishonesty: "*I see no reason for not following the latest development of the law by the Privy Council*": see paras.173–184 particularly 184.

22–24 An allegation of dishonesty must be pleaded clearly and with particularity: *Belmont Finance Corporation Ltd v Williams Furniture Ltd* [1979] Ch 250, 268 (Eng CA); *Deak Perera Far East Ltd v Chase Manhattan Bank, NA* [1995] 2 HKC 28 (CA).

6. The level of knowledge required for knowing receipt

22–25 Although a knowing recipient will often be found to have acted dishonestly, dishonesty is not a prerequisite to liability under knowing receipt. In order to be liable for knowing receipt the recipient had to have knowledge that the assets received were traceable to a breach of trust or of fiduciary duty, the single test for which is whether the recipient's state of knowledge was such as to make it unconscionable for him to retain the benefit of the receipt: *BCCI (Overseas) Ltd v Akindele* Ch 448 , applied in *Menno Leendert Vos* (substituted pursuant to the Order of A Cheung, J dated 18 October 2006) *v Global Fair Industrial Ltd* at [330] and *Akai Holdings Ltd (In Liq) v Thanakharn Kasikorn Thai Chamkat (Mahachon) (also known as Kasikornbank Public Co Ltd)* [2010] 3 HKC 153 (CA). Dishonest receipt of funds in circumstances where they were in fact traceable to a breach of fiduciary duty makes it unconscionable for the recipient to retain the benefit: *Papamichael v National Westminster Bank Plc* (Eng HC) at [248]; see also a summary of the different approaches adopted by courts in the commonwealth by the Court of Appeal (P Cheung JA) in *Akai Holdings Ltd (In Liq) v Thanakharn Kasikorn Thai Chamkat (Mahachon) (also known as Kasikornbank Public Co Ltd)* [2010] 3 HKC 153 (CA) at [213]–[243].

damage so arising subsequently becomes reasonably foreseeable, the source of the damage suffered from the nuisance is "out of control" of the defendant (*Cambridge Water Co. v Eastern Counties Leather* [1994] 2 A.C. 264). As a result, pleadings should set out the basis for a defence alleged on these grounds, and a defendant should require the plaintiff to set out specifically what failings are relied upon in support of the claim that the defendant failed to exercise reasonable care.

Statutory authority

23–28 Reliance on statutory authority should be pleaded specifically. Usually a defendant will also have to plead that there was no negligence on its part in relation to the execution of the acts so authorised.

23–29 Ordinances often provide for the carrying out of activities which interfere with the enjoyment of land. If the statute confers only a permissive power, then it must be exercised in such a way as not to interfere with private rights (see *Metropolitan Asylum District v Hill* (1881) 6 App. Cas. 193; and cf. *Hunter v Canary Wharf Ltd*). The defendant may have the burden of proving that any nuisance was the inevitable result of carrying out the activity empowered by statute, in order to establish a defence (see *Allen v Gulf Oil Refining Ltd* [1981] A.C. 1001, *Yu Shu Tung v Buk Cheong Lung and another* A6531/1989 (unreported, 7 November 1991)). The defendant must prove they used reasonable care in doing the statutory work (see *Lam Yuk Fong & Another v Attorney General and Another* [1987] HKLR 263 (See n.16 above), *Tate & Lyle Industries Ltd v Greater London Council* [1983] 2 W.L.R. 649; and *Potter v Mole Valley DC* (1982) C.L.Y. 2266).

23–30 In *Marcic v Thames Water Utilities Ltd* [2004] 1 All E.R. 135; [2004] B.L.R. 1; 91Con.L.R. 1, the House of Lords upheld arguments, rejected by the Court of Appeal, that there could be no claim in nuisance where a sewerage undertaker was charged by statute to provide a service, necessarily limited as to extent and degree by statute-based financing rules applicable to the undertaker (This was cited with approval in *Leung Tsang Hung & another v The Incorporated Owners of Kwok Wing House* [2007] 10 HKCFAR 480 where it was considered that a claim of this nature would involve the court's intervention in high-level policy decisions regarding the allocation of public resources in the obviously inappropriate setting of an individual claim brought in public nuisance or negligence).

