

## SECTION I: ADMIRALTY

	<i>Para.</i>
(i) Admiralty Jurisdiction.....	1-01
(ii) Admiralty Proceedings.....	1-31
The Writ of Summons.....	1-32
(i) Writ <i>in rem</i> .....	1-33
(ii) Writ <i>in personam</i> .....	1-37
Pleadings Relating to the Arrest of a Ship or Property.....	1-38
Caveats.....	1-48
Preliminary Acts.....	1-56
Limitation Proceedings.....	1-59
Appraisement and Sale of a Ship under Arrest.....	1-71
Determination of Priorities.....	1-76
Payment Out.....	1-78

### *Precedent*

1. Writ of Summons in Admiralty action <i>in rem</i> .....	1-A01
2. Writ of Summons in Admiralty action <i>in rem</i> in Sister Ship Action.....	1-A02
3. Writ of Summons in Admiralty action <i>in rem</i> in respect of Loss of Life/Fatal Accident.....	1-A03
4. Writ of Summons in Admiralty action <i>in personam</i> .....	1-A04
5. Indorsement on writ for a claim by sole owners for declaration of ownership and for possession.....	1-A05
6. Indorsement on Writ for a claim by part owner for a declaration of ownership.....	1-A06
7. Indorsement on Writ for a claim by part owner for possession.....	1-A07
8. Indorsement on Writ for a claim in co-ownership dispute.....	1-A08
9. Indorsement on Writ for a claim in respect of a mortgage.....	1-A09
10. Indorsement on Writ for a claim for damage received by a ship in collision.....	1-A10
11. Indorsement on Writ for a claim for damage received by ship and cargo in collision.....	1-A11
12. Indorsement on Writ for a claim for damage received by a ship otherwise than by collision.....	1-A12
13. Indorsement on Writ for a claim for damage to ship lying in defective berth.....	1-A13
14. Indorsement on Writ for a claim for damage done by a ship.....	1-A14
15. Indorsement on Writ for a claim for personal injuries sustained on board a ship.....	1-A15
16. Indorsement on Writ for a claim for damage sustained by cargo in collision.....	1-A16
17. Indorsement on Writ for a claim for damage to cargo.....	1-A17
18. Indorsement on Writ for a claim for damage to cargo and for declarations as to general average and salvage.....	1-A18
19. Indorsement on Writ for a claim for breach of charterparty.....	1-A19
20. Indorsement on Writ for a claim for salvage.....	1-A20
21. Indorsement on Writ for a claim for towage.....	1-A21

22. Indorsement on Writ for a claim for pilotage .....	1-A22
23. Indorsement on Writ for a claim for goods and materials supplied to a ship.....	1-A23
24. Indorsement on Writ for a claim for repair of a ship .....	1-A24
25. Indorsement on Writ for a claim for construction or equipping of ship .....	1-A25
26. Indorsement on Writ for a claim for dock charges and dues .....	1-A26
27. Indorsement on Writ for a claim for seamen's wages .....	1-A27
28. Indorsement on Writ for a claim for agent's disbursements.....	1-A28
29. Indorsement on Writ of claim for General Average Contribution ( <i>in personam</i> ) .....	1-A29
30. Indorsement on Writ arising out of bottomry bond .....	1-A30
31. Notice to be indorsed on Writ pursuant to Consular Relations Ordinance (Cap 557).....	1-A31
32. Warrant of Arrest.....	1-A32
33. Praeceptum for Caveat Against Arrest .....	1-A33
34. Praeceptum for Warrant of Arrest.....	1-A34
35. Praeceptum for Service of Writ <i>in Rem</i> by Bailiff.....	1-A35
36. Undertaking .....	1-A36
37. Affidavit for Warrant of Arrest in action in Respect of a Mortgage.....	1-A37
38. Affidavit for Warrant of Arrest in action for Possession .....	1-A38
39. Affidavit for Warrant of Arrest in action for Restraint.....	1-A39
40. Affidavit for Warrant of Arrest in action for Damage to Cargo .....	1-A40
41. Affidavit for Warrant of Arrest in action for Towage .....	1-A41
42. Affidavit for Warrant of Arrest in action for Repairs .....	1-A42
43. Affidavit for Warrant of Arrest in action for Disbursements by Agent.....	1-A43
44. Affidavit for Warrant of Arrest in action for Damage or Loss of Ship on Collision .....	1-A44
45. Notice to Consul of Intention to Apply for Warrant of Arrest .....	1-A45
46. Praeceptum for Caveat Against Release and Payment .....	1-A46
47. Praeceptum for Withdrawal of Caveat.....	1-A47
48. Bail Bond .....	1-A48
49. Affidavit of Surety to Bail Bond.....	1-A49
50. Notice of Bail.....	1-A50
51. Affidavit of Service of Notice of Bail.....	1-A51
52. Praeceptum for Commission for Appraisalment and Sale .....	1-A52
53. Commission for Appraisalment and Sale .....	1-A53
54. Notice of Motion to Release Part of Property under Arrest .....	1-A54
55. Notice of Motion to Release Vessel under Arrest .....	1-A55
56. Affidavit in Support of Motion to Release Vessel under Arrest.....	1-A56
57. Release.....	1-A57
58. Claim for Possession and Declaration of Ownership by Sole Owner .....	1-A58
59. Claim in co-ownership dispute .....	1-A59
60. Claim in a mortgage action.....	1-A60
61. Claim for damage sustained by a ship otherwise than on collision .....	1-A61
62. Claim for damage sustained by a ship in defective berth .....	1-A62
63. Claim for damage done by ship .....	1-A63
64. Claim for personal injury.....	1-A64
65. Claim for fatal accident.....	1-A65
66. Claim by passenger against carrier for personal injuries under the Athens Convention .....	1-A66

67. Claim for failure to deliver cargo: Bill of Lading.....	1-A67
68. Claim for misdelivery of cargo: Bill of Lading .....	1-A68
69. Claim for loss and damage to cargo: Bill of Lading/Hague-Visby Rules ....	1-A69
70. Statement of Claim for short delivery of goods.....	1-A70
71. Statement of Claim for breach of charterparty .....	1-A71
72. Claim for salvage .....	1-A72
73. Claim for towage .....	1-A73
74. Claim for Pilotage.....	1-A74
75. Claim for goods and materials supplied .....	1-A75
76. Claim for repairs to ship .....	1-A76
77. Claim for the Master's wages and disbursements .....	1-A77
78. Claim for agent's disbursements.....	1-A78
79. Claim by shipowner for general average .....	1-A79
80. Claim under bottomry bond.....	1-A80
81. Defence to claim for damages sustained by a ship in a defective berth .....	1-A81
82. Defence to fatal accident claim.....	1-A82
83. Defence in salvage action denying salvage .....	1-A83
84. Defence in salvage action admitting salvage.....	1-A84
85. Defence in claim for repairs.....	1-A85
86. Defence to claim for agent's disbursements .....	1-A86
87. Notice of Originating Motion .....	1-A87
88. Writ of Summons for Limitation of Liability for Damage arising out of a Collision.....	1-A88
89. Statement of Claim in Limitation Action .....	1-A89
90. Alternative Indorsement on Writ of Summons for limitation of liability for damages arising out of a collision .....	1-A90
91. Summons for Decree of Limitation .....	1-A91
92. Summons for Decree of Limitation of Liability: Short form.....	1-A92
93. Affidavit in Support of Summons for Decree of Limitation.....	1-A93
94. Defence in limitation action.....	1-A94
95. Summons to Set Aside Decree of Limitation of Liability .....	1-A95
96. Notice by defendants that they no longer dispute the Plaintiffs' right .....	1-A96
97. Notice of Motion for appraisalment and sale <i>pendente lite</i> .....	1-A97
98. Notice of Motion for determination of priorities and payment out .....	1-A98
99. Preliminary Acts .....	1-A99
100. Summons for Directions on collision action.....	1-A100
101. Agreement of settlement of liability .....	1-A101
102. Claim on Reference to Registrar.....	1-A102
103. Agreement in settlement of quantum.....	1-A103
104. Preliminary Act: Damage to Cargo on Collision.....	1-A104
105. Claim for Fatal Accident on collision.....	1-A105

## (i) Admiralty Jurisdiction

**1-01** The Admiralty jurisdiction of the Hong Kong Court of First Instance is limited by subject matter. As discussed below, if a claim is commenced *in personam* in the Admiralty list, the subject matter jurisdiction may not be of much significance. However, an *in rem* claim must be commenced in the Admiralty list and a pre-condition of commencing *in rem* proceeding (giving rise to the right to arrest) is that the claim must fall within one of the subject matters over which the Court has Admiralty jurisdiction. For this reason, it is important to examine the subject matters comprising the Admiralty jurisdiction of the Court of First Instance. Admiralty jurisdiction must exist at the time of commencement of the Action, namely when the *in rem* writ is issued (*The Ruby Star* [2015] 1 HKLRD 543).

**1-02** Section 12A of the High Court Ordinance (Cap 4) (HCO) contains an exhaustive list of the heads of subject matters falling within the Court's Admiralty jurisdiction. Most of the subject matters concern claims in connection with a "ship".

**1-03** "Ship" is defined by s 12E(1) as including "any description of vessel used in navigation and (except in subs. 2(c) of this section) includes, subject to any regulations made by the Governor, a hovercraft". "Vessel" has been defined to refer to "a craft larger than rowing boats and includes every description of watercraft used or capable of being used as a means of transportation on water" (*Steedman v Schofield* [1992] 2 Lloyd's Rep 163). In order for a vessel to be used as a means of transportation on water, the waters she uses must be navigable waters and she must be used in navigation. It is a question of fact in each case whether a vessel is being used in navigation on navigable waters as means of transportation on water. The Courts will generally look at the purpose for which the body of water concerned and the vessel is used for. In *Merchants' Marine Insurance v North of English P&I Association* [1926] 26 Lloyd's Rep 201 (CA), a case which concerned a pontoon with a crane mounted on it, which was permanently moored at a naval dock; it could be moved but with great difficulty. The Court of Appeal in finding that it was not a ship, held that "adaptability for navigation and use for that purpose was one of the most essential criteria to determine whether an object was a ship" (for an in depth discussion, refer to *Meesson, Admiralty Jurisdiction and Practice*).

**1-04** Section 12A(2) covers the following subject matters:

- (a) any claim to the possession or ownership of a ship or to the ownership of any share therein;
- (b) any question arising between the co-owners of a ship as to possession, employment or earnings of that ship;
- (c) any claim in respect of a mortgage of or charge on a ship or any share therein;
- (d) any claim for damage received by a ship;
- (e) any claim for damage done by a ship;
- (f) any claim for loss of life or personal injury sustained as a consequence of any defect in a ship or in her apparel or equipment, or as a consequence of the wrongful act, neglect or default of the owners, charterers or persons in possession or control of a ship; or the master or crew of a ship, or any other person for whose wrongful acts, neglects or defaults the owners, charterers or persons in possession or control of a ship are responsible, being an act, neglect or default in the navigation or management of the ship, in the loading, carriage or discharge of goods on, in or from the ship, or in the embarkation, carriage or disembarkation of persons on, in or from the ship;
- (g) any claim for loss of or damage to goods carried in a ship;
- (h) any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship;

- (i) any claim:
  - (i) under the Salvage Convention 1989;
  - (ii) under any contract for or in relation to salvage services; or
  - (iii) in the nature of salvage not falling within items (i) or (ii) above; or any corresponding claim in connection with an aircraft (replaced 35 of 1997, s 9);
- (j) any claim in the nature of towage in respect of a ship or an aircraft;
- (k) any claim in the nature of pilotage in respect of a ship or an aircraft;
- (l) any claim in respect of goods or materials supplied to a ship for her operation or maintenance;
- (m) any claim in respect of the construction, repair or equipment of a ship or in respect of dock charges or dues;
- (n) any claim by a master or member of the crew of a ship for wages (including any sum allotted out of wages or adjudged by a superintendent to be due by way of wages);
- (o) any claim by a master, shipper, charterer or agent in respect of disbursements made on account of a ship;
- (p) any claim arising out of an act which is or is claimed to be a general average act;
- (q) any claim arising out of bottomry;
- (r) any claim for the forfeiture or condemnation of a ship or of goods which are being or have been carried, or have been attempted to be carried, in a ship, or for the restoration of a ship or any such goods after seizure, or for droits of admiralty; or
- (s) any claim arising under s 7 of the Merchant Shipping (Prevention and Control of Pollution) Ordinance (replaced 37 of 1990, s 12(2)).

**1-05** Any claim to the possession or ownership of a ship or to the ownership therein extends to all questions relating to the possession or ownership of the ship, regardless of the nationality of the ship (s 12A(7) HCO). Claims for possession may arise where a ship has been misappropriated or a charterer refuses to redeliver her after a lawful termination by the owners. An order for delivery of possession will usually also include an order for the handing over of the ship's papers unless there is a dispute as to title (*The Frances of Leith* (1820) 2 Dod 420). The Court has jurisdiction to determine all claims as to ownership whether legal or equitable. Claims as to ownership usually involve a party seeking a declaration that he is the legal owner of the ship and is entitled to be registered as such. The Hong Kong Courts have the power to rectify an entry in the Hong Kong register but such a power will not be exercised against a bona fide purchase for good value without notice of an earlier fraud (*The Horlock* (1877) 2 PD 243). Under Hong Kong law, a claim arising from a dispute under a contract for the sale and purchase of a vessel or by sellers under a sale and purchase agreement for unpaid purchase price or deposit is not a claim for the "ownership" or "possession" of a ship and so does not fall under this head of jurisdiction (*The Hong Ming* [2011] 5 HKC 512; s 12A HCO).

