J Eq	Journal of Equity
JIBL	Journal of International Banking Law
JPEL	Journal of Planning & Environment Law
JPIL	Journal of Personal Injury Law
Lewin	John Mowbray, et al, *Lewin on Trusts* (18th ed, Sweet & Maxwell: London, 2008)
LMCLQ	Lloyd's Maritime and Commercial Law Quarterly
LS	Legal Studies
L. & T. Review	Landlord & Tenant Review
LQR	Law Quarterly Review
MGL	Meagher, R., Heydon, D. & Leeming, M. *Meagher Gummon & Lehane's Equity: Doctrines & Remedies* (4th ed, LexisNexis Butterworths: Australia, 2002)
MLR	Modern Law Review
Moffat	Graham Moffat, Gerry Bean and Rebecca Probert, *Trusts Law* (5th ed, Cambridge University Press: UK, 2009)
MonLR	Monash University Law Review
MULR	Melbourne University Law Review
NLJ	New Law Journal
NPJ	Non Permanent Judge, Court of Final Appeal
NZLJ	New Zealand Law Journal
NSWSC	New South Wales Supreme Court
NSWCA	New South Wales Court of Appeal
Ong	Dennis SK Ong, *Trusts Law in Australia* (4th ed, The Federation Press: Sydney, 2012)
P & M	A J Oakley, *Parker and Mellows: The Modern Law of Trust* (9th ed, Sweet & Maxwell: London, 2008)
Pettit	Philip H Pettit, *Equity and the Law of Trusts* (12th ed, Oxford University Press: Oxford, 2012)
PC	Judicial Committee of the Privy Council
PCB	Private Client Business
PJ	Permanent Judge, Court of Final Appeal
PL	Public Law
PLB	Property Law Bulletin
PRC	People's Republic of China
RHC	Rules of High Court (Cap 4A)
SC	Session Cases
Snell	J McGhee (ed) *Snell's Equity* (32nd ed, Sweet & Maxwell: London, 2010)
SLT	Scots Law Times
Sol Jo	Solicitor's Journal
SydLR	Sydney Law Review
Tudor	Jean Warburton, Debra Morris and N F Riddle, *Tudor on Charities* (9th ed, Sweet & Maxwell: London, 2003)
UNSWLJ	University of New South Wales Law Journal
UQLJ	University of Queensland Law Journal
WMS	John Martyn and Nicholas Caddick (ed) *Williams, Mortimer and Sunnucks on Executors Administrators and Probate* (19th ed, Sweet & Maxwell: London, 2008)
WTLR	Wills & Trusts Law Reports

CHAPTER 1

Nature, History and Maxims of Equity

General History of Equity

[1-1] Equity is the body of law developed by the English Court of Chancery before 1873 alongside the common law and for the purpose of 'softening the hard edges' or 'mitigating against the injustice or harshness caused by the rigidity'[1] of the common law. Equity was said to be the conscience of the Chancellor of the day and it differed as to the length of the Chancellor's foot. Principles of law based upon conscience have been criticised as being uncertain, as 'one Chancellor may have a long foot, another a short foot, a third an indifferent foot'.[2] There is force in the argument that the law of equity should be 'rule and principle based' instead of 'sense and feeling based' because common sense is vague and unpredictable.[3] However, it is judicial activism and the judicial sense of justice that promulgates and nurtures the development of the 'principle' of equity and without such conscience, there would not be the system of law of equity today.

[1-2] Before the enactment of the Supreme Court of Judicature Act 1873 (Imp) (the Judicature Act), equity was exclusively administered by the Court of Chancery. Common law courts (King's courts) did not recognise equitable rights and would not administer the principles of equity or award equitable remedies. Equally, equity had no power to decide disputes of legal rights and titles. The Judicature Act had the effect of fusing the administration of the principles of common law and equity so that judges in superior courts had both common law and equitable jurisdictions together, so that cases commenced in the common law court that required the intervention of equity would not be dismissed because the court lacked equitable jurisdiction (transfer was not an option opened to the court then). Where there are conflicts between the principles of common law and the principles of equity, the latter will prevail.

[1-3] Some judges, however, erroneously assumed that the Judicature Act fused the principles of common law and equity themselves so that the desired principles from each could be picked out and used together for a particular case. This assumption has led to a series of cases called 'fusion fallacies'. For example, common law remedies have been awarded for a breach of duty, which arises purely out of equity. In *Seager v Copydex Ltd*,[4] managers of a marketing company were held to have breached the duty of confidence to an inventor who had disclosed his ideas about a new invention. Although the duty of

1 See *Wise Wave Investments Ltd v TKF Services Ltd* [2007] HKCU 1451 at para 47 per A Cheung J. For the development of the law of equity in the United States, see Richard HW Maloy, 'Expansive Equity Jurisprudence: A Court Divided' (2007) 40 Suffolk University Law Review 641; and for Canada, see Dennis R. Klinck, 'Doing 'Complete Justice': Equity in the Ontario Court of Chancery (2006) 32 Queen's Law Journal 45.

2 R Megarry, *Miscellany at Law* (London: Stevens, 1955) at p 139.

3 H Litton, 'Dogged by Dogma: Will Common Sense ever prevail in the law?' (2001) 31 HKLJ 35.

4 [1967] 2 All ER 415.

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confidence is purely an equitable duty, the court awarded common law damages such as the type that is awarded in torts. In *Cuckmere Brick Co Ltd v Mutual Finance Ltd*,[5] a mortgagee breached its duty of good faith to its mortgagor by failing to advertise the full potential of the property and the mortgagor was awarded common law damages for the loss of profits. One of the most famous examples of 'fusion fallacy' is the case of *Walsh v Lonsdale*,[6] where the tenant held an agreement for a lease which was void at law because it had not been sealed. When the tenant refused to pay rent, the landlord distrained the tenant's property, a right he was only entitled to exercise if a valid lease had been granted. With the justification that 'there is only one court, and the equity court prevails in it', George Jessel MR held that the tenant stood in the same position as if the lease had actually been executed because equity would have granted specific performance of the lease as a relief. Thus, the Master of the Rolls held that the landlord was entitled to exercise the right of distrainment. Although this case has been strongly criticised, especially for failing to recognise the discretion of awarding specific performance in equity, the rule it established has survived.

[1-4] The fact that these cases are called 'fusion fallacies'[7] does not suggest that equity and the common law cannot borrow from one another as they both develop. Mason P in the New South Wales Court of Appeal has even argued that the notion of 'fusion fallacies' is itself fallacious and historically unsound because the common law and equity systems had developed from one another long before the Judicature Act and have continued after its enactment.[8] Professor Michael Tilbury is also persuasive in arguing that 'what can be done with rules is more important than where they came from'.[9]

Equity in Hong Kong

[1-5] The basis for the application of English equity law in the Hong Kong Special Administrative Region (HKSAR) can be traced to Article 8 of the Basic Law which states that:

> the laws previously in force in Hong Kong,[10] that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region.

Thus, it is important to understand the history of the reception of English law in Hong Kong in colonial times to ascertain the application of the rules of equity as of the handover.

5 [1971] Ch 949, [1971] 2 All ER 633.
6 (1882) 21 Ch D 9 (CA).
7 See generally *Evans* at para [2.13]–[2.19]; *H & M* para [1-020]–[1-023]. For details, see JD Heydon and MJ Leeming, *Cases and Materials on Equity and Trusts* (8th ed, LexisNexis Butterworths: Australia, 2011) at para [1.19]–[1.39]; *Pettit* at pp 8–12. See also, Mark Leeming, 'Equity, the Judicature Acts and Restitution' (2011) 5 J Eq 199.
8 *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298, (2003) 197 ALR 626, (2003) 44 ACSR 390, [2003] NSWCA 10.
9 M Tilbury, *Civil Remedies: Principles of Civil Remedies — Vol One*, (Butterworths: Sydney, 1990), at pp 11–12.
10 'Previously in force' means in force as of 30 June 1997: see Hong Kong Reunification Ordinance (Cap 2601), section 5.

[1-6] Almost immediately after colonisation, the laws of England were introduced in Hong Kong.[11] From 1846 to 1966, a formula, later recast as section 5 of the Supreme Court Ordinance 1873, was used to apply all the laws of England which existed on 5 April 1843 (the cut-off date), except those which were considered not suited to the circumstances of Hong Kong. This formula not only incorporated the English statutes passed before the cut-off date but also common law and equity, together with their developments after the cut-off date. The Application of English Law Ordinance 1966 (Cap 88) declared that English legal principles and Imperial statutes were applicable in Hong Kong as of 7 January 1966,[12] subject to their modification in accordance with local circumstances.[13] English principles of equity might not be entirely suitable for Hong Kong as it has its own unique characteristics. Thus, these principles were only in force to the extent of their *applicability* to the circumstances of Hong Kong and could be modified accordingly. The test to determine the applicability of a rule can be strict, such as the test adopted by the Hong Kong courts, which held the English common law and equity to be inapplicable only if it caused injustice or oppression.[14]

[1-7] Although this Ordinance is now repealed,[15] it was operative on 30 June 1997 and it is therefore important in ascertaining the extent of the operation of common law and equity on this date.[16] The principles of common law and equity will continue to be enforced in Hong Kong courts, as provided in section 7(1) of the Hong Kong Reunification Ordinance (Cap 2601):

> 7. Maintenance of previous laws
> (1) The laws previously in force in Hong Kong, that is the common law, rules of equity, Ordinances, subsidiary legislation and customary law, which have been adopted as the laws of the HKSAR, shall continue to apply.

The High Court of Hong Kong will continue to administer the principles of common law and equity and whenever there is conflict, the rule of equity will prevail.[17]

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11 See B Hsu, *The Common Law: In Chinese Context* (Hong Kong University Press: Hong Kong, 1992) at pp 7–19.
12 The Application of the English Law Ordinance (Cap 88) (rep) declared the extent to which English law was in force in the colony.
13 Application of the English Law Ordinance (Cap 88) (rep), section 3(1)(b).
14 *Wong Yu-Shi (No 1) v Wong Ying-kuen* [1957] HKLR 420, at pp 442–443. Compared with a more flexible test as adopted by Lord Denning in *Nyali Ltd v A-G* [1956] 1 QB 1 at pp 16–17. See generally P Wesley-Smith, *An Introduction to the Hong Kong Legal System* (3rd ed, Oxford University Press: Hong Kong, 1998) at pp 37–44.
15 The Standing Committee of the National People's Congress did not adopt this Ordinance as the laws of the HKSAR in its Decision on 23 February 1997 because it was declared inconsistent with the Basic Law.
16 See P Wesley-Smith, 'The Content of the Common Law in Hong Kong' in R Wacks (ed), *The New Legal Order in Hong Kong* (Hong Kong University Press: Hong Kong, 1999) at p 23.
17 High Court Ordinance (Cap 4), section 16. There is no such equivalent provision in the District Court Ordinance (Cap 336) or the Hong Kong Court of Final Appeal Ordinance (Cap 484). However, the District Court has equitable jurisdiction to hear and determine various proceedings of an equitable nature, including estate administration, execution and variation of trusts, mortgage redemption and grant equitable nature remedies such as injunctions and specific performance. See District Court Ordinance (Cap 336), section 37(1).

The Maxims of Equity

[1-8] The maxims of equity are not positive laws of equity, so literal and relentless application of their full width is not suitable. Maxims themselves overlap and cannot be logically divided. There are 12 maxims of equity but there is no reason or authority to limit them to these 12.[18] Maxims are guidelines that are derived and distilled from judges' consciences when adjudicating cases in the Court of Chancery. Maxims in equity are also recognised as a summary statement of a broad theme which underlines equitable concepts and principles rather than a specific rule of law. [19] In *Ni Tiee Bor Robert v Golden Crane Industries Ltd*, the Court of Appeal stressed that equitable maxims:

> are not to be taken as positive laws of equity which will be applied literally and relentlessly in their full width, but rather as trends or principles which can be discerned in many of the detailed rules which equity has established.[20]

Equity will not suffer a wrong without a remedy [21]

[1-9] Basically, if common law does not provide a remedy, equity would and should intervene to redress the wrong by providing a remedy. The underlying purpose of equity is to round the sharp edges of common law and to supplement common law whenever it is inadequate. Equity steps in when there is injustice in the operation of common law.