Isolated act or state of affairs

23–31 A single isolated escape might cause an actionable nuisance provided that the nuisance arises from the condition of the defendant's land or premises or activities. A single negligent act does not necessarily constitute a private nuisance (*S.C.M. United Kingdom Ltd v W.J. Whittall & Son Ltd* [1971] 1 Q.B. 337); but a nuisance may be caused by an isolated incident of damage resulting from a course of conduct (see *British Celanese Ltd v A.H. Hunt (Capacitors) Ltd* (1969) 1 W.L.R. 959, *S.C.M. United Kingdom Ltd v W.J. Whittall & Son Ltd*). See also *Spicer v Smee* [1946] 1 All E.R. 489 (defective electric wiring causing fire); *Bolton v Stone* [1951] A.C. 850 (cricket ball); and *Castle v St Augustine Links Ltd* (1922) 38 T.L.R. 615 (golf ball); and see *Crown River Cruises Ltd v Kimbolton Fireworks Ltd* [1996] 2 Lloyd's Rep. 533 (one-off firework display).

23–32 The "negligent" interruption of a supply of gas by a third party has been held not to be actionable as a private nuisance, on the grounds that it does not involve an invasion of any substance or form of energy into a person's property—*Anglian Water Services Ltd*

v Crawshaw Robbins & Co. Ltd [2001] 1 B.L.R. 173, per Stanley Burnton J. The reference to "negligence" in the circumstances of the case is not altogether clear as nuisance per se was or is not generally required as a premise for the actionable case. However, see para. [24–11] above.

Relevant type of damage

23–33 An actionable nuisance arises when a reasonably foreseeable (relevant) type of damage is caused (*Cambridge Water Co. v Eastern Counties Leather Plc* [1994] 2 A.C. 264; *Chan Ying Wah v Bachy Soletanche Group Ltd & Another* [2005] 2 HKLRD 176) or impending (see above)). The concept of reasonable foreseeability of damage really "concerns … not that of foreseeability alone, but of foreseeability as an aspect of reasonableness"—see *Network Rail Infrastructure Ltd (t/a Railtrack Plc) v CJ Morris (t/a Soundstar Studio)* [2004] EWCA Civ 172—and thus encompasses also aspects of remoteness (para.33, per Buxton L.J.). The fact that damage is greater than that foreseen, but still of the relevant type, will not afford a defence (*Holbeck Hall Hotel Ltd v Scarborough BC*). Reasonable foreseeability must imply some understanding of the chain of events which is putatively foreseen (*Arscott Coal Authority and Another* [2005] EWCA Civ 892, CA, para.58). Furthermore, damage is foreseeable only when there is a real risk of damage, that is, one that would occur to the mind of a reasonable person in the position of the defendant, and one that he would not brush aside as far fetched (*Overseas Tankship (UK) Ltd v Miller Steamship Co. Pty (Wagon Mound No.2)* [1967] 1 A.C. 617 at 643). This dictum was applied to the detriment of a plaintiff in *Hamilton v Papakura DC* [2002] UKPC 9, February 28, 2002, where the Privy Council said further, in the context of that case, "The mere fact that certain herbicides may kill or damage certain plants at certain concentrations does not itself establish such a risk" (para.39). See, also *Coleman v British Gas Services Ltd*, February 27, 2002, Lawtel, HC, where the Court rejected a claim for psychological injury arising from a fear of carbon monoxide poisoning induced after a period of potential actual harm with no physical harm resulting.

23–34 A defendant should plead specifically a denial that the relevant type of harm was reasonably foreseeable at the relevant time. This defence succeeded in *Cambridge Water Co. v Eastern Counties Leather Plc*. See, too, *Ellison v Ministry of Defence* (1997) 81 Build.L.R. 101 where this defence was relied on successfully.

23–35 For the third type of nuisance no actual financial loss need be suffered. In such cases, if diminution of capital value cannot be established because there is no permanent loss, diminution in letting value may be used. If that is not feasible by reason of reasonableness or practicality, general of loss of amenity may be used. Physical inconvenience and distress is not the appropriate basis. See generally *Dobson v Thames Water Utilities Ltd and OF- WAT* [2007] EWHC 2121 (TCC).

23–36 Personal injury should not now be within the scope of nuisance, but rather be pleaded, if available, within negligence (*Hunter v Canary Wharf Ltd* (above)).