**1-06** Any question arising between the co-owners of a ship as to possession, employment or earnings of that ship concerns difference in opinions as to the employment of a ship. This head of jurisdiction was more relevant in the past where co-owners were viewed as tenants in common but this position has now changed as the relationship between partners will usually be regulated by shareholder or partnership agreements. On application by a party, the Court has the power to order restraint of the owners in possession of the vessel until security is given for the full value of the other owners' interest in the vessel (*The Apollo* (1824) 1 Hagg 306), an account of profits or any account outstanding between parties, and to direct that the ship be sold and any other order it deems fit (s 12A(4) HCO).

- 1-07** Any claim in respect of a mortgage or charge on a ship or any share therein is not confined to Hong Kong mortgages. The Court has the power to entertain claims in respect of mortgages or charges created and registered in a foreign jurisdiction, whether registered or not and whether legal or equitable. However, a foreign law opinion will have to be tendered confirming that the effect and validity of the security interest created by the mortgage or charge.
- 1-08** Any claim for damage received by a ship includes claims for damages caused other than by a ship, for example buoys (*The Hoegh Silvercrest* [1962] 1 Lloyd's Rep 9), pier heads (*The Upcerne* [1912] p. 160) and product liability claims against a manufacturer of a product that has caused damage to a ship (*Hindustan Steam Shipping Co Ltd v Siemens Bros & Co Ltd* [1955] 1 Lloyd's Rep 167). However, in the event of a collision, it cannot be brought against the cargo laden on board the colliding ship, even if it belongs to the owner of the colliding ship (*The Victor* (1860) Lush 72).
- 1-09** Any claim for damage done by a ship refers to damage satisfying the following 3 criteria: (1) the damage must be caused by something done by those engaged in the navigation or management of the ship in a physical sense; (2) the ship must be the instrument by which the damage was done; and (3) the damage must be sustained by a person or property external to it (*The Rama* [1996] 2 Lloyd's Rep 281). The damage must have been done by the ship and not just arising out of the damage done (*The Vera Cruz* (No. 2) (1884) 9 PD 96). However, the damage suffered by the claimant need not be physical damage as long as he has a valid cause of action in tort for financial loss (*The Dagmara and Ama Antixine* [1988] 1 Lloyd's Rep 431). The most common example of a claim under this head is damage arising from a collision between two ships. It also extends to cover any claim in respect of liability incurred under Merchant Shipping (Liability and Compensation for Oil Pollution) Ordinance (Cap 414).
- 1-10** Any claim for loss of life or personal injury includes the jurisdiction to hear and determine any claim for loss of life or personal injury (The claim can be brought by a person onboard the ship or in respect of persons onboard another ship or ashore.) as a consequence of (i) any defect in a ship or her apparel or equipment; (ii) any wrongful act, neglect or default of the owners, charterers or persons in possession or control of the ship or of the master ('Master' is defined under s 12E of the HCO and includes every person (except a pilot) having command or charge of a ship and crew. The act, neglect or default must have been one of (i) neglect or default in navigation or management of the ship; (ii) loading, carriage or discharge of good on, in or from a ship, or (iii) the embarkation, carriage or disembarkation of persons on, in or from the ship. Traditionally, the jurisdiction, did not extend to a claim for indemnity in respect of statutory compensation for loss of life (*The Moliere* [1925] 27) but it has been suggested that perhaps it can be claimed as damage done by a ship (*Meeson, Admiralty Jurisdiction and Practice* para 2.71).
- 1-11** Any claim for loss of or damage to goods carried in a ship includes the jurisdiction to hear and determine claims for loss or damage to cargo and passenger baggage; it does not include the master or crew's personal effects (*The Eschersheim*, [1974] 2 Lloyd's Rep 188).
- 1-12** Any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship adopts language that is wide enough to cover claims, whether in contract or tort as long as it arises out of an agreement relating to the carriage of goods in a particular vessel (*The S Ekeferio* [1957] 1 Lloyd's Rep 285). It does not cover claims relating to carriage in unidentified vessels. There is no need for a direct contractual relationship or nexus between the parties as long as there is a reasonably direct connection with the carriage of goods or use or hire of a vessel (*Gatoil International Inc v Artwright-Boston Manufacturers Mutual Insurance Co* [1985] AC 255). The most common claims are claims for breach of charterparty, claims for breach of a bill of lading contract and claims for freight and demurrage. It is also wide enough to cover claims for an indemnity against the ship owner for losses or damage arising from the contract of carriage of cargo, claims

arising under a towage contract (*The Conoco Britannia* [1972] QB 543), claim in negligence brought by sub-charterers against head owners for overloading cargo (*The Antonis P Lemos* [1985] AC 711) or antedating bills of lading (*The St Eleferio* [1957] 1 Lloyd's Rep 285). As the law currently stands, the jurisdiction does not extend to include claims arising under ship management agreements possibly unless the managers were entitled to enter into charterparties for the owners (*The Stella Nova* [1981] Com LR 200), claims by brokers for commission (*The Nuovo Raffaeline* [1871] LR 3 A&E), claim for non-payment of container hire under a container leasing agreement (*Gatoil v Arkwright Boston Manufacturers Mutual Insurance Co* [1985] AC 255) and a claim for enforcement of an arbitration award made under an arbitration clause in a charterparty (*The Bumbesti* [1999] 2 Lloyd's Rep 481).

Any claim for salvage arising under the Salvage Convention 1989 (art 1(a) of the Salvage Convention defines salvage as "any act or activity undertaken to assist a vessel or any other property in danger in navigable waters or in any other waters whatsoever". The salvage operations must have (1) had a useful result in order to give right to a reward (art 12) and no payment is due unless services rendered exceed what can be reasonably considered as due performance of a contract entered into before the danger arose (art 17); (2) be a contract for or in relation to salvage services (under common law, salvage has been defined as "a service which saves or helps to save a recognised subject of salvage when in danger, if the rendering of such service is voluntary in the sense of being solely attributable neither to pre-existing contractual or official duty owed to the owner of the salvaged property nor to the interest of self-preservation" (*The Cythera* [1965] 1 Lloyd's Rep 454 (Supreme Court of New South Wales)); or (3) be in the nature of salvage not falling within (1) or (2) above or any corresponding claim in connection with an aircraft which in summary confers jurisdiction on the Court to hear and determine any claim in relation to salvage. The phrase "under any contract for or in relation to salvage services" includes any claim arising out of such contract whether or not arising during the provision of the services (s 12A(6)(b) of the High Court Ordinance). The Court has jurisdiction to award salvage remuneration for services rendered to a ship, her cargo or apparel or any other property belonging to her (*Wells v Gas Float Whitton No.2 (Owners)* [1897] AC 337) and to award interest on a salvage award (*The Aldora* [1975] QB 748). An owner of an aircraft which renders salvage services is entitled to the same reward if an aircraft is used (Civil Aviation Ordinance, s 9(1)(a)) as is the Government of the Hong Kong Special Administrative Region (Crown Proceedings Ordinance, s 25).

Any claim in the nature of towage and pilotage includes the jurisdiction to hear and determine any claim in the nature of towage of a ship or aircraft or pilotage in respect of a ship or aircraft. Towage can be defined as "the employment of one vessel to expedite the voyage of another, where nothing more is required than the accelerating her progress" (*The Princess Alice* (1849) 3 W Rob 138) and a claim in the nature of towage is not confined to actual towage but extends to escorting services by a tug from outside a port into a port (*The Leoborg* [1962] 2 Lloyd's Rep 146). In relation to aircraft, towage and pilotage means towage and pilotage while the aircraft is water-borne (s 12E(1) HCO).

Any claim in respect of goods or materials supplied to a ship for her operation or maintenance includes the jurisdiction to hear and determine claims made not only by the supplier of goods or materials, but also claims by other persons making advances to enable the purchase of goods or materials (*The Fairport* (No.5) [1967] 2 Lloyd's Rep 162). The claim must be related to a particular vessel. It is also wide enough to include a claim for all "necessaries" including the provision of crew services (or payment of wages in that respect) (*The Nore Challenger and the Nore Commander* [2001] 2 Lloyd's Rep 103). It does not include a claim for hire of containers under a container lease agreement as it was held that the hire of containers had an insufficient connection with the operation of the vessel (*The River Rima* [1987] 2 Lloyd's Rep 106 (CA)) and in any event the underlying contract did not specify a particular ship (*The River Rima* [1988] 2 Lloyd's Rep 193 (HL)).

- 1-16 Any claim in respect of the construction, repair or equipment of a ship, dock charges or dues:** This head of jurisdiction is self explanatory. It has been held that equipment connotes items of a more permanent nature like for instance anchors, cables, hawsers, sail ropes and such things as may be said to be part of a ship's equipment but not consumable stores like fuel oil, coal or food (*The DVora* [2953] 1 WLR 34). A repairer that remains in possession of a ship has a common law possessory lien (*The Smith's Dock Co Ltd v The St Merriel (Owners)* [1963] 1 Lloyd's Rep 63).
- 1-17 Any claim by a master or member of crew for wages** includes the jurisdiction to determine claims in respect of sums allotted out of wages or adjudged by a superintendent to be due by way of wages. In order to qualify as wages, the sums must have been earned in respect of work done on board a ship or in duties connected with it though not necessarily conducted on board the ship (*The British Trade* [1924] p. 104; *The "Tacoma City"* [1991] 1 Lloyd's Rep 330). The following items have been previously held to be recoverable as wages: (i) damages for wrongful dismissal (*The Blessing* (1877) 3 PD 35); (ii) wages earned after wrongful termination of the contract (*The Arosa Star* [1959] 2 Lloyd's Rep 396; *The Great Eastern* (1861) LR 1 A&E 384); (iii) a bonus agreed to be paid on special conditions (*The Elmville (No.2)* [1904] p. 422); (iv) social benefits incorporated into the employment contract (*The Arosa Kulm (No.2)* [1960] 1 Lloyd's Rep 97); (v) repatriation costs, foreign income tax and pension fund contributions (*The Westport (No.4)* [1968] 2 Lloyd's Rep 559). The commencement of proceedings to recover wages does not terminate the employment contract and wages continue to accrue and may be recovered in that claim (*The Fairport (No.2)* [1965] Lloyd's Rep 7).
- 1-18** A claim for master's and crew's wages gives rise to a maritime lien. If a volunteer, such as a mortgagee bank or a person who has arrested the ship, pays wages, he will be entitled to be subrogated to the maritime lien in respect of the wages so paid provided the payment is made with the sanction of Court (*The Berostar* [1970] 2 Lloyd's Rep 403; *The Leoburg (No.2)* [1964] 1 Lloyd's Rep 380). There will be no subrogation of such rights if payment was made without leave of Court.
- 1-19** The Court has jurisdiction to entertain a claim for wages by the master and/or crew that is brought against a foreign ship. However notice of such actions must be given to the consulate in Hong Kong of the state concerned, if there is one in Hong Kong (O 75 r 5(5)). The consulate has no right to veto the action but any statement it makes will be a factor taken into consideration by the Hong Kong Courts as to whether or not to exercise its jurisdiction over the claim.
- 1-20 Any claim by a master, shipper, charterer or agent** in respect of disbursements includes the jurisdiction to hear claims made by the master, shipper, charterer or agent on account of a ship. A master can only claim disbursements properly incurred by him in the course of his employment and in his capacity as master (*The Ripon City* [1897] p. 226) where he had authority to pledge the owners' credit i.e. where the owner is liable for the expense. It does not include disbursements made by him which ought to have been for charterers' account (*The Turgot* (1886) 11 PD 21). A ship's agent may include a fee, charge or commission for his own fees provided the disbursements made or liabilities incurred were for a particular, identified ship (*The West port (No.3)* [1966] 1 Lloyd's Rep 342).
- 1-21 Any claim arising out of a general average act:** There is a general average act where "any extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in time of peril for the purpose of preserving the property imperilled in the common adventure" (Marine Insurance Ordinance (Cap 329), s 66(2)). Where the York-Antwerp Rules have been incorporated into the contract of carriage, the obligations of parties in respect of general average are contractual. Rule A of the York-Antwerp Rules define general average as "define an act of general average as arising when, and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred

for the common safety for the purpose of preserving from peril the property involved in the common adventure". The ship owner has a lien on cargo for general average contribution and may require payment of security in respect of cargo's general average contribution before agreeing to part with the cargo. This lien is enforceable against the consignee of the cargo even though the consignee was not the owner of the cargo at the time of the average incident and hence under no personal liability for general average (*Castle Insurance v Hong Kong Shipping* [1984] AC 226). The ship owner will be entitled to recover all reasonable costs incurred in exercising a lien over cargo for general average contribution provided the lien was reasonably exercised: *The Lehmann Timber* [2013] EWCA Civ 650.