[1-10] This maxim shall not be taken literally to mean that equity will redress every moral wrong. In observing the origin of equity, it should be noted that it was developed to remedy the insufficiency of common law. Equity should intervene if common law does not remedy a wrong; however, equity should only intervene if there is a proven legal wrong and should not intervene for every moral wrong. In other words, equity should intervene if the parties have established a common law cause of action but, due to some technical defect, are unable to find a remedy in law. For example, in the case of breach of trust by a trustee, the beneficiary had no remedy at law because the legal wrong was not done to the beneficiary but to the settlor of the trust. Equity then steps in to enforce the trust by granting a remedy to the beneficiary. In *Union Eagle Ltd v Golden Achievement Ltd*[22] the Privy Council held that equity would not intervene to rescue a purchaser who has been in breach of an essential condition of sale. In this case, the written sale and purchase agreement required completion to take place on or before 20 September 1991 and before 5.00 pm on that day. Time was of the essence. The vendor was entitled to rescind and keep the deposit should the purchaser fail to comply with any of the terms and conditions of the agreement. Completion did not take place by 5.00 pm but the vendor's solicitors were told that a messenger was on his way. The messenger arrived at 5.10 pm with the purchase money but was told that the vendor had instructed a rescission and the return of the purchase money. The purchaser sought specific performance in the High Court,

18 *Snell* at Chapter 5; R Meagher, D Heydon, M Leeming, *Meagher Gummow & Lehane's Equity: Doctrines & Remedies* (4th ed, Sydney: LexisNexis Butterworths, 2002) at para [3–005]; PL Loughlan, 'The Historical Role of the Equity Jurisdiction' in P Parkinson, *The Principles of Equity* (2nd ed, Law Book Co: Sydney, 2003), at pp 24–27
19 *Corin v Patton* (1990) 169 CLR 540 at p 557 per Mason CJ and McHugh J.
20 [2000] HKCU 697 at para 14.
21 *Snell* at paras [5-002]–[5-004]; *Pettit* at p 25; *Hudson* at para [1.4.1].
22 [1997] 1 HKC 173.

failed[23] and failed again on appeal to the Court of Appeal[24] and the Privy Council.[25] The Privy Council in emphatic terms stated:

> The fact is that the purchaser was late. Any suggestion that relief can be obtained on the ground that he was only slightly late is bound to lead to arguments over how late is too late, which can be resolved only by litigation. For five years the vendor has not known whether he is entitled to resell the flat or not. It has been sterilised by a caution pending a final decision in this case. In his dissenting judgment, Godfrey J.A. said that the case 'cries out for the intervention of equity'. Their Lordships think that, on the contrary, it shows the need for a firm restatement of the principle that in cases of rescission of an ordinary contract of sale of land for failure to comply with an essential condition as to time, equity will not intervene. [26]

[1-11] This maxim leads to a tricky belief or so-called 'beguiling heresy',[27] that is, it is uncertain as to when and how equity will intervene to provide a remedy. If one believes that equity will intervene in any case of unconscionability, it still does not displace or resolve the uncertainty[28]: *Union Eagle* is a good example – should the vendor be told to strictly watch the time and to insist on punctual completion at 5.00pm sharp and to forfeit millions of dollars of deposit if the purchaser does not turn up on time? Or is it more equitable to allow the purchaser to be a few minutes late so that the 'time of essence' provision as agreed between parties loses its spirit and commercial certainty is not preserved? The practice of a profit hungry vendor or his solicitor taking advantage of trivial breaches by purchasers has been criticised and, on some occasions, as vividly described by Seagroatt J in *Speedy Rich (Asia) Ltd v Leung Pui Shu*,[29] the vendor's solicitor watches 'the clock with an eager tactical eye and to be swiftly in action to take advantage of the trap and impose forfeiture'. The approach adopted by the Privy Council in *Union Eagle* case has been criticised,[30] with critics saying that such a practice should have been condemned and not encouraged as equity is there to round the sharp edges of the rigid common law. Despite sharp academic criticism, the Privy Council's decision in *Union Eagle* was followed in *Douglas Ltd v Ji Shan International Investment Ltd*.[31] Here, equity could not be invoked to interfere with the clear contractual right of rescission enjoyed by the vendor for breach of a time of essence condition in a contract for sale of land.

[1-12] This can be compared with *Speedy Rich (Asia) Ltd v Leung Pui Shu*,[32] where the contract provided that completion was due to take place by 1.00 pm on 7 April 1997. The contract expressly entitled the purchaser to inspect the property on the completion date before completion took place. But as a result of circumstances beyond the purchaser's control, he was unable to do so. Accordingly, the solicitors for the vendors and purchaser

23 [1995] HKC 225, [1995] HKCFI 154.
24 [1996] 1 HKC 349, [1995] HKCA 518.
25 [1997] 1 HKC 173.
26 [1997] 1 HKC 173 at p 182.
27 See *The Scaptrade* [1983] 2 AC 694 at p 700.
28 Lord Hoffman in *Union Eagle* spoke of the existence of an undefined discretion to refuse to enforce the contract on the ground that this would be unconscionable, which is sufficient to create uncertainty: *Union Eagle Ltd v Golden Achievement Ltd* [1997] 1 HKC 173 at pp 178I–179B.
29 [2000] HKCFI 765 (HCA 3623/1997, 21 June 2000).
30 M Fok, 'Does Hong Kong Need an Antidote to Union Eagle?' (2000) 30 Hong Kong LJ 490 at p 494; ME Kowalski, 'Good Faith, Greed and Time of the Essence or How to Make HK$15M in 600 Seconds (Reflections of a Canadian Real Property Solicitor)' (2000) 30 Hong Kong LJ 476; J Sihombing, 'Union Eagle: Then and Now' (2000) 30 Hong Kong LJ 501.
31 [1998] 2 HKC 165.
32 [2000] HKCFI 765 (HCA 3623/1997, 21 June 2000).

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CHAPTER 6

Fiduciary Obligations

The Fiduciary Relationship

[6-1] The meaning of a fiduciary is found in the classic statement of Millet LJ (as his Lordship then was) in *Bristol & West Building Society v Mothew*:

> A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary. As Dr Finn pointed out in his classic work *Fiduciary Obligations* (1977), page 2, he is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary.[1]

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[6-2] Indeed the relationship of trust and confidence, albeit the most important fiduciary relationship, is only the first kind. Millett LJ (as the NPJ then was) in fact recognised that there are two other kinds of fiduciary relationships – the second kind is one of influence and the third, a kind of confidentiality. A fiduciary relationship based on influence is about vulnerability and unconscionability. Equity deplores the exploitation of the weak and will strive to come to their protection and so the doctrines of equitable fraud and undue influence were derived. There is also a fiduciary relationship based on confidentiality of information parted. Information is inherently confidential because of its nature, or becomes confidential because of the circumstances in which it is imparted. It is also unconscionable for a party to take advantage of such confidential information.[2]

[6-3] There are certain settled categories of relationships in which equity will impose a duty. In other kinds of relationships, equity may impose a fiduciary duty for that one purpose only (an ad hoc relationship). Within the following settled categories, equity will presume the relationship to be fiduciary: between trustee and

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1 [1998] 1 Ch 1 at p 18. See also *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at pp 96–97 per Mason J. See generally Len Sealy, 'Fiduciary Obligations, Forty years On' (1995) 9 JCL 37. It has been said that judicial thinking about the content of fiduciary duties has changed significantly over the last decade and the mere fact that a fiduciary relationship exists between two parties does not mean that their relationship would be fiduciary for all purposes, see Matthew Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties* (Hart Publishing: Oxford and Portland, Oregon, 2011), 16–17.

2 See P J Millett 'Equity's Place in the Law of Commerce' (1998) 114 LQR 214 at pp 219–221.

beneficiary[3] (including a constructive trustee); between a company director[4] and a

3 *Mayluck Investment Ltd v Lee Yih Ping* [1996] 3 HKC 245 (a trustee under section 7 of the Partition Ordinance (Cap 352) who holds proceeds of sale for a parcel of land is in a fiduciary position to fully account to all the parties interested); *Tin Kwong International Enterprise Co Ltd v San Tung* [2005] HKCU 517 (company director who received in his personal bank account money that belonged to the company was held to be a constructive trustee); *Lai Kit Bick Joana v To Yui Hung* [2004] HKCU 1505 (son used title deeds entrusted to him by his father to dispose of the properties and arrogated the proceeds, when he knew that his father did not consent to the same, was in breach of his fiduciary duty as trustee). See also Kerry Ayers, 'Fiduciary Obligations in Express Trusts' [1997] NZLJ 243.

4 *Re Catchick Paul Chater (decd)* [1927] HKCU 9 at p 6 per Wood ACJ; *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134 at p 159, [1942] 1 All ER 378 at p 395G; cf *Tan Poh Lean v Hong Kong Communications Equipment Co Ltd* [1983] 2 HKC 488 (plaintiff formed a company and appointed the defendant as director so that the defendant might look after the company for the plaintiff — this did not render the defendant a fiduciary for the plaintiff); *Kung Kwok Wai David v Citibank NA* [1989] 2 HKC 48 (CA) (power to expel fellow director is a fiduciary power which must be exercised in the best interests of the company); *GSL Engineering Ltd v Yau Hon Yin Sammon* [1990] 2 HKC 360 (managing director); *Tan Eng Guan v Southland Co Ltd* [1996] 2 HKC 100 (defendant directors lent out the company's money to their own companies and some to themselves); *Chinese United Establishments Ltd v Cheung Siu Ki* [1997] 2 HKC 212; *Re MW Lee & Sons Enterprises Ltd* [1999] 2 HKC 686, [1999] 3 HKLRD 427; *Hong Kong Racing Pigeon Association Ltd v Lam Koon Nam* [2002] HKCU 738, [2002] 3 HKLRD 133; *Kiddie Products Co Ltd v Wong Man Kam Patrick* [2002] HKCU 845; *Ciro Citterio Menswear plc (in adm) v Thakrar* [2002] EWHC 293 (Ch), [2002] 1 WLR 2217; *Criterion Properties plc v Stratford UK Properties LLC* [2002] EWCA Civ 1883, [2003] 2 BCLC 129, [2003] 1 WLR 2108, on appeal [2004] UKHL 28 (HL); *Gwembe Valley Development Company Ltd v Koshy* [2003] EWCA Civ 1048 (an article of association of a company exempting directors from liability in profiting from the company had to be read in conjunction with other articles that required full disclosure; without such full disclosure the exemption could not operate independently to save the director-in-breach); *China Everbright-IHD Pacific Ltd v Ch'ng Poh* [2002] HKCU 1481, [2003] 2 HKLRD 594 (CFA) at [56]; *Clark v Cutland* [2003] EWCA Civ 810, [2004] 1 WLR 783; *Item Software (UK) Limited v Fassihi* [2003] IRLR 769, on appeal [2004] IRLR 928 (Eng CA); *Gemtact Co Ltd v Ling Chi Hung* [2004] HKCU 1408; *Official Receiver v Yan Kwok Kee Gay* [2005] HKCU 423; *Item Software (UK) Ltd v Fassihi* [2004] EWCA Civ 1244, [2004] All ER (D) 187 (Sep) (Eng CA); *Chu Siu Wa v Koldtech Development (International) Ltd* [2005] HKCU 452; *Tin Kwong International Enterprise Co Ltd v San Tung* [2005] HKCU 517; *Marblesum Ltd v Poon Shu Pang* [2005] HKCU 761; *Belgian Bank v Sino Global International Ltd* [2005] HKCU 1232; *Leung Alfred Cheukwah v Unity Investments Holdings Ltd* [2005] HKCU 1244; *Tripole Trading Ltd v Prosperfield Ventures Ltd* [2006] 1 HKLRD 200, (2006) 9 HKCFAR 1; *Swan v Sandhu* [2005] EWHC 2743, [2005] All ER (D) 38 (Dec) [2006] BPIR 1035 (Ch); *PNC Telecom plc v Thomas* [2007] All ER (D) 13 (Aug); *Pacific Electric Wire & Cable Co Ltd v Texan Management Ltd* [2008] 4 HKLRD 349; *Re Grand Field Group Holdings Ltd* [2009] 3 HKC 81; *Vos v Global Fair Industrial Ltd* [2009] HKCU 1910; *Tradepower (Holdings) Ltd (In Liq) v Tradepower (Hong Kong) Ltd* (2009) 12 HKCFAR 417, [2010] 1 HKC 380 (CFA); *Akai Holdings Ltd (In Liq) v Kasikornbank PCL* (2010) 13 HKCFAR 479, [2011] 1 HKC 357 (CFA) (executive chairman and chief executive officer); *Passport Special Opportunities Master Fund v Esun Holdings Ltd* [2011] 4 HKC 62; *Berryland Books v Baldwin* [2010] EWCA Civ 1440, [2010] All ER (D) 209 (Dec) (Eng CA). Cf *Foster Bryant Surveying Ltd v Bryant* [2007] EWCA Civ 200, [2007] All ER (D) 213 (Mar), [2007] IRLR 425, [2007] 2 BCLC 239 (Eng CA) (retiring director). Also see Abdul Majid, Low Chee Keong and Krishnan Arjunan, 'Company Directors' Perceptions of Their Responsibilities and Duties: A Hong Kong Survey' (1998) 28 Hong Kong LJ 60. The learned authors have conducted a survey of all managing directors of listed companies in Hong Kong, the result of which discloses an overwhelmingly low degree of awareness concerning a director's legal obligation and duties. Many, however, were aware that shareholders have a right to commence derivative action against directors for breach of

promoter[5] of the company; between partners to a partnership;[6] between solicitor and client;[7] between agent and principal;[8] between guardian and ward;[9] between Crown servant and Crown;[10] between receiver and liquidator[11]; between a trustee in bankruptcy and creditors;[12] and between the executor or administrator and the deceased's estate.[13]

fiduciary duties. As to the position of a former director, see *Shanghai Finance Holdings Ltd v Sun Tai Cheung Credits Ltd* [2002] 2 HKC 487, [2002] HKCU 618. See also Companies Ordinance (Cap 622), section 728(4)(b) for a statutory recognition of a company director as fiduciary. Equity does not impose fiduciary duties between partners in a partnership, who eventually choose to adopt a corporate structure, in which they would owe fiduciary duty as directors to the corporation instead of fiduciary duty between partners, see *Friend v Brooker* (2009) 239 CLR 129, (2009) 255 ALR 601, (2009) 72 ACSR 1.

5 *Erlanger v New Sombrero Phosphate Co* (1878) 2 App Cas 1218 at p 1236; *Gluckstein v Barnes* [1900] AC 240; *Jubilee Cotton Mills Ltd v Lewis* [1924] AC 958. See also Gross, 'Who is a Company Promoter' (1970) 86 LQR 493.

6 *Kao Lee & Yip v Koo Hoi Yan Donald* [2003] 2 HKC 113 at pp 131C–D, [2003] 2 HKLRD 296 at 311A–B per Ma J; *Wang Mai Lee v Lau Pit Chuen* [2005] HKCU 1589. See also, *Friend v Brooker* (2009) 239 CLR 129, (2009) 255 ALR 601, (2009) 72 ACSR 1 (where partners choose to form a company and to become directors of that company, they would not owe a fiduciary duty to each other but the fiduciary duty is then owed to the company in their capacity as directors).

