Held:

(1) The plaintiff's acceptance was too late. The plaintiff "knew that Dodds was no longer minded to sell the property to him as plainly and clearly as if Dodds had told him in so many words, 'I withdraw the offer', before he tried to accept the offer".
(2) The defendant had validly withdrawn his offer.

B. Lapse of offer

On 1 January, Peter offers to sell his car to Bob for HK$100,000. Since Peter is emigrating to the Bahamas, he asks Bob to reply as soon as possible. Three months later, Bob accepts the offer and sends a cheque in the sum of HK$100,000 to Peter. Peter has already sold his car to George by that time. Does Bob have any legal claim against Peter?

No. Bob has failed to accept Peter's offer within a reasonable time. This is especially the case since Peter has asked Bob to reply to him as soon as possible. Peter's offer has already lapsed when Bob sends the cheque.

2.033 An offer lapses if it is not accepted within the stipulated time and, where no time is stipulated, after the lapse of a reasonable time.[22] What is a reasonable time is a question of fact depending on the subject matter of the contract, the means used to communicate the offer and other circumstances of the case.[23] This is a fast-moving commercial world. A person cannot take advantage of an opportunity unless he acts promptly.

C. Death of a party

(1) Tom offers to sell his car to Sue. Tom dies soon after making the offer. Sue, unaware of Tom's death, accepts Tom's offer. Is there a valid contract which Sue can enforce against Tom's estate?
(2) Tom sends an offer to Sue's address to sell his car to Sue or to her son, John. Sue dies after receiving the offer, but before accepting it. John now wishes to accept the offer. Can he do so?

22 In *Ramsgate Victoria Hotel Co Ltd v Montefiore* (1865–66) LR 1 Ex 109, a company allotted shares to the defendant some five months after the defendant's request for them. The court held the allotment was not made within a reasonable time.

23 *Manchester Diocesan Council for Education v Commercial & General Investments Ltd* [1970] 1 WLR 241.

In scenario 1, Tom's offer can still be accepted by Sue after his death if Sue is unaware of Tom's death. Sue's acceptance of Tom's offer is valid. Sue can, therefore, enforce the contract against Tom's estate. Tom's estate will be required to fulfil Tom's contractual obligations.

In scenario 2, John can accept Tom's offer after Sue's death. Tom does not intend that his offer should only be accepted by Sue.

D. Death of the offeror

2.034 Where the offeree accepts the offer unaware of the offeror's death, and the deceased's contractual obligations can be performed by his personal representatives, a valid contract arises. This principle is based on considerations of convenience. On the other hand, an offer cannot be accepted if the offeree knows of the offeror's death.[24] One possible explanation for this rule is that death amounts to an implied withdrawal of the offer. Another explanation is that the knowledge of the death of the offeror amounts to the revocation of the offer. There are situations, however, where death of the offeror does not terminate the offer.[25]

E. Death of the offeree

2.035 Scenario 2 above deals with the reverse situation: the offeree dies before accepting the offer. If the facts show that the offeror and the offeree intend that the offer can be accepted by the offeree's son (or the offeree) even after the offeree's death, the offeree's death does not terminate the offer.[26]

2.036 An offer can be accepted by the offeree's personal representative after the offeree's death unless the terms of the offer or the subject matter of the contract or other circumstances show that the offer is only open to acceptance by the offeree personally.[27] This will be the case where the offer involves a contract of personal nature (eg contract of employment or agency).

(vi) *Acceptance*

Is there a contract between Ah Wai and Scarlet in the following scenarios:

(1) Ah Wai offers to sell her car to Scarlet for HK$100,000. After Scarlet receives Ah Wai's offer, she writes back to Ah Wai stating that she will buy the car for that price.
(2) Ah Wai writes to Scarlet offering to sell her car for HK$100,000. Meanwhile, Scarlet also writes to Ah Wai offering to buy her car at the same price without any knowledge of Ah Wai's offer. Their letters cross in mail.

24 *Fong v Cilli* (1968) 11 FLR 495.

25 For example, if a contract of guarantee states that it can only be determined by express notice of the guarantor or his or her personal representative, the death of the guarantor, even known to the creditor, will not determine the guarantee: only express notice will have this effect. See *Chitty on Contracts* (n.3 above) 130. See also *Bradbury v Morgan* (1862) 1 Hurl & C 249, 158 ER 877; *Re Silvester* [1895] 1 Ch 573.

26 *Carter v Hyde* (1923) 33 CLR 115. *Cf Reynolds v Atherton* (1921) 125 LT 690.

27 Roebuck, Wang, and Srivastava (eds), *Digest of Hong Kong Contract Law* (Beijing University Press, 1995) 180.

In scenario 1, there is a contract since Scarlet has unconditionally accepted Ah Wai's offer.

In scenario 2, there is no contract. There are just two independent cross-offers made by Ah Wai and Scarlet to each other. Since neither offer has been accepted, no contract is formed.

A. What is an acceptance?

2.037 An agreement comes into existence after the offeree unconditionally accepts the offer. Where the offeree introduces any variation to the terms of the offer, the acceptance is not unconditional, and no agreement comes into existence.[28] In *Cockett Marine DMCC v ING Bank NV*,[29] it was held that there was no question of any contract between the parties as the purported acceptance included additional terms; it was not an unqualified acceptance. Such variation amounts to a counter-offer.[30]

B. Cross-offers

2.038 Cross-offers (as in scenario 2, above) are two identical offers made by the two parties to each other. They are two independent offers. One is not an acceptance of the other. A contract cannot come into existence without correspondence between offer and acceptance. Cross offers, therefore, do not create a contract. The underlying reason for this rule is that there cannot be acceptance of an offer without the knowledge of it.[31] Moreover, such a rule is practical and in line with[32] commercial expectations of promoting certainty.[33]

Tinn v Hoffman & Co
(1873) 29 LT 271

The defendant wrote to the plaintiff offering to sell him 800 tons of iron at 69s per ton. Meanwhile, the plaintiff wrote to the defendant offering to buy 800 tons of iron at the same price. The letters crossed in the post. The plaintiff argued that there was a contract.

Held: There was no contract between the parties. The offer made by each party in ignorance of the offer made by the other party could not be construed as an acceptance of the other as it would create uncertainty and inconvenience.[34]

28 For what is a counter-offer, see para.2.027.
29 [2019] EWCH 1533.
30 See *Maple Leaf Macro Volatility Master Fund v Rouvroy* [2009] 2 All ER (Comm) 287.
31 *R v Clarke*.
32 *Chitty on Contracts* (n.3 above) 109.
33 *Allianz Insurance Co Egypt v Aigaion Insurance Co SA* [2009] 2 All ER (Comm) 745. In this case, negotiations for reinsurance were conducted by e-mail; the reinsured at the request of the reinsurer forwarded the slip which omitted a term previously agreed between the parties and the reinsurer. Held, there was an acceptance on the terms of slip and there was a contract without the omitted term.
34 Grove J said that:
a letter may be put into the post or sent out by private messenger and then the writer may repent what he has written and may dispatch a telegram or send a special messenger on horse back, saying, "I have posted or sent to you a letter making you a certain offer, I cannot fulfil it, consider it cancelled." This second message or telegram may arrive before the letter itself, which may have been miscarried, and yet in a few days or a week, the parties having meanwhile considered there was no contract, the letter might come to hand. Is it then to become a contract? … there must be an offer which the person accepting has had an opportunity of considering, and which when he accepts he knows will form a binding contract.

(vii) *Communication of acceptance*

Consider whether a contract is made in the following scenarios.

(1) Bonnie is a professor in feminist studies. She writes a book on sexual harassment and the plight of women. She sends a copy of the book to John offering to sell it to him for HK$2,000. John writes back to Bonnie informing her that he will buy the book and that a cheque for HK$2,000 will be sent in due course.
(2) Bonnie also sends a copy of the book to another friend, Isis, stating that if she does not hear from her within a month, she will consider that Isis agrees to buy the book. Isis reads the book. She likes the book but being out of job, she does not want to buy it. Isis, however, keeps the book with her. Three months later, Bonnie sends an invoice for HK$2000, being the price of the book. Isis refuses to pay.

In scenario 1, John's acceptance of Bonnie's offer has been communicated to Bonnie. A contract comes into existence between John and Bonnie.

In scenario 2, there is no communication of Isis' acceptance of the offer to Bonnie. However, in some cases, communication of an acceptance is not necessary where the offer can be accepted by conduct, for example, where the offeror waives the requirement of communication of acceptance and allows an acceptance by conduct, which is the case here. Isis' conduct of reading and keeping the book indicates her intention to accept Bonnie's offer and a contract comes into existence.

A. Communication of acceptance

2.039 To be binding, an acceptance of the offer, as a rule, must be actually brought to the offeror's knowledge. There is no contract "where a person writes an acceptance on a piece of paper which he simply keeps; where a company resolves to accept an application for shares but does not communicate the resolution to the applicant, where a person decides to accept an offer to sell some goods and instructs his bank to pay the offeror but neither he nor the bank gives notice of this fact to the offeror; and where a person communicates his acceptance only to his own agent".[35] There is no contract in these cases because it will be unjust to impose a contract upon the offeror without the offeror's knowledge of acceptance.

B. Exceptions to the requirement of communication of acceptance

2.040 There are several exceptions to the requirement that acceptance must be communicated to the offeror. In *National Car Parks Ltd v Revenue and Customs Commissioners*,[36] the court held that where a car park "pay and display" machine had a notice that a customer who paid more money than the stipulated sum, the overpaid money would not be returned. Thus if a car driver by pressing the green button on the machine got a ticket to enter the car park, he would be deemed to have accepted the car park's offer by conduct and in case

35 *Chitty on Contracts* (n.3 above) 109.
36 [2019] EWCA Civ 854.

(viii) *By whom should an acceptance be communicated?*

2.049 Acceptance must be communicated to the offeror by the offeree or his duly authorised agent.

> ***Powell v Lee***
> **(1908) 99 LT 284**
>
> The plaintiff made an application for the position of a school headmaster. The management of the school decided to appoint him. One of the members of the school management informed the plaintiff of this decision although he had no authority to do so. Subsequently, the school decided to revoke the school management's decision. The plaintiff sued the school.
>
> Held: This communication of acceptance by an unauthorised person was not binding and no contract came into existence. The communication must be made by the offeree or by his duly authorised agent.

(ix) *Method of acceptance*

2.050 Where the offeror indicates that acceptance of the offer must be made by a particular method only (eg by post, fax or e-mail), the acceptance must be made by that method. However, the offeror must make it clear that no other method will be valid by using words like "acceptance must be made *only* by the offeror's prescribed method".

2.051 Otherwise, the offeree is entitled to validly communicate his acceptance in an equally or more efficacious or faster method. In *Tinn v Hoffman & Co*, the offeree was requested to "reply by return of post". The court held that "that does not mean exclusively a reply by letter or return of post, but [one] may reply by telegram or by verbal message or by another means no later than a letter written by return of post". The emphasis in *Tinn v Hoffman & Co* was on the speed of communicating the acceptance rather than on the means.

(x) *When does the acceptance become effective where parties are not face-to-face?*

2.052 These days, most contracts are made by letters, telegrams, faxes, couriers, and e-mails. Difficult questions arise as to when acceptance is effective and complete.

A. Contracts concluded through postal means and telegram

> On 1 January, Benjamin offers to sell his BMW car to Lily for HK$60,000. He states that the offer must be accepted in writing within one week. Lily posts her acceptance on 6 January. Benjamin has sold the car to Alice before receiving Lily's acceptance.
>
> Does a valid contract come into existence between Benjamin and Lily and, if so, when?