**Bottomry and respondentia** are actions that are brought for the purpose of enforcing bottomry bonds which are essentially contracts for a loan on the security of a ship for the duration of the voyage, with the risk of the loss to the lender of the ship (*The Atlas* (1827) 2 Hagg 48; *Meeson, Admiralty Practice and Jurisdiction*). In other words, it is dependent on (i) the necessity to obtain funds for the purpose of the voyage and (ii) the necessity of obtaining the funds by bottomry because it cannot be obtained any other way, i.e. the distress of the vessel and the want of personal credit on the part of the ship owner. Bottomry bonds are obsolete in practice in this day and age due to the availability of credit and funds through means other than bottomry.

**Any claim for forfeiture, condemnation or restoration of a ship or of goods** includes the jurisdiction of a Court to grant a declaration in respect of the proceeds of sale of a ship forfeited or condemned by the Court and held by the Bailiff (*The Skylark* [1965] 474). The Court may condemn or forfeit dangerous goods sent or carried on board any vessel of Hong Kong flag or foreign without being properly marked or without a written notice having been given of the description of the goods, or under a false description or with a false description of the sender or carrier.

**Droits of Admiralty** include the jurisdiction to determine claims on behalf of the Government to condemn as droits of Admiralty any goods found derelict (For definition of derelict see *R v Property Derelict* (1825) 1 Hagg 383) on the sea, including flotsam (defined as goods which float when a ship is sunk – *Constable's Case* (1600) 5 Co Rep 106a), jetsam (jetsam are goods thrown into the sea to lighten a ship which nevertheless sinks – *Constable's Case supra*) or lagan (Lagan or sometimes known as ligam are goods heavier than water so they will not sink, cast into the sea from a ship which perishes – *Constable's Case supra*), which, if they have not touched the ground are Admiralty droits. Such things must be returned to their true owner, if he appears in time, otherwise they will be condemned as droits. Property found in the possession of and belonging to convicted pirates are droits of Admiralty but not property in their possession but not belonging to them. The Hong Kong Special Administrative Government's right to claim wreck does not extend to unclaimed wreck found outside its territorial waters (*The Lusitania* [1998] QB 384).

**Wreck removal**, which includes derelict, flotsam, jetsam and lagan, is now governed by statutory legislation (the Merchant Shipping Act 1894 (UK) s 510 in its application in Hong Kong).

**Section 12A(3)** extends the Admiralty jurisdiction to any application to the Court of First Instance under the (i) Merchant Shipping Acts 1894–1979 in their application to Hong Kong; (ii) the Merchant Shipping Ordinance (Cap 281); (iii) Merchant Shipping (Safety Ordinance) (Cap 369); (iv) Merchant Shipping (Liability and Compensation for Oil Pollution) Ordinance (Cap 414); (v) Merchant Shipping (Registration) Ordinance (Cap 415); (vi) Merchant Shipping (Limitation of Ship owners Liability) Ordinance (Cap 434); (vii) Merchant Shipping (Local Vessels) Ordinance (Cap 548); and (viii) Bunker Oil Pollution (Liability and Compensation) Ordinance (Cap 605). It also covers claims for damages, loss of life or personal injury arising out of a collision (s 12A(3)(b)) and claims for limitation of liability (s 12A(3)(c)).

**1-27** Section 12A(1)(c) extends the Admiralty jurisdiction to include any other Admiralty jurisdiction which it had immediately prior to the commencement of the Supreme Court (Amendment) Ordinance 1989. These include the jurisdiction over acts done on the high seas, claims for necessities and the power to award interest.

**1-28** *Maritime liens*: A maritime lien operates effectively as a charge on the ship that will follow the ship, notwithstanding a change of ownership. It adheres to the ship from the time the facts happened which gave rise to the maritime lien, and continues until it is discharged either by way of being satisfied, laches (delays) of the owner, or in any other way which, by law, it may be discharged (*The Two Ellens* (1872) LR 4 PC 16) for example, by a court sale, total or permanent destruction or capture of the *res* and condemnation as prize. Under Hong Kong law, claims arising from (i) damage done by ships; (ii) salvage; (iii) bottomry and respondentia; and (iv) seamen's and master's wages are recognised as giving rise to maritime liens. In addition a master has a maritime lien for all disbursements or liabilities properly made or incurred by him on account of a ship (s 94, Merchant Shipping (Seafarers) Ordinance (Cap 478)).

**1-29** *Statutory/In rem liens*: Although the other claims identified in s 12A(2) do not give rise to a maritime lien, they are enforceable by an action *in rem* and arrest of the vessel and are commonly referred to as giving rise to statutory liens. The right to arrest in respect of such claims is lost if there is a change of ownership of the vessel but the right will be protected if court proceedings are commenced prior to the change of ownership.

**1-30** *Admiralty jurisdiction* is invoked by the commencement of either actions *in rem* or actions *in personam*. An action *in rem* proceeds against the property named in the writ. An action *in personam* proceeds against the Defendant named in the writ. The purpose of commencing an action *in rem* is to obtain security for a claim and a defendant is not entitled to an order that the action proceed without security if the vessel against which the *in rem* proceedings has been arrested and released from arrest.

## (ii) Admiralty Proceedings

**1-31** *Admiralty Proceedings* are issued out of the High Court Registry in the usual way (for formalities for issuing writs, see O. 6 r 7, as applied by O. 75 r 3 of the Rules of High Court (Cap 4A)) (RHC) but subject to the provisions of RHC O. 75. For prescribed Special Admiralty Forms, practitioners should refer to Appendix B of the Rules of High Court. Admiralty actions bear the prefix HCAJ and are presided over by an Admiralty Judge. However, there is no "Admiralty List" per se and admiralty actions are not "particular proceedings" for the purposes of RHC O. 72.

## The Writ of Summons

**1-32** Admiralty proceedings may be either *in rem* or *in personam*. For a discussion of the differences between *in rem* and *in personam* claims, please refer to [1-37]. An action *in rem* and an action *in personam* cannot be commenced in the same writ; separate writs must be issued. In an action *in rem*, each of the plaintiff's claims must fall within the Admiralty jurisdiction of the Court (*The Decurion* (No.2) [2013] 2 HKLRD 930).

### (i) Writ in rem

**1-33** *Writ in rem* may be issued against the *res* in the prescribed form (Form 1, Appendix B, Rules of High Court (Cap 4A)) but only when the admiralty jurisdiction of the Court can be properly invoked (s 12B(2), 12B(3), 12B(4) and 12B(5) of the High Court Ordinance (Cap 4). The writ *in rem* may also be issued against the proceeds of sale by the court of

a *res*, cargo or freight and in some cases, an aircraft or hovercraft. It is usual practice for the plaintiff to be named. However, if the action is being brought by owners of a ship or cargo, the plaintiff is usually described as "the owners of the ship or vessel 'X'" or "the persons entitled to sue in respect of a cargo lately laden on board" the offending ship. However, a defendant may apply to Court for the solicitors of the Defendants as named on the writ to name all parties for whom the solicitors were authorised to issue the writ – see *The Whitlemine* (1842) 1 Wm Rob 335, 337.

The writ should be issued against the "owners or other persons interested in" the property proceeded against, and not the defendants in name (RHC Form 1, Appendix B). If the ship is sold after the writ is issued, the usual procedure is for the previous owners to acknowledge service of the writ and for the new owners to intervene in the proceedings as person interested in the property – see RHC O. 75 r 17. The exception to this general rule is if the writ has to be issued against particular, named persons, by virtue of the circumstances of claim for eg claims against co-owners of a ship pursuant to s 12A(2)(b) HCO (for a discussion on co-ownership actions, please refer to [1-06]).

The writ must be indorsed with either a general indorsement of claim or a statement of claim in the usual way. **1-35**

**Sister-ships: In rem** proceedings may be commenced against a ship and all other ships which are in the defendant's registered ownership at the time the writ is issued i.e. her sister ships. In cases where sister ship actions are contemplated, the writ should name the offending ship and all other ships which at that time are in defendant's registered ownership. In practice, the writ is usually directed against the "owners and/or other persons interested in the ship or vessel X and her sister ships particularised in Schedule A of this writ". Once a ship named in the writ has been served with the writ or arrested, the writ must be amended immediately by striking out the names of the remaining ships. This follows the principle that only one ship can be served with a writ or arrested for one cause of action (*The Banco* [1971] 1 Lloyd's Rep 49; s 12(B)(8)). In practice, it is not unusual for claimants to issue separate writs against each sister ship to preserve their cause of action against each ship. This is allowed under s 12(B)(8) which provides that it does not "prevent the issue of, in respect of any one such claim, of a writ naming more than one ship, or if 2 or more writs each naming a different ship". For service of *in rem* writs generally, please see RHC O 75 r 8. **1-36**

### (ii) Writ in personam

*Writ in personam* may be issued against a defendant personally. It differs from other High Court actions founded in tort or contract in that it is specifically subject to the provisions of RHC O 75. Unlike an action commenced *in rem*, an action commenced *in personam* does not entitle a claimant to security as of right as its claim is against the defendant personally and not the property forming the subject matter of the claim. **1-37**

## Pleadings Relating to the Arrest of a Ship or Property

The main purpose of the action *in rem* is to obtain security for litigation or arbitration (*The Jalamsyia* [1987] 2 Lloyd's Rep 164). The fact that the dispute is subject to on-going arbitration or that the dispute is governed by an arbitration clause must be disclosed in the affidavit supporting the warrant of arrest – see *The Rena K* [1979] QB 377. This is done by way of arresting the property named in the writ *in rem* if it is within the territorial jurisdiction of the Court and thereafter negotiating security for its release or selling the property by way of a Court sale to obtain proceeds of sale. **1-38**

**1-39** The arrest process is initiated by filing the following documents with the Registry (RHC O 75 r 5). In addition to these documents, if the claim is for possession of a foreign ship belonging to a port of a state with a consulate in Hong Kong, a notice that action has begun must be given to the consul; if the claim is for bottomry and the bottomry bond is in a foreign language, a notarial translation must be submitted to the Registry):

- A Praeceptum for a Warrant of Arrest
- A Warrant of Arrest
- An Affidavit to lead the Warrant of Arrest.
- An undertaking to pay the Bailiff its reasonable costs and expenses incurred in the arrest.

**1-40** *Affidavit to lead the Warrant of Arrest:* This is the crucial document in an arrest application. There is no prescribed form for the affidavit. The affidavit has to be made by the plaintiff or its agents and must give full particulars of the nature of the claim (or counter-claim), that it is a claim falling within the admiralty jurisdiction of the Court, that the claim has not been satisfied and the name and nature of the property to be arrested. The relevant provision of HCO s 12B should be identified. If the property is a ship, the port of registration of the ship has to be specifically identified. It is not uncommon for there to be several ships with the same name. The purpose of identifying the port of registry is to minimise the risk of the wrong ship being arrested.

**1-41** For claims falling under HCO ss 12B(2)(d)–12B(2)(q) the affidavit must state the following:

- i. the name of the person who would be liable on the claim in an action *in personam* (the relevant person);
- ii. that the relevant person was, when the cause of action arose, the owner, or charterer of, or in possession or in control of, the ship in connection with which the claim arose; and
- iii. that at the time of issue of the writ the relevant person was either the beneficial owner of all the shares in the ship in respect of which the warrant is required, or, where appropriate, the charterer of it under a charter by demise is required to give full and frank disclosure of all material facts giving rise to the dispute.

**1-42** Where the arrest is of a sister-ship, the affidavit must state that the registered owners of the sister-ship at the time the action is brought were the owners or charterers or in possession or control of the ship in respect of which the claim arises at the time when the action arose *The Decurion* (unrep., HCAJ 141/2010 [2012] HKEC 612) where the Court held that “control” for the purposes of s 12B(4) must mean something more than the control which would normally come with the possession of a ship). The most obvious example is the ability to dictate what is to be done in relation to the vessel. The mere fact that a party is described as “operator” or may be the parent of the charterers is not conclusive evidence that party has control over a ship. Information about ownership is usually obtained from online service providers such as Lloyd’s List, Equasis and Seaweb. It is also good practice to exhibit a copy of the ship’s current Transcript of Register (if available).

**1-43** *Beneficial ownership* Following the Court of Appeal decision in *The Almojil* 61 [2015] 3 HKLRD 598, registered ownership itself may not be conclusive of the beneficial ownership of a vessel. A Court is entitled to look behind the registered ownership to determine whether the registered owner held shares (or part of the shares) in the ship on trust for a third party. If a true trust existed, then the requirements of S 12B(4)(i) and (ii) may not be satisfied.

**1-44** *Arrest to obtain security for foreign proceedings and arbitration* is allowed but the existence of the foreign proceedings or an arbitration agreement must be disclosed in the affidavit leading the warrant of arrest (*The Britannia* [1998] HKC 221, applying the *Rena K*

[1979] QB 377). The Court has jurisdiction to maintain an arrest provided that the purpose of the arrest is to obtain security for the *in rem* proceedings and not the arbitration. Once security is furnished, the *in rem* proceedings will be stayed in favour of the arbitration.