7 *Longstaff v Birtles* [2001] EWCA Civ 1219, [2002] 1 WLR 470 (CA); *Nishimatsu-Costain-China Harbour Joint Venture v Ip Kwan & Co (a firm)* [2000] 2 HKC 445; *China Top Consultants Ltd v Prosperity Construction and Decoration Ltd* [2003] HKCU 1023; *Yazhou Travel Investment Co Ltd v Bateson* [2004] 1 HKC 292; *Ratiu v Conway* [2006] 1 All ER 571, [2005] 46 EGCS 177, [2006] 1 EGLR 125, 11-29-2005 Times 2974,063, [2006] WTLR 101, [2005] EWCA Civ 1302 (Eng CA); *Hebei Enterprises Ltd v Livasiri & Co (a firm)* (2008) 11 HKCFAR 321, [2008] 4 HKC 177, [2008] 5 HKLRD 102 (CFA). See also Brian Keene, 'Solicitors' Fiduciary Obligations and Wills — Case Note; *Ramcoomarsingh v Administrator General*' [2003] NZLJ 26. A solicitor's fiduciary duty to his client was not necessarily to be found in or confined to the terms of the contractual retainer, see *Hilton v Barker Booth & Eastwood* [2005] UKHL 8, [2005] 1 WLR 567, [2005] 1 All ER 651, [2005] PNLR 23, [2006] Pens LR 1, [2005] 6 EG 141 (CS), (2005) 102(14) LSG 27, (2005) 155 NLJR 219, (2005) 149 SJLB 179, [2005] NPC 14, Times, February 4, 2005 (HL). A series of transactions between a solicitor and a person who, in the circumstances, reposed trust and confidence in him might give rise to a fiduciary duty without a retainer: see *Bolkiah v KPMG* [1999] 2 AC 222, [1999] 2 WLR 215, [1999] 1 All ER 517, [1999] 1 BCLC 1, [1999] CLC 175, [1999] PNLR 220, [1999] 149 NLJ 16, (1999) 143 SJLB 35, Times, April 20, 1999, Independent, January 12, 1999 (HL); *Longstaff v Birtles* (supra).

8 *R v Chong Chui Ha* [1997] 4 HKC 518; cf *Tai Sang Kung Ltd v Paraking Ltd* [2001] 4 HKC 61 (a vendor real estate agent acting for the purchaser in the sale of the real estate agent's own property is not necessarily an agent in law, where real estate agents in Hong Kong have a role as no more than introducers who take commission from both the vendor and purchaser).

9 *Hatch v Hatch* (1804) 9 Ves 292, 32 ER 615; *Clay v Clay* (2001) 202 CLR 410, (2001) 178 ALR 193, (2001) 75 ALJR 528.

10 *Reading v A-G* [1951] AC 507; *A-G (HK) v Read* [1994] 1 AC 324.

11 See *The Convenience Container* [2007] 4 HKC 484, [2007] 3 HKLRD 575 (CA) at [52] where Reyes J considered that a liquidator is not a trustee of the assets of the company in liquidation but is a fiduciary.

12 *Seagram v Tuck* (1881) 18 Ch D 296; *Re Gent, Gent-Davis v Harris* (1888) 40 Ch D 190; *Re Tse Lee Yuen Jewellery Ltd* [1984] 1 HKC 352 (official receiver). See also John Glover and John Duns, 'Insolvency Administrations at General Law: Fiduciary Obligations of Company Receivers, Voluntary Administrators and Liquidators' (2001) 9(3) InsolvLJ 130.

13 An executor is not a trustee but has fiduciary duties similar to those of a trustee: *Lee Tak Yee v Lee Tak Yan* [1999] 1 HKC 837 at p 841 per Finlay J.

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[6-4] Within the ad hoc category are joint venturers and their joint venture;[14] agents to principals;[15] manufacturer and sole distributor;[16] doctor and patient;[17] professional advisers;[18] banks and customers;[19] brokers and clients;[20] employees to employers (note that the duty of fidelity is not the same as fiduciary duty);[21] and mortgagees to mortgagors.[22] Relationships within the ad hoc category do not ordinarily involve fiduciary duties but there might be special circumstances or arrangements that take the relationship into the fiduciary field.[23]

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14 *United Dominions Corp Ltd v Brian Pty Ltd* (1985) 157 CLR 1; *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, (1984) 55 ALR 417, (1984) 58 ALJR 587, (1984) 4 IPR 291; *Global Container Lines Ltd v Bonyad Shipping Co* [1998] 1 Lloyd's Rep 528 at pp 546–547; *Murad v Al-Saraj* [2005] EWCA Civ 959, [2005] All ER (D) 503 (Jul) (Eng CA); *Active Profit Ltd v Nissho Iwai Hong Kong Corp Ltd* (2006) 9 HKCFAR 653, [2006] 4 HKLRD 467; *John Alexander's Clubs v White City Tennis Club* (2010) 241 CLR 1, (2010) 266 ALR 462 (HCA) (contractual obligation to exercise option in a particular way between joint venture did not give rise to a fiduciary duty between them). See also Tina Cockburn, 'Fiduciary Obligations in Property Development Joint Ventures' (2005) 43(4) LSJ 53; 'Joint Ventures Partnerships and Fiduciary Obligations' (1994) 24 QLSJ 77; Shaunnagh Dorsett, 'Prospective joint venturers and fiduciary duties: A comment on the SCNZ decision in Chirnside v Fay' (2007) 1 J Eq 221.

15 *De Bussche v Alt* (1878) 8 Ch D 286; *Boston Deep Sea Fishing & Ice Co v Ansell* (1888) 39 Ch D 339; *Blackman v Thompson* [1994] ANZ Conv R 279 (NSWCA); *Breen v Williams* (1996) 186 CLR 71. But not every agent is a fiduciary, see *Piddocke v Burt* [1894] 1 Ch 343 at 346 per Chitty J; *Jones v Bouffier* (1911) 12 CLR 579 at 613 per Isaacs J. See generally, *Snell* at para [7-005].

16 *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, (1984) 55 ALR 417, (1984) 58 ALJR 587, (1984) 4 IPR 291.

17 *Breen v Williams* (1996) 186 CLR 71.

18 *Indata Equipment Supplies Ltd v ACL Ltd* [1998] FSR 248 at p 254. See also Gordon Cameron and Monica Sah, 'Controlling The Quality of Financial Advice: The Use of Regulatory for to Satisfy Fiduciary Obligations' (1997) JBL MAR143. An investment manager is a fiduciary, see *Diamantides v JP Morgan Chase Bank* [2005] EWCA Civ 1612, [2005] All ER (D) 323 (Dec) (Eng CA) at para 27 per Moore-Bick LJ.

19 *Lloyds Bank Ltd v Bundy* [1975] QB 326 at pp 341–342; *Esquire (Electronics) Ltd v The Hong Kong and Shanghai Banking Corporation Ltd* [2005] HKCU 971. See also 'Banks' Fiduciary Obligations' (1986) 1(3) JIBL N96. Cf *Kung Kwok Wai David v Citibank NA* [1989] 2 HKC 48 (CA).

20 *Kung Kwok Wai David v Citibank NA* [1989] 2 HKC 48 (CA).

21 Ma J in *Kao Lee & Yip v Koo Hoi Yan Donald* [2003] 2 HKC 113 at pp 131C–D was influenced by Dr Finn's classic work 'Fiduciary Obligations' to hold that employees are within the settled category of relationship of fiduciary. Some other learned authors are not that certain: see *Snell* at para [7-006] that employees do not ordinarily owe fiduciary duties. See also *Premiere Agri Technologies Asia Inc v Wong Siu Hung John* [2003] HKCU 1135 (CA); *British Midland Tool Ltd v Midland International Tooling Ltd* [2003] EWHC 466 at para [94]; *Shepherds Investments Ltd v Walters* [2006] EWHC 836, [2006] All ER (D) 213 (Apr) (Ch); *Helmet Integrated Systems Ltd v Tunnard* [2006] EWCA Civ 1735, [2006] All ER (D) 228 (Dec) (Eng CA); *Foster Bryant Surveying Ltd v Bryant* [2007] EWCA Civ 200, [2007] All ER (D) 213 (Mar), [2007] IRLR 425, [2007] 2 BCLC 239 (Eng CA). See Clive Turner, 'Liability of an Employee for Breach of Fiduciary Obligation' (1995) 15 Qld Lawyer 206.

22 *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] Ch 949 at pp 965–966; *Bishop v Bonham* [1988] 1 WLR 742 at pp 749–750.

23 See *English v Dedham Vale Properties Ltd* [1978] 1 WLR 93 (a purchaser of land who applied in the vendor's name for planning permission owed a fiduciary duty to the vendor as the purchaser had effectively appointed himself agent of the vendor); *Commonwealth Bank of Australia v Smith* (1991) 102 ALR 453 (a local branch manager of a bank who created a reasonable expectation in his customers that the bank was providing advice and acted in

[6-5] *Bank*. The relationship between a bank and its customers per se is not a fiduciary one.[24] For instance, the act of taking deposits from customers would not render the bank a trustee, as the bank is free to use that deposit to invest at its liberty. Contrast this with the position of a trustee, whose power to utilise the trust property is very limited. If the banks were to be so confined, the development of the financial market would have been severely restricted. Furthermore, the assets of a bank in liquidation will be divided amongst its secured creditors and not its customers. Thus a bank cannot be holding customers' deposits on trust as it cannot pay its customers before its secured creditors.[25] However, there are occasions where a banker acts in a fiduciary capacity similar to that of a trustee and beneficiary. In *Woods v Martins Bank Ltd*,[26] a bank was held liable in its fiduciary capacity for loss suffered by a customer as a result of negligent advice given by a bank manager in relation to the wisdom of an investment. In *Esquire (Electronics) Ltd v The Hong Kong and Shanghai Banking Corporation Ltd*,[27] a bank creditor who was conferred with a power of attorney by the debtor customer to sell the customer's building with full power and complete discretion was held to be in a fiduciary position. In *Arklow Investments Ltd v Maclean*,[28] a potential client disclosed confidential information about a proposed scheme for purchasing an island to a merchant banker, but the merchant banker was not retained to assist in raising finance for that acquisition. Subsequently, the merchant banker brokered the acquisition for other purchasers. The issue is whether the merchant banker owed a fiduciary duty to the client. The Privy Council held that the only relationship between the client and the banker was that created by the giving and receipt of confidential information, which by itself was insufficient to create a fiduciary relationship. However, if a bank has exceeded its conventional role as a bank (which is not usual nowadays when banks have been expanding their services) then it would attract fiduciary obligations towards its customers. For example, in *Kung Kwok Wai David v Citibank NA*,[29] the bank was acting in the capacity of broker and its customer in the capacity of client when the bank resumed the task to purchase securities bond from an underwriter on the customer's behalf.

[6-6] *Mortgagee*. A mortgagee exercising a power of sale is to protect his own interest by recouping his loan to the mortgagor. He acts for his own benefit and it is legitimate for a mortgagee to exercise his powers for the purpose of protecting his security. A mortgagee exercising a power of sale owes an equitable duty to exercise its powers in good faith to

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the customers' interest rather than the interest of the bank was held to owe a fiduciary duty to customers); *Dex Asia Ltd v DBS Bank (HK) Ltd* [2009] 5 HKC 289. See also Tyrone M Carlin, 'Fiduciary Obligations in Non-traditional Settings — Update' (2001) 29(1) ABLR 65.

24 *Foley v Hill* (1848) 2 HL Cas 28; *Midland Bank Ltd v Conway Corporation* [1965] 1 WLR 1165 (a bank that received rent on a customer's behalf, crediting the customer's account and paying rate for it was held to be not receiving the sum as a trustee).

25 *Mahadumrongkul Chairod v Bank of Credit and Commerce Hong Kong Ltd (in liq)* [1997] 1 HKC 141 (CA) at p 151H. See also Ross Cranston, *Principles of Banking Law* (Oxford: Clarendon Press, 1997) at p 207; William Blair, 'Secondary Liability of Financial Institutions for the Fraud of Third Parties' (2000) 30 Hong Kong LJ 74.

26 [1959] 1 QB 55, [1958] 3 All ER 166.

27 [2005] HKCU 971.

28 [2000] 1 WLR 594.

29 [1989] 2 HKC 48 (CA).

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CHAPTER 12

Minor Doctrines

Marshalling

[12-1] Lord Hoffmann said in *In Re Bank of Credit and Commerce International SA (No 8)* that:

> This is a principle for doing equity between two or more creditors, each of whom are owed debts by the same debtor, but one of whom can enforce his claim against more than one security or fund and the other can resort to only one. It gives the latter an equity to require that the first creditor satisfy himself (or be treated as having satisfied himself) so far as possible out of the security or fund to which the latter has no claim.[1]

The doctrine of marshalling is simply this: where a creditor has recourse to two funds, say Funds X and Y, for satisfaction of his or her claim, and another creditor is only entitled to access one of those funds, say Fund Y, equity requires the first creditor ('the double claimant') to satisfy his or her claim from Fund X first, so that Fund Y would not be exhausted by the first creditor's claim and can be used to satisfy the second creditor's ('the single claimant') claim. After exhaustion of Fund X, equity would allow the double claimant to have access to Fund Y for any deficiency.[2] The rationale behind this is to prevent one claimant from depriving or prejudicing another claimant from his or her security. It enables all parties having equities thereon to receive their due proportion by preventing a creditor's election to exhaust a security which leaves other creditors in vain, where he has other alternative securities available.[3] The doctrine of marshalling does not apply where there is only one debt owed to the creditor; it is a doctrine which operates to do equity between two or more creditors.[4]

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1. In *Re Bank of Credit and Commerce International SA (No 8)* [1998] AC 214 at pp 230–231, per Lord Hoffmann.
2. *Aldrich v Cooper* (1803) 8 Ves 382, 32 ER 402; *Wallis v Woodyear* (1855) 2 Jur NS 179; *Dolphin v Aylward* (1870) LR 4 HL 486; *Trimmer v Bayne* (1803) 9 Ves 209, 32 ER 582. See Gino Dal Pont, 'Fair Shares — The Equitable Doctrine of Marshalling' (1996) 70(5) LIJ 48; David Marks, 'Marshalling and Subrogation: A Clash of Priorities' (1997) 10(7) Insolv Int 49.
3. *Clifton v Burt* (1720) 1 P Wms 678; *Lanoy v Athol* (1742) 2 Atk 444; *Trimmer v Bayne* (1803) 9 Ves 209; *Selby v Selby* (1828) 4 Russ 336; *Re Burge, Woodall & Co, ex p Skyrme* [1912] 1 KB 393 (the doctrine of marshalling was applied by analogy such that where brokers had pledged a client's securities together with their own to a bank to secure an overdraft and the bank had satisfied itself from the client's securities at the broker's bankruptcy, the client was entitled to satisfy himself from the surplus securities in the hands of the trustee); *Re Fry, Fry v Fry* [1912] 2 Ch 86 (the court applied the doctrine of marshalling to entitle rent charges of a mortgaged property to reserve the rent charges, with deficiencies to be made good from the sale of the general estate); *Re Cohen, National Provincial Bank Ltd v Katz* [1960] Ch 179.
4. *Re Bank of Credit and Commerce International SA (No 8)* [1996] Ch 245 at p 272, [1996] 2 All ER 121 at p 142; *HSBC Bank (China) Co Ltd v Yip Kim Po* [2008] 5 HKC 224.