23–37 Where damage has been suffered but that damage can only be said to have become reasonably foreseeable at a date later than the initial acts/omissions giving rise to the state of nuisance, no liability attaches in respect of those earlier acts/omissions, save where the consequences of those earlier acts still pose a threat of damage or are causing damage in which case liability will arise if the source of the damage is not "out of control" of the defendant (see *Cambridge Water Co. v Eastern Counties Leather Plc* [1994] 2 A.C. 264; and *Anthony and Others v Coal Authority* [2005] EWHC 1654 (QB), and the comments above under Reasonable care). Such avoidance of liability should be pleaded specifically by the defendant.

35–14 If the liquidator is at any time of the opinion that the company will not be able to pay its debts in full within the required period, the liquidator must forthwith summon a meeting of the creditors and lay before the meeting a statement of the assets and liabilities of the company. (s.273A(1). At this meeting, the creditors may appoint another liquidator in his place and fix the remuneration of the same and appoint a committee of inspection (s.237A(2)). Where this is the case, ss.238 and 239 shall not apply and ss.247 and 248 (set out below) shall apply as if the winding-up were a creditors' voluntary winding-up (see s.239A).

Creditors' voluntary winding-up

35–15 A creditors' voluntary liquidation is appropriate where the company is insolvent or cannot, by reason of its liabilities, continue its business. Where a creditors' voluntary liquidation is proposed, the company must arrange for a meeting of creditors to be summoned for the same day or the day after the meeting of members at which the resolution to wind-up the company voluntarily under s.228(1) is proposed. Notice of the meeting of creditors should be sent out by post at the same time as notice of the meeting to propose the resolution to be wound-up is sent to the shareholders (s.241(1)), and must be advertised once in the Gazette and at least once in both an English language and a Chinese language newspaper in circulation in Hong Kong (s.241(2)). The business of the meeting will include the appointment of a liquidator and a committee of inspection.

35–16 The directors must compile a statement of the company's affairs to be presented at the meeting of creditors and include a list of creditors and the estimated amount of their claims, and they must appoint a director to preside at the meeting (s.241(3)).

35–17 If the meeting of the company is adjourned but the meeting of the creditors is held, and the resolution to wind-up is passed at an adjourned meeting, any resolution of the creditors will have effect as if passed immediately after the resolution to wind-up the company (s.241(5)).

35–18 The creditors and shareholders at their respective meetings may nominate a person to be a liquidator. If they nominate different persons, the creditors' nominee will be appointed unless a director, member, or creditor applies to the court within seven days of the creditors' meeting for an order appointing the shareholders' nominee instead of or jointly with the creditors' nominee or for an order appointing some other person entirely. If no person is nominated by the creditors, the shareholders' nominee will be the liquidator (s.242). If there is no committee of inspection, the creditors will fix the liquidator's remuneration (s.244(1)).

35–19 For a form of the notice of the board meeting, see Form K10. For a form of the minutes of board meeting to call an extraordinary general meeting and a creditors' meeting, see Form K11. For notice to members to hold an extraordinary general meeting, see Form K12. For forms of proxy and minutes of the extraordinary general meeting, see Form K13 and K14 respectively. For a form of the advertisement of the resolutions passed at the extraordinary general meeting, see Form K15. For a notice and advertisement for a creditors' meeting, see Form K16. For forms of proxy and minutes for a creditors' meeting, see Form K17 and K18 respectively.

35–20 Just as for a members' voluntary liquidation, the liquidator must publish notice of his appointment in the Gazette and deliver a copy to the Registrar for registration within 21 days after the date of his appointment (s.253).

35–21 At the creditors' meeting or at a subsequent meeting of creditors, the creditors may appoint a committee of inspection consisting of a maximum of five persons. The company may also appoint a maximum of five persons to be members of that committee. The

creditors may, however, resolve that all or any of the persons appointed by the company ought not to be members of the committee of inspection and the company is bound by such a resolution unless the court on application appoints other person(s) to act as members of the committee (s.243(1)).

35–22 As soon as the affairs of the company are fully wound-up, the liquidator shall make up an account of the winding-up, showing how the winding-up has been conducted and the property of the company disposed of. The liquidator shall then call a general meeting and a meeting of the creditors for the purpose of laying the account before the members and creditors and to give any explanation of the account to the members and creditors (s.248). The final meeting shall be called by advertisement in the Gazette (s.248(2)). The account and a report of the meeting must be provided to the Registrar who will register the same and the company will be dissolved three months after registration unless deferred by the Court. In the event that the winding-up continues for more than one year, the liquidator must summon a general meeting at the end of the first year from the commencement of the winding-up, and of each succeeding year, and lay before the meeting an account of his acts and dealings and of the conduct of the liquidation during the preceding year (s.247). For a form of the notice and advertisement of the final meetings of members and creditors, see Form K19. For a form of the proxy for the final meetings of members and creditors, see Form K20 and for forms of minutes of the final meetings of members and creditors, see Form K21 and K22 respectively.