The right of arrest is lost after a judgment *in rem* is obtained (*The All etta* [1974] 1 Lloyd’s Rep 40). There is also no right to arrest to enforce an arbitration award; (*Astrofiel Armadora SA v The Owners of the Ship Chong Bong* (unrep., HCAJ 384/1995, [1995] HKEC 505); however, *in rem* proceedings may be commenced if the underlying claim is pleaded as being in respect of one of the subject matter jurisdictions and not pleaded as a claim to enforce an arbitration award (*Handytankers KS v Owners and/or Demise Charterers of Alas subsequently renamed as Kombos* [2015] 6 HKC 557).

*Material non-disclosure* or false or inaccurate statements contained in the affidavit can lead to the warrant of arrest subsequently being set aside, the ship being released from arrest and security returned. Generally, a plaintiff is not required to depose to the merits of its claim (*The Harima* [1987] HKLR 770) but it must give full and frank disclosure of all facts relevant to whether he has a cause of action falling within the Admiralty jurisdiction of the Court or he risks the claim being struck out and the warrant of arrest being set aside; see *Hong Ming* [2011] 5 HKC 512.

*Wrongful arrest:* A court will order an inquiry into damages for wrongful arrest if the arrest was conducted maliciously or with gross negligence (*The Hong Ming* supra; *The Maule* [1995] 1 HKLR 255). The onus is on the defendant to establish malice or gross negligence. Damages may also be awarded in a case where the arrest has been unduly delayed.

## Caveats

*Caveat against arrest:* A person who desires to prevent the arrest of any property can file a caveat against arrest. This is done by filing a notice, called a praecipe for a caveat (See RHC O 75 r 6(1)). The praecipe must be in Form No. 5 of Appendix B, signed by the person or his solicitors undertaking to (i) acknowledge issue or service of the writ in any action commenced against the property (RHC O 75 r 6(1)(a)), and (ii) within three days of receiving notice that such action has been begun, to give bail in the action in a sum not exceeding an amount specified in the praecipe or to pay the amount into court (RHC O 75 r 6(1)(b)). On filing the praecipe, a party may cause a caveat against the issue of a warrant to arrest the property described in the praecipe to be entered into the caveat book maintained by the Registry.

The fact that there is a caveat against arrest in force does not prevent the issue of a warrant of arrest of the property to which the caveat relates (RHC O 75 r 6(2)). The purpose of the caveat procedure is to avoid the necessity of going through the usual procedure of arrest and causing security to be furnished (*The Jian She* 33 [2001] 2 HKC 493; and *Halsbury Laws of Hong Kong* [250.092]).

However, where any property with respect to which a caveat is entered, the party who issued the caveat may apply by motion to Court for an order that the warrant be set aside, and unless the Court is satisfied that the party who applied for the warrant had *good and sufficient reason* for doing so, the Court may order the discharge of the warrant of arrest and payment of damages for loss suffered as a result of the arrest (RHC O 75 r 7).

It is mandatory for a party applying for a warrant of arrest to conduct a search of the caveat book prior to applying for the warrant to ascertain whether a caveat against arrest is in force against the property; (RHC O 75 r 5(3)). The applicant will be entitled to a reasonable opportunity of assessing whether the undertaking contained in the caveat is satisfactory and whether it ought to be accepted. If the undertaking is not satisfactory, the applicant needs to accept it and he will not be penalised in costs and damages for procuring

the warrant of arrest (*The Crimdon* [1900] p. 171). For liability for damages for wrongful arrest, see *The Strathnaver* (1875) 1 App Cas 58 and *The Maule* [1995] 1 HKLR 255.

**1-52** Where the undertaking contained in the praecipe is given by a solicitor without qualification, the solicitor becomes personally liable to perform the undertaking, and shall be liable to committal for failure to comply with the terms of the undertaking (see RHC O 75 r 9).

**1-53** *Bail* must be given by way of bond in Form No. 11 in Appendix B (RHC O 75 r 16). The sureties to the bond must enter into the bond before a commissioner for oaths or a solicitor so authorised under s 7A of the Legal Practitioners Ordinance (Cap 159). The bail bond represents the *res* in the action and the Court has no authority to interfere in its wording without the consent of the plaintiff and the sureties (*The Tat Yau* 8 [1998] 4 HKC 108).

**1-54** A surety must make an affidavit stating that he is able to pay the sum for which the bond is given (RHC O 75 r 16(2)). No affidavit is required if the surety is a corporation unless required by the opposite party (RHC O 75 r 16(3)).

**1-55** *Caveat against release* A person claiming to have a right of action against any property that is under arrest or the proceeds of sale thereof and who wants to be served with notice of any application to Court in respect of that property or proceeds of sale, may on filing a praecipe, enter a caveat against release of that property or payment out of the proceeds of sale (RHC O 75 r 14). The purpose of a caveat is to prevent the release of the property under arrest or payment out of the proceeds of sale (RHC O 75 r 13(3)). A plaintiff who has issued an *in rem* writ against the property in another action should consider entering a caveat in the action in which the property has been arrested in order to receive notice of applications made in the latter action.

### Preliminary Acts

**1-56** *Preliminary Acts* are filed in actions arising from claims for damage, loss of life or personal injury arising from a collision between ships. The general rule is that the plaintiff must within two months after service of the writ on the defendant, and the defendant must within two months after acknowledging issue or service of the writ, and before any pleading is served, file a preliminary act in the Registry (RHC O 75 r 18(1); the obligation to file a preliminary act extends not only to owners of the colliding vessels but to all parties involved in the collision action). The Court has the discretion to dispense with the filing of preliminary acts in appropriate circumstances. This discretion is usually exercised only in exceptional circumstances (*The Graingers No. 4* [1964] 2 Lloyd's Rep 415).

**1-57** A statement of fact contained in a preliminary act is a formal admission and the Court will hold the parties to statements contained in the preliminary acts.

**1-58** *Contents* of the preliminary act must contain the following particulars (RHC O 75 r 18(1)). The Court has the power to order the amendment of a defective preliminary act:

- (1) the names of the ships which came into collision and their ports of registry;
- (2) the date and time of the collision;
- (3) the place of the collision;
- (4) the direction and force of the wind;
- (5) the state of the weather;
- (6) the state, direction and force of the tidal or other current;
- (7) the course steered and speed through the water of the ship when the other ship was first seen or immediately before any measures were taken with reference to her presence, whichever was earlier;
- (8) the lights, if any, carried by the ship;

- (9) the distance and bearing of the other ship if and when her echo was first observed by radar, and the distance, bearing and approximate heading of the other ship when first seen;
- (10) what light or combination of lights, if any, of the other ship was first seen;
- (11) what other lights or combination of lights, if any, of the other ship were subsequently seen before the collision, and when;
- (12) what alterations, if any, were made to the course and speed of the ship after the earlier of the two times referred to in Art 7 up to the time of the collision, and when, and what measures, if any, other than alterations of course or speed, were taken to avoid the collision, and when;
- (13) the heading of the ship, the parts of each ship which first came into contact and approximate angle between the two ships at the moment of contact;
- (14) what sound signals, if any, were given, and when;
- (15) what sound signals, if any, were heard from the other ship, and when.

### Limitation Proceedings

The concept of limitation of liability is simply that a ship owner and other designated parties are entitled to limit their liability arising out of a maritime incident to a particular sum, irrespective of the total number of claims and their amounts. The act of invoking limitation of liability does not constitute an admission of liability as such. If a limitation decree is granted, the ship owner (and others) will set up a fund and all claimants can only look to the fund for satisfaction of their claims, but not otherwise. It is legally possible, but in practice highly difficult, for a claimant to "break the limit". In order for a person liable to lose the right to limit liability, it must be proved that the loss resulted from his personal act or omission, committed with intent to cause such loss, or recklessly and with knowledge that such loss would probably result. In the ordinary course of things, what happens is that the claimants will accept a *pro rata* share of the limitation fund in satisfaction of their claims, *period*. In Hong Kong, the law on limitation can be found in the Convention on Limitation of Liability for Maritime Claims, 1976 ("**London Convention**"), set out in Schedule 2 of the Merchant Shipping (Limitation of Shipowners Liability) Ordinance, (Cap 434). A Protocol to the 1976 Convention was adopted on 3 May 1996 ("**1996 Protocol**") and entered into force on 13 May 2004 after its ratification by the requisite number of States. The 1996 Protocol increased the limits of liability under the London Convention. The Merchant Shipping (Liability and Compensation for Oil Pollution) Ordinance (Cap 414) gives the International Convention on Civil Liability for Oil Pollution Damage 1969, force of law in Hong Kong. Part II of the London Convention extends the definition of "ship" to cover hovercrafts and any structure whether completed or in the course of completion launched and intended for use in navigation as a ship or part of a ship) or other property (See O 75 r 1(2)). Article 1 of the London Convention defines "ship owner" to include owners, charterers, managers and operators of a ship other persons include salvors and liability insurers of all the foregoing groups of persons.

Liability may be limited in respect of loss of life, personal injury, loss of or damage to property occurring on board in connection with the operation of the ship or salvage operation, and consequential losses arising therefrom (Art 2(1)(a) London Convention). Other types of claims may also be limited. Articles 2(1)(b)–2(1)(f) London Convention. Claims under arts 2(1)(d), 2(1)(e) and 2(1)(f) are not subject to limitation to the extent that they relate to remuneration under a contract with the person liable (Article 2(2) London Convention). These claims are subject to limitation even if brought by way of indemnity (art 2(2) London Convention; *Sun Wai Wah Transportation v Cheung Kee Marine Services Co Ltd* [2010] 1 HKLRD 833).

- 1-62** However, under the London Convention, a person will be barred from claiming limitation if it is proved that the loss resulted from his personal act or omissions, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result (*Floata Consolidation Ltd v. Man Lee Hing Vehicles Ltd* [2016] 2 HKLRD 1091). The burden of establishing that a person is not entitled to limit liability rests on the party seeking to bar limitation.
- 1-63** Limitation depends on the type of claim and the size (tonnage) of the ship involved in the claim. There are five bands of claims in respect of loss of life and person injury and four for any other claims (Art 6(1) London Convention).
- 1-64** The procedure for the commencement of limitation proceedings is contained in O 75 r 37–40 of the Rules of High Court.
- 1-65** The person seeking relief shall be named as the plaintiff in the action (*see* O 75 r 37(1)) and at least one person with claims against him arising out of the casualty must be named (“Name” includes a firm name or the name under which a person carried on his business, and where any person with a claim against the plaintiff in respect of the casualty as the owner of (or as bearing some other relation to a ship), he may be so described – *see* O 75 r 37(5)) as a defendant in the action (O 75 r 37(2)). Additional defendants may be described generally. Limitation may also be pleaded as a defence in an appropriate action (O 18 r 22).
- 1-66** Proceedings are commenced by the issuance of a writ (RHC Appendix B Form No. 2 and RHC Form No. 2A for service out of jurisdiction) in the Court of First Instance admiralty jurisdiction. Within 7 days after the acknowledgement of service of the writ by one of the defendants named therein, or if none of them acknowledges service, within 7 days after the time limited for acknowledging service, the plaintiff, without serving a statement of claim must take out a summons for a decree limiting his liability, or, in default of such a decree, for directions for the further proceedings in the action (O 75 r 38). The summons must be supported by affidavit(s) proving
- (a) the plaintiff’s case in the action; and
  - (b) if none of the defendants named in the writ by their names has acknowledged service, service of the writ on at least one of the defendants so named.
- 1-67** The affidavit must state the full names of all persons who, to the knowledge of the plaintiffs, have claims against him in respect of the casualty (O 75 r 38(2)). On the hearing of the Summons to the Registrar, if it appears that the plaintiff’s right to limit is not disputed, the Registrar may make a decree limiting liability. If it appears to him that any defendant has insufficient information to enable him to decide whether or not to dispute the plaintiff’s right to limit, the hearing may be adjourned to enable the defendant to obtain such information. If the Registrar does not make a decree of limitation, he must give such directions as to further proceedings in the action as appear to him to be appropriate – O 75 r 38(5)–38(7).
- 1-68** If a limitation decree is not made, the parties may be ordered to file pleadings in the action. The plaintiff will generally ask for a declaration of the tonnage of the ship for limitation purposes and offer to pay into court the alleged limitation amount together with interest from the date of occurrence of the incident and to give security for such further sums as the Court may direct (if there are claims for personal injury or loss of life), but not exceeding the limitation amount plus interest. The defence generally puts the plaintiff to prove his right to limit.
- 1-69** The proceedings, after the decree has been made is governed by O 75 r 39 of the Rules of High Court. Any person with a claim against the plaintiff in respect of the casualty to which the action relates, who was not named in the writ as a defendant, or, if named, was neither served with the writ nor has acknowledged issue of it, may within the time fixed by the decree, apply to set aside the decree (O 75 r 40). The decree will be set aside if it is

proved that he has a bona fide claim and there are sufficient *prima facie* grounds for contention that the plaintiff is not entitled to the relief given to him by the decree.