There is a valid contract made between Benjamin and Lily. It comes into existence as soon as Lily posts the letter of acceptance on 6 January 2001, which is before the deadline for acceptance set by Benjamin.

1. The postal rule

2.053 Where post is the prescribed method for sending an acceptance or it is reasonable to use post to send an acceptance, the acceptance, according to the "postal rule", is deemed to be complete when the properly stamped and addressed letter of acceptance is posted,[41] and not when it is delivered to the offeror's address, or received by him, or brought to his notice, or read by him. The offeror is bound by the acceptance even though the letter of acceptance is delayed, never reaches him, or is lost. This rule, laid down in *Adams v Lindsell* as far back as in 1818, still applies.

> ***Adams v Lindsell***
> **(1818) 1 B & Ald 681, 106 ER 250**
>
> The defendants by a letter of 2 September 1817 offered to sell certain goods to the plaintiffs. The letter reached the plaintiffs on 5 September and the plaintiffs posted their acceptance on the same day. The plaintiffs' acceptance reached the defendants on 9 September, but on 8 September the defendants had already sold the goods to X. The defendants argued that there was no contract between the parties until they received the plaintiffs' letter of acceptance.
>
> Held: There was a binding contract the moment the letter recent of acceptance was posted by the plaintiffs on 5 September.

The postal rule laid down in *Adams v Lindsell* in 1818 has recently been affirmed by the the UK Supreme Court.[42]

2.054 The rationale of the postal rule is to promote certainty and expediency in commercial transactions. As the judge in *Adams v Lindsell* explained:

> if the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it. And so it might go on *ad infinitum*.

2.055 The postal rule has been extended to acceptances by telegram.[43]

2.056 When is the postal rule inapplicable?

> (1) On 1 January 2001, Benjamin offers to sell his BMW car to Scarlet for HK$60,000. He states that the offer must be accepted in writing. Does a valid contract come into existence in the following scenarios?

41 "Posting" means that the letter is put in the control of the post office or in a post office letter box.
42 *Brownlie v Four Seasons Holdings Inc* [2017] UKSC 80.
43 *Cowan v O'Connor* (1888) LR 20 QBD 640.

Sammy's promise. Performance of a service can be good consideration. There is a contract between Benjamin and Sammy and Benjamin can enforce Sammy's promise.

2.068 "Consideration" is a necessary ingredient of a contract. A person who does not give consideration for a contract cannot enforce it. The institution of contract has emerged because of commercial necessity and to facilitate trade and business dealings. However, "there are no free lunches". One must, therefore, pay for the benefit or promise which one wishes to secure.

2.069 According to the traditional definition of consideration, it may consist of something of value in the eyes of the law. It may consist of money, or something which has economic value or is measurable in monetary terms, for example, it may consist of goods or performance of some services or suffering of some detriment (giving up of some rights). Both parties to a contract give consideration. For instance, in a sale and purchase contract, the buyer's price is the buyer's consideration and the seller's goods are the seller's consideration.[53] It may however be noted that the value received by one party may be just notional, for example, where A agrees with bank B that he will be the bank's guarantor for a loan to be advanced to C. Here in spite of the fact that A has no real benefit; he does not get anything of value from the bank, the guarantee by A is enforceable.[54]

(ii) *Adequacy of consideration*

Will a valid contract arise in the following situation?

Benjamin offers to sell his new business law book to Isis for HK$50. Isis agrees to accept Benjamin's offer. The price of the book in the University Bookshop is HK$500.

There is a contract between Isis and Benjamin. Isis' promise to pay HK$50 is good consideration for Benjamin's book although the market value of the book is much higher. If Isis has promised to pay some money or something which has value, monetary or otherwise a valid contract comes into existence. The court is not concerned as to whether Benjamin should have a good bargain.

2.070 To constitute a valid contract, the consideration paid by one party need not have equal monetary value to the consideration of the other party. Even a few chocolate wrappers can form part of the consideration for a long-playing record or DVD.[55]

2.071 The rule that consideration need not be adequate implies that nominal consideration, for example, HK$1,000 for buying a valuable property, or a peppercorn for a car could

53 Some contracts, although not supported by consideration, can be enforced provided they are made by deed or in a particular form. Here, we are not concerned with such contracts. The reference in this chapter is to consideration which is necessary to form a simple contract.

54 *Chitty on Contracts* (n.52 above) para.4.005.

55 *Chappell & Co Ltd v Nestle & Co Ltd.*

be regarded as valid consideration, although in the generality of cases, commercial transactions are usually made after parties have bargained for the best price. The courts do not enquire into the adequacy of consideration because if they do so, no contract could ever be valid. Price estimation always varies from one person to another. The task of the court is not to engage in arithmetical exercise: it is to bring the contract to finality and achieve certainty in commercial transactions.[56] The fact that a person pays "too much" or "too little," however could be evidence of fraud or mistake.[57]

Chappell & Co Ltd v Nestle Co Ltd
[1960] AC 87

The defendant advertised for sale to the public records of the tune "Rockin Shoes" for 1s 6d and three wrappers of its milk chocolate products. The question was whether the three wrappers were part of the consideration.

Held:

(1) The wrappers were part of the consideration.

(2) "It is a perfectly good contract if a person accepts an offer to supply goods if he (a) does something of value to the supplier and (b) pays money: the consideration is both (a) and (b) … And even where there was no direct benefit from the acquisition of the wrappers there may have been an indirect benefit by way of advertisement. It is to my mind illegitimate to argue [that] … price can only include money or something which can be readily converted into an ascertainable sum of money … to my mind, the acquiring and delivering of the wrappers was certainly part of the consideration in these cases, and I see no good reason for drawing a distinction between these and other cases" (Lord Reid).

(3) "I think they [the wrappers] are part of the consideration. They are so described in the offer. 'They', the wrappers, 'will help you to get smash hit recordings.' They are so described in the record itself—all you have to do to get such new record is to send three wrappers from Nestle's 6d. milk chocolate bars, together with postal order for 1s 6d. This is not conclusive but however described they are, in my view, in law part of the consideration. It is said that when received the wrappers are of no value to Nestle's. This I would have thought irrelevant. A contracting party can stipulate for what consideration he chooses. A peppercorn does not cease to be good consideration if it is established that the promisee does not like pepper and will throw away the corn. As the whole object of selling the record, if it was a sale, was to increase the sales of chocolate, it seems to me wrong not to treat the stipulated evidence of such sales as part of the consideration" (Lord Somervell).[58]

56 *Thomas v Thomas* (1842) 2 QB 851, 114 ER 330 (payment of £1 and keeping the house in good repair was considered good consideration for a promise to allow the tenant to live in the house for one year).

57 See *Chitty on Contracts* (n.3 above) para.3.013.

58 *Cf Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548.

2.078 These principles laid down in *Pao On v Lau Yiu Long* were subsequently followed in *L&D Associates v Chan Man Chon*, discussed below.

L&D Associates v Chan Man Chon
[1987] 2 HKC 237

The plaintiff acted as the estate agent of a vendor for the sale of a property. In response to an advertisement placed by the plaintiff regarding the proposed sale, the defendant asked the plaintiff to show her the property. Following the viewing of the property, the defendant signed a document entitled "Inspection Record". Pursuant to the terms in the document, the defendant agreed to pay the plaintiff an agency fee for introducing her to the property, but the defendant refused to pay the agency fee. The plaintiff sued the defendant. The court examined the question whether the consideration provided by the plaintiff (ie introduction of the defendant to the premises) for the defendant's promise to pay the agency fee was "past" consideration as the introduction had already been effected when the defendant signed the "Inspection Record".

Held:

(1) Since the promise to pay the agency fee was made by the defendant after viewing the property, the services provided by the plaintiff (ie introduction of the defendant to the premises) was "past" consideration. The plaintiff, therefore, could not enforce the defendant's promise.
(2) In any event, the plaintiff could not establish that the defendant's promise of paying the agency fee would have been legally enforceable had it been promised before the plaintiff introduced the defendant to the property. This was because any agreement for payment of commission in the circumstances would have been unenforceable for being a violation of the legal principle that an agent who had accepted an appointment from one principal could not accept another appointment inconsistent with its duty to the first principal unless it had informed both the parties and obtained their consent to the double employment. The plaintiff had not obtained the vendor's consent to a second agency with the defendant, and, therefore, could not sue the defendant.

I. *Modern approaches to past consideration*

2.079 The rigour of the rule as to past consideration is being mitigated by adopting a practical approach, sometimes at the cost of forcing the facts to fit uneasily into the slots of offer, acceptance, and consideration.[62] A recent judgment of the Court of Appeal has broken the shackles of the past and guides us to how the presence and absence of consideration should be determined in employment situations. The author has quoted some paragraphs in

62 *New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd*; *City Polytechnic of Hong Kong v Blue Cross (Asia-Pacific) Insurance Ltd*.

full from the Court of Appeal's judgment given below to explain modern trends towards the doctrine of past consideration.

Chong Cheng Lin Courtney v Cathay Pacific Airways Ltd
[2011] 1 HKLRD 10

The plaintiff joined Cathay Pacific Airways (CP) as a cabin attendant in 1979. She was employed under a contract. The contract provided, *inter alia*, that the employer could require an employee to resign or retire but in that case the employer had to give the employee one month's notice or one month pay in lieu thereof. After the plaintiff taking up employment with the CP, it introduced a Retiree Travel Benefit (RTB) scheme for its staff and their eligible dependants to encourage loyalty of employees. In 1993, before the plaintiff had reached the normal retirement age, her employment was terminated by the CP giving the plaintiff one month's notice and paying a retirement grant. The Plaintiff brought proceedings against the CP, arguing that she was also entitled to the RTB. At issue was whether the RTB provisions had contractual force and if so, whether the plaintiff gave consideration for the CP's promise of travel benefits.

Held: The RTB provisions intended to have contractual force: they were not discretionary benefits which the CP could withhold from its cabin attendants.

> The law must not depart from the reality of everyday life for no good reason. Having concluded that the relevant provisions in the 1991 Handbook were indeed intended by the parties to have contractual force, and having observed that throughout both Cathay and its cabin attendants had honored those provisions on that footing (save where genuine disagreement appeared regarding its scope of application, like what happened in the present case), it would take very compelling reasons for the Court to hold that what were regarded as contractual by the parties actually had no contractual force in law for want of consideration.
>
> I take the view that the necessary consideration for the variation was supplied by the employee by not leaving CP. It should be remembered that under the Conditions of Service, the plaintiff could have left CP at any time by giving one month's notice (or one month's pay in lieu of notice). She did not do so. Plainly, part of the reason was her overall remuneration package, which included the RTB that she was enjoying from her employment. Indeed, that precisely was the main reason for the introduction of RTB, that is to say, to encourage loyalty of its employees and to retain the services of its cabin attendants, particularly in light of competition from other airlines which offered similar packages.
>
> It should be borne in mind that the present type of consideration is entirely different from the one that has been found to be no more than past consideration in the cases. In a typical case of past consideration, a promisee merely performs, or promises to perform, his pre-existing contractual obligations to the promisor.

onus was on the party which asserted that no legal effect was intended. In deciding whether the onus had been discharged, the courts would be influenced by the "importance of the agreement to the parties, and by the fact that one of them acted in reliance of it".[95]

(2) Here, the defendant fell far short of discharging this heavy onus. The parties entered into an agreement which was obviously commercial in nature. Its terms were in dispute at trial, but the evidence clearly showed that both sides acted on the basis that their agreement gave rise to enforceable contractual obligations.