Winding-up under s.228A of the CO

35–23 Section 228A of the CO provides a special procedure for the voluntary winding-up of Hong Kong companies where the directors of the company, or the majority of them, have formed the opinion that the company cannot by reason of its liabilities continue and resolve at a meeting of directors and deliver to the Registrar a "winding-up statement". The winding-up statement must be delivered to the Registrar within seven days after the date on which it is made (s.228A(3)). For the form of the notice of the board meeting and the minutes for the board meeting, see Form K23 and Form K24 respectively.

35–24 The winding-up statement is in a form prescribed by the Companies Registry (Form W2). The winding-up statement certifies that, at the meeting of directors, the directors or a majority of them resolved:

(a) the company cannot by reason of its liabilities continue its business;
(b) that it is necessary that the company be wound-up and that the winding-up should be commenced under s.228A because it is not reasonably practicable for it to be commenced under another section of the Ordinance; and
(c) meetings of the company and of its creditors will be summoned for a date not later than 28 days after the delivery of the winding-up statement to the Registrar.

35–25 It is necessary to set out in the form the grounds upon which the directors believe that the company should be wound-up and why it is not reasonably practicable for the winding-up to be commenced under another section of the CO. The directors are required to forthwith appoint a person to be a provisional liquidator in the winding-up of the company, who must be a solicitor or certified public accountant and have consented in writing to the appointment (s.228A(5)(b) and (8)). The provisional liquidator shall have similar powers and duties as a liquidator in a creditors' voluntary winding-up, including the power to collect in all the assets of the company, but excluding the power of sale (with limited exceptions) (s.228A (14), (15) and (16)).

35–26 Within 14 days after the appointment of a provisional liquidator, the directors are required to give notice in the Gazette of the date of commencement of the winding-up by

8. In support of the aforesaid, and in particular the allegation that the mark "Stiffo" is calculated to deceive, the Plaintiff will rely on the fact that the mark "Stiffo" was adopted by the Defendant with the deliberate object of causing deception as aforesaid.

Particulars

The Plaintiff will rely, pending discovery and/or interrogatories, upon the fact that at the date of such adoption the name "Squiffo" was a very well-known mark, distinctive of the Plaintiff and none other. The Defendant, who is in the trade, must have known that fact. Further the mark "Stiffo" has no natural connection with the Defendant or the goods concerned and has a considerable oral and visual similarity to "Squiffo" which, the Plaintiff says, in all the circumstances, must have been obvious to the Defendant.

9. By virtue of the aforesaid acts of the Defendant, the Plaintiff has suffered loss and damage and, unless the Defendant's acts are restrained by this Honourable Court, will suffer further loss and damage.

10. Although the Plaintiff does not presently know the full extent of the Defendant's unlawful activities, they will claim relief at trial including damages and/or an account of profits in respect of each and every unlawful act of the Defendant.

11. The Plaintiff is entitled to and claim interest on sums awarded, to be assessed as may be appropriate, pursuant to s.48 of the High Court Ordinance (Cap.4).

And the Plaintiff claims:

(1) An injunction to restrain the Defendant (whether acting by himself, his servants, agents or otherwise howsoever) from doing any of the following acts (including by means of the Internet or otherwise), that is to say:
   (a) passing off water pistols, not being water pistols of the Plaintiff, as and for the Plaintiff's, whether by the use of the mark "Stiffo" or any other name, mark or device identical or similar to "Squiffo", or otherwise howsoever; or
   (b) authorising, causing, enabling, assisting, counselling or procuring others to do any of the acts aforesaid.
(2) An order for the delivery-up or destruction upon oath of all water pistols, printed or written matter, packaging, labels or other articles in the possession, custody or control of the Defendant, the use of which would be a breach of the foregoing injunction.
(3) An inquiry as to damages or alternatively at the Plaintiff's option an account of profits in respect of the Defendant's acts of passing off and an order for payment by the Defendant to the Plaintiff of all sums found due upon such inquiry as to damages or account of profits.
(4) Interest at such rate and for such period on all sums found due as to this Honourable Court shall deem just under s.48 of the High Court Ordinance (Cap.4).
(5) Costs.
(6) Further or other relief.