Unless proceedings are commenced in due time to set aside the decree, the fund will be distributed rateably among parties that have filed claims. The procedure for payment out is governed by O 75 r 41. **1-70**

### Appraisal and Sale of a Ship under Arrest

A court may order the appraisal and sale of an arrested vessel on the application of a party to the action. Usually, the application will be made by the arresting party, and in certain circumstances the bailiff, where the arrested ship becomes a wasting asset such that the continuing costs of maintaining the arrest will be to the disadvantage of all those interested in the ship. **1-71**

The application for an order for appraisal and sale before judgment should be made by motion in the action in which the ship is under arrest and should be supported by an affidavit (RHC O 75, r 12/3). The affidavit should set out the grounds of the application including all relevant facts, the amount of the claims against the fund, the costs of arrest incurred and likely to be incurred until judgment and whether the fund is likely to be sufficient to satisfy all the claims. The application together with the supporting affidavit must be served on all parties to the claim and all persons who have entered caveats against release. If judgment is sought in default of the defendant filing an acknowledgment of service, it will not be necessary to serve the application and supporting affidavit on the defendant (*HSBC Bank Plc v. The Owners or Demise Charterers of the Ship or Vessel “The Appellis”* (unrep., HCAJ 63/2016, [2017] HKEC 2151). **1-72**

Once the Court orders the sale, the party applying for the sale has to file a praecipe in RHC Form No. 12 of Appendix B and execute an undertaking in writing to the bailiff to pay the fees and expenses of the bailiff on demand before a commission for the appraisal and sale of the vessel will be issued (RHC O 75, r 23). The appraisal will be carried out by an independent surveyor appointed by the bailiff. **1-73**

The sale will usually be conducted by way of public tender by the bailiff. The bailiff will make known the sale to the maritime world by advertising it in prominent publications such as Lloyd’s List and the South China Morning Post for two consecutive days. All tenders are confidential and have to be accompanied by a cheque for payment of 10 per cent of the tender amount. The Court will not depart from the usual course of appraisal and sale by public tender to allow a private sale unless there are powerful special features to justify doing so, for example if the tender fails to meet the appraised value of the vessel (*Den Norske Bank AS v Asset Century Ltd* [1991] 1 HKLR 320). The vessel shall not be sold at a price less than the appraised value of the vessel without order of court. **1-74**

The sale of a ship by judicial sale extinguishes all prior maritime liens and other charges or encumbrances, giving the purchaser clean title. After the sale, all claims or demands against the ship can only be enforced against the proceeds of sale (*The Acrux* [1962] 1 Lloyd’s Rep 405). **1-75**

### Determination of Priorities

Pursuant to RHC O 75 r 22, where the Court has ordered the ship to be sold, any party who has obtained or obtains judgment against the ship or proceeds of sale of the ship may apply to court for the determination of priority of claims. Therefore, the Court retains an **1-76**

equitable jurisdiction to determine how the fund in court is to be divided among the claimants and the priority of the competing claims.

1-77 However, the general order of priorities is as follows:

- (1) claims stemming from the statutory rights of detention of public authorities;
- (2) bailiffs' costs and expenses;
- (3) arresting party's costs in creation of the fund;
- (4) claim of a holder of a common law possessory lien (subject to existing maritime liens);
- (5) claims of holders of maritime liens;
- (6) claims of mortgagees; and
- (7) claims of holders of statutory rights of action *in rem*.

### Payment Out

1-78 **Payment out** may generally only be made by a judge in person (RHC O. 75 r 24(2)). However, payment may also be ordered with the consent of all interested parties in the following circumstances (i) where a claim has been referred to the Registrar for decision and all parties to the reference have agreed to accept the Registrar's decision and to the payment out of any money in court in accordance with the decision; (ii) the parties are agreed as to the persons entitled and amounts to be paid to each of them from the proceeds of sale paid into court; and (iii) where there is no dispute between the parties.

1-79 **An agreement between solicitors** in writing and signed by those solicitors may become an order of court if the Registrar thinks it is reasonable and such as a judge would allow, be filed in the Registry (RHC O. 75 r 35). This is commonly used to obtain payment out. If it is accepted for filing, the agreement will become an order of court and has the same effect as if made by a judge.

## ADMIRALTY PLEADINGS: THE WRIT

### 1. Writ of Summons in Admiralty Action *in Rem*\*

HCAJ/

#### IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE ADMIRALTY ACTION NO.

Admiralty action *in rem* against: the ship or vessel MV "YY" (Hong Kong flag) 1-A01  
**BETWEEN**

THE OWNERS OF THE SHIP OR VESSEL MV "XX" OR P	Plaintiffs
and	
THE OWNERS OF THE SHIP OR VESSEL MV "YY"	Defendants

TO THE DEFENDANTS and other persons interested in the ship or vessel MV "YY" registered at the port of [insert].

THIS WRIT OF SUMMONS has been issued by the Plaintiffs against the property described above in respect of the claim set out on the back. Within 14 days after the service of this Writ on you, counting the day of service, you must either satisfy the claim or return to the Registry of the High Court the accompanying ACKNOWLEDGEMENT OF SERVICE stating therein whether you intend to contest these proceedings or to make an admission.

If you fail to satisfy the claim or to return an Acknowledgement within the time stated, the Plaintiffs may proceed with the action and judgment may be given without further notice to you and if the property described in this Writ is under the arrest of the Court it may be sold by order of the Court.

Issued from the Registry of the High Court this [ ] day of [ ] 20[ ].  
Registrar

\* (RHC O 75 r 3(1)); Form No. 1 of Appendix B to the RHC.) NB: Directions for Acknowledgement of Service are given with the accompanying form.

Note:- This Writ may not be served later than 12 calendar months beginning with that date unless renewed by order of the Court.

14. The Defendant admits that [the sum of \$[ ] of] the purchase price remains unpaid but will say that it is entitled to set off against that sum so much of the sum awarded by way of counterclaim herein as shall be sufficient to extinguish it.

### Counterclaim

15. By way of counterclaim, the Defendant repeats paras.4 to 14 herein above.  
16. The Defendant is entitled to and does claim interest on such sums found due at such rate and for such period as the Court deems fit under s.49 of the District Court Ordinance (Cap.336)/s.48 of the High Court Ordinance (Cap.4).

And the Defendant counterclaims against the Plaintiff for:

- (1) Damages;
- (2) Interest;
- (3) Costs.

Dated the \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_

[Signed]

[Statement of truth]

## SECTION 13: TITLE TO GOODS – TORTS AGAINST GOODS

	Para.
Wrongful interference with goods .....	13-01
A. Conversion .....	13-04
The nature of conversion .....	13-04
Conversion by taking or receiving property .....	13-08
Conversion by transfer .....	13-11
Conversion by detention .....	13-13
Conversion by a bailee .....	13-16
Conversion by an involuntary bailee .....	13-17
Conversion by sale and other disposition .....	13-18
Conversion by wrongful dispossession .....	13-20
Subject-matter of conversion .....	13-22
The right to sue .....	13-26
Relief .....	13-34
Damages .....	13-35
B. Trespass to goods .....	13-38
The right to sue .....	13-41
Relief and Damages .....	13-42
C. Detinue .....	13-43
The right to sue .....	13-45
Relief and Damages .....	13-46
Precedent .....	
Conversion by taking .....	13-E1
Conversion by transfer (sale) .....	13-E2
Conversion by transfer (delivery) .....	13-E3
Conversion by detention .....	13-E4
Claim for conversion by destruction of the goods .....	13-E5
Claim based on trespass to goods (damage) .....	13-E6
Conversion by transfer .....	13-E7
Conversion: detention by bailee by wrongful exercise of a lien .....	13-E8
Claim for conversion by detention and when the defendant is treated as an insurer .....	13-E9
Claim for conversion by destruction of the goods .....	13-E10
Claim for conversion by destruction of the goods .....	13-E11
Claim based on trespass to goods (taking) .....	13-E12
Claim based on trespass to goods (damage/destruction) .....	13-E13
Defence Denying the Plaintiff's Right to Sue Denial of the Plaintiff's Title .....	13-E14
Denial of the acts complained of .....	13-E15
Defence of return of the goods .....	13-E16
Defence of <i>jus tertii</i> .....	13-E17
Competing rights and interpleader .....	13-E18
Defence that the Plaintiff's title is extinguished .....	13-E19
Defence of purchase from a seller with voidable title .....	13-E20
Defence of purchase from a seller in possession .....	13-E21
Defence of purchase from buyer in possession .....	13-E22

Defence of purchase from mercantile agent .....	13-E23
Defence relating to hire purchase .....	13-E24
Defence raising the limitation ordinance (Cap.347) .....	13-E25
Defences asserting a right against the owner .....	13-E26
Defence of stoppage in transit .....	13-E27
Defence of trespass by the Plaintiff .....	13-E28
Defence of mitigation by improvement .....	13-E29

### Wrongful interference with goods

The tort of wrongful interference with goods protects a person's title or possession of goods as against intentional interference resulting in damage. Hong Kong law in this area is largely moulded on English common law and principles of equity as it existed prior to the enactment of the UK Torts (Interference with Goods) Act 1977. There is no Hong Kong legislation, yet, equivalent to the UK Act. **13-01**

There are three main causes of action for the tort of wrongful interference with goods under Hong Kong law: **13-02**

- (1) conversion;
- (2) trespass to goods; and
- (3) detinue.

In addition, a person may sue in negligence so far as it resulted in damage to goods or to an interest in goods, but this tort overlaps to a considerable extent with trespass to goods, and so will not be discussed separately in this section. **13-03**

#### A. Conversion

##### The nature of conversion

An action in conversion lies in an unlawful use or appropriation of another person's chattel by the defendant for his own or another person's use. In contrast to trespass, this tort not only includes wrongful interference with another person's goods and possessory interest but also of having caused damage or injury to his rights or title in them. **13-04**

In common law, conversion may take a variety of forms. As such, there is no precise definition, although attempts to define conversion have been made in various cases. In *Hollins v Fowler* (1875) LR 7 HL 757 (referred to in *Baker v Barclays Bank* [1955] WLR 822), any act which is an interference with the dominion of the true owner of goods is a conversion of those goods. In a sense, conversion is a tort of absolute liability. Although it is normally necessary to show some conscious act on the part of the defendant, it is not necessary to show that the defendant knew of the claimant's interest in the goods or of any other interest in the goods. Neither negligence nor intention to harm is an ingredient of the tort: fault is similarly irrelevant (*OBG Ltd v Allan* [2007] UKHL 21 [308], referred to in *De Krassel v Chu Vincent* [2010] 2 HKLRD 937). **13-05**

A person therefore is guilty of conversion if he deals with goods in a manner inconsistent with the rights of the true owner intending to negative the rights of the true owner or to assert a right inconsistent with that right (*Lancashire & Yorkshire Railway v MacNicol* (1919) 88 LJKB 601). **13-06**

Conversion may exist in various forms. It is often helpful to consider conversion in terms of the categories of the act that usually constitute the tort. **13-07**

#### Conversion by taking or receiving property

Any unauthorized taking of or receiving the goods of another with the intention of exercising dominion (however temporary) over them is a conversion (*Kuwait Airways v Iraq Airways Co* [2002] 2 AC 883). If the taking of the goods is without that intention, there is a trespass to goods but no conversion (*Fouldes v Willoughby* (1841) 8 M & W 540). The defendant need not intend to acquire title or assert a full title. An unauthorised borrowing of chattel can amount to conversion (eg joy-riding in a car: *Aitkin Agencies Ltd v Richardson* **13-08**

[1967] NZLR 65). A taking can be constructive such as where the holder of documents of the title to goods (eg a bill of lading) takes some active steps to exercise dominion over them, for instance, by endorsing the document to another.

**13-09** If a person merely takes possession of the premises in which there are goods belonging to another, there will be no conversion unless he intends to take possession of the goods as well (*Thorogood v Robinson* (1845) 6 QB 769). However, subsequent use of, disposal of, or dealing with the goods will amount to a conversion (*Whanson (Hawow) Ltd v Rapid Civil Eng Ltd* (1987) 38 BLR 106).

**13-10** There is also certain statutory protection afforded to persons who voluntarily received or purchased goods from those without good title:

- (1) Sales of Goods Ordinance (Cap.26): the goods were bought in market overt, in good faith and without notice of defect or want of title on the part of the seller.
- (2) Factors Ordinance (Cap.48): the goods were purchased from a mercantile agent with authority in ordinary course of business to dispose of the goods.
- (3) Bills of Exchange Ordinance (Cap.19): the cheque/bill was received in due course and good faith by the holder.

### Conversion by transfer

**13-11** A person who is in wrongful possession of goods and unlawfully parts with that possession is guilty of conversion. Sale and delivery of another person's goods is a typical conversion of those goods whether the sale confers no title on the purchaser (*Martindale v Smith* (1841) 1 QB 389) or whether the sale comes within one of the exceptions to the rule *nemo dat quod non habet* and does pass title. Sale without delivery, however, will only amount to conversion if the sale is effective to pass title to the goods: otherwise there is no change either of title or of possession to find a claim in conversion. The defendant must take some active steps that bring about the delivery of goods (or the documents of title) away from the true owner (*RH Willis and Son v British Car Auctions Ltd* [1978] 1 WLR 438).