2.114 In case a contract is drafted by lawyers and the parties have carried forward the arrangements envisaged by the contract without further express consideration or it involves payment of a large sum of money by one of the contracting parties, the courts are likely to infer that the parties intended to create a legally binding contract.[96]

(ii) *Rebutting the presumption applying to commercial agreements*

2.115 The presumption that commercial agreements are intended to be binding, however, can be rebutted where there is evidence that the parties do not intend to enforce their agreement. This may happen, for example, where the agreement is made "subject to contract" or contains an "honourable pledge clause".

A. Agreements made "subject to contract"

2.116 It is a common practice in a sale of real estate for the vendor and purchaser to enter into an agreement "subject to contract". The agreement contains terms such as price, date for giving vacant possession of the property, and the date for signing the formal agreement, but several other details remain to be agreed upon. The words "subject to contract" negate contractual intention and the parties are not bound until formal contracts are exchanged. Despite the commercial nature of the agreement, the parties' intention is that the agreement should not have legal effect until the parties have time to think over the matter and decide all the important terms governing their transaction.[97] There is only an agreement to agree, but no contract.

B. Agreements containing honourable pledge clauses

Rose & Frank Co v JR Crompton & Brothers Ltd
[1925] AC 445

The defendant was a manufacturer of facial tissues. It entered into an agreement with the plaintiff to grant it the right to sell its products on certain terms and conditions.

95 *Chitty on Contracts* (n.3 above) paras.2.146, 2.150; and see *Kingswood Estate Co v Anderson* [1963] 2 QB 169, 181.
96 *Heis v MF Global UK Services Ltd* [2016] Pens LR 225.
97 *Commission for the New Towns v Cooper (Great Britain) Ltd* [1995] Ch 259, 295.

One of the clauses of the agreement, described as an "honourable pledge clause", stated that "This arrangement is not entered into … as a formal or legal agreement, and shall not be subject to legal jurisdiction in the law courts … but it is only a definite expression and record of the purpose and intention of the three parties concerned to which they each honourably pledge". Another clause in the agreement provided that the party terminating the agreement was required to give six months' notice.

A dispute arose between the parties. The defendant terminated the agreement without giving six months' notice. At issue was whether the defendant was required to give the requisite notice. This turned on the question whether the agreement between the parties was intended to be legally binding.

Held: The presumption that parties in commercial transactions intended to create legal relations would not apply. The "honourable pledge clause" negatived the parties' contractual intention. The agreement was only binding in honour.[98]

(iii) *Presumption relating to social and domestic agreements*

2.117 Social and domestic agreements such as those between husband and wife, parent, and child and friends are presumed not to have a legal effect.

Balfour v Balfour
[1919] 2 KB 571

Mr Balfour and Mrs Balfour were a happily married couple living in amity. The husband was originally posted in Sri Lanka (formerly known as Ceylon). In November 1915, Mr Balfour went to England with Mrs Balfour. Subsequently, Mr Balfour returned to Sri Lanka but Mrs Balfour stayed back for medical treatment. Before sailing to Sri Lanka, Mr Balfour promised to pay Mrs Balfour £30 a month until she joined him in Sri Lanka. He made some monthly payments but then refused to pay anymore. Mrs Balfour sued on the promise, but the Court of Appeal refused to enforce her husband's promise.

Held: The agreement between Mr Balfour and Mrs Balfour was a mere domestic arrangement: the parties did not intend that it should be attended by legal consequences. Mrs Balfour, therefore, could not sue Mr Balfour when he refused to continue his payments

> Agreements such as these are outside the realm of contracts altogether … In respect of these promises each house is a domain into which the King's writ does not seek to run, and to which his officers do not seek to be admitted (Lord Atkin).

98 See *Jones v Vernon's Pools Ltd* [1938] 2 All ER 626. See also *New World Development Co Ltd v Sun Hung Kai Securities Ltd* (2006) 9 HKCFAR 403.

2.125 The freedom to contract, however, can be misused by people who can take advantage of others' innocence, immaturity or lack of mental capacity. The law, therefore, protects certain classes of people, including minors, mentally disordered, and drunk or drugged persons. Since such persons are considered to have limited contractual capacity and the rights of those who contract with them are limited.

(a) Contracts made by minors

Avi, a 16-year-old professional badminton player who is representing Hong Kong in the World's Junior Badminton Tournament, enters into the following contracts with:

(1) Mr Chan, the famous badminton coach, to receive badminton training from him.
(2) Ben's Badminton Shop to buy a badminton racket already delivered to Avi for his training.
(3) The Hong Kong Badminton Society to borrow HK$2,000 to buy uniforms to be used during the tournament.
(4) Nike Store to purchase 20 pairs of Nike sports shoes at the total price of HK$20,000.

Avi does not want to perform any of the above contracts. Can he do so?

Since Avi is under 18, his capacity to contract is limited. However, in scenario 1, there is a contract to provide education or training to Avi. Since Avi is a professional badminton player, a contract to obtain training at the hands of an expert is necessary for Avi's professional development. It is a contract for "necessaries" which is binding on Avi.

In scenario 2, it is necessary for Avi to purchase a badminton racket for his training and the racket has already been sold and delivered to him. Such an executed contract for necessaries is binding on Avi. Avi has to pay a reasonable price for the racket. Section 4(1) of the Sale of Goods Ordinance provides, *inter alia,* that where necessaries are sold and delivered to a minor or infant, he must pay a reasonable price.

In scenario 3, the loan is taken out by Avi to buy the uniforms which are necessary for his participation in the badminton tournament. A loan for buying necessary items of clothing is also binding on a minor. Avi, therefore, must repay the loan.

In scenario 4, Avi has entered into a contract for purchasing something which is not really required by him. Even a professional player does not need to purchase 20 pairs of sports shoes at one time. In contracting to purchase 20 pairs of sports shoes, Avi is simply indulging in extravagance. Such a contract is not binding on Avi because it is not a contract for necessaries.

2.126 Persons under 18 are minors. They only have limited contractual capacity. Contracts with minors fall into three distinct categories with different legal consequences. These are:

(1) contracts for necessaries;
(2) contracts which are binding on a minor unless repudiated by him; and
(3) contracts which are unenforceable against a minor unless ratified by him.

(i) Contracts for necessaries

2.127 Contracts for necessaries include contracts whereby goods, beneficial education or training or services are provided to a minor.

A. Contracts for goods sold and delivered

2.128 Section 4(1) of the Sale of Goods Ordinance provides, *inter alia*, that where necessaries are sold and delivered to a minor or infant, he must pay a reasonable price. In other words, only executed contracts for sale of necessaries are binding on minors. According to s.4(2) of the Sale of Goods Ordinance, "necessaries" means goods suitable to the condition in life of an infant or minor and to his actual requirements at the time of the sale and delivery.

2.129 Accordingly, whether the goods are necessaries or not raises two questions, the first being a question of law and the second being a question of fact: whether the goods are regarded by law as necessaries and whether they are in fact required by the particular minor.

2.130 The law recognises that payment for items such as food and drinks, accommodation, clothing, and medical services, are payment for things without which a minor cannot reasonably exist and are therefore treated as necessaries. But such necessaries do not include luxuries.

2.131 The question whether an item is necessary for the minor is determined by looking at the minor's background, whether he is rich or poor, and the minor's actual requirement at the time of sale and delivery of the items. For example, in scenario 2, above, the badminton racket sold and delivered to Avi falls into the category of necessaries for Avi is a professional badminton player, whereas 20 pairs of Nike sports shoes in scenario 4, above are not necessaries since Avi does not need so many pairs of shoes. In *Nash v Inman*,[106] a tailor failed to recover the price for 11 fancy waistcoats from a minor as the minor had already been supplied with adequate clothes.[107] The idea of limiting a minor's capacity to buy things is to prevent others such as businesspeople from taking advantage of a minor's tender age and impulsive temperament.

2.132 The onus is on the person dealing with a minor to prove that the particular items supplied to the minor are necessaries.[108] Thus, a shop which supplies goods to a minor must

106 [1908] 2 KB 1.
107 In *Ryder v Wombwell* (1868–69) LR 4 Ex 32, the plaintiff sued a minor with current income of £500 per year and having the prospect of an income of £20,000 per year on attaining majority. Given that the case was decided in 1868, the minor's current and future income was exceptionally high. The minor had bought gifts from the plaintiff on credit for £25. The gifts consisted of a pair of shirt sleeve studs composed of crystals adorned with diamonds and rubies, and an antique silver gilt goblet. Notwithstanding the minor's high income, the court held that those items were not necessaries.
108 *Ibid.*

prove that the goods are really needed by the minor. However, the plaintiff may claim the price of the goods if the plaintiff has already executed his part of the contract (ie delivered the goods). Mere sale of the goods without delivery brings into existence an executory contract which is not enforceable against the minor.[109] Moreover, the plaintiff can only claim a reasonable price, not the contract price of the goods.[110]

2.133 Where a minor obtains a loan and uses the loan or part of it to buy necessaries, the lender can recover the amount spent on buying necessaries.[111]

B. Contracts with minors for providing education, instruction or training

2.134 Besides providing a minor with reasonable accommodation, food, clothing, and medical services, the law equally recognises the importance of the minor's proper education. Education does not only mean formal education in a school, college, or university. It also includes professional instructions and training. However, only a contract to provide a minor with necessary education, instruction, or training is enforceable at law. Education, instruction, or training will be necessaries only if they are appropriate to the status and position of the minor. A contract for unnecessary education, like unnecessary goods, is not binding on a minor.[112]

2.135 Whereas a contract for the supply of necessary goods is binding on the minor only if the goods have been sold and supplied, a contract for providing education, instruction or training is binding on the minor whether or not the contract has been executed or remains executory. It is irrelevant whether the other contracting party has not performed any part of its obligations under the contract.[113]

> ***Roberts v Gray***
> **[1913] 1 KB 520**
>
> The defendant, a minor billiard player, agreed with the plaintiff, a professional billiard player, to go on a world tour and play matches. The defendant agreed to pay the plaintiff for taking him out on such tour and for learning billiards from the defendant. After the plaintiff had made all the tour arrangements, defendant refused to go. The plaintiff sued the defendant, claiming his remuneration.
>
> Held: Under the contract between the plaintiff and the defendant, the plaintiff agreed to give training to the defendant to improve his skills as a billiard player. It was a contract for necessaries. Contracts for necessaries applied not only to bread, cheese, and clothes, but also to education, including any form of instruction which was suitable for the minor. Such a contract was enforceable.

109 See generally GH Treitel, *The Law of Contract* (12th ed 2007) para.12.008. If a minor is liable on an executory contract it would have to be decided whether the goods must be necessary when sold, or at the time when they ought to have been delivered, or perhaps even when the minor refuses to take delivery.

110 This is because the claim is not in contract, but only in quasi-contract. See also the Sale of Goods Ordinance s.4(1).

111 *Marlow v Pitfeild* (1719) 1 P Wms 558, 24 ER 516.

112 *Hamiliton v Bennett* (1930) 94 JPN 136.

113 *Proform Sports Management Ltd v Proactive Sports Management Ltd* [2007] Bus LR 93, [35].

C. Contracts for beneficial services

2.136 Contracts for providing education to a minor are binding because they are beneficial to the minor. Although there is no general principle that any contract beneficial to a minor is binding on him, there are several situations where the courts will treat a contract to provide beneficial services, other than education, binding on the minor such as the following:

(1) a contract between a group of under-aged musicians and a company to act as managers and agents to manage its affairs;[114] or
(2) a contract between a minor (Charlie Chaplin's son) and a publisher whereby the minor agrees to tell his life story to be written by a "ghost writer" in return for royalties on the resulting work.[115]

(ii) *Contracts binding on a minor unless repudiated*

> Eric, a 17-year-old boy, signed a two-year lease agreement for a flat. After attaining 18 years of age, he wants to repudiate the agreement. Can he do so?