[12-2] The doctrine can be expressly or impliedly excluded by language in the security document.[5] For example, a first mortgagee can, by express stipulation in the mortgage deed, require the mortgagor not to render a second mortgage unless he or she exacts from the second mortgagee a covenant not to enforce any right to marshal against property subject to the first mortgage, and this expressly excludes the operation of the doctrine of marshalling. The same can apply in guarantee where the guarantee is expressed to be in addition to, and shall not be affected in enforcement by, other guarantees or securities so held.[6]

[12-3] In an action commenced by the single claimant, equity intervenes by enjoining the double claimant from enforcing the double claimant's security against Fund Y in priority over Fund X. The counter argument is that a creditor should have a right to choose which asset he or she wishes to levy and such liberty should not be restrained.[7] The Australian courts have rejected applications for injunctions to restrain a double claimant from enforcing his or her securities by resorting to Fund Y. Australian jurisprudence regards that the doctrine of marshalling does not prevent an earlier mortgagee satisfying his charge against whichever fund or security he thinks fit. Instead of compelling the double claimant to seek recourse against Fund X first, Australian courts confer on the single claimant the right to stand in the shoes of the double claimant with respect to Fund X, in other words, to have the single claimant 'subrogated' to the double claimant's right towards Fund X.[8] So the double claimant preserves his or her liberty of choice, and if Fund Y becomes insufficient to meet the single claimant's claim, the single claimant will have an interest in Fund X equivalent to that of a second mortgagee, whilst honouring the double claimant's interest as the first mortgagee.

[12-4] The double claimant's right against the two funds must be the same kind of right for the doctrine to apply. In *Webb v Smith*,[9] a maltster had supplied malt to a brewer who defaulted in payment. A firm of auctioneers had acted for the brewer in the sale of a brewery and part of the proceeds of the sale was in their hands subject to their claim for charges incurred in connection with the sale. The auctioneers also had in their hands the balance of the price of some furniture sold by them for the brewer. The maltster was a creditor of the brewer, who by letter charged the proceeds of the sale of the brewery in

5 *Aldrich v Cooper* (1803) 8 Ves 382 at p 397, 32 ER 402 at p 408.

6 *HSBC Bank (China) Co Ltd v Yip Kim Po* [2008] 5 HKC 224.

7 *Jenkins v Brache* (1902) 27 VLR 643 at p 648, [1902] ALR 59 at p 61. In the case of *Wallis v Woodyear* (1855) 2 Jur (NS) 179 at p 180, Sir William Page-Wood VC stressed the double claimant has 'a right to take the first money that is realised by any of this securities which first comes to hand'. See also *Wright v Simpson* (1802) 6 Ves 714 at pp 731–732, 31 ER 1272 at pp 1280–1281; *Manks v Whitely* [1911] 2 Ch 448 at p 466; *Whiteley v Delaney* [1914] AC 132.

8 *Ernst Bros Co v Canada Permanent Mortgage Corporation* (1920) 47 OLR 362 at p 368 per Orde JA; *Mir Bros Projects Pty Ltd v Lyons* [1977] 2 NSWLR 192 at p 196; *Commonwealth Trading Bank v Colonial Mutual Life Assurance Society Ltd* [1970] Tas SR 120 at pp 130–131 where Neasey J placed emphasis on the right of the first mortgagee double claimant stating that 'there is difficulty in any concept of enforcing an equity to marshal against the first mortgagee, because it is basic to the principle that he has been paid off. The equity to marshal is "enforced" against the person who is disadvantaged or dispossessed by its operation. The court does not even interfere with the first mortgagee's choice as to which security he shall realise. That is not to say that he will not be bound by a marshalling order of the court, if for example he is in possession of the fund upon which the order is to operate'. See also *Chase Corporation (Aust) Ltd (administrator apptd) v North Sydney Brick & Tiles Co Ltd* (1994) 35 NSWLR 1 at pp 19–21 per Cohen J.

9 (1885) 30 Ch D 192 (Eng CA).

favour of the maltster. The auctioneers wrote to the maltster acknowledging the receipt of the letter of charge. The auctioneers afterwards paid the brewer the balance of the price of the furniture and appropriated the part of the proceeds of the sale of the brewery in their hands in order to pay off their charges. The Court of Appeal held that the doctrine of marshalling did not apply. The letter of charge and the auctioneers' acknowledgment thereof amounted to a good equitable assignment in favour of the maltster. The auctioneers had a lien for their charges upon the part of the proceeds of the sale of the brewery in their hands, and they were at liberty to appropriate the part of the proceeds of the sale of the brewery in their hands in order to pay off their charges. They were not bound to pay off their charges out of the price of the furniture in order to enable the maltster to obtain payment of his charge. Lindley LJ said:

> The general principle of marshalling was stated by Sir William Grant, MR, in *Trimmer v Bayne* [9 Ves 209, 211], in the words that 'a person having resort to two funds shall not by his choice disappoint another, having one only'. That appears to be a correct statement of the law. The vice of the argument for the [maltster] is that in truth there were not two funds to which the [auctioneers] could resort, that is, two funds standing upon an equal footing. The [auctioneers] had a superior right of lien as to the fund produced by the sale of the brewery. I think, however, that they could not have deprived the [maltster] of the benefit of his charge, if there had been two funds to which they might have resorted under equal circumstances. The appeal of the [auctioneers] must be allowed.[10]

Brett MR said:

> Here the two funds were in the hands of the same persons; over the one they had a right of lien, but not over the other. They stood in a different position with regard to the two funds. Can there be an application of the doctrine of marshalling as to these funds? I cannot think that the doctrine of marshalling applies where there are different funds as to which different rights exist.[11]

[12-5] The applicability of the doctrine of marshalling to assignment and setting-off of debts was considered by Warner J in *Smitak International Zeesleepen Bergingsbedriff BV v Selco Salvage Ltd*.[12] Generally, the court will never give effect to the doctrine of marshalling in a way that is detrimental to the double claimant. There, two salvaging companies, Smit and Selco, had cooperated in salvaging operations, with some involving Selco as the principal contractor (Class A) and some involving Smit as the principle contractor (Class B). Unbeknownst to Smit, Selco had assigned its interests to four banks in order to raise capital. Ultimately, Selco was wound up and Smit was entitled to a right of set-off for moneys owed by Selco. Three of the assignee banks sought, by the doctrine of marshalling, to bind Smit to first resort to the funds which had not been assigned to them. Warner J considered a right to set-off as a 'fund' to which a claimant may resort for the purposes of marshalling. However, the crucial problem was that the fourth assignee bank had not been joined as a party to the action by the three assignee banks. Warner J refused to apply the doctrine of marshalling because applying it would force Smit to face litigation against the fourth assignee and if it lost, it would be deprived *pro tanto* of the benefit of its right to set-off.

10 *Webb v Smith* (1885) 30 Ch D 192 (CA) at pp 202–203.

11 *Webb v Smith* (1885) 30 Ch D 192 (CA) at p 199.

12 [1988] 2 Lloyd's Rep 398. See criticism in SR Derham, 'Set off against an Assignee: The Relevance of Marshalling, Contribution and Subrogation' (1991) 107 LQR 126 and R Meagher, D Heydon, M Leeming, *Meagher Gummow & Lehane's Equity: Doctrines & Remedies* (4th ed, Sydney: LexisNexis Butterworths, 2002) at para [11-075].

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[12-6] The doctrine of marshalling was referred to and accepted in Hong Kong in *On Faith Woollen Weaving Factory v Star Industrial Corporation*,[13] where a landlord, in distraining for rent due, seized and sold the tenant's goods including the machine that was the subject of a bill of sale.[14] The tenant was also a judgment debtor and the writs of *fieri facias* had been delivered to the bailiff. The goods had been sold by the landlord and the distraint was satisfied out of the proceeds of sale. The question was whether the grantee of the bill of sale had a prior claim to the judgment creditor in respect of the surplus, which turned to the question of marshalling. Where should the distraint be first cast, to the machine or the other goods? Under the doctrine of marshalling, the landlord should first resort to goods not assigned by a bill of sale.[15] On the other hand, a mortgagee (likewise for a grantee of a bill of sale) can marshall against a simple contract debtor[16] and a judgment creditor.[17] Judge O'Connor considered that the distraint should be cast upon the other goods because the judgment creditor, taking through his debtor, should not be put in a better position than the debtor himself. Accordingly, the grantee of the bill of sale had a prior claim to the judgment creditors in respect of the surplus from the sale proceeds on the distraint.

[12-7] The debtor must be a single debtor who owns two funds, instead of two debtors. For instance, where defendant C and defendant D are both liable to the plaintiff A, and another plaintiff B has a claim against defendant D only, plaintiff B cannot require plaintiff A to seek recourse against defendant C.[18] That remains so, unless defendant C is liable to defendant D. The two funds X and Y must both be in existence at the time of the operation of the doctrine marshalling. In *Re Professional Life Assurance Co*,[19] a company was wound up and its policy holders wanted to claim against shareholders via the doctrine of marshalling. The court refused as the policy holders did not have two funds to either of which they may have resorted, that is, they could not proceed against individual shareholders until the capital of the company had been exhausted. The court held that policy holders could not call on the principle of marshalling to create a second fund, which itself was a pre-condition of the doctrine. The single debtor must be able to exercise control over the two funds such that his or her election to enforce against one fund would not bar his right to seek recourse against the second fund. The right of marshalling is available against not only the common mortgagor, but also all persons taking through him or her by operation of the law, such as the mortgagor's personal representatives or trustee in bankruptcy.

[12-8] Marshalling itself does not confer an equitable right or interest in the property to the single claimant, but a mere equity to invoke the court's equitable jurisdiction to grant a remedy so that equal justice is done as between creditors. Both the double claimant and the single claimant must have a proprietary interest in the funds before the doctrine can be called upon, otherwise their interests are the same as all other unsecured creditors to share all the assets on a *pari passu* basis. The essence of marshalling is really about the competing interests of general creditors and the single claimant. If the double claimant

13 [1968] HKDCLR 80.

14 Typically, a bill of sale is a written instrument whereby the title of the goods is transferred as security for the payment of money in circumstances in which the transferor is intended to remain in possession of the goods.

15 *Re Stephenson, ex parte Stephenson* (1847) De G 586.

16 *McCarthy v McCartie* (1904) 38 ILTR 3, [1904] Irish Rep 113.

17 *Gray v Stone* [1893] 69 LTR 282.

18 *Ex p Kendall* (1811) 17 Ves 514, 34 ER 199, [1803–1813] All ER Rep 295.

19 (1867) LR 3 Eq 668.

has exhausted Fund Y before Fund X, the single claimant, but for the operation of the doctrine, would rank equally vis-à-vis other general creditors. Neither will equity hold the double claimant as a trustee to the single claimant.[20]

Marshalling in mortgages

[12-9] Marshalling usually occurs in a mortgage situation where a debtor has two real properties, X and Y, and he or she first mortgages these two properties to mortgagee bank A and subsequently mortgages property Y to mortgagee bank B. The court would require mortgagee bank A to realise his interest in property X as far as possible before dealing with property Y.[21]

Marshalling in deceased estates

[12-10] The doctrine of marshalling applies equally to the administration of a deceased's estate to prevent injustice to the beneficiaries arising from deceased creditors' choices on which estate property to enforce their claims. Unsecured creditors can have the secured creditors marshalled to the real property of the estate and leave the liquid assets to satisfy their claims.[22] Marshalling operates against the fundamental rules that creditors of the deceased are entitled to satisfaction out of the first available fund coming into the hands of the administrator or executor. For example, in *Lanoy v Duke and Duchess of Athol*,[23] Lanoy had bequeathed a part of his estate to his wife and provided that should she leave their daughter, his wife would pay the daughter £6000 on the latter's marriage. Subsequently, Lanoy received a large sum of money and covenanted that he should have the use of such money for life and that from such sum, the wife should acquire a rent charge of £500 for life and the remainder to raise £6,000 for the daughter's portions, and resettled the property comprised in the earlier settlement. Lord Hardwicke LC declared that the recent settlement revoked the previous will. However, the freehold and copyhold lands not implicated in the recent settlement still belonged to the wife by virtue of the will. In an earlier judgment, it was held that the wife should account for the rents and profits of premises comprised in the settlement since the testator's death and should retain £80 per annum for the maintenance of the daughter. The daughter submitted that since the date of judgment, the rents and profits proved insufficient to satisfy her claim. Accordingly, there was a balance due to the daughter. The daughter claimed that such arrears of maintenance were to be discharged out of the testator's personal and copyhold estates, now belonging to the wife. It was held that the daughter was to be considered as a creditor in equity and therefore, entitled to require the wife to satisfy her own debt out of any fund available to her on which the daughter had no charge, that being the testator's personal and copyhold estates obtained under the will. The doctrine of marshalling operated as the wife had two funds, real and personal assets, to answer her demands whilst the daughter had only one.

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20 *South v Bloxham* (1865) 2 H & M 457, 71 ER 541.