**13-12** The transfer need not be by way of a contract intended to pass title. A carrier or warehouseman who delivers goods to an unauthorized person can be guilty of conversion. Transferring goods in circumstances where the transferee can acquire a lien over them can amount to conversion (*Syeds v Hay* (1791) 4 Term Rep 260). It is sufficient to be a party in an unauthorized transfer of possession (*Hliort v Bolt* (1874) LR 9 Exch 86).

### Conversion by detention

**13-13** A demand by the person with possessory title followed by an unjustified refusal to deliver up is treated as a conversion. A demand is necessary before the detention will be actionable (*Clayton v Le Roy* [1911] 2 KB 1031) and the defendant must be in possession at the time of the demand. If he is not, then there is no conversion by detention (although there may have been an earlier conversion by transfer: *Featherstonehaugh v Johnson* (1818) 8 Taut 237).

**13-14** The demand must be unconditional (*Rushworth v Taylor* (1841) 3 QB 699) and the refusal must also be unconditional. A detainer may be entitled to a reasonable time in which to make enquiries but, once that has elapsed, whether or not the detainer is satisfied as to the claimant's rights, he must hand over the goods (*Alexander v Southey* (1821) 5 B & Ald 247). Where the goods have been taken away from the detainer under a legal process or taken from him involuntarily, there is no conversion (*Chan Hoi (No.2) v The Commissioner of Police* [1968] HKLR 126).

Delay in complying with the demand will normally render the detainer an insurer of the goods for subsequent damage so that if the goods are stolen during the period after the demand, the detainer as bailee is liable (*Mitchell v Ealing LBC* [1979] QB 1).

### Conversion by a bailee

A bailee, who is obliged to deliver the goods that are the subject-matter of bailment to the order of his bailor, may be guilty of conversion if he misdelivers the goods to a third party who has no right to receive the goods (*Trafigura Beheer BV Amsterdam v China Navigation Co Ltd & Harvest Fortune Shipping Ltd (Third Party)* [2001] 1 HKLRD 17). A bailee may also be liable in conversion where he delivers the goods to a person who is a fraudster and has presented a forged bill of lading or to anyone other than the named party in the documents of title (eg *Devereux v Barclay* (1891) 2 B & A 702).

### Conversion by an involuntary bailee

An involuntary bailee may be liable in conversion where he deprives the owner of his goods by an unauthorized and negligent act. An involuntary bailee is a person to whom goods have been delivered without his consent. Involuntary reception of unsolicited goods by a person is not conversion. It is only when the involuntary bailee willingly damages or deprives the owner of his goods by unauthorized acts that he will be liable for conversion (*Hurt v Bott* (1874) LR 9 Ex 86).

### Conversion by sale and other disposition

Generally speaking, a mere agreement to sell goods, if unaccompanied by delivery, is not conversion (*Lancashire Waggon Co v Fitzhugh* (1861) 6H&N 502). However, a wrongful sale of goods of another person accompanied by delivery of the goods, or documents of title, may amount to conversion (*Hollins v Fowler*). The exception in Hong Kong is the statutory protection in the case of a sale in market overt found in the Sale of Goods Ordinance (Cap.26). A sale made other than in accordance with a representation, whether true or not, by which the seller induced the owner of the goods to part with its possession, amounts to conversion (*Webster v General Accident Fire and Life Assurance Corp Ltd* [1953] 1 QB 520).

Any other wrongful disposition of goods having the effect of depriving the owner of the use of them permanently or for a substantial time, is conversion (*Parker v Godin* (1728) 2 Stra 813; *Powell v Hoyland* (1851) 6 Exch 67; *Singer Manufacturing Co v Clark* (1879) 5 Ex D37; *Winter v Bancks* (1901) 17 TLR 446).

### Conversion by wrongful dispossession

A wrongful dispossession of the owner's goods by removal or misdelivery amounts to conversion if there is an intent to convert them to the use of the taker or some third party, or otherwise to deal with them in a manner inconsistent with the rights of the owner (*Fouldes v Willoughby*; *Lancashire and Yorkshire Rly Co, London and North Western Rly Co and Greaser Ltd v Mac Nicoll* (1918) 88 LJKB 601). Where a person delivers goods with a view to changing the property in them and the delivery does not take place with the authority of the true owner or the person entitled to delivery of the goods, he may be liable

in conversion (*Yien Yieh Commercial Bank Ltd v Kwai Chung Cold Storage Co Ltd* [1988] 2 HKLR 569 CA). Similarly, a delivery by mistake amounts to conversion if it is inconsistent with the claimant's right to possession (*He-ro Chemicals Ltd v Jeuro Container Transport (HK) Ltd & Another* [1993] 2 HKC 386). However, a person may be protected from being sued by an effective exemption clause (*Yien Yieh Commercial Bank Ltd v Kwai Chung Cold Storage Co Ltd*).

- 13-21** A person may also be liable to conversion if he allows a third party to take the goods of the owner without the authority of the true owner, where there exists a principal and agent relationship between the owner and the person being sued (*Tyrone Crystal Ltd v European Asian Bank & Another* [1985] 2 HKC 762).

### Subject-matter of conversion

- 13-22** The goods or chattels that form the subject-matter of conversion can be anything that can be possessed (*Friedel v Castlereagh* (1877) 11 ICLR 93). In short, it has the meaning as "goods" as defined in the Sale of Goods Ordinance, which includes all personal chattels other than things in action and money, emblements, industrial growing crops, and things attached to or forming part of the land that is agreed to be severed before sale or under the contract of sale.
- 13-23** The exclusion of "money" is slightly misleading. Money in specie (ie coins and notes) can be converted: it is money in the abstract (eg in a bank account) which cannot be. Negotiable instruments and title deeds are primarily documents creating "things in action" but they are at the same time physical objects, pieces of paper. If the piece of paper is unlawfully converted, the damages will be assessed on the basis of the value of the rights created by the document (*Kleinwort v Comptoir National d'Escompte de Paris* [1894] 2 QB 157; *Midland Bank Ltd v Reckitt* [1933] AC 1).
- 13-24** If, by reason of a fraudulent alteration, the piece of paper is valueless (eg, fraudulent, altered cheque), no rights arise from it and a claim in conversion will fail: *Smith v Lloyd's TSB Bank Plc* [2001] QB 541; [2001] 1 All ER 424.
- 13-25** Both choses in possession and choses in action could be a subject-matter of conversion (*PBL Publication (Hong Kong) Ltd v Marks Hundred Co Ltd* [1987] 2 HKC 157; *Lau* (1989) 19 HKLJ (No.2) 235).

### The right to sue

- 13-26** The claimant must show that at the time of the conversion he was either in actual possession of the goods or entitled to immediate possession of them (*Trafigura Beheer BV Amsterdam v China Navigation Co Ltd & Harvest Fortune Shipping Ltd (Third Party)* citing *Hiort v London and North Western Railway Co* (1879) LR 4 ExD 188). It is not necessary to show a title of absolute ownership. Title unaccompanied by either actual possession or an immediate right to possession is insufficient to support an action in conversion (*The Winkfield* [1902] P. 42. The title to possession must be a legal title: an equitable title will not be sufficient: *MCC Proceeds Inc v Lehman Bros International Europe* [1998] 4 All ER 675).
- 13-27** Even a person in possession of goods that he has acquired under an illegal contract may have a right to sue in conversion those who wrongfully interfere with his possession of goods as he has a title good against everyone except the true owner or someone claiming under him (*Lo Chi-ming v Shum Kin-yuen* [1969] HKLRD 10, following *Sajan Singh v Sardara Ali* [1960] AC 167 and *Central Newbury Car Auctions Ltd v Unity Finance Ltd* [1956] 3 All ER 905).

The interest on which the claimant relies must have been vested in him at the time of the act of conversion (*The Future Express* [1993] 2 Lloyd's Rep 542; *Smith (Administrator of Cosslett Contractors Ltd) v Bridgend CBC* [2002] 1 AC 336). Thus, a claimant may not sue if he has parted with the property in the goods at the time of the alleged conversion (*Jarvis v Williams* [1955] 1 All ER 108), unless the right to sue passed to the claimant as part of the transfer of the goods to him (*Bristol and West of England Bank v Midland Ry* [1891] 2 QB 653).

Where goods have been bailed, who is to be treated as being in possession of the goods as entitled to possession will depend on the terms of the bailment. If the bailment confers exclusive possession on the bailee as long as the bailment lasts, only the bailee can maintain an action for conversion as the bailor has no immediate right to possession. Examples of such bailments are letting on hire, pledging or delivering the goods to someone who acquires a lien (*Milgate v Kebble* (1841) 3 M & G 100). If, before action, the bailor has transferred to the defendant the ownership of the goods, the bailee cannot recover more than the value of his own interest; and the defendant, relying upon such a transfer, is not setting up a *jus tertii*, but as donee or assignee of the tertius, his own right (*Eastern Construction Co Ltd v National Trust Co Ltd and Schmidt* [1914] AC 197).

An unpaid vendor protected by his lien has exclusive possession. The purchaser cannot bring an action unless he has rendered the price and thus become immediately entitled to possession (*Lord v Price* (1874) L.R. 9 Exch. 54, considered in *Yien Yieh Commercial Bank Ltd v Kwai Chung Cold Storage Co Ltd*).

If the bailee commits an act inconsistent with the bailment that terminates the bailment or entitles the bailor to do so, the bailor has the necessary right to possession to sue the bailee or any transferee from him (*Jelk v Haward* [1905] 2 KB 460). A breach of bailment by a pledgee or an unpaid seller does not give the pledgor or buyer a right of action; only if redemption or payment of the price is tendered can they sue (*Halliday v Holgate* (1868) LR 3 Exch 299).

A bailee at will (eg the borrower under a gratuitous loan) has a concurrent possession with his bailor: either may sue. However, an action by one is a bar to an action by the other. A servant or agent may have merely custody of the goods, and possession will remain exclusively with the employer or principal who alone can sue.

As mere possession will suffice to ground an action, a finder or other person who has come into actual possession of goods may sue in conversion, as he has title except that he cannot sue the actual owner (*Armory v Delamirie* (1722) 1 Stra 505). A co-owner can sue his fellow owner in conversion where the goods have been destroyed or disposed of, whether or not such disposal was effective to transfer title to the transferee (*Fennings v Lord Grenville* (1808) 1 Taunt 241).

### Relief

Under the common law, if goods have been wrongfully taken out of possession of the owner, the claimant can ask for an order of delivery up of goods or payment of its value at the date of conversion. If the goods have been taken unlawfully out of the claimant's possession he may lawfully retake them, and is justified to use reasonable force against a person who resists him (*Blades v Higgs* (1861) 10 CBNS 713).

### Damages

The starting point for the measure of damages is the value of the goods at the date of the conversion (*Wo Loong Hing v Zung Fu Company* (1953) 37 HKLR 213), together with

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

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

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

### B. Trespass to goods

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

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

**13-40** A deliberate taking away, out of possession, from the claimant is the most obvious form of trespass to goods, as is any unpermitted contact or damage to another's goods. Both are direct and immediate interference. It is not clear whether the tort is actionable without damage. The defendant's conduct must be blameworthy so that in the absence of negligence, accidental damage will not amount to trespass (*National Coal Board v JE Evans & Co* [1951] 2 KB 861 – the case of damage to an underground cable caused without negligence). However, deliberate conduct (in the erroneous belief held by the defendant that he was acting lawfully) does not amount to a defence if the act otherwise amounts to trespass (*Wilson v Lombank Ltd* [1963] 1 WLR 1294).

### The right to sue

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

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

### Relief and Damages

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

### C. Detinue

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

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

### The right to sue

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

### Relief and Damages

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

## Claims by Owner or Person Entitled to Possession

## Conversion by taking

- 13-E1
1. The Plaintiff is and was at all material times the owner of [identify goods].
  2. On [date], unlawfully and without the consent of the Plaintiff, the Defendant took the car from where it was parked at [address] and thereafter used it as if it were her own.
  3. In the premises, the Defendant has converted the car to her own use.
  4. At the date of conversion, the car was worth \$[ ].
  5. The Plaintiff has suffered loss and damage in that he has been put to the expenses of hiring an alternative car and the cost of taxi fares.

## Particulars

- (a) value of car: \$[ ];
  - (b) hire charges of [identify goods] from [date] to [date] at \$[ ] per week, namely \$[ ]; and
  - (c) taxi fares set out in the accompanying schedule: \$[ ].
6. The Plaintiff further claims interest on such sums as awarded by the Court at such rate and for such period as the Court thinks fit, pursuant to s.49 of the District Court Ordinance (Cap.336)/s.48 of the High Court Ordinance (Cap.4).

And the Plaintiff therefore claims:

- (1) damages;
- (2) interest; and
- (3) costs.

Dated the \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_

[Signed]

[Statement of truth]

## Conversion by transfer (sale)

- 13-E2
1. By a written agreement dated [date], the Plaintiff sold the Defendant a [identify the vehicle] ("the vehicle"), under a conditional sale contract so that the property in the vehicle was to remain the Plaintiff's until such time as all the installments of the purchase price had been paid.
  2. At a date unknown to the Plaintiff but in or about [date], the Defendant wrongfully and without the consent of the Plaintiff purported to sell the vehicle to Cheng.
  3. Cheng was a private purchaser acting in good faith and without notice of the conditional sale agreement and obtained good title to the vehicle.
  4. In selling the vehicle to Cheng, the Defendant converted the vehicle to his own use.
  5. By reason of the conversion, the Plaintiff has suffered loss and damage.