Claim for Passing Off one quality of Plaintiff's Goods for another

1. For many years the Plaintiff has used the mark "Squiffo de Lux" for its highest quality soap and the mark "Squiffo" (used alone) for its ordinary soap. **38–L2**

Particulars

[Give details.]

2. By reason of the aforesaid use the mark "Squiffo de Lux" has come to be associated by the trade and public as the Plaintiff's soap of the aforesaid highest quality.

3. The Defendant is a shopkeeper. In response to orders for "Squiffo de Lux" in the ordinary course of his trade he supplies the Plaintiff's ordinary "Squiffo" soap, thereby falsely representing such soap to be "Squiffo de Lux" soap.

Particulars

The Plaintiff will rely, pending discovery and/or interrogatories, upon the following acts of the Defendant:

[Give details].

4. In the premises, the Defendant has passed off soap branded "Squiffo de Lux" soap, as and for the Plaintiff's soap, contrary to the facts.

5. By virtue of the aforesaid acts of the Defendant, the Plaintiff has suffered loss and damage and, unless the Defendant's acts are restrained by this Honourable Court, will suffer further loss and damage.

6. The Plaintiff is entitled to and claim interest on sums awarded, to be assessed as may be appropriate, pursuant to s.48 of the High Court Ordinance (Cap.4).

And the Plaintiff claims:

(1) An injunction to restrain the Defendant (whether acting by himself, his servants, agents or otherwise howsoever) from doing any of the following acts (including by means of the Internet or otherwise), that is to say:
   (a) supplying in response to orders for "Squiffo de Lux" any soap (including in particular "Squiffo" branded soap) other than the Plaintiff's "Squiffo de Lux" soap; or
   (b) otherwise passing off soap, not being the Plaintiff's "Squiffo de Lux" soap, as and for the Plaintiff's soap.
(2) An inquiry as to damages or alternatively at the Plaintiff's option an account of profits in respect of the Defendant's acts of passing off and an order for payment by the Defendant to the Plaintiff of all sums found due upon such inquiry as to damages or account of profits.
(3) Interest at such rate and for such period on all sums found due as to this Honourable Court shall deem just under s.48 of the High Court Ordinance (Cap.4).
(4) Costs.
(5) Further or other relief.

an insurable interest also arises under s.64A–64E of the Insurance Companies Ordinance (Cap.41) for life insurance and other non-indemnity insurance policies: *Mark Rowlands Ltd v Berni Inns Ltd* [1985] 3 All ER 473; and *Siu v Eastern Insurance Co Ltd* [1994] 1 All ER 213. In particular, the insured must hold the relevant interest at the inception of the contract (s.64B of the Insurance Companies Ordinance (Cap.57)). Where an insurable interest is required under the contract, the insured cannot recover any amount in excess of such interest (s.64D of the Insurance Companies Ordinance (Cap.57)). For these reasons, the insured must plead the nature of his insurable interest and that such interest was held before the contract was bound.

42–09 The only statutory definition of an insurable interest arises from s.5 of the Marine Insurance Ordinance:

> "(1) Subject to the provisions of this Ordinance, every person has an insurable interest who is interested in a marine adventure.
> (2) In particular, a person is interested in a marine adventure where he stands in any legal or equitable relation to the adventure or to any insurable property at risk therein, in consequence of which he may benefit by the safety or due arrival of insurable property, or may be prejudiced by its loss or by damage thereto, or by detention thereof, or may incur liability in respect thereof."

42–10 There is no general definition of what constitutes an insurable interest for other types of insurance. While there is a body of authority on the subject in various insurance contexts, there are divergences of approach. See for example, *Lucena v Craufurd* (1806) 2 B&P (NR) 269, 302 (Lawrence J) and 321 (Lord Eldon); *Macaurd v North Assurance Co* [1925] AC 619, 625 (Lord Buckmaster); *Mark Rowlands v Berni Inns Ltd* [1986] QB 211, 228 (Kerr LJ) and *Glengate-KG v Norwich Union* [1996] 1 Lloyd's Rep 614. In *Feasey v Sun Life* [2003] EWCA Civ 885; Waller LJ conducted a thorough survey of the authorities in the context of life insurance (see paras.64–96) and set out (at para.97) seven key principles to be derived from such cases. It is notable, however, that Dyson LJ, who agreed with Waller LJ's conclusion on this point, did not adopt these principles and Ward LJ dissented.