As Eric has attained 18, he has the right to repudiate the lease agreement.

2.137 Both the minor and the other contracting party are bound where they make a contract (1) relating to an interest in land[116] or (2) for the acquisition of shares in a company,[117] or (3) to enter into a partnership agreement,[118] or (4) relating to marriage settlements.[119] So far as the minor is concerned, the contracts cease to bind if he repudiates them on reaching the age of majority or within a reasonable time after reaching the age of majority.

(iii) *Contracts unenforceable against a minor unless ratified*

2.138 Contracts other than for the acquisition of an interest in land or shares in corporations or partnerships are not enforceable against a minor unless ratified by him upon attaining the age of majority.

(iv) *Minor's liability in tort*

2.139 A minor may fraudulently misrepresent his age to borrow money from another. In such cases, the lender cannot claim his money back by suing the minor in the tort of deceit

114 *Denmark Productions Ltd v Boscobel Productions Ltd* (1967) 111 SJ 715.

115 *Chaplin v Leslie Frewin (Publishers) Ltd* [1966] Ch 71.

116 *Davies v Beynon Harris* (1931) 47 TLR 424. Generally, for breach of a contract relating to an interest in land, the court may order the guilty party to specifically perform the contract. However, the court may not make such an order against a party dealing with a minor since it will be unfair to give such a right to the minor when the other party does not have the same right against the minor. Such a view is in line with the basic contractual principle that one party cannot be allowed preferential treatment over the other. On the other hand, when the minor has performed his or her side of the agreement, the other party is bound to specifically perform its side of the agreement.

117 *Re China Steamship and Labuan Coal Co* (1867–68) LR 3 Ch App 458.

118 *Lovell & Christmas v Beauchamp* [1894] AC 607.

119 *Edwards v Carter* [1893] AC 360.

buy one of them, this is a sale of existing but unascertained goods. When Ray sets aside a particular Toyota car for Donald, the goods become ascertained.

3.037 Consider another example, where Donald owns 10 acres of land on Lantau Island. Donald enters into three separate contracts in writing with Ray:

(1) Under the first contract, Donald agrees to sell to Ray 1,000 tons of gravel from a quarry located on the land at HK$200 per ton. Ray has to remove the gravel from the land.
(2) Under the second contract, Donald sells to Ray all the corn presently growing on a five-acre tract. It is Donald's duty to harvest and deliver the corn to Ray.
(3) Under the third contact, Donald permits Ray to enter his land and cut and haul the timber from the trees growing on the other five-acre tract.

3.038 In the above three situations, all the goods seem a part of the land until they are removed, harvested and, lastly, cut. Some operations need to be performed to make them into goods. Once this is done, for example, when the gravel is separated and weighed to the exact amount, the corn is harvested and clearly earmarked to be delivered and the timber is cut and hauled, only then do they acquire the character of being ascertained goods. Furthermore, they need to be appropriated for the purposes[49] of the contract with Ray to become ascertained and ready to be in a deliverable state.

4. FORMALITIES

3.039 A sale of goods contract does not require any particular formalities, as such. Thus, all contracts for the sale of goods can be made either by word of mouth[50] or in writing. They may also be partly in writing and partly by word of mouth or may be implied from the conduct of the parties.[51]

5. TERMS OF THE CONTRACT

3.040 During the course of negotiations leading to the formation of a contract of sale or when entering into an actual contract of sale, a seller of goods may make statements to the buyer related to the goods. Such statements may only amount to a mere representation or may actually be clearly stated and form a part of the contract, by which they will become the terms of the contract. Both representations and terms in a contract have legal consequences. Breach of a representation or term can have different repercussions for the innocent party involved in that the innocent party may generally want to rescind the contract, has the right to reject the goods and to decline to pay the price, or if the price has already been paid, the innocent party could recover it; or the innocent party may consider being

49 Unascertained goods need to be ascertained and then unconditionally appropriated to the contract. However, the seller needs to notify the buyer of this fact that the goods have been clearly earmarked. See SOGO s.20.
50 SOGO s.5.
51 Anson, *Law of Contracts* (Oxford Press, 27th ed 1998) 133–134; Cheshire, Fifoot, and Furmston, *Law of Contract* (Butterworths, 12th ed 1991) 146–155.

discharged from his obligations and sue for a breach of contract and for damages and/or lost profits, may want to continue and claim only damages or may claim damages under the Misrepresentation Ordinance and ask for an appropriate remedy therein.[52]

3.041 Similar to all other contracts, the terms of a sale of goods contract may be express or implied. Express terms are those that the parties expressly agree on and include in their agreement.[53] Consider the following illustration:

> ***Siu Fung Nin Hing Kee v Gilman & Co Ltd***
> **[1966] HKLR 258**
>
> The plaintiffs had contracted to buy 800 tons of Thai yellow maize from the defendants. A clear written term of the contract stated that the delivery of the maize would take place in April 1965. When the defendants delivered the goods, they only delivered 600 tons and failed to deliver 200 tons. The plaintiffs sued for damages for non-delivery. However, the defendants relied on various exemption clauses in the contract, including
>
> "Sellers are not responsible for delay in shipment or delivery due to war, civil commotions, strikes, floods or to any other circumstances beyond their control"; and "No guarantee of shipment dates can be given, but delivery will be expedited as much as possible".
>
> Held: The printed clause as to no guarantee of shipment dates, if applicable, was subordinate to the typewritten term providing for delivery in April.
>
> Further, the court held that onus was on the defendants, which they had failed to discharge, that non-delivery was due to circumstances beyond their control and also the non-availability from the source contemplated by the defendants was insufficient; they had to show that the goods could not have been procured from other sources.

3.042 Implied terms are those that, although not expressly included, were intended by the parties to form a part of their contract. The terms may be implied by statutes, trade usage, or customs, or by the circumstances of a particular case. Implied terms may not sometimes be read into the contract. In *Kensland Realty Ltd v Whale View Investment Ltd*,[54] the Court of

52 See Chapter 2 on Contract Law for details on what happens when there is a misrepresentation in a contract or where there is an actual breach of a warranty or term. For negligent misrepresentation and remedy of rescission, see *Link Folk Ltd v Glorious Motors Ltd* (DCCJ 552/2010, [2011] HKEC 1237).
53 For example, *China Light & Power Co Ltd v See Kong Silk Ltd* [1994] 2 HKLR 334 (where a dispute arose with respect to a claim for charges for unmetered electricity supplied. A question arose as to what terms of the contract applied, ie, whether Electricity company Rules, which constituted the terms of its contract with consumers, made in 1985, or those under 1972/78 applied). In 1985, new rules came in whereby the appellants stated that these Rules "supersede all previously published Supply Rules of the Company". Among other things, the Court held that the 1985 Rules applied to charges for electricity consumed after 1985, but not before. The terms under which electricity was supplied and consumed in 1983 could not be unilaterally varied by one party to the agreement in 1985. The supply was made under the 1972/1978 Rules. These Rules governed the supply at the time of the consumption, and these rules were the terms of the agreement and the basis on which the charges had to be made.
54 (2001) 4 HKCFAR 381, [59].

Final Appeal reiterated the test for implying a term in a written contract from the judgment of Lord Simon in the Privy Council case of *BP Refinery (Westernpoint) Pty Ltd v Shire of Hastings*[55] stating that:

> ... for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that "it goes without saying"; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.

3.043 In *Konwall Construction & Engineering Co Ltd v Strong Progress Ltd*,[56] it was held that no implied term could be inferred into the Sales Contract that delivery would not be made by the defendant if it would be manifestly unreasonable for the plaintiff to require delivery within 24 hours of the quantity of steel so specified since it would be contrary to the express terms agreed by the parties. Further there was also no implied term in the Sales Contract that P must identify the project in Hong Kong for which the steel bars were to be used. There was no basis to suggest such a common understanding between the parties, and the terms were vague. Further, such an implied term was not necessary to give business efficacy to the Sales Contract. P might not have the particulars which would have been required for the fulfilment of the implied term at the stage of placing an order. See the following illustrations:

Nam Sun Trading Co v Andersen, Meyer & Co Ltd
(1951) 35 HKLR 113

The plaintiff claimed the return of two deposits paid under sales contracts made in Hong Kong. It was a term of the contracts that the deposits and balance of the purchase money must be paid in New York in US dollars.

The contracts were subsequently frustrated due to an American embargo. The defendant, while admitting liability to return the deposits, submitted that it was a term of the contracts that any refunds, such as the refund of the deposits in question, should be made in the same place where the deposits were made, namely, the United States. The defendant argued that this was implied from the term related to payment of the deposit and the balance of purchase money in the United States.

Held: It was not possible to read such an implied term into the contract.[57]

55 (1977) 180 CLR 266, (1978) 52 ALJR 20, 26.
56 [2013] 3 HKLRD 503.
57 "The provision as to the payments in the United States relates exclusively to deposits and the balance of purchase money ... the place where it would be natural to expect the refund to be made is the place where the Plaintiff has its existence and carries on business", 115–116 (Gould J).

William Artists International Ltd v Chevaliar (Hong Kong) Ltd
[1996] 3 HKC 545

The plaintiff agreed to sell a walnut conference table to the defendant. Delivery of the table took place in accordance with the contract, but was rejected by the defendant who was dissatisfied with its colour. The defendant argued that it was an implied term that the wood colour of this table was to correspond to that of the Tecno walnut wood sample supplied to the defendant; or with that of the Tecno desktop finished in walnut which the defendant, at the plaintiff's invitation, had inspected before the order being placed; or of a colour that would tally with the overall colour scheme of the boardroom which the plaintiff knew was being refurbished.

Held: The defendant was entitled to reject the table.

Le Pichon J stated that "... I find that it was a term of the contract between the parties that the conference table to be delivered was to be of a dark, rather than a light, shade of brown within the range of colours exemplified by the Tecno walnut wood sample and the desktop in walnut that was inspected. It follows that the table actually delivered was not in accordance with the contract entered into between the parties and I hold that the defendant was entitled to reject the table" (555).

3.044 Contractual terms are classified into conditions, warranties, or innominate terms.[58]

(a) Conditions and warranties

3.045 The terms of the contract may be classified into conditions or warranties. A *condition* has been usually described as a term that is of such vital importance that it goes to the root of the transaction.[59] The Sale of Goods Ordinance does not define conditions. Neither does it explain how a condition is to be distinguished from a warranty. What the ordinance does is to explain the legal effect of the breach of condition or warranty in the following terms:

> Whether a stipulation in a contract of sale is a condition, the breach of which may give rise to a right to treat the contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages but not a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract.[60]

3.046 The effect of a breach of condition is to entitle the other party to repudiate the contract. Thus, for example, if the breach is committed by the seller, the buyer has the right

58 See Anson (n.51 above) 170; Cheshire, Fifoot, and Furmston (n.51 above) 172–178. See also Chapter 2 on Contract Law.
59 *Ibid.*
60 SOGO s.11(3).

has not got it. It is true that the seller delivered to him the de facto possession, but the seller had not got the right to possession and consequently could not give it to the buyer. Therefore the buyer, during the time that he had the car in his actual possession had no right to it, and was at all times liable to the true owner for its conversion".[77]

Karflex Ltd v Poole
[1933] 2 KB 251

The plaintiff who was a hire-purchase dealer bought a car from K and hired it to the defendant on hire-purchase. The defendant defaulted on the first payment under the hire-purchase agreement. The plaintiff then sued the defendant on the hire-purchase agreement. It then transpired that K was never the owner of the car. At this point, the plaintiff paid off the true owner and proceeded with the action against the defendant.