## Particulars

Value of the vehicle: \$[ ]

6. The Plaintiff further claims interest on such sums as awarded by the Court at such rate and for such period as the Court thinks fit pursuant to s.49 of the District Court Ordinance (Cap.336)/s.48 of the High Court Ordinance (Cap.4).

And the Plaintiff therefore claims:

- (1) damages;
- (2) interest; and
- (3) costs.

Dated the \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_

[Signed]

[Statement of truth]

**Conversion by transfer (delivery)**

- 13-E3** 1. The Plaintiff is and was at all material times the owner of the goods ("the goods").
2. The goods were stolen from the Plaintiff on [date].
3. After the theft but at a date unknown to the Plaintiff, the goods came into the possession of the Defendant.
4. On or about [date], the Defendant delivered the goods to a person whose identity the Plaintiff is unable to establish.
5. In storing the Plaintiff's property and thereafter delivering it to a stranger, the Defendant converted the Plaintiff's goods to his own use.
6. By reason of the conversion, the Plaintiff has suffered loss and damage. The value of the goods was \$[ ].
7. The Plaintiff further claims interest on such sums as awarded by the Court at such rate and for such period as the Court thinks fit, pursuant to s.49 of the District Court Ordinance (Cap.336)/s.48 of the High Court Ordinance (Cap.4).

And the Plaintiff therefore claims:

- (1) damages;
- (2) interest; and
- (3) costs.

Dated the \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_

[Signed]

[Statement of truth]

**Conversion by detention**

- 13-E4** 1. The Plaintiff is and was at all material times the owner of [identify the goods] ("the goods"), which was part of a quantity of property stored by him at the warehouse of Storage Limited in [address].
2. At a date unknown to the Plaintiff, the goods came into the possession of the Defendant.
3. By a letter dated [date], the Plaintiff's solicitors wrote to the Defendant requesting him to deliver the goods to the Plaintiff but the Defendant failed or refused to do so.
4. In the premises the Defendant converted the goods to his own use.
5. By reason of the conversion, the Plaintiff has suffered loss and damage.

**Particulars**

The estimated value of the goods is \$[ ].

6. The Plaintiff further claims interest on such sums as awarded by the Court at such rate and for such period as the Court thinks fit pursuant to s.49 of the District Court Ordinance (Cap.336)/s.48 of the High Court Ordinance (Cap.4).

And the Plaintiff therefore claims:

- (1) damages;
- (2) interest; and
- (3) costs.

Dated the \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_

[Signed]

[Statement of truth]

### Claim for conversion by destruction of the goods

- 13-E5**
1. The Plaintiff is and was at all material times the owner of a consignment of [x] tons of [identify material] valued at \$[ ].
  2. At a date unknown to the Plaintiff, the consignment was delivered to the Defendant at their manufacturing premises at [address] where, without the Plaintiff's knowledge or consent, the Plaintiff's material was used in the manufacture of [identify product].
  3. In the premises the Defendant converted the said material to its own use.
  4. By reason of the conversion, the Plaintiff has suffered loss and damage, namely \$[ ], the value of the material.
  5. The Plaintiff further claims interest on such sums as awarded by the Court at such rate and for such period as the Court thinks fit pursuant to s.49 of the District Court Ordinance (Cap.336)/s.48 of the High Court Ordinance (Cap.4).

And the Plaintiff therefore claims:

- (1) damages;
- (2) interest; and
- (3) costs.

Dated the \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_

[Signed]

[Statement of truth]

### Claim based on trespass to goods (damage)

- 13-E6**
1. The Plaintiff is and was at all material times the owner of [identify the vehicle] ("the vehicle").
  2. On a date unknown to the Plaintiff but in or about [date], the vehicle came into the possession of the Defendant who used it as if it were his own and without the Plaintiff's knowledge or consent until its return to the Plaintiff on [date].
  3. During the period in which the vehicle was used by the Defendant, the vehicle recorded an additional mileage of [x] miles, the clutch became worn and required replacement upon its return and there were numerous dents and marks to the bodywork.
  4. In the premises, the Defendant converted the vehicle to his own use.
  5. By reason of the conversion, the Plaintiff has suffered loss and damage.

#### Particulars

- (1) Cost of replacement of clutch \$[ ].
- (2) Bodywork repairs \$[ ].
- (3) The Plaintiff was unable to use the vehicle and was obliged to hire another for a period of [x] weeks at a total cost of \$[ ].
- Total \$[ ]

6. The Plaintiff further claims interest on such sums as awarded by the Court at such rate and for such period as the Court thinks fit pursuant to s.49 of the District Court Ordinance (Cap.336)/s.48 of the High Court Ordinance (Cap.4).

And the Plaintiff therefore claims:

- (1) damages;
- (2) interest; and
- (3) costs.

Dated the \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_

[Signed]

[Statement of truth]

**Conversion by transfer**

- 13-E7**
1. The Defendant carries on business of a vehicle repair workshop at [address].
  2. On [date], the Plaintiff left his [identify vehicle] ("the vehicle") at the Defendant's workshop in order to obtain an estimate for a repair to the clutch.
  3. On a date unknown to the Plaintiff but between [date] and [date], the Defendant parted with the possession of the vehicle to a stranger.
  4. In delivering the vehicle to a stranger, the Defendant is liable to the Plaintiff in conversion and the Plaintiff has suffered loss and damage.

**Particulars**

Value of the vehicle at the time of conversion: \$[ ].

5. The Plaintiff further claims interest on such sums as awarded by the Court at such rate and for such period as the Court thinks fit pursuant to s.49 of the District Court Ordinance (Cap.336)/s.48 of the High Court Ordinance (Cap.4).

And the Plaintiff therefore claims:

- (1) damages;
- (2) interest; and
- (3) costs.

Dated the \_\_\_\_ day of \_\_\_\_\_,

[Signed]

[Statement of truth]

**Conversion: detention by bailee by wrongful exercise of a lien**

1. The Plaintiff is and was at all material times an importer of [identify materials]. **13-E8**
2. The Plaintiff entered into a contract with [PQ] Limited as a forwarding agent to arrange the delivery of a consignment of the materials from [address] to [address].
3. In carrying out its contract [PQ] Limited contracted with the Defendant to carry the consignment by road from [address] to [address].
4. During transit, the Defendant wrongfully purported to exercise a lien over the said consignment for amounts owed to it by [PQ] Limited and procured the transportation of the consignment to their warehouse in [address].
5. In the premises, the Defendant converted the consignment to its own use.
6. By reason of the conversion, the Plaintiff has suffered loss and damage in that it was required to obtain a further consignment of the material on the open market and was put to loss and expense.

**Particulars**

[Set out the loss and damage]

7. The Plaintiff further claims interest on such sums as awarded by the Court at such rate and for such period as the Court thinks fit pursuant to s.49 of the District Court Ordinance (Cap.336)/s.48 of the High Court Ordinance (Cap.4).

And the Plaintiff therefore claims:

- (1) damages;
- (2) interest; and
- (3) costs.

Dated the \_\_\_\_ day of \_\_\_\_\_,

[Signed]

[Statement of truth]

**Claim for conversion by detention and when the defendant is treated as an insurer**

- 13-E9** 1. The Plaintiff is and was at all material times the owner of a quantity of antiques that were deposited with the Defendant at his home at [address] while the Plaintiff was working abroad.
2. In a letter sent to the Defendant on [date], the Plaintiff unconditionally demanded the return of the goods and, by agreement with the Defendant, attended at the Defendant's home on [date] to remove them.
3. The Defendant was absent from his home when the Plaintiff arrived to collect them.
4. The Defendant's failure to comply with the Plaintiff's demand for the return of goods on [date] rendered him liable as an insurer from that date.
5. On [date], the goods were destroyed by fire.
6. In the premises, the Defendant is liable to the Plaintiff for the value of the goods. The approximate value that the Plaintiff attributes to the goods is \$[ ].
7. The Plaintiff further claims interest on such sums as awarded by the Court at such rate and for such period as the Court thinks fit pursuant to s.49 of the District Court Ordinance (Cap.336)/s.48 of the High Court Ordinance (Cap.4).

And the Plaintiff therefore claims:

- (1) damages;
- (2) interest; and
- (3) costs.

Dated the \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_

[Signed]

[Statement of truth]

**Claim for conversion by destruction of the goods**

1. On [ ], the Plaintiff delivered a quantity of [identify the material] ("the material") to the Defendant at his premises in [address]. **13-E10**
2. On a date unknown to the Plaintiff, the Defendant used the Plaintiff's material for the manufacture of [identify product].
3. The Defendant's use of the Plaintiff's property was done without the Plaintiff's consent.
4. In the premises, the Defendant is liable to the Plaintiff in conversion namely, \$[ ] being the value of the material delivered to the Defendant.
5. The Plaintiff further claims interest on such sums as awarded by the Court at such rate and for such period as the Court thinks fit pursuant to s.49 of the District Court Ordinance (Cap.336)/s.48 of the High Court Ordinance (Cap.4).

And the Plaintiff therefore claims:

- (1) damages;
- (2) interest; and
- (3) costs.

Dated the \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_

[Signed]

**Claim for conversion by destruction of the goods**

- 13-E11** 1. On [date], the Plaintiff lent the Defendant his [identify the car] ("the car"), to enable him to use it to travel to Shenzhen via the port of Huanggang.
2. On [date], the Defendant was detained at Huanggang having used the car to smuggle a quantity of tobacco into Hong Kong.
3. The Plaintiff's car was impounded and thereafter confiscated.
4. In using or permitting the car to be used for the purpose of evading the duty on the importation of tobacco, the Defendant rendered the car liable to impoundment and confiscation.
5. In the premises, the Defendant converted the car to his own use and the Plaintiff has suffered loss and damage.

**Particulars**

Value of the car at the date of conversion: \$[ ].

6. The Plaintiff further claims interest on such sums as awarded by the Court at such rate and for such period as the Court thinks fit pursuant to s.49 of the District Court Ordinance (Cap.336)/s.48 of the High Court Ordinance (Cap.4).

And the Plaintiff therefore claims:

- (1) damages;
- (2) interest; and
- (3) costs.

Dated the \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_

[Signed]

[Statement of truth]

**Claim based on trespass to goods (taking)**

- 13-E12** 1. The Defendant is a county court bailiff.
2. On [date], the Defendant, purporting to levy execution upon the Defendant's property, attended the premises of the Plaintiff and seized goods to the value of \$[ ] or thereabouts.
3. The only amount in respect of which the bailiff was entitled to levy execution was the sum of \$[ ]. In the premises, the execution was wrongful and the taking of the Plaintiff's goods was a trespass.
4. By reason of the trespass, the Plaintiff has suffered loss and damage in the difference between the value of the goods and the value of execution debt namely \$[ ].
5. The Plaintiff further claims interest on such sums as awarded by the Court at such rate and for such period as the Court thinks fit pursuant to s.49 of the District Court Ordinance (Cap.336)/s.48 of the High Court Ordinance (Cap.4).

And the Plaintiff therefore claims:

- (1) damages;
- (2) interest; and
- (3) costs.

Dated the \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_

[Signed]

[Statement of truth]

**Claim based on trespass to goods (damage/destruction)**

- 13-E13** 1. The Plaintiff is and was at all material times the owner of [identify goods] ("the goods").
2. On [date], the Defendant, with the intention of damaging the goods, picked them up and [destroyed] [harmed] them.
3. In the premises, the Plaintiff was guilty of trespass.
4. By reason of the trespass, the Plaintiff has suffered loss and damage.

**Particulars**

- (1) The cost of repair was \$[ ].
- (2) The goods in their undamaged condition were worth \$[ ]. In their present condition, although repaired, they are worth no more than \$[ ]. The diminution in value amounts to \$[ ].
5. The Plaintiff further claims interest on such sums as awarded by the Court at such rate and for such period as the Court thinks fit pursuant to s.49 of the District Court Ordinance (Cap.336)/s.48 of the High Court Ordinance (Cap.4).

And the Plaintiff therefore claims:

- (1) damages;
- (2) interest; and
- (3) costs.

Dated the \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_

[Signed]

[Statement of truth]

**Defence Denying the Plaintiff's Right to Sue Denial of the Plaintiff's Title**

1. Unless otherwise expressly indicated, references herein to numbered **13-E14** paragraphs are references to the allegation pleaded in the corresponding paragraphs in the Statement of Claim.
2. Unless otherwise stated, the Defendant adopts the nomenclature used in the Statement of Claim.
3. Save and except for the admission herein contained the Defendant does not admit each and every allegation in the Statement of Claim as if the same were specifically set out and traversed seriatim.
4. It is denied that the Plaintiff is or was the owner of the goods or entitled to possession of them.
5. By reason of the matters aforesaid, the Plaintiff is not entitled to the sum claimed or at all.

Dated the \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_

[Signed]

[Statement of truth]

**Denial of the acts complained of**

**13-E15** 1. Unless otherwise expressly indicated, references herein to numbered paragraphs are references to the allegation pleaded in the corresponding paragraphs in the Statement of Claim.