21 *Lanoy v Duke and Duchess of Athol* (1742) 2 Atk 444 (a settled estate was insufficient to pay both the widow's jointure covenanted by the testator and the daughter's portions assigned by his will. The court considered the daughter as a creditor in equity and entitled her to require her mother to first satisfy her own debt out of any fund available to her on which the daughter had no charge); *Baldwin v Belcher, Re Cornwall* (1842) 3 Dr & War 173; *Re Roddy's Estate, ex p Fitzgerald* (1861) 11 I Ch R 369; *Gibson v Seagrim* (1855) 20 Beav 614; *Webb v Smith* (1885) 30 Ch D 192 (CA). See also *Dolphin v Aylward* (1870) LR 4 HL 486.

22 *Aldrich v Cooper* (1803) 8 Ves 382 at p 397, 32 ER 402 at p 408.

23 (1742) 2 Atk 444.

CHAPTER 19

The Trustee

Appointment of Trustees

Private appointment

[19-1] A trust, if created and governed by the law of Hong Kong, is subject to the Trustee Ordinance (Cap 29), which came into force on 27 July 1934. The Trustee Ordinance closely mirrors the Trustee Act 1925 (UK).[1] Under the Trustee Ordinance (Cap 29), the meaning of a trustee extends to implied and constructive trustees, to trustees having a beneficial interest in the trust property and to a personal representative whose duties are incidental to that of a trustee. A person is usually appointed as a trustee by either the instrument creating the trust,[2] which includes the power of appointment, by the exercise of a statutory power,[3] or by the court.[4] Regardless, a trust, save for charitable trusts, is limited to having only four trustees.[5] A trustee must be *sui juris*[6] and sound mind and not an undischarged bankrupt.[7] There is no rule prohibiting a beneficiary from been a trustee of the same trust[8] but where the trustee is the only beneficiary in the trust the trustee will be in possession of both the legal and beneficial estates and the two will merge. The trust will lapse and the trustee becomes the absolute owner of all the former trust properties. When a trustee dies, becomes unfit to act, is unwilling to act further, or remains out of Hong Kong for more than twelve months, the person nominated by the trust instrument can appoint a new trustee in place primarily. If the person so nominated has died, cannot be found, or is unwilling to act, the surviving or continuing trustee (who is usually the outgoing trustee) then has the power, failing which, the personal representative of the last surviving or continuing trustee, may appoint.[9] The power to appoint contained in

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1 Since 1925, the United Kingdom has enacted a number of legislation, affecting trust and trustee: the Trustee Delegation Act 1999, the Trustee Investments Act 1961, and the Trusts of Land and Appointment Trustees Act 1996. The new substantial trust legislation, the Trustee Act 2000, has replaced the Trustee Act 1925. Hong Kong has a recent trust law reform in 2013 and new provision has been inserted into the existing Trustee Ordinance (Cap 29).

2 *Tempest v Lord Camoys* (1882) 21 Ch D 571 (CA).

3 Trustee Ordinance (Cap 29), section 37(1); New Territories Ordinance (Cap 97), section 18 (power of the Secretary for Home Affairs to appoint a trustee for a minor if land is vested in the minor); Partition Ordinance (Cap 352), section 7 (application of the proceeds of the sale of land under a partition order by a trustee). See *Mayluck Investment Ltd v Lee Yih Ping* [1996] 3 HKC 245.

4 Trustee Ordinance (Cap 29), section 42.

5 Trustee Ordinance (Cap 29), section 36.

6 See Trustee Ordinance (Cap 29), sections 37(1) and 38(2). Cf *Re Vinogradoff* [1935] WN 68.

7 Although undesirable (see *Re Barker's Trust* (1875) 1 Ch D 43), there is no express statutory provision disentitling a bankrupt from being appointed as a trustee in Hong Kong.

8 See generally *Lewin* paras [2-13]–[2-25].

9 Trustee Ordinance (Cap 29), section 37(1) and (4).

the trust instrument is to be given precedence over the wishes of the beneficiaries.[10] The court has no power to substitute a more suitable person if the court thinks fit if the power of appointment was exercised bona fide.[11] If the power of appointment conferred by the trust instrument is on two persons, then the power must be exercised jointly. Otherwise, if the two persons cannot agree, they are taken to have failed or refused to appoint and the power becomes exercisable by the person in the next category.[12] A trustee can be appointed to separate parts of the trust property.[13] A trustee accepts office expressly by declaration, by consent or impliedly by acting in execution of the trust. Certainly, a person does not elect or consent to become a resulting or constructive trustee, — this role is imposed upon him by implication of law. Once a trustee accepts office, the legal title of the trust property is vested in him.[14] The execution of the trust document which appoints the person a trustee, or when the person unequivocally accepts the appointment orally, will render the person an expressly appointed trustee. A person impliedly accepts the appointment if he personally interferes with the trust property or otherwise acts in accordance with the terms of the trust or deals with the trust property, but the mere safekeeping of the trust deed without more does not constitute acceptance.[15]

[19-2] Suppose that at the time of the settlement the nominated trustee is unwilling or unable to act — does the trust fail? 'Trusts do not fail by a failure of trustees',[16] except if it is of the essence of a trust that the trustees selected by the settlor and noone else are to act as the trustees and those trustees cannot or will not undertake the office, the trust must fail.[17] Where no trustee is effectually appointed by the creator of the trust,[18] or all the trustees appointed by him die or refuse to accept the trust before the trust takes effect, the person in whom the trust property is vested by reason of the failure of appointment, death or refusal is deemed in equity to be the trustee of the property for the purposes of the trust.[19] However, in such an event, if there is any procedure for the appointment of new trustees which is applicable to the case, it can be resorted to for the appointment of an original trustee; if that procedure is not applicable or is not resorted to, a court of equity will appoint an original trustee.[20] If all the trustees disclaim, the property revests

10 In *Re Higginbottom* [1892] 3 Ch 132, the majority of the beneficiaries wished to appoint a particular person as the new trustee, whereas the existing trustee had appointed another person. It was held that the trustee's power to appoint was founded in the trust instrument, which prevailed over the wishes of the beneficiaries.

11 *Re Norris* (1884) 27 Ch D 333.

12 *Re Sheppard's Settlement Trusts* [1888] WN 234.

13 Trustee Ordinance (Cap 29), section 37(1)(b).

14 *Townson v Tickell* (1819) 3 B &Ald 31; *Hill v Wilson* (1873) 8 Ch App 888.

15 *Robinson v Pett* (1734) 3 PeereWms 249; *Doyle v Blake* (1804) 2 Sch&Lef 231; *Lord Montford v Lord Cadogan* (1816) 19 Ves 635 at p 638 per Lord Eldon LC; *Urch v Walker* (1838) 3 My & Cr 702; *Evans v John* (1841) 4 Beav 35; *Cook v Fryer* (1842) 1 Hare 498; *James v Frearson* (1842) 1 Y & C ChCas 370; *White v Barton* (1854) 18 Beav 192; *Bence v Gilpin* (1868) LR 3 Exch 76.

16 *Ellison v Ellison* (1802) 6 Ves 656 at p 663 per Lord Eldon LC; *Brown v Higgs* (1803) 8 Ves 561 at p 570 per Lord Eldon LC.

17 *Re Willis, Shaw v Willis* [1921] 1 Ch 44 (CA); *Re Lysaght, Hill v Royal College of Surgeons* [1966] Ch 191 at p 207, [1965] 2 All ER 888 at p 896; *Re Armitage, Ellam v Norwich Corp* [1972] Ch 438, [1972] 1 All ER 708.

18 *Bennet v Davis* (1725) 2 P Wms 316; *Sonley v Clock-makers' Co* (1780) 1 Bro CC 81; *A-G v Stephens* (1834) 3 My & K 347.

19 *Pits v Pelham* (1670) 1 Lev 304 (HL); *Mallott v Wilson* [1903] 2 Ch 494 at pp 502–503.

20 *Moggridge v Thackwell* (1803) 7 Ves 36 at pp 84–85 per Lord Eldon LC; *A-G v Stephens* (1834) 3 My & K 347 at p 352; *Tempest v Lord Camoys* (1866) 35 Beav 201; *Dodkin v Brunt* (1868) LR 6 Eq 580; *Jones v Jones* (1874) 31 LT 535.

in the disposer or, if he is dead, in his legal representative, who becomes by operation of law the trustee of the property for the purposes of the trust.[21] This is the case because the settlor has done everything in his power to constitute the trust. For example, in *Re Rose, Rose v IRC*,[22] the settlor had executed share transfers and delivered the share certificates, yet there was a possibility that the directors might refuse to register the transfers. Further, the disclaimer of the trustee, or of all the trustees nominated by the disposer, does not avoid the trust,[23] but a new trustee will be appointed by a court of equity to execute it.[24] In *Leung Mui v Hong Kong and Shanghai Banking Corporation*,[25] the trust was held to be still in existence notwithstanding that the trustee had ceased to act and was absent from the colony due to outbreak of the First World War. The remedy was not to call for the transfer of the trust property to the beneficiaries but rather, to appoint a new trustee.

[19-3] A trustee, before accepting the appointment, may disclaim the appointment or refuse to serve. The trustee cannot retain legal title to the trust property for the disclaimer to be valid and effective. A trustee cannot disclaim part of the trust property. Usually, it is preferable to enter into a deed of disclaimer as evidence of formally disclaiming the office of a trustee. A disclaimer or refusal to act in the trust takes effect *ab initio* and vests the trust property, as from the date when the trust disposition came into operation, exclusively in the trustees who consent to act. A valid and effective disclaimer, once executed, is beyond reproach. A person who has disclaimed or refused a trust cannot afterwards act in it, even by exercising the power of appointing a new trustee;[26] and he does not become a trustee by subsequently acting in connection with the trust as agent of the accepting trustees[27] or as an adviser of the beneficiaries.[28]

[19-4] A beneficiary of a trust and, if the trust has more than one trustee, the continuing trustee, both have the same right to seek the appointment of a new trustee.[29] If a trustee becomes mentally incapacitated and no person can be appointed as a new trustee in place of him, the beneficiary may, by written direction to the attorney acting for the incapacitated trustee under an enduring power of attorney or the committee appointed by the court under Pt II of the Mental Health Ordinance (Cap 136), request the appointment of a person in place of the incapacitated trustee.[30]

[19-5] A trustee whose appointment is defective becomes a trustee *de son tort* and he is liable to account to the beneficiaries for the money or property that he has received in that capacity as if he is a properly appointed express trustee.[31] If he acts in good faith even as a trustee *de son tort*, he will be afford the protection of an indemnity in respect of the costs and expenses in the management of the trust.[32] Firstly, the remedy is to seek

21 *Mallott v Wilson* [1903] 2 Ch 494 at pp 502–503 per Byrne J.

22 [1952] Ch 499, [1952] 1 All ER 1217 (CA).

23 *Robson v Flight* (1865) 4 De G J & Sm 608 at p 613 per Lord Westbury LC.

24 *A-G v Stephens* (1834) 3 My & K 347 at p 352; *Leung Mui v Hong Kong and Shanghai Banking Corporation* [1923] 18 HKLR 56.

25 [1923] 18 HKLR 56.

26 *Re Birchall, Birchall v Ashton* (1889) 40 Ch D 436 at p 437 (CA).

27 *Dove v Everard* (1830) 1 Russ & M 231; *Lowry v Fulton* (1839) 9 Sim 104 at pp 115 and 124.

28 *Stacey v Elph* (1833) 1 My & K 195 at p 198.

29 Trustee Ordinance (Cap 29), section 57.

30 Trustee Ordinance (Cap 29), section 40B.

31 *Jasmine Trustees Ltd v Wells & Hind* [2008] Ch 194, [2007] 3 WLR 810.

32 *Travis v Illingworth* (1865) 2 Drew and Sm 344, (1865) 62 ER 652.

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ratification from the beneficiaries. However, if not all the beneficiaries are *sui juris*, then the next step is to have the otherwise defective appointment sanctioned by the court.[33]

Court appointment

[19-6] The court has the power to appoint trustees provided by sections 37 and 42 of the Trustee Ordinance (Cap 29). Section 42(1) of the Trustees Ordinance (Cap 29) provides:

> 42. Power of court to appoint new trustees
>
> (1) The court may, whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient, difficult or impracticable so to do without the assistance of the court, make an order appointing a new trustee or new trustees either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee….[34]

Section 38 of the Trustees Ordinance (Cap 29) provides:

> 38. Supplemental provisions as to appointment of trustees
>
> (1) On the appointment of a trustee for the whole or any part of trust property–
>
> (a) the number of trustees may, subject to the restrictions imposed by this Ordinance on the number of trustees, be increased; and
>
> (b) a separate set of trustees, not exceeding 4 may be appointed for any part of the trust property held on trusts distinct from those relating to any other part or parts of the trust property, notwithstanding that no new trustees or trustee are or is to be appointed for other parts of the trust property, and any existing trustee may be appointed or remain one of such separate set of trustees, or, if only one trustee was originally appointed, then, save as hereinafter provided, one separate trustee may be appointed; and
>
> (c) it shall not be obligatory, save as hereinafter provided, to appoint more than one new trustee where only one trustee was originally appointed, or to fill up the original number of trustees where more than 2 trustees were originally appointed, but, except where only one trustee was originally appointed, and a sole trustee when appointed will be able to give valid receipts for all capital money, a trustee shall not be discharged from his trust unless there will be either a trust corporation or at least 2 individuals[35] to act as trustees to perform the trust; and
>
> (d) any assurance or thing requisite for vesting the trust property, or any part thereof, in a sole trustee, or jointly in the persons who are the trustees, shall be executed or done.
>
> (2) Nothing in this Ordinance shall authorize the appointment of a sole trustee, not being a trust corporation, where the trustee, when appointed would be under the age of 21 years or, would not be able to give valid receipts for all capital money arising under the trust.[36]

[19-7] The general principle guiding the court in the exercise of its inherent jurisdiction is the welfare of the beneficiaries. If there is no misconduct or loss to the trust fund, the

33 See generally, Francis Tregear, 'Putting it right: remedying problems arising from defective trustee appointment' (2013) 19 Trusts and Trustees 23.