Held: The action failed because of the breach of the implied condition as to title. It was further held that the defendant could repudiate the hire-purchase agreement and recover the deposit paid to the plaintiff, even though he had not been evicted by the true owner.

Goddard J stated that "... it seems to me that there is a condition in this contract that the plaintiffs are the owners of the car ... where a person is letting out chattels of any description on hire-purchase, he does thereby impliedly contract, not that he will at some time become possessed of that property during the currency of the agreement, but that he is the owner of the property at the time when he lets it out".[78]

Butterworth v Kingsway Motors Ltd
[1954] 1 WLR 1286

A took delivery of a car under a hire-purchase agreement. He then sold the car to B. B, in turn, sold the car to C. C later sold the car to the defendant. The defendant subsequently sold the car to the plaintiff. After the plaintiff had used the car for eleven and a half months, he received a notice (from the Finance Company) under the hire-purchase agreement claiming repossession of the car. The plaintiff immediately wrote to the defendant claiming the return of the purchase price. Within one week of the plaintiff's claim, A paid off the outstanding balance of the hire-purchase price to the finance company.

77 *Rowland v Divall* [1923] 2 KB 500, 506.
78 *Karflex Ltd v Poole* [1933] 2 KB 251, 263.

Held: The plaintiff is entitled to recover the full purchase price of £1,275 from the defendant.

3.065 It may be possible to foresee a situation where the seller has the power to confer a good title on the buyer, but may not have the right to sell the goods.

Niblett Ltd v Confectioners' Materials Co Ltd
[1921] 3 KB 387

The defendant, an American company, sold 3,000 tons of preserved milk to the plaintiff. When the goods arrived in England, they were detained by the customs on the grounds of infringement of a trademark of an English company.

Held: Since the English company could have obtained an injunction to prevent the sale of the milk, the defendant had no right to sell them.

3.066 What conclusion can be drawn from the case law above?

3.067 All the above cases emphasise the principle contained in s.14(1)(a) of the seller's implied promise that he has a title to the goods which he can rightfully pass on to the buyer in a sale of goods transaction. Where the seller did not have the power or the right, the seller could not confer a good title on the buyer.

(b) Implied warranties as to goods being free from encumbrances and quiet possession

3.068 Section 14(1)(b) embodies two implied warranties, namely:

(1) An implied warranty that the goods are and will remain free from encumbrances before the property is to pass;[79] and
(2) An implied warranty that the buyer shall have quiet possession of the goods.[80] There are very few cases on the two warranties, because the law does not generally recognise real encumbrances over chattels by a person not in possession, and even equity only does so subject to the rights of the bona fide purchaser without notice.[81] Practical situations where s.14(1)(b) could become relevant would be in relation to charges or encumbrances on ships and aircraft.[82]

79 In a limited title sale, there is an implied warranty that all charges or encumbrances known to the seller have been disclosed to the buyer.
80 In a limited title sale, there is an implied warranty that neither the seller nor a third-party whose limited title is being passed on by the seller or anyone claiming through the seller or third-party will disturb the buyer's quiet possession of the goods.
81 See Atiyah (n.11 above) 112.
82 See Bridge (n.1 above) 406, where Bridge states: "It is not easy to envisage encumbrances against goods. The common law has traditionally been unreceptive to the notion of covenants running with chattels."

substitute goods. In this case, the buyer can claim damages against the seller. The measure of damages will be the same, and it would be as if the goods were never delivered.[299]

3.207 The rules for the assessment of damages for non-delivery are laid down in s.53:

(1) Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non delivery.
(2) The measure of damages is the estimated loss directly and naturally resulting in the ordinary course of events, from the sellers' breach of contract.
(3) Where there is an available market for the goods in question, the measure of damages is prima facie to be ascertained by the difference between the contract price and the market price or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed for delivery, then at the time of the neglect or refusal to deliver.

3.208 Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for repudiatory breach or non-delivery as provided by s.53(1). See the following case for illustration on assessment of damages:

3.209 In *Zhaoqing Kidstar Foods Ltd v Utility Industrial Ltd,*[300] the plaintiff sued the defendant for non-delivery of goods and brought an action for assessment of damages. The plaintiff had entered into three sales contracts with the defendant for the supply of Korean Refined White Sugar of TS Brand ("TS Sugar") to Sanrong Port in the People's Republic of China (PRC). Of the three contracts, the defendant performed two. In so far as the third contract, the parties agreed that the defendant should arrange for delivery of TS Sugar to Sanrong Port in three instalments in the month of October. Accordingly, on 19 September 2016, the plaintiff paid US$164,044.80 to the defendant for the supply of the first batch of TS Sugar scheduled to be delivered on 17 October 2016. However, on 30 September 2016, in wrongful and anticipatory breach of the Contract, the defendant notified the plaintiff that since the market price of TS Sugar had risen, it would not deliver TS Sugar to the plaintiff under the Contract. The plaintiff accepted the defendant's repudiation and urgently sourced and ordered TS Sugar from another supplier to meet its production demands. The quoted price at which the Plaintiff now bought the quantity of sugar was higher than its original contract price with the defendant. The Plaintiff also tried to bargain and settled at purchase price of US$645 per metric ton, which was slightly lower than the quote of US$650 per metric ton initially given by the new seller under the new contract. In any case, this new contract price was higher than that of the original contract price of US$534 and thus the plaintiff's calculated loss was of US$74,592.

3.210 Consequently, the plaintiff sued the defendant and, by a Judgment in 2017, the defendant was adjudged to pay the plaintiff (i) the liquidated sum of US$164,044.80 (being the amount paid by the plaintiff to the defendant for goods which were not delivered); (ii) damages to be assessed (in respect of the price difference for sourcing goods from a

299 See *Great Time Industrial (Hong Kong) Ltd v Tanhouse Ltd* (DCCJ 2862/2010, [2013] HKEC 1132).
300 [2018] HKFCI 2668.

substitute supplier) amongst other costs. In this instant determination for assessment of damages, the Court held that:

> The rule of common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.

3.211 Furthermore, applying s.53(3) for the assessment of damages, the principle of mitigation by the buyer and authorities relevant to the assessment of damages, the court determined that apart from US$164,088 and interest thereon that, damages will be assessed at US$74,592 or the Hong Kong dollar equivalent at the time of payment. The court determined this based on the principle in *British Westinghouse Electronic & Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673at [689] where his Lordship stated that:

> The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps.

3.212 Thus referring to the prima facie measure of damages under s.53(3) of SOGO that ought to be considered hand in hand with the rules of mitigation in which a buyer must, following his acceptance of the repudiation, take reasonable steps to reduce his loss, for example, by buying substitute goods in the market,[301] the court ordered the defendant to do so.

3.213 The market price rule, which is a prima facie rule, is the same as in an action by the seller.[302] The measure of damages for breach of warranty is the estimated loss directly and

301 See *Zhaoqing Kidstar Foods v Utility Industrial Ltd* [2018] HKFCI, para.14. See also Sharma C, *Chitty on Contracts—Hong Kong Specific Contracts* (5th ed 2016) 14, para.20.568.
302 Sale of Goods Ordinance s.55(2) and 55(3), which lay down the *prima facie* rule for measurement of damages for breach of warranty as to quality or condition. Section 55 of the Sale of Goods Ordinance stipulates:

> Where there is a breach of warranty by the seller, or where the buyer elects, or is compelled, to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not, by reason only of such breach of warranty, entitled to reject the goods; but he may:
> set up against the seller the breach of warranty in diminution or extinction of the price; or
> maintain an action against the seller for damages for the breach of warranty.
> The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.

> See also *Wing Tat Haberdashery Co Ltd v Elegance Development & Industrial Co Ltd* (CACV 126/2011, [2012] HKEC 230): Defective coloured dyed tapes sold by the plaintiff to the defendant, the defendant accepted them but claimed for breach of warranty. It was held that the defendant was given goods which were not fit to be used for the purpose and were defective and accordingly the judge at the first instance allowed the claim but reduced the amount based on the fact that once the buyer discovered the defect, he "has a duty to see that the defective goods are not sent to his sub-buyer to avoid further or consequential loss which he could have avoided by taking precautionary steps". Damages were calculated based on s.55 as in the case of a breach of warranty of quality; such a loss is *prima facie* the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty. The fact that the buyer has set up the breach of warranty in diminution or extinction of the price does not prevent him from maintaining an action for the same breach of warranty if he has suffered further damage. See also *Kudos Knitting (HK) Ltd v Zamira Fashion Ltd* (DCCJ 5393/2009, [2011] HKEC 1116).

cardholder only makes a part payment or only pays a minimum amount, he is required to pay interest on the balance from the date of purchase. Interest and other charges in Hong Kong can be "excruciatingly painful" for the cardholder if the payment is not made on time.[11] Fortunately, 86% of the Hong Kong credit cardholders pay their due in time.[12]

(c) Contractual basis

4.014 A credit card payment system entails three independent contracts. These are between (1) the issuer and the cardholder, (2) the cardholder and the merchant and (3) and the merchant and the issuer. In these contracts, parties act as principals, not as agents.

4.015 The contract between the issuer and the cardholder is usually a standard term contract. The common terms in such contracts are that the card is the property of the issuer; the issuer may cancel the card at any time; the issuer may vary the terms of the contract by giving reasonable notice; the issuer has no legal liability for the merchant's refusal; and the cardholder must not exceed the credit limit. Since the contractual terms are standard terms, they cannot be negotiated by the cardholder.

4.016 The contract between the cardholder and the merchant is similar to a typical sale of goods or services contract. The merchant may discriminate between cash and a card or even among cards.[13] However, once a merchant displays a sticker indicating acceptance of a card, he is bound by such an acceptance unless the cardholder is guilty of fraud or some other illegal conduct.

4.017 The contract between the merchant and the issuer is also a standard term contract. Under this contract, the issuer undertakes to make the payment of the sum due under the contract between the merchant and the cardholder. The issuer, however, deducts the agreed amount of service fee between the issuer and the merchant before making the payment to the merchant. The issuer may include a term in such contracts that the merchant must not refuse to accept the issuer's card in the event of an irregularity.

(d) Problems relating to credit cards

4.018 Credit cards provide lucrative business, especially to banks and financial institutions. These institutions, therefore, use aggressive marketing strategies to secure increasing numbers of clients. Banks and financial institutions in Hong Kong charge very high rates of interest. They also impose a financial charge for late payments. Defaulters or "revolvers" are the "sweet spot" of the banking industry.[14] Banks hate "deadbeat" cardholders who pay the amount due on their credit card within the grace period, which does not require the payment of any interest or financial charges.

11 Some credit card issuers charge more than 50% interest. DK Srivastava, "High Interest Rates on Credit Cards: Do Customers Need Protection?" (1998) 7 The Canterbury Law Review 188–198.

12 This fact was revealed in a survey conducted in 2016. In comparison, only 57% cardholders in the United States and 56% cardholders in Australia make payments in time, available at http://www.scmp.com/news/hong-kong/economy/article/1975017/hongkongers-best-world-keeping-credit-card-bills-survey-shows.

13 A merchant may give a discount for cash payments. A merchant may, for example, accept VISA but not MasterCard.

14 The Frontline *Interview of Ed Yangling, president of the American Bankers Association*, available at http://www.pbs.org/wbgh/pages/frontline.