Utmost Good Faith

42–11 Contracts of insurance are contracts of the utmost good faith. This gives rise to a legal obligation upon the insured, prior to the contract being made, to disclose to the insurer all material facts and circumstances known to the insured which affect the risk being run. Lord Mansfield's words in *Carter v Boehm* (1766) Burr 1905 have stood the test of time:

> "Insurance is a contract of speculation. The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the assured only; the underwriter trusts his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge to mislead the underwriter into a belief that the circumstance does not exist and to induce him to estimate the *risqué* as if it did not exist. The keeping back such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived and the policy is void; because the *risqué* is really different from the *risqué* understood and intended to be run at the time of the agreement... The policy would be equally void against the underwriter if he concealed... The governing principle is applicable to all contracts and dealings. Good faith forbids either party; by concealing what he privately knows to draw the other into a bargain from his ignorance of the fact and his believing the contrary..."

42–12 The obligation of good faith is mutual and owed by the insurer as well as the insured and if it is not observed by either party, the contract may be avoided by the other party: *Carter v Boehm* (above); and *Banque Keyser SA v Skandia (UK) Insurance Co Ltd* [1990] 1 QB 665, 770F–G (affirmed [1991] 2 AC 249, reversed on another ground). The legal basis of the obligation is not obvious and is perhaps best explained as "an incident of the contract of insurance" in *The Good Luck* [1988] 1 Lloyd's Rep 514, 546 (Hobhouse J) (affirmed [1989] 2 Lloyd's Rep 238, 264 (May LJ) but reversed on other grounds [1992] 1 AC 233). It is settled law that the principles (given statutory form in ss.17–20 of the Marine Insurance Ordinance) are equally applicable to marine and non-marine insurance, as they are to reinsurance: *Pan Atlantic Insurance Co v Pine Top Insurance Co* [1995] AC 501, 518D–E and 554D–G and *Highlands Insurance Co v Continental Insurance Co* [1987] 1 Lloyds Rep 109, 113–114.

42–13 Recent litigation in the United Kingdom has drawn attention to the separate and independent duty of disclosure owed by an insured's broker under s.19 of the Marine Insurance Ordinance. Even if the insured is released from his duty of disclosure under the contract, for example, where he is not aware of the detailed background to the matter because it is a "broker product", that does not necessarily release the broker from his duty which is both separate and independent of the duty owed by the insured. See *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] Lloyd's Rep IR 230, 241–242, 247, 249 and 254.

42–14 The defences of non-disclosure and misrepresentations are frequently run together. In a non-disclosure defence, the burden is on the insurer to prove:

(i) that a *material circumstance*, which was *known to or ought in the ordinary course of his business to have been known to the insured* and which was *not known to and not deemed to be known to the insurer*, was *not disclosed*; and/or
(ii) that a person acting as an *agent to insure* failed to disclose a *material circumstance* which was *known to that agent or which ought in the ordinary course of business to have been known by him or ought to have been communicated to him* but which was *not known and not deemed to be known* to the insurer; and
(iii) that the insurer was *induced by the non-disclosure* to *write the risk* on the relevant terms.

42–15 See ss.18 and 19 of the Marine Insurance Ordinance. Each of the parts in italics should be specifically pleaded in the insurer's statement of case.

42–16 The test for materiality is set out in s.18(2) of the Marine Insurance Ordinance:

> "Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium or determining whether he will take the risk."

42–17 The materiality of information is a question of fact, determined at the time that disclosure is due, by reference to the judgment of the prudent insurer. For the purposes of materiality it is not necessary for the insurer to prove that he would not have written the risk or would have charged a higher premium. It is sufficient if the fact or circumstance not disclosed would have had an effect on the thought processes of the insurer in weighing up the risk: in *Pan Atlantic Insurance Co v Pine Top Insurance Co* [1995] AC 501, 531 (Lord Mustill). Under s.18(2) of the Marine Insurance Ordinance, the relevant insurer is not the particular insurer but a reasonable insurer in the relevant sector of the market at the time of the contract: *Associated Oil Carriers Ltd v Union Insurance Society of Canton Ltd* [1917] 2 KB 184, 191–192.