34 Cf Trustee Act 1925 (UK), section 41(1).

35 The meaning of the word 'Individual' in this context only refers to human beings and does not extend to corporations. See *Jasmine Trustees Ltd v Wells & Hind (a firm)* [2008] Ch 194, [2007] 3 WLR 810. See also, 'Appointment and retirement of trustees' (2007) Trusts & Estates (Apr) 3-4; Judith Morris and Carolyn O'Sullivan, 'Jasmine Trustees v HMRC – tangles in the trusteeship chain: Part 2' (2007) 6 Private Client Business 442–448; Nick Dunnell, 'Discharging trustees and trustees de son tort' (2007) 13(9) Trusts & Trustees 584–588.

36 Cf Trustee Act 1925 (UK), section 37.

court is unlikely to interfere.[37] In cases of positive misconduct, the court will, without hesitation, remove the trustee who has abused his trust. But not every mistake or neglect of duty or inaccuracy of conduct on the part of a trustee will induce the court to adopt such a course. The act or omission must be such as to endanger the trust property or to show a want of honesty or proper capacity to execute the duties or a want of reasonable fidelity. Friction or hostility between the trustees and beneficiaries, or between a trustee and his co-trustees, is not of itself a reason for the removal of a trustee. But where hostility is grounded on the mode in which the trust has been administered, or where it is likely to obstruct or hinder the due performance of trustee's duties, the court may come to the conclusion that it is necessary, for the welfare of the beneficiaries, that a trustee should be removed.[38]

[19-8] Facts relevant to the consideration as to what is expedient to undertake include the interests of the beneficiaries, the security of the trust property and the faithful and sound exercise of the powers conferred on the trustee. Actual misconduct on the part of the trustee need not be shown, but the court must be satisfied that his continuance in office would be prejudicial to the due performance of the trust, and so to the interests of the beneficiaries. In *Koo Wai Hon (an infant) v Tai Sau Lin*,[39] a mother gave to Tai, the aunt of her infant daughter, $1.8 million to hold on trust for the payment of the daughter's education and for her use after she left school. The mother died in 1993. Relations between the father and the aunt became strained and the father, as his infant daughter's next friend, issued an originating summons on his daughter's behalf against the aunt, seeking relief under section 42 of the Trustee Ordinance (Cap 29) to appoint a new trustee in place of, or in addition to, the aunt. It was admitted that the aunt should have provided the father with an adequate and accurate account of the trust fund at the end of each financial year of the trust which she had not done. It was alleged that the daughter's school fees for a number of terms were not paid by the aunt out of the trust fund. Instead, they were paid by the father. That was admitted by the aunt, though she claimed that the father had insisted on paying them himself. The court was not able to decide that issue definitively without the oral examination of the father and the aunt, but it was more likely for the sake of convenience the father had paid the school fees himself in the belief that he would be reimbursed his expenditure from the trust fund in due course. He subsequently decided not to press for the reimbursement of his expenditure. It took over six months for the aunt, despite repeated requests, to provide the father with trust accounts. She only did so when faced with irrefutable legal authority that she was obliged to do so, having previously put forward a number of untenable excuses for not having done so earlier. The account in the joint names of the aunt and her husband, into which the trust fund had been placed, was an Asset Vantage account with the Hong Kong Bank. That account gave the aunt and her husband overdraft facilities with the trust fund as security. However, it was accepted that that was not done in bad faith: a better rate of interest is earned on sums in such an account and the bank statements show that the overdraft facilities were not in fact used. There was no demonstrable threat to the trust fund. Keith J held that:

37 *Investec Trust (Jersey) Ltd v Jaiswal* [2005] JRC 126A (Royal Court of Jersey) (interlocutory application for appointment of co-trustee of bare trust of company shares pending resolution of dispute as to beneficial owners refused on the basis that no allegation of loss by existing trustee, which was prepared to remain pending resolution of dispute as to beneficial ownership).

38 *Lewin*at paras [13-46]–[13-47]; see also *Wong Keung v Chung Lap* (unreported, HCA 8817/1983, Supreme Court of Hong Kong, 11 April 1986, Nazareth J).

39 [1995] HKLY 632.

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[23-71] If the express intention of the parties was to complete and not to utilise the escape clause, then the escape clause cannot later be relied on as a defence to specific performance. In *Kwok Ka v Mak Siu Hing*[178] the usual escape clause was contained in the sale and purchase agreement but the parties had written a remark on the agreement which stated that 'if the deeds have no problem, then there shall be definite purchase and definite sale'. The transaction did not proceed as planned and the vendor sent a cheque to the purchaser's solicitor in reliance on the escape clause. The purchaser rejected the cheque and sought specific performance of the agreement. Barnett J held that written words peculiar to a transaction had greater weight than the printed form of the contract. Since the written remarks provided that the only impediment to the completion of the sale should be difficulties with the title only and since there was no title problem, the escape clause was not available to the vendor.

178 [1999] 2 HKC 410, [1999] 2 HKLRD 564, [1999] CPR 37.

CHAPTER 24

Injunctions

[24-1] An injunction[1] is a remedy that compels the performance of an act in restoring another person's right, interest or property or to restrain the doing of an act which infringes such right, interest or property.[2] Court orders generally require the performance of a

1 Its origin can be found in 18th century English cases where there were instances of injunctions granted to restrain proceedings at law where the legal title of the defendant was founded on inequitable transactions, eg to restrain a legal instrument obtained by inequitable means or fraud: *Stribley v Hawkie* [1744] 3 Atk 276, (1744) 26 ER 961; *Talleyrand v Boulanger* [1797] 3 Ves 448, (1797) 30 ER 1099; *Jervis v White* [1802] 6 Ves 738, (1802) 31 ER 1284; to restrain proceedings on instruments affected with constructive fraud: *Dering v Lord Winchelsea* [1787] 1 Cox 318, (1787) 29 ER 1184; *Newman v Milner* [1794] 2 Ves 483, (1794) 30 ER 736; to compel repayment of money paid under a gambling transaction void at law and the delivery of an instrument for cancellation: *Rawden v Shadwell* [1755] Amb 269, (1755) 27 ER 179; *Newman v Franco* [1795] 2 Anst 519, (1795) 145 ER 953; *Andrews v Berry* [1795] 3 Anst 634, (1795) 145 ER 990; to restrain proceedings on instruments founded on expectations from third parties but concealed from them: *Woodhouse v Shepley* [1794] 2 Atk 535, (1794) 26 ER 721. Injunctions granted to stay legal proceedings where the plaintiff has an equitable defence with which the court of law could not deal: *Williams v Cheney* [1796] 3 Ves 59, (1794) 30 ER 893; *Perry v Barker* [1803] 8 Ves 527, (1803) 32 ER 459; *Reynolds v Nelson* [1821] 6 Madd 290, (1821) 56 ER 1101; *Ball v Storie* [1823] 1 Sim & Stu 210, (1823) 57 ER 84; *Williams v Davies* [1829] 2 Sim 461, (1829) 57 ER 860. Injunction to restrain legal proceedings for forfeiture of money regarded as a penalty in equity: *Hardy v Martin* [1783] 1 Cox 26, (1783) 29 ER 1046; *Errington v Aynesly* [1788] 2 Brown CC 341, (1788) 29 ER 191. Special injunctions could be granted by a Court of Chancery against waste (now obsolete): *Robinson v Litton* [1744] 3 Atk 209, (1744) 26 ER 922; against infringement of copyright, patents, secret inventions, trademarks and against passing off: *University of Oxford and Cambridge v Richardson* [1802] 6 Ves 689, (1802) 31 ER 1260; *Morris v Kelly* [1820] 1 Jac & W 481, (1820) 37 ER 451; *Rundell v Murray* [1821] Jac 311, (1821) 37 ER 868; *Yovatt v Winyard* [1820] 1 Jac & W 394, (1820) 37 ER 425; *Lewis v Langdon* [1835] 7 Sim 421, (1835) 58 ER 899; *Knott v Morgan* [1836] 2 Keen 213, (1836) 48 ER 610; or to restrain nuisance: *Coulson v White* [1743] 3 Atk 21, (1743) 26 ER 816; *Anonymous* [1752] 3 Atk 751, (1752) 26 ER 1230; or to restrain breach of trust: *Lord Chedworth v Edwards* (1802) 8 Ves 46, (1802) 32 ER 268; *Cholmondeley v Clinton* [1815] 19 Ves 261, (1815) 34 ER 515; or to stay an arbitral proceeding: *Mylne v Dickenson* [1815] G Coop 195, (1815) 35 ER 528; and to restrain retainer and pleading of counsel: *Baylis v Grout* [1835] 2 MY & K 316, (1835) 39 ER 964; and to restrain breach of covenant in a lease: *Barret v Blagrave* [1800] 5 Ves 555, (1800) 31 ER 735, on appeal [1801] 6 Ves 104, (1801) 31 ER 960; and to restrain partners in a partnership: *Reid v Bowers* [1793] 4 Brown C C 441, (1793) 29 ER 978; and to restrain improper disposal of bankrupt's estate and effects: *Flower v Herbert* [1751] 2 Ves 326, (1751) 28 ER 210. See generally, CS Drewry, *Treatise on the Law and Practice of Injunctions* (S Sweet, Law Bookseller: London, 1841); Steven Gee, Commercial Injunctions (5th ed, London: Sweet & Maxwell, 2004).

2 *Australian Securities and Investment Commission v Edensor* (2001) 204 CLR 559. See William Williamson Kerr, *A Treatise on the Law and Practice of Injunctions* (6th ed, Sweet & Maxwell Ltd: London, 1981) at p 1. However, injury to proprietary interest is not a requirement for injunction granted in the exclusive jurisdiction: see IDF Spry, *Equitable Remedies* (7th ed, Law Book Company: Sydney, 2007) at Appendix B.

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positive act; for instance, an order for the payment of damages or for delivery up,[3] or the forbidding of a certain act (such as an order that trespassing ceases to occur). These orders are not injunctions. An injunction is a well-developed equitable remedy[4] but it does not displace the existence of injunctive relief found at common law.[5] Having originated in the English Court of Chancery, injunctions were devised to restrain the setting up of positive but unconscionable defences at the common law. Due to their origins in the Court of Chancery, injunctions have been an important form of equitable relief, granted under the inherent jurisdiction of the Court of Chancery. That inherent jurisdiction has been endorsed by statute in Hong Kong.[6]

[24-2] This chapter is predominantly concerned with private injunctions and not injunctions in public law, administrative law,[7] criminal law[8] or human

3 *Doulton Potteries Ltd v Bronotte* [1971] 1 NSWLR 591.

4 In Australia, injunctions have emerged from being a remedy found predominantly in equity, to a statutory remedy where legislature can modify or vary the manner in which this remedy can be granted. For example, an undertaking as to damages from the applicant is a crucial requirement for a decree of injunction but section 1324(6) of the Corporations Act 2001 expressly absolves the Australian Securities and Investments Commission (the corporate watchdog in Australia) from providing such an undertaking. Nor is an undertaking required of the applicant who seeks to restrain infringement of privacy. In Hong Kong, the Mandatory Provident Fund Schemes Authority has a similar statutory waiver for proceedings it commences to restrain breach of the Mandatory Provident Fund Schemes. See Mandatory Provident Fund Schemes Ordinance (Cap 485), section 45F(8). See also Lang Thai, 'Statutory Injunction — Call for Amendment to section 1324 of the Corporations Act' (2006) 24(1) C&SLJ 41.

5 Common law courts had jurisdiction to grant common law injunctions. The notion of a common law injunction has diminished since the enactment of the Judicature Act 1825 as it conferred both the both equitable and common law jurisdictions on the courts and therefore, common law courts have the power to grant legal as well as equitable injunctions. Injunctions other than common law injunctions are referred to as specific or equitable injunctions.

6 See *A Co v B Co* [2002] 2 HKC 497, [2002] 3 HKLRD 111; *Tan Li Hui Cheng v Tan Kian Chee* [1997] 4 HKC 94.

7 See, for example, *The Stewards of the Royal Hong Kong Jockey Club v Moses* [1982] 1 HKC 12; *Cheng Kai Man William v Panel on Take-Overs and Mergers (No 1)* [1994] 1 HKC 390; *Society for Protection of the Harbour Ltd v Chief Executive in Council* [2003] 4 HKC 1; *Super Lion Enterprises Ltd v Commissioner of Rating and Valuation* [2006] 1 HKLRD 239; *Secretary for Justice v Ocean Technology Ltd* [2008] 2 HKLRD 82 (injunction to restrain unlicensed radio broadcast refused); *A (Torture Claimant) v Director of Immigration* [2008] 4 HKLRD 752 (CA) (removal and deportation orders); *EN (Serbia) v Secretary of State for the Home Department* [2010] QB 633 (Eng CA) (deportation order after conviction of burglary possession of offensive weapon); Othman v Same [2010] 2 AC 110 (HL) (Deportation orders made by Secretary of State on ground of national security); *Asif Ali v Director Of Immigration* [2011] 5 HKC 8 (deportation order). See also 'Injunctions in Public Litigation' (NSW) (1989) 6 EPLJ 48.