4.019 The banking industry saw tremendous growth in the area of credit cards almost 25 years ago, when the banking industry successfully eliminated a critical restriction, that is, the limit on the interest rate a lender can charge a borrower. Furthermore, in 1996, the US Supreme Court, in *Smiley v Citibank (South Dakota) NA* 517 US 735 (1996), lifted restrictions on the amount of late penalty fees a credit card company could charge.[15]

4.020 In Hong Kong, interest rates on credit card payments are governed by the Money Lender's Ordinance (Cap.163), which permits the charging of interest up to 60%.[16] However, in Japan or Australia, this is around 15%; Hong Kong banks and financial institutions charge up to 28% or more interest. In addition, they impose a 3% financial charge. However, the language in which interest rates and financial charges are explained is difficult for the common person to understand. Such an absence of regulations can put users into a difficult position, as they may not be able to escape their credit card debt or may take a more-than-reasonable time to get out of this situation.

4.021 The interest rate on credit is generally calculated according to the following formula: APR/100 x ADB/365 x number of days revolved.

4.022 *APR* refers to the annual percentage rate, while ADB is the average daily balance. The formula can be translated as taking the annual percentage rate (APR) and dividing by 100, then multiplying by the amount of the average daily balance (ADB) divided by 365; this total is then taken and multiplied by the total number of days in which the amount revolved before the payment was made on the account.[17] The issuer usually charges interest from the date of the transaction up until the time when the payment is made.

4.023 In order to ease pressure from users, credit card companies often indicate a "minimum payment" by which a credit card user may continue to use his card for purchases. Generally, the minimum payment amount is about 2–3% of the outstanding balance. Should a credit cardholder only make minimum payment, it would take between 7 and 10 years, or even longer, depending on the rate of interest, to pay off his debts.[18] From the cardholder's point of view, the issuer should warn the cardholder of the consequences of making only a minimum payment.[19]

4.024 In addition to interest and late fee payments, cardholders are subject to hidden charges and costs. A merchant accepting credit cards pays 1–6% as the processing fee to the acquirer. "Merchant agreements" exist between the acquirer and the merchant, specifying that the merchant will not offer different prices for card and non-card payments. It is common sense for the merchant not to pay a service fee for credit cards from his own pocket.

15 Mary Bells, "Who Invented Credit Cards?", available at http://investors.about.com.

16 Srivastava (n.11 above) 191.

17 https://www.thesimpledollar.com/how-is-credit-card-interest-calculated.

18 The consumer council of Hong Kong has warned of the effect of minimum payment on customers and urged them to be more careful. See Srivastava (n.11 above) 190.

19 The Office of the Comptroller of the Currency of the US Government has imposed such restrictions on credit card companies since 2006. See http://en.wikipedia.org/wiki/credit_card.

fully complied at the time of presentation, but the same document is complied later within the validity of the letter of credit. This is because whether or not there was a "complying presentation" was to be viewed from the perspective of the issuing bank at the time of the presentation made to it and not at the time the negotiation bank effected the payment to the beneficiary.[36] Once the issuing bank accepts a presentation of documents under a letter of credit as complying, it cannot later refuse payment on the basis that the documents are not in compliance.[37] Otherwise, businessmen will be in a precarious situation. In international trade, a seller must be certain where he stands in relation to a bank's commitment under a letter of credit. According to UCP 600, an issuing bank has five banking days after the day of presentation to decide whether the presentation is compliant or not.[38] Once the issuing bank determines that a presentation is complying, it must honour.[39] The obligation to honour is so strict that even if the issuing bank makes its determination about compliance of the presented documents before the expiry of the five days for such determination, it cannot change its mind and refuse payment on the basis that the time period for the determination of compliance is not over yet.[40] Courts are reluctant to stop payment under the letter of credit even if they find the documents under the terms of letter of credit were available for submission but not submitted. For example, a bill of lading from another agent was issued on exchange or goods were available for inspection but not inspected and therefore inspection certificate was not issued. This is because buyer or seller has alternative remedies available, so stopping of payment under letter of credit is not justified. In any event, courts do not venture in opening of facts when it comes to payment under a letter of credit.[41]

4.038 Another facet of this rule is that the issuing bank or the authorising bank cannot vary the terms of credit, for example, making part payment from the authorised credit.[42] Even if documents are forged and the forgery is not apparent, the issuing bank or the authorised bank must make the payment.[43] However, the issuing bank or the authorising bank must act in good faith.[44] Meanwhile, when the issuing bank or the authorised bank knows or ought to know of the fraud, it must not make the payment or it will be liable to compensate the buyer.[45]

5. PROMISSORY NOTES

4.039 Have you noticed that the HK$20 note, printed by HSBC, "*promises to pay Twenty Hong Kong Dollars to the bearer on demand at its office here*"? This means that the bank which prints the HK$20 note will pay HK$20 to anyone who hands the printed HK$20

36 *China New Era International Ltd v Bank of China (Hong Kong) Ltd.*
37 *Swiss Singapore Overseas Enterprises Pte Ltd v China Citic Bank Corp Ltd Xiamen Branch* [2010] 2 HKLRD 1125.
38 UCP 600 art.14(b).
39 UCP 600 art.15(a).
40 *Swiss Singapore Overseas Enterprises Pte Ltd v China Citic Bank Corp Ltd, Xiamen Branch* [2014] 1 HKC 96. The Court of Appeal agreed with the decision of the Court of First Instance (*Swiss Singapore Overseas Enterprises Pte Ltd v China Citic Bank Corp Ltd* [2014] 6 HKC 55) and the Court of Final Appeal rejected the leave to appeal in this case (FAMV 50/2014, [2014] HKEC 2127).
41 *Hong Kong Huihuang Industrial Co Ltd v Allahabad Bank* (CACV 144/2016, [2016] HKEC 2328).
42 *Rudolph Robinson Steel Co v Nissho Iwai Hong Kong Corp Ltd* [1998] 1 HKLRD 966.
43 *Gian Singh & Co Ltd v Banque de l'Indochine* [1974] 1 WLR 1234.
44 *Ever Egale Co Ltd v Kincheng Banking Corp* [1993] 2 HKC 157.
45 *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] QB 159.

note to its office. You must be wondering how we can buy a bowl of noodles, pay with that HK$20 note and not be challenged by the shopkeeper, not to mention the fact that, if the bowl of noodles only costs HK$18, he also returns HK$2. Banknotes make our day-to-day life easy, so far as buying and selling are concerned.

4.040 Promissory notes that also make commercial transactions easier are similar to currency notes. The maker of the promissory note makes an unconditional promise to pay a certain sum to the holder of the note. In the commercial world, it is very common to write and issue promissory notes.

4.041 For example, a buyer (B) buys goods worth HK$1,000 from a seller (S1). However, B does not have HK$1,000 to pay at the time, so he writes on a piece of paper "I promise to pay to the seller (S1) HK$1,000" and signs it. This piece of paper is sufficient for S1 to claim HK$1,000 from B. It is also possible for S1 to buy something worth HK$1,000 from another seller (S2); instead of paying him cash, S1 can hand over the piece of paper, issued earlier by B, to S2. In this case, S2 can take this paper to B and claim HK$1,000. Such transactions have been very common since the early days of trade and commerce. The very purpose of such a document is to facilitate business and make sure that money is paid to the recipient without a problem.

4.042 The law of Hong Kong recognises the validity of payment through the medium of promissory notes. The Bills of Exchange Ordinance (Cap.19) states that: "A promissory note is an unconditional promise in writing made by one person to another signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money to, or to the order of, a specified person or to bearer".[46]

4.043 In essence, a promissory note contains a promise to pay a certain sum of money. The law does not set out any specific format as to how the document should be drafted. A promissory note must satisfy the following requirements:[47]

(1) it is in *writing* and *signed* by the maker;
(2) there must be an engagement or *promise* to pay;
(3) such a promise must be *unconditional*;
(4) the promise must be in respect of *payment of money only*;
(5) the amount payable must be *certain*; and
(6) the payee must be *certain*.

(a) Writing and signature

4.044 Promissory notes are negotiable instruments; they are, therefore, required to be in writing. The simple reason for this requirement is that, if they are not in writing, they cannot be negotiated. The writing requirement also confirms that an oral promise to pay does not constitute a promissory note.

46 Bills of Exchange Ordinance s.89.
47 For the sake of easy understanding, conditions are divided into different parts to emphasise each and every aspect of a Promissory Note. This idea has been adopted from RK Bangia, *Negotiable Instruments Act* (Allahabad Law Agency, 3rd ed 1990). The same idea has also been adopted to explain the conditions of a bill of exchange later in the chapter.

4.045 The document must also be signed by the maker who promises to pay. The signing of the document shows the understanding and free will of the maker of the promissory note, who promises to pay unconditionally and assumes related responsibilities.[48]

4.046 Hong Kong has enacted the Electronic Transactions Ordinance (Cap.553), which provides legal force to all computer-generated documents, whether signed manually or mechanically. In view of this law, a promissory note generated through a computer and signed digitally by the maker is valid.

(b) Promise or engaging to pay

4.047 In order to qualify as a promissory note, it is necessary for documents to contain a promise to pay. This promise should be expressed.

Two examples of an express promise are stated below:

(1) "I promise to pay B or Order HK$1,000".
(2) "I acknowledge to be indebted to B in the sum of HK$1,000 to be paid on demand for value received".

4.048 The first is a classic example of a promissory note. In the second, the maker acknowledges the debt and then promises to pay on demand.[49] However, mere acknowledgement of debt (without a promise to pay) is not a promissory note.

4.049 For example, A signs a document in the following terms:

(1) "I have borrowed HK$1,000 from Mr C and I am accountable to him for the same";
(2) "Mr C, I.O.U. (I owe you) HK$1,000"; or
(3) "I have received HK$1,000 from C, which has to be paid to him".

4.050 The maker only acknowledges that he owed or borrowed or received HK$1,000 from C, but does not promise to pay. The acknowledgement of a loan does not create a promissory note. The acknowledgement of a loan can also be made by issuing a receipt.

4.051 Consider the following:

> "This receipt is hereby executed by A for HK$1,000 received from B. This amount is to be repayable after two months. Interest at the rate of 10 per cent is to be charged".

48 Bills of Exchange Ordinance s.94.

49 It should be noted that s.89(1) requires that a valid promissory note must be payable "on demand or a fixed or determinable future time". In the situation where the date is fixed, the covenantor has an option to pay before that day but he is not obligated to do so. However, if he chooses to pay before the fixed date, the bill holder is obliged to accept payment. See *Golden Garden Management Ltd v Grand TG Gold Holdings Ltd* [2012] 1 HKLRD 934.

This receipt is a mere acknowledgement that A has received HK$1,000 and sets out the repayment terms. It cannot be called a *promissory note*, even if it contains a promise to pay.[50] Loan agreements cannot become promissory notes.

4.052 On the other hand, once a promissory note exists, it does not matter whether or not it also contains other payment terms or states reasons for borrowing.[51]

4.053 It is not necessary for the words "I promise to pay" to be written in the promissory note itself. It is sufficient for it to be inferred from the promissory note.

(c) An unconditional promise to pay

4.054 The promise to pay unconditionally is the essence of a promissory note. As a result, a note stipulating conditions for payment will be disqualified as a promissory note except in one case. A payment may be made conditional on the occurrence or non-occurrence of certain events or on the satisfaction of certain conditions. The validity of a promissory note will be negatively affected if any of the following conditions are used:

(1) "I promise to pay B at my convenience";
(2) "I promise to pay B HK$1,000 if he supplies me with mango";
(3) "I promise to pay B HK$1,000 if he goes to Macau"; and
(4) "I promise to pay B HK$1,000 one month after my marriage with Angela".