42–18 It is also necessary for the individual insurer to prove that it was induced, as a matter of fact, by the non-disclosure. That is, but for the non-disclosure, the insurer would not have entered into the particular contract, either at all or on the same terms: *Decorum Investments*

Claim against an architect

[*Heading: see form P1*]

The Parties

48–P3 1. The Plaintiff is and was at all material times the owner and occupier of the premise located at [address] (the "**Premise**"). During [SPECIFY: date], the Plaintiff began to have an interest in constructing an extension to the Premise (the "**Construction**").

2. The Defendant is and was at all material times a firm carrying on business as architects and held themselves out as an experienced, skilled and competent firm of architects in the design, construction, supervision of and inspection of residential extensions.

3. The aforementioned are the parties (the "**Parties**").

The Engagement

4. By a contract agreed on [SPECIFY: date] and evinced in writing the Plaintiff engaged the Defendant to design and supervise the Construction for the sum of [SPECIFY: consideration] exclusive of VAT (the '**Engagement**"). Pursuant thereto, the Plaintiff paid a deposit of $[SPECIFY: deposit sum] paid with a cheque at the time of the contract, and agreed that the balance payable upon completion of the Construction. A copy of the receipt evidencing payment is attached [ATTACH: receipt if payment of deposit with cheque].

5. At the time that the Engagement was agreed, the Plaintiff informed the Defendant that he intended to use the extension for a bedroom for his daughter so that she could reside in the Premise at the end of her lease ending [SPECIFY: date]. It was therefore a condition of the Engagement that the Construction would be completed by [SPECIFY: date] (the "**Condition**"). Further, or in the alternative, the Defendant warranted that they would ensure that the Construction was completed by [SPECIFY: date] (the "**Warrant**").

6. The Engagement was contained in and/or evinced by the following documents:

(a) the Defendant's letter to the Plaintiff dated [SPECIFY: date]; and
(b) the Plaintiff's letter in response to the Defendant dated [SPECIFY: date].

7. It was an express term of the Engagement that the Defendant would:

> "*design a single story extension to the side of the Premise, extending an estimated twenty metres from the side wall. We* [the Defendant] *will assist select a suitable contractor and to supervise the building works.*"

8. It was an implied term of the Engagement, implied as a matter of law and/or to give business efficacy to the Engagement and/or to reflect the true intention of the Parties, that the Defendant would carry out its duties with the reasonable skill

and care to be expected of a competent firm of architects holding themself out as being experienced in residential construction projects.

9. Further, or in the alternative, due to the aforementioned, it was an express and/or implied term that time was of the essence in performing the Agreement, including the Construction.

10. Further or alternatively, the Defendant owed the Plaintiff a like duty of care in tort.

The Construction

11. In pursuance of the Engagement, the Defendant prepared design, drawings, specification and/or instructions and a material specification (the "**Design**") to prepare instructions to the [SPECIFY: contractors/builders] (the "**Contractor**") to complete the Construction on or about [SPECIFY: date] to be completed by [SPECIFY: date] by relying upon the Design.

12. The Defendant informed the Plaintiff and the Contractor that to complete the Construction by [SPECIFY: date] (in readiness for the return of the Plaintiff's daughter) the Contractor should commence the works for the Construction on [SPECIFY: date]. Accordingly, the Contractor began the works for the Construction on [SPECIFY: date].

13. On [SPECIFY: date] the Contractor discovered pipes located at the side of the property immediately beneath the ground (the "**Pipes**"). The Defendant informed the Plaintiff of the Pipes on [SPECIFY: date] and stated that this would delay the Construction until [SPECIFY: date].

14. In these premises, in breach of contract and/or in breach of its duty of care to the Plaintiff, the Defendant:

Particulars of Breach of Contract/ Duty of Care

(a) failed to heed and/or consider the specific instruction of the Plaintiff that the Construction should be completed by [SPECIFY: date];
(b) failed to take reasonable step to allow the Construction to commence on [SPECIFY: date];
(c) failed to ensure that the Design took sufficient and/or any account of the Pipes provided to and relied upon by the Contractor;
(d) failed to complete adequate checks into the Premise so as to complete the Design;
(e) failed to provide designs to allow the Construction to be completed by [SPECIFY: date] due to not considering additional time required to allow the Construction in light of the Pipes;
(f) required the Plaintiff to engage an alternative architect to prepare designs which were prepared with reasonable skill and care when time was of the essence of the Agreement;
(g) failed to complete and/or supervise the Construction; and/or
(h) failed to warn the Plaintiff of the risk of delay in case Pipes were discovered, to allow the Plaintiff to take alternative steps to accommodate his daughter.