8 For example, by analogy, restraint orders under the Organized and Serious Crimes Ordinance (Cap 455), sections 14–15; Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405), sections 9–10. See also *Secretary for Justice v Tan Lam Chuan* [2005] 3 HKC 545 (CA); *Re B-J (a child)* [2001] 2 WLR 1661, [2001] 2 FLR 443, [2000] 2 FLR 443, [2000] 2 FCR 599, [2000] Fam Law 807 (CA); *Daiichi UK Ltd v Stop Huntingdon Animal Cruelty* [2003] EWHC 2337 (QB), [2005] 1 BCLC 27, [2004] 1 WLR 1503; *Guildford BC v Hein* [2005] EWCA Civ 979, [2005] BLGR 797 (Eng CA); *Serious Fraud Office v Lexi Holdings plc* [2008] EWCA Crim 1443, [2008] All ER (D) 149 (Jul) (Eng CA); *Secretary For Justice v Wu Lihui* [2008] 6 HKC 373 (CA) (restraint order to prohibit dealing with deposit in bank refused); *Jennings v Crown Prosecution Service* [2008] 1 AC 1046 (HL) (restraint order issued to prevent dissipation of assets by the fraudster prior to his criminal trial for conspiracy to defraud); *Serious Fraud Office v Lexi Holdings plc* [2009] 1 All ER 586, [2009] QB 376 (Eng CA)

rights.[9] An injunction is a type of administrative law remedy restraining the performance of certain acts by an administrative body or a public officer.[10] The Court of First Instance has power in public law to restrain a public officer from implementing an *ultra vires* administrative decision, or to restrain a person not entitled to act in a public office from so acting and to declare the office vacant.[11] When a private person applies for an injunction to defend a public interest, the standing (*locus standi*) of the applicant has to be established. Where a public body has been given a statutory responsibility which it is required to perform in the public interest, it has standing to apply to the court for an injunction to prevent interference with the performance of its public responsibilities.[12] For injunctions in private law, the issue of standing usually does not present a problem. Statutory injunctions are also found in criminal law,[13] legal aid,[14] telecommunications,[15]

(Variation of order prior to conviction); *Gibson v Revenue and Customs Prosecutions Office* [2009] QB 348 (confiscation order made against convicted defendant for drug trafficking offence); *R v Briggs-Price* [2009] AC 1026 (Eng CA) (restraint order on assets issued for the offence of evasion of excise duty on imported cigarettes); *R v Islam* [2009] AC 1076 (HL) (confiscation order made in sum including wholesale value of heroin on black market); *R v Nelson* [2010] QB 678 (Eng CA) (confiscation order for receiving stolen goods); *Re Stanford International Bank Ltd* [2011] Ch 33 (Eng CA) (restraint order under proceeds of crime legislation); *Re Yeung Ka Sing Carson* [2012] 6 HKC 9 (restraint order against assets tainted by money laundering and organised crime). See also 'Abortion: Injunction, Standing & Status of Unborn Child' (1997) 5 MedLRev 329.

9 See *Gardner v National Netball League Pty Ltd* [2001] FMCA 50, (2001) 182 ALR 408 (application for interim injunction by a pregnant player in the National Netball League obtained against the League to allow her to continue to play until she was 20 weeks pregnant as expert evidence showed that the foetus only became endangered after 20 weeks); *Wong Tsz Jam v Commissioner of Police* [2008] 5 HKLRD 164 (CA) (application for interlocutory injunction to restrain police officers from recording personal information of people stopped in the street and had their identity card inspected). See also Ian Loveland, 'Injunctions, Planning Enforcement and Human Rights' (2002) 65(6) MLR 906; Linda Clarke, 'Injunctions and the Human Rights Act 1998: Jurisdiction and Discretion' (2002) 21 CJQ 29.

10 Power to grant an injunction in public law is separately provided for by sections 21J and 21K(2) of the High Court Ordinance (Cap 4). It has been suggested that *Mareva* relief is not restricted as a private law remedy and it can be invoked in a statutory cause of action against the public in administrative law. See *F Hoffmann La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295 (HL); *Securities and Investments Board v Pantell (No 1)* [1989] 2 All ER 673. See also Dennis Crighton, '*Pantell (No 1) Mareva* Injunctions: Isolated Incursion into the Field of Public Law or Part of A Strategic Plan' (1994) Jan JBL 8; Mark Leeming, 'Standing to seek injunctions against officersof the Commonwealth' (2006) 1 J Eq 3.

11 High Court Ordinance (Cap 4), section 21J; but see Crown Proceedings Ordinance (Cap 300), section 16 where the court is not to grant an injunction or specific performance against the Crown or any officer of the Crown but only to make a declaratory order in lieu. The Crown, in the context of administrative law, is now construed as the Hong Kong Special Administrative Region government. See Interpretation and General Clauses Ordinance (Cap 1) Schedule 8 clause 2. See also Legislative Council Ordinance (Cap 542), section 73 (an elector or the Secretary for Justice may seek to restrain a person from continuing to act as a Legislative Council member after being disqualified); District Councils Ordinance (Cap 547), section 79; Village Representative Election Ordinance (Cap 576), section 58.

12 *Broadmoor Special Hospital Authority v Robinson* [1999] EWCA 3606, [2000] QB 775, [2000] 2 All ER 727, [2000] 1 WLR 1590.

13 Weapons of Mass Destruction (Control of Provision of Services) Ordinance (Cap 526), section 12; Elections (Corrupt and Illegal Conduct) Ordinance (Cap 554), section 28.

14 Legal Aid Ordinance (Cap 91), section 15.

15 Telecommunications Ordinance (Cap 106), sections 14 and 39A.

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television broadcasting,[16] national or regional flag and emblem manufacturing,[17] protection of privacy,[18] anti discrimination,[19] trade union matters,[20] and in restraining unlicensed outer space activities.[21]

[24-3] Injunctions in the exclusive jurisdiction refer to injunctions sought in a proceeding to enforce an equitable right on a cause of action that arises in equity: for example, a vendor's equitable right to set aside a conveyance of land induced by undue influence or for a beneficiary to restrain a trustee from committing a breach of trust. If the injunction is sought in the exclusive jurisdiction, a plaintiff is not required to prove that damages would not be a sufficient remedy if the injunction were refused.[22] Injunctions in the auxiliary jurisdiction refer to two types of injunctions: first, injunctions to prevent multiplicity of actions and secondly, injunctions to restrain threatened intellectual property infringements of legal rights. For example, injunctions to restrain a breach of contract or to restrain the publication of defamatory material or trespass on property are injunctions in the auxiliary jurisdiction. In seeking an injunction in the auxiliary jurisdiction, a plaintiff has to show that damages are not an adequate remedy.[23]

[24-4] An injunction that compels the performance of an act is a mandatory (restorative or positive) injunction; a prohibitory (or negative) injunction forbids the doing of an act.[24] If there is no likelihood of reoccurrence of the wrongdoing, an injunction will not be granted in vain. Injunctions can be differentiated as to timing. In a case of extreme emergency that justifies the granting of immediate relief on an *ex parte* basis, an interim injunction is the appropriate relief. It is generally granted on the basis that it will be dissolved when the matter is next brought back to court. If the party, having the benefit of the interim injunction, applies for a continual injunction, that application will be heard *inter parte* at the next return date and the application determined on its merits. At that stage, if an injunction is granted, it would be on an interlocutory basis pending further orders of the court or final judgment. An interlocutory injunction temporarily maintains the status quo of parties[25] and their assets pending trial. A permanent injunction is sought as a type of final order enjoining acts in perpetuity and it will not be granted until the disposal of the proceedings on its merits. An injunction that confers a right to seize, to possess and to preserve evidence, widely used in intellectual properties infringement matters, is referred to as an *Anton Piller* order.[26] Sometimes an injunction granted before the commission of any wrongs, in effect pre-empting potential wrongdoing, or to order rectification of

16 Broadcasting Ordinance (Cap 562), sections 7B and 15.
17 National Flag and National Emblem Ordinance (Cap 2401), section 5; Regional Flag and Regional Emblem Ordinance (Cap 2602), section 5.
18 Interception of Communications Ordinance (Cap 532), section 10.
19 Sex Discrimination Ordinance (Cap 480), sections 76, 81 and 82; Disability Discrimination Ordinance (Cap 487), sections 72, 77 and 78; Family Status Discrimination Ordinance (Cap 527), sections 54, 59 and 60.
20 Trade Unions Ordinance (Cap 332), section 17A (power of Registrar on union elections and membership) and section 49 (preventing a trade union officer from misusing funds).
21 Outer Space Ordinance (Cap 523), section 10.
22 *Ex p Adamson* (1878) 8 Ch D 807; *Nocton v Lord Ashburton* [1914] AC 932, [1914–15] All ER Rep 45; *Mahoney v Purnell* [1996] 3 All ER 61; *White v Jones* [1995] 2 AC 207; [1995] 1 All ER 691.
23 R Meagher, D Heydon, M Leeming, *Meagher Gummow & Lehane's Equity: Doctrines & Remedies* (4th ed, Sydney: LexisNexis Butterworths, 2002) at paras [21-015]–[21-055].
24 JD Heydon (et al), *Cases and Material on Equity and Trust* (3rd ed, Butterworths: Sydney, 1989) at p 1071.
25 See *Union (V-Tex) Shirt Factory Ltd (in liq) v Union V-Tex Realty Ltd* [1985] 2 HKC 617.
26 *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55.

the effects of a wrongful act which, if it is not rectified, will occasion further damage, is known as *quia timet* injunction. An injunction that restrains potential dissipation of assets out of the jurisdiction to frustrate any future judgment is a *Mareva* injunction.[27] This name derives from the decision of *Mareva Compania Naviera SA v International Bulkcarriers SA*,[28] where such an order was first made. Post-judgment injunctions have two forms: firstly, once a final order is made and an appeal is certain, it is likely the judgment might be reversed on appeal, and the Court of First Instance has jurisdiction to grant an injunction preserving the subject matter pending the outcome of the appeal. Secondly, an asset preservation order holds the subject matter until the judgment creditor exercises his right to seize the same and realises it to satisfy a judgment debt.[29]

[24-5] An injunction is an *in personam* remedy which is directed against a natural person.[30] If the restrained entity is a corporation, its directors would be restrained while in a partnership, it would be the partners, and in an incorporated or unincorporated association, the committee members. These categories of persons will be restrained as they exercise the power and functions of that entity. An injunction, regardless of whatever kind, does not operate *in rem* (directed against the subject matter).[31]

[24-6] Due to its origins in the Court of Chancery, injunctive relief remains largely discretionary, guided by established principles of equity. Although there has also been significant statutory recognition and adoption of the injunction, this form of relief maintains its discretionary nature. Although the scope and application of equitable remedies can be expressly dictated by legislation, most statutes do not lay down in express terms how a court is to exercise its jurisdiction in granting injunctive relief. This leaves judges to decide the manner and circumstances in which an injunction may be granted.

[24-7] *Power to grant injunction.* Section 21L of the High Court Ordinance (Cap 4) confers a power to the Court of First Instance to grant interlocutory or final injunctive relief or to appoint a receiver whenever the court considers it just or convenient to do so and either unconditionally or on such terms and conditions as the court thinks just.[32] It provides:

> 21L. Injunction and receiver
>
> (1) The Court of First Instance may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the Court of First Instance to be just or convenient to do so.
>
> (2) Any such order may be made either unconditionally or on such terms and conditions as the court thinks just.
>
> (3) The power of the Court of First Instance under subsection (1) to grant an interlocutory injunction restraining a party to any proceedings from removing from the jurisdiction of the Court of First Instance, or otherwise dealing with, assets located within that

27 The High Court of Australia prefers to refer to *Mareva* relief as *Mareva* orders and not *Mareva* injunctions. See *Cardile v LED Builders* (1999) 198 CLR 380.
28 [1975] 2 Lloyd's Rep 509 (CA).
29 An asset preservation order is not recognised as a type of injunction in Australia: see *Pelechowski v Registrar* (1999) 198 CLR 435 (CA). See IDF Spry, *The Principles of Equitable Remedies* (9th ed, Sydney: LBC, 2014) at p 550.
30 See *Commissioner of Customs and Excise v Golden Science Technology Ltd* [1999] 4 HKC 169 (CA).
31 See John J McEvoy and Janet M Dine 'Are *Mareva* Injunctions Becoming Attachment Orders' (1989) 8 CJQ 236.
32 See *Lau King Ting v Cheng Miu Har* [2008] 4 HKLRD 563 at paras [43]–[44].

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CHAPTER 27

Minor Remedies

Rescission

[27-1] Rescission is a term capable of numerous meanings.[1] In the context of this chapter, it refers to the equitable doctrine of rescission that allows a party to a contract or a transaction to set aside that contract or transaction and to return to that party's original position.[2] If rescission is granted, the contract will be set aside *ab initio*, that is, from its inception. Apart from formal contracts, rescission in equity also applies to all dispositions and transactions. Rescission puts an end to a contract in a way that treats it as if it never existed (rescission *ab initio*), which has the effect of totally discharging the parties from the duty to perform their contractual obligations.[3] Rescission also refers to termination of a contract for breach or repudiation (rescission *in futuro*).[4] Strictly speaking, it is not, in itself, a remedy ordered by the court and the court's function in granting rescission is to adjudicate on the validity of the acts of the party rescinding the contract and to make consequential orders so as to achieve *restitutio in integrum* (returning to the original position),[5] such as reconveyance of property transferred under voidable transactions. The party seeking rescission must be prepared to make necessary restitution to the other party where necessary. For example, in a voidable transaction involving the transfer of property from A to B, A has a mere equity of his right to set aside the voidable transaction. When A elects to rescind the contract, A will regain an interest in the property and B will hold

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1 See eg rescission of deportation order, Immigration Ordinance (Cap 115), section 55; rescission, variation and publication of insurance requirements, Insurance Companies Ordinance (Cap 41), section 38; Disclaimer of property, rescission of contracts, securities and futures by a bankrupt, Securities and Futures Ordinance (Cap 571), section 49; appeals in the case of Criminal Bankruptcy Orders, Criminal Procedure Ordinance (Cap 221), section 84B; variation, discharge of orders for financial provision, Matrimonial Proceedings and Property Ordinance (Cap 192), section 11.

2 See generally *Lewin* at paras [4-64]–[4-66]; R Meagher, D Heydon, M Leeming, *Meagher Gummow & Lehane's Equity: Doctrines & Remedies* (4th ed, Sydney: LexisNexis Butterworths, 2002) at paras [24-005]–[24-095]; *Snell* at paras [15-001]–[15-019]; H G Beale (ed), *Chitty on Contract* (31st ed., Sweet & Maxwell: London, 2012) at paras [24-001], [24-049]; N C Seddon et al, *Law of Contract* (LexisNexis Butterworths: Australia, 2002) at paras [11.8]–[11.73]; JW Carter, E Peden & GJ Tolhurst, *Contract Law in Australia* (5th ed., LexisNexis Butterworths : Australia, 2007) at paras [30-04], [32-04]. For summary judgment for an application for an order of rescission, see the Rules of the High Court (Cap 4A), Order 86, rule 1(b). For jurisdictions of the District Court to grant an order of rescission, see District Court Ordinance (Cap 336), section 37(d).