4.055 However, a promise to pay B HK$1,000,000 "provided that C leaves me enough money" is considered an unconditional promise to pay, as death is certain to happen. The only thing that is uncertain is when (ie the timing of) the death will occur. Such uncertainty does not make the payment conditional. Similarly, a promise to pay on "the first day of the Year of the Pig" is an unconditional promise, as the first day of the Year of the Pig is certain to come.

4.056 A statement related to the consequence of the failure to pay the promised sum of money also does not make the payment conditional. For example, a statement that "on default of the payment, the promissor (A) and his properties shall be liable for the principal (say HK$1,000,000) and all consequential damages" is an unconditional promise to pay.

(d) Promise must be to pay money only

4.057 In a promissory note, the promise to pay must refer only to money and nothing else. This is because the promise to deliver some goods is not a promise to pay money only but to do something in addition to that (such as the delivery of a car). For example, someone writes, "I promise to give you an LCD television". This promise is not a promissory note, because it is a promise to give goods, not money.

50 *Mohammed Akbar Khan v Attar Singh* [1936] 2 All ER 545.

51 Bills of Exchange Ordinance s.89(3).

replaced largely by credit cards, debit cards, and bank transfers. Nevertheless, money lenders still use promissory notes for the collection of the money lent by them. So long as the institution of the money lender exists, promissory notes will continue to play a meaningful role.

6. BILLS OF EXCHANGE

4.069 Bills of Exchange are important instruments that facilitate the regulation of international commercial transactions, especially sale-of-goods transactions. A bill of exchange is a method by which the buyer pays the seller the price of the goods. In international transactions, buyers and sellers are at arms length and are in two different countries. Nonetheless, the world is interdependent. Some need to sell goods, and others need to buy goods. The buyer wants his money, and the seller wants his goods. This method of payment through a bill of exchange is secure, giving confidence to the seller and providing security to both the buyer and the seller. The seller gets a guarantee of payment, and the buyer gets a guarantee of receipt of the goods.

4.070 How does a bill of exchange facilitate an international sale-of-goods transaction? One person (the seller) orders another (the buyer) to pay a certain sum of money (the price) to a third person (the seller's bank or the seller). In other words, the payment is available on the seller's order. You may recall that, in a promissory note, the maker of the promissory note *promises* to pay, but in a bill of exchange, there is an *order* to pay.

4.071 The Bills of Exchange Ordinance defines a bill of exchange as "an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to, or to the order of, a specified person or to bearer".[56]

4.072 Similar to a promissory note, a bill of exchange should also be:

(1) in writing and signed by the maker;
(2) the order to pay must be unconditional;
(3) the order must be to pay money only;
(4) the sum payable must be certain; and
(5) the payee should be certain.

4.073 These similarities between a promissory note and a bill of exchange create some confusion; however, a bill of exchange also has some flexibility. Where the maker of the bill of exchange and the person who is ordered to pay are one and the same, that instrument can be treated by the holder either as a promissory note or as a bill of exchange. Once the holder decides one way or the other, the holder is bound by his election or decision. Thus, if the holder treats an instrument as a bill of exchange, at a later stage, he cannot treat it as a promissory note. The reason is that the process for the collection of money for a bill of exchange differs from that while applying for a promissory note.[57]

56 Bills of Exchange Ordinance s.3(1).
57 *Ibid.*, s.95 states that all the provisions of the Ordinance related to bills of exchange are also applicable to a promissory note, except for the provisions related to presentment for acceptance, acceptance, acceptance supra protest and bills in set.

4.074 There is no fixed format for either a bill of exchange or a promissory note. It is, therefore, necessary to read the whole instrument and then infer the maker's intention in order to decide whether an instrument is a promissory note or a bill of exchange. For example, in a bill of exchange, the maker makes an "order" to pay. However, in practice, out of politeness, the maker may write "please pay". The change of the word from "order" to "please pay" does not make that instrument invalid as a bill of exchange.[58]

4.075 Similarly, if an instrument contains the words "Bill of Exchange", that does not make it a bill of exchange. We still need to read the whole instrument to understand its true nature. Moreover, there are subtle differences between the UK and Hong Kong Law. For example, if in the United Kingdom an instrument states, "Bill of Exchange—payable at 90 days D/A,"[59] it is regarded as not being a bill of exchange because of the uncertainty as to the date of maturity of the bill.[60]

4.076 In Hong Kong, however, a similar instrument with the statement "payable at 120 days D/A sight" has been held to be a bill of exchange.[61] What made the different between the two bills is the inclusion of the word *sight* in the Hong Kong example and its absence in the UK example. The court in Hong Kong ignored the inclusion of the word "D/A" and said that there was certainty with regard to the maturity of the bill, because it was "payable at 120 days D/A sight".[62]

(a) Parties to a bill of exchange

4.077 In a bill of exchange, there are three parties:

(1) the person who makes or draws the bill of exchange—the Drawer;
(2) the person on whom the bill of exchange is drawn, that is, the person who is ordered to make payment—the Drawee; and
(3) the person in whose favour the bill of exchange has been made or the person to whom or on whose order the sum of money stated in the bill of exchange is payable—the Payee.

4.078 The drawer is often a seller, the drawee is often a buyer and the payee is a bank that receives payment. Although the definition of a bill of exchange refers to three parties, in practice this may not be the case The drawer and the drawee could be the same person. Similarly, the drawee and the payee could also be the same person.[63] Even the drawer and the payee may also be the same person. This may happen when the drawer buys the bill of exchange from the payee.

4.079 It is also possible that a bill of exchange could have more than one drawee, whether they are partners or not. However, two drawees cannot be addressed in succession or

58 D Roebuck (ed), *Law Relating to Banking in Hong Kong* (Hong Kong University Press, 2nd ed 1994) 16.
59 Here *D/A* means document against acceptance.
60 *Korea Exchange Bank v Debenhams (Central Buying) Ltd* [1979] 1 Lloyd's Rep 548.
61 *NCNB National Bank v Gonara (HK) Ltd* [1984] HKLR 152. It should be noted that the law in the United Kingdom and Hong Kong are the same.
62 John Mo (3rd ed 2003) 376.
63 Bills of Exchange Ordinance s.5.

violated. Its existence is based "on the simple principle that in a civilised society, people must be able to live on the assumption that others will respect their person and possessions and if they fail to do so, they will pay for their unwarranted interference, aggression, or for failure to observe norms of expected behaviour".[2] In imposing liability for certain acts, the law of tort also sets standards of behaviour.

2. TYPES OF TORTIOUS LIABILITY

9.003 There are three main types of tortious liability, namely, liability for intentional torts, liability for negligence (unintentional torts) and strict liability. The liability in the first two categories is based on fault. It is concerned with a person's failure to follow a certain standard of conduct. Where a person deliberately beats you, locks you up in a place, sexually harasses you, enters your land or throws something onto your land or takes away your property or damages it, such conduct is not acceptable and amounts to the commission of intentional torts. On the other hand, where a person carelessly drives his car and injures a pedestrian; gives careless investment advice to his client, causing the client financial loss; or a manufacturer carelessly produces contaminated articles of food which causes food poisoning to the consumer, such person or manufacturer is liable in the tort of negligence.[3]

9.004 Strict liability arises independently of any fault. A person is liable whether the harm is caused intentionally or negligently. For instance, where a person stores a large quantity of chemicals on his premises without any statutory authority and an explosion is caused destroying the plaintiff's flat, that person may be liable under the tort of strict liability.[4]

9.005 It is beyond the scope of this chapter to examine every tort. This chapter discusses the torts of negligence, occupiers' liability, and defamation: these are the most important topics for business law students.

(a) Remedies

9.006 In a tort claim, the successful plaintiff is usually awarded damages, that is, monetary compensation. The object of awarding damages is, as far as practicable, to place the victim in the same position in which he was before the tort was committed. For instance, where a person is injured in an accident because of the defendant's negligent driving, he is entitled to an award of damages for all medical expenses incurred and loss of income as a result of the accident, as well as damages for pain and suffering.

9.007 Where the court is satisfied that payment of damages will not adequately compensate the victim, it may order the wrongdoer to do something else to compensate the victim. For instance, if a person has taken away your vintage sports car, the court may order him to

2 *Ibid.*, 5.
3 *Ibid.*, 4–5.
4 However, where a thing is brought onto the land under the authority of a statute, it is necessary to prove negligence to establish liability.

return the car to you. It may also grant an injunction to restrain a wrongdoer from interfering with another's enjoyment of his property (eg an injunction may be granted to prevent a person from playing mahjong after midnight, causing nuisance to neighbours).

(b) Tort and crime

9.008 A tort is different from a crime. When a person commits a crime, he is punished and sent to prison. A victim of crime does not usually get damages from the criminal. Tort, on the other hand, is a civil wrong. It gives the victim the right to sue the wrongdoer for damages. Tort law is more concerned with compensating the victim rather than punishing the wrongdoer.

9.009 There are situations where an act could be both a crime and a tort. For example, when a person beats you, the wrongdoer can be prosecuted and punished for the crime of assault. The victim can also sue the wrongdoer in the tort of battery to claim damages.[5] Likewise where the defendant splashes paint on the plaintiff, he commits the tort of assault as well as a crime.

(c) Tort and contract

9.010 Both a breach of contract and a tort are civil wrongs. However, contractual obligations are fixed by the parties to a contract and are generally owed by one party to the other. Only a party to the contract can sue or be sued. By contrast, liability in tort is not based on any pre-existing relationship. Tortious duties are imposed by law and are generally owed to all persons. Whosoever commits a tort is liable. Sometimes, a wrong could give rise to both liability in tort as well as in contract. For example, where you sign a contract to employ a surgeon to operate upon you but he does his work carelessly, leaving a pair of scissors in your stomach. You can sue him either for breach of contract or in the tort of negligence.

3. NEGLIGENCE: DUTY OF CARE

9.011 Where a person suffers injury or damage due to a careless act or omission of another, he may have a claim against that person in negligence.[7] However, not all careless acts or omissions causing injury or damage give rise to liability. "A man is entitled to be as negligent as he pleases towards the whole world if he owes no duty".[8] And, as Judge Cardozo said: "there is no liability in an indeterminate amount for an indeterminate time to an indeterminate class". The courts use control devices to limit the range of potential claimants.[9]

5 See I Steele, "Negligence Liability for Failing to Prevent Crime: the Human Rights Dimension", (2008) 67(2) CLJ 239–241.
6 *Chang Ming Fang Jacqueline v Zhang Zi Qiang* (HCA 2714/2006, [2009] HKEC 1411).
7 *Chiu Chit v Bank of China (Hong Kong) Ltd* (DCCJ 4041/2007, [2009] HKEC 1357).
8 *Le Lievre v Gould* [1893] 1 QB 491.
9 *Ultramares Corp v Touche* 174 NE 441 (1931).

(a) The existence of a duty of care

(1) A lorry driver is drunk. While he is driving in an inebriated state along Tai Po Road, he kills a man and injures a woman. Can the deceased's estate and the injured woman claim against the lorry driver in negligence?

Their claims are likely to succeed. A driver owes a duty to take reasonable care of other road users. A person driving in an inebriated state is not likely to take such care. It therefore seems that the lorry driver has failed to discharge his duty to drive safely.

(2) Because of financial instability, the stock market is closed by the Hong Kong Securities and Futures Commission. Investors lose money due to the closure of the market. Jack, one of the investors, sues the Hong Kong Securities and Futures Commission in negligence for financial losses arising from such closure. Advise Jack.