2. Unless otherwise stated, the Defendant adopts the nomenclature used in the Statement of Claim.

3. Save and except for the admission herein contained the Defendant does not admit each and every allegation in the Statement of Claim as if the same were specifically set out and traversed seriatim.

4. The defendant is unable to admit or deny whether the Plaintiff is the owner of the motor car referred to in para.1 of the Statement of Claim and requires the Plaintiff to prove the same.

5. The Defendant admits that he drove away the motor car on [date] as alleged in para.2 of the Statement of Claim but denies that in doing so, he acted wrongfully as alleged or at all.

6. In the course of a telephone call made on [date] between Cheng acting on behalf of the Plaintiff and the Defendant, Cheng gave the Defendant permission to use the car to drive to [place] on [date].

7. By reason of the matters aforesaid, the Plaintiff is not entitled to the sum claimed or at all.

Dated the \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_

[Signed]

[Statement of truth]

**Defence of return of the goods**

1. Unless otherwise expressly indicated, references herein to numbered paragraphs are references to the allegation pleaded in the corresponding paragraphs in the Statement of Claim. **13-E16**

2. Unless otherwise stated, the Defendant adopts the nomenclature used in the Statement of Claim.

3. Save and except for the admission herein contained the Defendant does not admit each and every allegation in the Statement of Claim as if the same were specifically set out and traversed seriatim.

4. The Defendant is unable to admit or deny whether the Plaintiff is the owner of the goods referred to in para.1 of the Statement of Claim and requires the Plaintiff to prove the same.

5. On [date], before the commencement of the action, the Defendant returned the goods in working order and good condition to the Plaintiff's premises at [address].

6. By reason of the matters aforesaid, the Plaintiff is not entitled to the sum claimed or at all.

Dated the \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_

[Signed]

[Statement of truth]

**Defence of *jus tertii***

**13-E17** 1. Unless otherwise expressly indicated, references herein to numbered paragraphs are references to the allegation pleaded in the corresponding paragraphs in the Statement of Claim.

2. Unless otherwise stated, the Defendant adopts the nomenclature used in the Statement of Claim.

3. Save and except for the admission herein contained the Defendant does not admit each and every allegation in the Statement of Claim as if the same were specifically set out and traversed seriatim.

4. It is denied that the Plaintiff is or was the owner or entitled to possession of the goods referred to in para.1 of the Statement of Claim.

5. At all material times, the painting was the property of [identify true owner].

6. By reason of the matters aforesaid, the Plaintiff is not entitled to the sum claimed or at all.

Dated the \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_

[Signed]

[Statement of truth]

**Competing rights and interpleader****Defence**

1. Unless otherwise expressly indicated, references herein to numbered paragraphs are references to the allegation pleaded in the corresponding paragraphs in the Statement of Claim. **13-E18**

2. Unless otherwise stated, the Defendant adopts the nomenclature used in the Statement of Claim.

3. Save and except for the admission herein contained the Defendant does not admit each and every allegation in the Statement of Claim as if the same were specifically set out and traversed seriatim.

4. The Defendant is unable to admit or deny whether the Plaintiff is the owner of the goods referred to in para.1 of the Statement of Claim and requires the Plaintiff to prove the same.

5. By a letter dated [date], solicitors acting for [Y] Limited asserted that [Y] Limited was the owner of the goods and demanded their delivery to [Y] Limited. The Defendant is unable to determine the competing claims of the Plaintiff and [Y] Limited.

6. The Defendant makes no claim to an interest in the goods, nor a right to their possession.

7. The Defendant is not colluding with [Y] Limited in relation to the property and is willing to transfer the property to such person as the Court may direct.

8. By reason of the matters aforesaid, the Plaintiff is not entitled to the sum claimed or at all.

Dated the \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_

Dated

[Signed]

[Statement of truth]

**Defence that the Plaintiff's title is extinguished**

- 13-E19** 1. Unless otherwise expressly indicated, references herein to numbered paragraphs are references to the allegation pleaded in the corresponding paragraphs in the Statement of Claim.
2. Unless otherwise stated, the Defendant adopts the nomenclature used in the Statement of Claim.
3. Save and except for the admission herein contained the Defendant does not admit each and every allegation in the Statement of Claim as if the same were specifically set out and traversed seriatim.
4. It is denied that the Plaintiff is the owner of the goods referred to in para.1 of the Statement of Claim or has title to sue for damages in respect of them.
5. On [date], the Defendant agreed to pay the Plaintiff a sum of \$[ ] in settlement of a claim made by the Plaintiff for damages for wrongful interference with the goods. The agreed sum was made on the footing that it was compensation for the whole of the Plaintiff's interest in goods.
6. On [date], the Defendant paid the sum of \$[ ] pursuant to the agreement.
7. On payment, the Plaintiff's title to the goods was extinguished.
8. By reason of the matters aforesaid, the Plaintiff is not entitled to the sum claimed or at all.
- Dated the \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_

[Signed]

[Statement of truth]

**Defences Based on Loss of Title****Defence of purchase from a seller with voidable title**

- 13-E20** 1. Unless otherwise expressly indicated, references herein to numbered paragraphs are references to the allegation pleaded in the corresponding paragraphs in the Statement of Claim.
2. Unless otherwise stated, the Defendant adopts the nomenclature used in the Statement of Claim.
3. Save and except for the admission herein contained the Defendant does not admit each and every allegation in the Statement of Claim as if the same were specifically set out and traversed seriatim.
4. It is admitted that [X] purchased the goods from the Plaintiff under the sale agreement referred to in para.2 of the Statement of Claim.
5. The Defendant is unable to admit or deny that the sale agreement was induced by the fraud or misrepresentation of [X], as alleged or at all. The Plaintiff is required to prove each and every such allegation.
6. If the sale agreement was induced by fraud or misrepresentation as alleged, it was voidable but remained in force until avoided by the Plaintiff.
7. By a written contract made on [date] and before the Plaintiff had avoided the sale agreement, the Defendant purchased the goods from [X]. In purchasing the goods, the Defendant acted in good faith and without notice of such defect in title as the Plaintiff may establish.
8. In the premises, the Defendant obtained good title to the goods under the Sale of Goods Ordinance (Cap.26).
9. By reason of the matters aforesaid, the Plaintiff is not entitled to the sum claimed or at all.
- Dated the \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_

[Signed]

[Statement of truth]

**Defence of purchase from a seller in possession**

- 13-E21** 1. Unless otherwise expressly indicated, references herein to numbered paragraphs are references to the allegation pleaded in the corresponding paragraphs in the Statement of Claim.
2. Unless otherwise stated, the Defendant adopts the nomenclature used in the Statement of Claim.
3. Save and except for the admission herein contained the Defendant does not admit each and every allegation in the Statement of Claim as if the same were specifically set out and traversed seriatim.
4. It is admitted that [X] sold the goods to the Plaintiff under the sale agreement referred to in para.2 of the Statement of Claim. Thereafter, [X] remained in possession of the goods.
5. On [date], [X] sold the goods to the Defendant who received the same in good faith and without notice of the previous sale.
6. In the premises, the Defendant acquired good title to the goods under the Sale of Goods Ordinance (Cap.26).
7. By reason of the matters aforesaid, the Plaintiff is not entitled to the sum claimed or at all.

Dated the \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_

[Signed]

[Statement of truth]

**Defence of purchase from buyer in possession**

- 13-E22** 1. Unless otherwise expressly indicated, references herein to numbered paragraphs are references to the allegation pleaded in the corresponding paragraphs in the Statement of Claim.
2. Unless otherwise stated, the Defendant adopts the nomenclature used in the Statement of Claim.
3. Save and except for the admission herein contained the Defendant does not admit each and every allegation in the Statement of Claim as if the same were specifically set out and traversed seriatim.
4. It is admitted that the Plaintiff agreed to sell the goods to [X] under the agreement referred to para.1 of the Statement of Claim and that, upon sale, no title in the goods passed to [X].
5. On a date unknown to the Defendant but after the date of the said agreement and with the Plaintiff's consent, [X] obtained possession of the goods.
6. By an oral agreement made on [date], [X] sold and delivered the goods to the Defendant who received them in good faith and without notice or any lien or other right of the Plaintiff in respect of the goods.
7. In the premises, the Defendant obtained good title to the goods under the Sale of Goods Ordinance (Cap.26).
8. By reason of the matters aforesaid, the Plaintiff is not entitled to the sum claimed or at all.

Dated the \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_

[Signed]

[Statement of truth]

**Defence of purchase from mercantile agent**

**13-E23** 1. Unless otherwise expressly indicated, references herein to numbered paragraphs are references to the allegation pleaded in the corresponding paragraphs in the Statement of Claim.

2. Unless otherwise stated, the Defendant adopts the nomenclature used in the Statement of Claim.

3. Save and except for the admission herein contained the Defendant does not admit each and every allegation in the Statement of Claim as if the same were specifically set out and traversed seriatim.

4. The Plaintiff is a dealer in machinery and appointed Cheng as his agent, having the power to sell the Plaintiff's machines in the customary course of his business. In the premises, Cheng was a mercantile agent within the meaning of s.2 of the Factors Ordinance.

5. In the course of his agency, Cheng stored a quantity of the Plaintiff's machines in his warehouse in [address] and was thereby in possession of those machines with the consent of the Plaintiff.

6. It is admitted that by a contract made on [date], Cheng sold [x] machines to the Defendant at \$[ ] a piece. The Defendant is unable to admit or deny whether in doing so, Cheng had the authority of the Plaintiff and the Plaintiff is required to prove an absence of authority. At the time of the sale, the Defendant as purchaser was acting in good faith and without notice of such lack of authority as may be proved and thereby good title to the x machines.

7. By reason of the matters aforesaid, the Plaintiff is not entitled to the sum claimed or at all.

Dated the \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_

[Signed]

[Statement of truth]

**Defence Relating to Hire Purchase**

**13-E24** 1. Unless otherwise expressly indicated, references herein to numbered paragraphs are references to the allegation pleaded in the corresponding paragraphs in the Statement of Claim.

2. Unless otherwise stated, the Defendant adopts the nomenclature used in the Statement of Claim.

3. Save and except for the admission herein contained the Defendant does not admit each and every allegation in the Statement of Claim as if the same were specifically set out and traversed seriatim.

4. It is admitted that the Plaintiff sold the car to [X] by the conditional sale agreement referred to in para.1 of the Statement of Claim.

5. On a date unknown to the Defendant, [X] sold the car to [PQ] Limited.

6. By an oral agreement made on [date], [PQ] Limited sold the car to the Defendant.

7. In purchasing the car, the Defendant was a private purchaser and acted in good faith and without notice of the conditional sale agreement.

8. In the premises, the Defendant obtained good title to the car.

9. By reason of the matters aforesaid, the Plaintiff is not entitled to the sum claimed or at all.

Dated the \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_

[Signed]

[Statement of truth]

**Defence raising the Limitation Ordinance (Cap.347)**

- 13-E25** 1. Unless otherwise expressly indicated, references herein to numbered paragraphs are references to the allegation pleaded in the corresponding paragraphs in the Statement of Claim.
2. Unless otherwise stated, the Defendant adopts the nomenclature used in the Statement of Claim.
3. Save and except for the admission herein contained the Defendant does not admit each and every allegation in the Statement of Claim as if the same were specifically set out and traversed seriatim.
4. It is admitted that the Plaintiff was the owner of the goods on or before [date].
5. On or about [date], one [X] acquired possession of the goods and used them as if they were his own and thereby converted them to his own use.
6. Thereafter, the Plaintiff was kept out of possession of the goods for a period in excess of six years prior to the commencement of these proceedings and, by operation of s.4 of the Limitation Ordinance, the Plaintiff's title to them was extinguished.
7. By [date], [Y] had acquired possession of the goods and by a contract of sale made on that date, [Y] sold the goods to the Defendant who thereby obtained good title to them.
8. By reason of the matters aforesaid, the Plaintiff is not entitled to the sum claimed or at all.
- Dated the \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_

[Signed]

[Statement of truth]

**Defences Asserting a Right against the Owner**

1. Unless otherwise expressly indicated, references herein to numbered paragraphs are references to the allegation pleaded in the corresponding paragraphs in the Statement of Claim.
2. Unless otherwise stated, the Defendant adopts the nomenclature used in the Statement of Claim.
3. Save and except for the admission herein contained the Defendant does not admit each and every allegation in the Statement of Claim as if the same were specifically set out and traversed seriatim.
4. It is admitted that on [date], the Plaintiff delivered the goods to the Defendant to carry out the works of repair specified in para.1 of the Statement of Claim.
5. Pursuant to the said contract, the Defendant carried out the repairs and thereupon the Plaintiff became liable to the Defendant, the contract price.
6. The Plaintiff has failed or refused to pay the same.
7. In the premises, the Defendant has exercised a lien over the said goods until payment of the contract price is made as he is entitled to do. In the exercise of his lien, the Defendant is entitled to retain possession of them.
8. By reason of the matters aforesaid, the Plaintiff is not entitled to the sum claimed or at all.
- Dated the \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_

[Signed]

[Statement of truth]