3 *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457.

4 *Shevill v Builders Licensing Board* (1982) 149 CLR 620, 42 ALR 305. For the distinction between rescission and termination upon acceptance of repudiation see *Win Joyce Investment Ltd v Kiu Kam Cheong* [2004] 4 HKC 636, [2005] 1 HKLRD 587.

5 *Horsler v Zorro* [1975] Ch 302; *Johnson v Agnew* [1980] AC 367; *TSB Bank Ltd v Camfield* [1995] 1 WLR 430.

it on constructive trust for A.[6] A will be required to refund any payment to B by way of restitution and the court will ensure such refund by consequential orders.

[27-2] As aforesaid, rescission is also used to describe the rights of an innocent party to a contract to treat a breach of the other party as a repudiation which relieves the former from further performance under the contract.[7] However, while the innocent party is relieved from further obligation under the contract, this is not rescission *ab initio* but rather a rescission *in futuro* and he is entitled to sue for damages for the breach.[8] Rescission is also used to describe express contractual rights (rescission by agreement) that allow parties to 'rescind' the contract upon the happening of certain events or the failure of certain conditions.[9]

[27-3] *Proper allowance.* In declaring a rescission valid, the court takes into account allowances for deterioration or improvements to property in order to restore parties substantially to the previous status quo. However, the court will not take into account matters of personal taste, nor improvements made after the improver has reasonable notice for the alleged defect in title. Allowances will not be made for losses sustained in carrying on a business transferred under a voidable contract, since the court is concerned with compensation that will restore the status quo in relation to the subject matter of the contract.[10]

[27-4] *Contractual rescission provision.* The right of rescission is an equitable right which cannot be excluded by contract. In other words, the inherent equitable jurisdiction of the court cannot be contracted out of and if there is such provision in the contract to abrogate the right of rescission, that clause in itself is unconscionable and liable to be struck down. Contracts often contain rescission clauses which entitle either, or both, parties to rescind in the event of default. Such contractual rescission provisions give rise to a contractual right to rescind in addition to the right to rescind in equity.

Grounds of rescission

[27-5] Rescission may be granted in, but is not limited to, the following circumstances:

(1) where the contract is vitiated by misdescription[11] or mistake and mistake is determined by the common law test of mistake since there is no separate concept in equity;[12]

(2) where the contract is vitiated by illegality;[13]

6 *Bristol and West Building Society v Mothew* [1999] Ch 1 (CA); *El Ajou v Dollar Land Holdings plc* [1993] 3 All ER 717.

7 *Harold Wood Brick Co Ltd v Ferris* [1935] 2 KB 198; *McDonald v Dennys Lascelles Ltd* [1933] 148 CLR 457.

8 *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457; *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827.

9 Note that a vendor cannot rely on such contractual rights to 'rescind' if he has knowingly sold the property when he has title to only part of the property: *Re Des Reaux and Setchfield's Contract* [1926] Ch 178, or no title of the property: *Re Deighton and Harris's Contract* [1898] 1 Ch 458; *Re Jackson and Haden's Contract* [1906] 1 Ch 412.

10 *Brown v Smitt* (1924) 34 CLR 160.

11 See *Flight v Booth* (1834) 1 Bing NC 370; *Charles Hunt Ltd v Palmer* [1931] 2 Ch 287. Cf *Shepherd v Croft* [1911] 1 Ch 521; *Re Belchamand Gawley's Contract* [1930] 1 Ch 56.

12 *Bell v Lever Brothers Ltd* [1932] AC 161 (HL); *Solle v Butcher* [1950] 1 KB 671; *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2002] 4 All ER 689.

13 *Gascoigne v Gascoigne* [1918] 1 KB 223; *Berg v Sadler & Moore* [1937] 2 KB 158.

(3) where the contract is induced by fraudulent[14] or innocent[15] misrepresentation;

(4) where the contract is induced by the exercise of duress,[16] undue influence or unconscionable conduct, known as constructive fraud; and

(5) where an innocent party terminates a contract for breach (rescission *in futuro*).

[27-6] *Misrepresentation.* Where a party is induced to enter into a contract by fraudulent misrepresentations, he may rescind the contract.[17] Where the contract is an instrument of fraud, it will be a nullity and rescission is not required. In *Halley v Law Society*,[18] Halley claimed a sum of money from his account with his solicitor that represented the fees he received for some commercial transactions. The Law Society claimed to hold the money for persons beneficially entitled to them. The trial judge found that Halley was not entitled to the money because the transactions were fraudulent, as the transactions would not give any benefit to the victims. The trial judge, however, found for the Law Society on the grounds that Halley had no beneficial interests in the money and Halley appealed. The Court of Appeal upheld the trial judge's findings that the commercial transactions were instruments of fraud and held that the transactions would not transfer any beneficial interest in the money involved. As to whether the transactions could be rescinded, the Court of Appeal held that there was no transaction on Halley's part to rescind and the law will not impose a requirement for the fraudster to be notified of the rescission. The Court of Appeal held that:

> In this case, the contract has been held to be the instrument of fraud, and nothing else. The elaborate documentation was, in the words of the [trial] judge, "no more than a vehicle for obtaining money … by false pretences" … In my view, the court is entitled to disregard the apparent effect of that fraudulent contract … It is meaningless to impose a requirement for the fraudster to be notified of "rescission". From the fraudster's point of view there is nothing to rescind; for practical purposes, he has parted with nothing of value and incurred no obligations; the victim is left with some documents which, from the outset, were known and intended by the other party to be worthless.[19]

[27-7] A plaintiff has to prove that there is a representation that is false and that the plaintiff has relied upon that representation to enter into the agreement.[20] A representation that would have likely played a part in influencing the decision of a reasonable person to enter into the contract will be presumed to have affected the person in this manner unless the contrary is proved.[21] The fact that a plaintiff has an opportunity to discover the falsity of the representations is not a defence. Thus, a defendant induces another to enter into a contract by a material representation which is untrue; it is no defence to an action for rescission that the plaintiff has the means of discovering, and might, with reasonable

14 *Halley v Law Society* [2003] WTLR 845, [2003] EWCA Civ 97 (if the contract is an instrument of fraud, it is a nullity); *Ross River Ltd v Cambridge City Football Club Ltd* [2008] 1 All ER 1004, [2007] 41 EGCS 201, [2008] 1 All ER (Comm) 1028, (2007) 157 NLJ 1507, [2007] EWHC 2115.

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

16 See *Halpern v Halpern (Nos 1 & 2)* [2007] 3 All ER 478, [2007] 3 WLR 849, [2008] QB 195 (Eng CA).

17 *Twinsectra v Yardley* [1999] LILR 527; *Halley v Law Society* [2003] EWCA Civ 97.

18 [2003] EWCA Civ 97.

19 *Halley v Law Society* [2003] EWCA Civ 97 at paras [47]–[48].

20 See *Nip Wun Lan v Chan Oi Ling* [1985] 2 HKC 105, [1983–85] 2 CPR 129 (CA).

21 *County NatWest Bank Ltd v Barton*, The Times, July 29, 1999; Misrepresentation Ordinance (Cap 284), section 2.

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diligence, have discovered that it is untrue.[22] A misrepresentation is innocent if a party honestly believes in the truth of his assertion, even if he has no reasonable ground for his belief[23] or if he once knew the true facts but has forgotten them.[24] The situation is different with fraudulent misrepresentation. A party who is induced to enter into a contract by another's innocent misrepresentations may not rescind the contract at common law.[25] At common law, the mere existence of an innocent misrepresentation does not give rise to a right to rescind a contract after completion. However, this was abrogated by statute[26] and rescission of a completed contract induced by innocent misrepresentation is allowed. Section 2(b) of the Misrepresentation Ordinance (Cap 248) states that where a person enters into a contract after the representation has been made to him and the contract has been performed, then, if he would otherwise be entitled to rescind the contract without alleging fraud, he shall be so entitled. Innocent misrepresentations were not recognised as a ground for relief by the common law unless they had become incorporated as terms in the contract.[27] An innocent party can claim damages arising from contracts induced by innocent misrepresentations.[28] The court will be slow to uphold a rescission of a contract induced by innocent misrepresentation, vis-à-vis fraudulent misrepresentation, where the court is eager to deprive the fraudulent party from enjoying the benefit of his fraud at the expense of the innocent party.[29]

[27-8] A claim in damages founded on alleged misrepresentation perpetrated by a party inducing another to enter into a contract with him could not be invoked by the party so misled against the assignee of the debt of the party making the misrepresentation unless the contract has been rescinded before the assignment takes effect.[30] In *Feb Finance Ltd v Yea Kwong Yu*,[31] a customer of a stockbroking firm was misled by an agent of the firm to enter into a contract to purchase shares and then sustained loss. Upon liquidation of the customer's trading account with the stockbroking firm, the debit balance stood at over $1 million. The creditor stockbroking firm assigned its debt to Feb Finance. The customer debtor sought to counterclaim against Feb Finance damages for misrepresentation made by the creditor stockbroker. The Master refused the customer's counterclaim and the customer appealed. Liu J held that the misrepresentations were not closely connected with the contract between the customer and the creditor stockbroking firm because they were between the agent and him. Therefore no damages claim could be based on such misrepresentation raised by the customer against the creditor stockbroker's assignee. Liu J also held that unless the customer rescinded the contract between himself vis-à-vis the creditor stockbroking firm before the notice of assignment was effected, the customer could not counterclaim.

[27-9] *Non-disclosure.* In contracts *uberrimae fidei* (where one party has the command of means of knowledge that is not available to the other) a party may rescind such a contract

22 *Redgrave v Hurd* (1881) 20 Ch D 1; *Welltech Investment Ltd v Easy Fair Industries Ltd* [1996] 4 HKC 711, [1995–96] CPR 559.
23 *Derry v Peek* (1889) 14 App Cas 337.
24 *Low v Bouverie* [1891] 3 Ch 82.
25 *Redgrave v Hurd* (1881) 20 Ch D 1.
26 Misrepresentation Ordinance (Cap 284), section 2(b).
27 *Bannerman v White* (1861) 10 CB (NS) 844. See *Heilbut Symons & Co v Buckleton* [1913] AC 30.
28 Misrepresentation Ordinance (Cap 284), section 3.
29 *Spence v Crawford* [1939] 3 All ER 271.
30 *Stoddart v Union Trust* [1912] 1 KB 81 (CA); *Provident Finance Corp Pty v Hammond* [1978] VR 312.
31 [1998] 1 HKC 552.

if he is not fully informed. This applies to many various contracts including contracts of insurance and contracts for family settlements and arrangements. For example, if the insured of an insurance contract fails to disclose material information that may affect the policy, the insurer will be entitled to rescind notwithstanding that the withheld information eventually cannot be substantiated.[32] In *Brotherton v Aseguradora Colseguros SA*,[33] Aseguradora provided insurances to a bank which covered losses caused by dishonest or fraudulent acts of the bank's employees. Aseguradora entered into reinsurance policies with Brotherton without disclosing reports regarding serious allegations of corruption about the bank's president and officers. Brotherton sought to rescind the contract after it became aware of further reports of investigations and disciplinary charges against the bank's officers. Aseguradora claimed that the reports need not be disclosed. The trial judge found against Aseguradora and Aseguradora appealed. The Court of Appeal dismissed its appeal and held that the knowledge of the corruption was so material that it would have induced Brotherton to act differently and thus, Brotherton's rescission was upheld. Examples of contracts for family settlements and arrangements that were set aside include an agreement where the rights of the parties depended on a secret marriage known to one side and not disclosed to the other,[34] where a party was not informed of a legal opinion which had been taken[35] and where a party was misinformed as to the contents of a legal opinion.[36] However, where a party enters into a family agreement after being misled by their legal adviser[37] and there had been due deliberation and full disclosure, the court will not set aside the contract on the ground that the parties were under a mistake to their rights.[38]

[27-10] *Mistake.* Mistake alone is not a ground for rescission, unless the mistake is induced by fraud, by representation, or deliberately not corrected where full disclosure is required.[39] In the absence of misrepresentation, equity will not order rescission unless the mistake is common to both parties,[40] and this is also true for mutual mistake. This is because both a common mistake and a mutual mistake are bilateral mistakes where the parties to the transaction both made a mistake and it could not be their intention to enter into a contract that is affected by the mistake. A unilateral mistake will not justify rescission. While a contract may be rescinded on the ground of mistake, there must be a mistake as to the terms of the instrument setting out the transaction as opposed to a mistake as to the effect of the transaction. In *Baird v BCE Holdings Pty Ltd*,[41] the parties entered into a share transfer arrangement relying on the advice of an accountant that they could do so without capital gains tax exposure. The parties tried to set aside the contract in equity when they found that the accountant's advice was wrong by arguing that the transfers were void *ab inito*. The New South Wales Supreme Court rejected this argument and held that relief on the ground of mistake is only available if it would be unconscionable for a party to rely on the mistake in the circumstances. Since the parties intended the share

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32 *Brotherton v Asegurada Colseguros SA (No 2)* [2003] EWCA Civ 705.
33 [2003] EWCA Civ 705, [2003] 2 All ER 298.
34 *Gordon v Gordon* (1821) 3 Swans 400.
35 *Harvey v Cooke* (1827) 4 Russ 34.
36 *Re Roberts, Roberts v Roberts* [1905] 1 Ch 704.
37 *Rogers v Ingham* (1876) 3 Ch D 351.
38 *Stapilton v Stapilton* (1739) 1 Atk 2; *Stone v Godfrey* (1854) 5 De GM & G 76.
39 *Gordon v Gordon* (1821) 3 Swan 400 (a deed of settlement of property was set aside because information was withheld in circumstances where a duty of candour was present); *Clarion Ltd v National Provident Institution* [2000] 1 WLR 1888 (equity does not provide relief from mistake as to commercial consequences).
40 *Riverlate Properties Ltd v Paul* [1975] Ch 133; *Copper v Phibbs* (1867) LR 2 HL 149.
41 (1996) 40 NSWLR 374.