Jack is unlikely to succeed. Although Jack's losses may be foreseeable by the Hong Kong Securities and Futures Commission, the court may not impose a duty on the Commission due to policy reasons. Therefore, it can be said that the Hong Kong Securities and Futures Commission has not breached any duty towards Jack. A decision to close the stock market may have been taken in the best long-term interest of Hong Kong. It will be wrong to inhibit the Commission by the threats of legal proceedings (see *Richardson Greenshields of Canada (Pacific) Ltd v Keung Chak Kiu* [1989] 2 HKLR 103).

9.012 *Donoghue v Stevenson* is the seminal case which laid down the present law of negligence in 1932. Before *Donoghue v Stevenson*, the law recognised only a few "duty situations" (eg innkeepers owed a duty of care to their guests, surgeons to their patients and attorneys to their clients). *Donoghue v Stevenson* itself creates a new duty category (ie manufacturer and consumer). But, more importantly, *Donoghue v Stevenson* also lays down a general principle for the creation of new categories of duty. The position that has been reached now is this: the plaintiff must prove that his case falls within one of the recognised duty categories. If the plaintiff cannot do so, his case will fail unless the court recognises a new duty.

Donoghue v Stevenson
[1932] AC 562

The plaintiff drank a bottle of ginger beer manufactured by the defendant. The ginger beer was bought by her friend from a retail shop. The bottle was sealed with a metal cap and was made of opaque glass. Some of the ginger beer was poured over the ice cream in a tumbler and the plaintiff drank it. As some of the ginger beer was still left in the bottle, her friend emptied it into her tumbler. A foreign body flowed out of the bottle. It looked like the remains of a dead snail. The plaintiff became ill. She either suffered food poisoning or became sick by the sight of what she saw, or both.

The plaintiff claimed damages from the manufacturer of the ginger beer who had sold it to the retailer. The plaintiff could not sue the retailer because she did not have a contract with the retailer as the ginger beer had been bought by her friend.

Held:

(1) The manufacturer of the ginger beer was liable. It owed a duty of care to the ultimate consumer to see that there was no noxious matter in the ginger beer which would cause injury to the consumer.

(2) "The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question." (Lord Atkin)

9.013 Lord Atkin's speech in *Donoghue v Stevenson* laid down what is called the neighbour principle for imposing liability in negligence. The neighbour principle is seen as implying that a duty of care can be established if the following three elements are satisfied:

(1) foreseeability of harm;
(2) proximity; and
(3) fairness, justice, and reasonableness.[10]

9.014 These requirements are in most cases merely facets of the same thing. The criterion of proximity does not lay down a precise, scientific ultimate test; and the presence of the necessary degree of proximity determines what is fair, just, and reasonable.[11]

9.015 The leading Hong Kong authority on the question of the existence of a duty of care is the erudite decision by Bokhary PJ of the Court of Final Appeal. A summary of the case appears below.

10 *Caparo Industries plc v Dickman* [1990] 2 AC 605, 628–629 (Lord Bridge). A summary of *Caparo* is given in para.9.044. See also, *Grasberg Capital Asia Ltd v Bank of Communications Ltd* [2017] 5 HKLRD 854; *Ng Tat Kuen v Tam Che Fu* [2015] HKEC 2226; *Sattar KA v Goodrich Transportation (HK) Ltd* [2019] 1 HKLRD 538.

11 See *So Kai Hau v YSK2 Engineering Co Ltd* [2018] HKCU 2583.

Held:

(1) That even if the plaintiff had been provided training in the techniques to combat violent behaviour of a tenant for self-defence, it still could not mean that the incident that resulted and the injuries, loss and damage that the plaintiff suffered would not have occurred.
(2) That providing truncheon would not have helped plaintiff prevent the injuries as he accepted that he would not have used the same as it would have provoked the attackers into exerting more or greater violence.
(3) That there had never been any incident nearly like that in question. The people in the [residential] estate were all very civilised. It was by and large a peaceful residential environment and the defendant could not reasonably have foreseen that something like the incident in question would take place.

(ii) *Proximity*

9.021 Lord Atkin's speech in *Donoghue v Stevenson* stressed not only the requirement of foreseeability of harm but also a close and direct relationship of proximity. Foreseeability alone was not sufficient. "Otherwise, there would be liability in negligence on the part of one who sees another about to walk over a cliff with head in the air, and forbears to shout a warning."[17]

9.022 A person may see a neighbour's child drowning in Victoria Harbour, but his failure to rescue the child will not make him liable in negligence because there is no relationship of proximity between that person and the child. However, there will be proximity in such a case if that person is a school teacher and the drowning child is under his control.

Yuen Kun Yeu v Attorney-General
[1987] HKLR 1154

The plaintiffs deposited substantial sums of money with a deposit-taking company registered under the Deposit-Taking Companies Ordinance. The deposit-taking company went into liquidation and as a result, the plaintiffs lost their deposits. The Commissioner of Deposit-taking Companies had various regulatory powers over the registration and de-registration of this deposit-taking company. The plaintiffs brought an action against the Attorney-General representing the Commissioner. They contended that the Commissioner was negligent since (1) he knew or ought to have known that the affairs of the company were being conducted fraudulently, speculatively and to the detriment of its depositors; (2) he failed to exercise his powers under the Ordinance so as to secure that the company complied with the obligations and restrictions imposed on it; and (3) he should either never have registered the company

17 *Yuen Kun Yeu v Attorney-General* [1987] HKLR 1154, 1171 (Lord Keith of Kinkel).

or have revoked its registration before the plaintiffs made their respective deposits with it in order to save them from the effects of the company's eventual liquidation.

Held:

(1) Foreseeability of harm did not of itself and automatically lead to a duty of care. There must also be proximity.
(2) The key question in this case was whether there was a relationship of proximity between the Commissioner and the depositors.
(3) At the time the depositors chose to deposit their money with the deposit-taking company in question, there was no relationship between the depositors and the Commissioner. There was also no special relationship between the Commissioner and the deposit-taking company. Therefore, there was no proximity between the depositors and the Commissioner.
(4) The duty of the Commissioner was not aimed at an individual member of the public. It was designed to protect the public in general against unscrupulous managers of deposit-taking companies. "The Commissioner did not have any power to control the day-to-day management of any company, and such a task would require immense resources … [It] is doubtful if any supervision could be close enough to prevent it in time to forestall loss to depositors. In these circumstances, their Lordships are unable to discern any intention on the part of the legislature that in considering whether to register or deregister a company, the commissioner should owe any statutory duty to potential depositors." (Lord Keith)

(iii) *Fairness, justice, and reasonableness*

9.023 Not only foreseeability of harm and proximity but also the elements of fairness, justice and reasonableness are examined by the court to determine the existence of a duty of care. Even if foreseeability and proximity are established, the plaintiff may still not succeed if the court thinks that it is not fair, just, and reasonable to impose a duty on the defendant.[18]

9.024 The classic *Donoghue v Stevenson* furnishes a good illustration of when it would be fair, just, and reasonable to allow a plaintiff to succeed.[19] In that case, the plaintiff had no remedy in contract against the manufacturer. If no remedy in tort were available, the defendant would have gone unpunished.

White v Jones
[1995] 2 AC 207

The defendants were solicitors. They were instructed by the plaintiffs' father, aged 78, to draw up a will giving the plaintiffs £9,000 each. The solicitors delayed in carrying out the father's instruction. After a month, the father again asked the solicitors

18 See *Grasberg Capital Asia Ltd v Bank of Communications Ltd* [2017] 5 HKLRD 854.
19 See also *Lam Pak Leung v Ip Tsz Ping* [2015] 3 HKLRD 437.

Held:

(1) The police did not owe a duty of care to individual members of the public to apprehend a criminal.

(2) The police should be immune from an action of this kind. Imposition of a duty of care on the police could lead to their "function being carried on in a detrimentally defensive frame of mind". "[A] great deal of police time, trouble and expense might be expected to have to be put into the preparation of the defence to the action and the attendance of witnesses at the trial. The result would be a significant diversion of police manpower and attention from their most important function, that of the suppression of crime. Closed investigations would require to be reopened and retraversed, not with the object of bringing any criminal to justice but to ascertain whether or not they had been competently conducted." (Lord Keith)

(3) If this action lies, every citizen will be able to require the court to investigate the performance of every policeman. If the policeman concentrates on one crime, he may be accused of neglecting others. If the policeman does not arrest on suspicion a suspect with previous convictions, the police force may be held liable for subsequent crimes.

(4) The threat of litigation against a police force would not make a policeman more efficient. The necessity for defending proceedings, successfully or unsuccessfully, would distract the policeman from his duties. (Lord Templeman)

9.029 *Hill v Chief Constable of West Yorkshire* was recently followed in *Robinson v Chief Constable of West Yorkshire*.[26] There, the appellant was knocked to the ground and injured when she was caught up in the arrest of a drug dealer. She sued the Chief Constable of West Yorkshire for damages for her personal injuries. The Court of Appeal held that generally no liability could be imposed on the police for negligence during suppression of crimes. In this case, Lady Justice Hallett said that "it will not be fair just and reasonable to impose a duty and the interests of the public at large may outweigh the interests of the individual allegedly wronged".[27]

9.030 *Hill v Chief Constable of West Yorkshire* was applied in *Yuen Kun Yeu v Attorney-General*. The Privy Council in that case observed that the position of the Commissioner of Deposit-taking Companies was analogous to that of the police force in *Hill*: "If the Commissioner were to be held to owe actual or potential depositors a duty of care in negligence, there would be reason to apprehend that the prospect of claims would have a seriously inhibiting effect on the work of his department."[28]

26 [2014] PIQR P14. The UK Supreme Court adopted a different approach than the Court of Appeal. It held that the plaintiff's injury was caused by a positive act of the police, there was a case for the latter to answer. Lord Hughes JSC *dubitante* said that there was no general rule that the police were not under any duty of care when discharging their functions of preventing and investigating crime: *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4. This case has persuasive value for Hong Kong.

27 *Ibid.*, [39]. *Lau Ming Lee v Secretary for Justice* [2017] 5 HKC 214 held that Hong Kong police should not be held liable for negligent investigation of a crime

28 *Yuen Kun Yeu v Attorney-General* [1987] HKLR 1154, 1176. See also para.9.022.

9.031 Several other instances can also be given where a plaintiff's claim has been set aside on policy grounds. Barristers have been held not liable in relation to their work in court as advocates, as a barrister's duty to the client is subject to a higher duty to the court. Fear of potential claims by clients would prevent a barrister from discharging this duty properly.[29] For the same reasons, solicitors are not liable for anything done or omitted in conducting a case in court.[30] In *Man Hin Fung v SKH Chan Young Secondary School*,[31] a 17-year-old student was injured due to the horseplay of two other students. This horseplay occurred only for a couple of seconds. The student claimed that he suffered injury because of lack of supervision on the part of school authorities. However, the court said that no teacher could be expected to keep a close watch on each pupil every minute of the day and that constant supervision by a teacher was only required where a student's situation was special. In the other cases, the court emphasised, constant supervision would be damaging to the teacher–pupil relationship and against public policy.

9.032 How the concept of duty of care applies to certain categories of duty is discussed in detail now. You will note, however, that the authors have only focused on two categories which are of much significance to students of business law.

3. DUTY OF CARE: PURE ECONOMIC LOSS CAUSED BY A NEGLIGENT ACT

(1) During Well's 21st birthday party, Will gives him a HK$3 million Alpha Beta sports car as a present. Two years later, when Well takes his girlfriend for a drive, he suddenly sees some smoke coming out from the car. He drives the car to his garage. He is told by the mechanics that there are serious manufacturing defects in the car, and it will cost him HK$250,000 to repair it. Well approaches the car dealer but is told that he cannot help him because the warranty period of the car has already expired. Advise Well if he could recover from the manufacturer the expenses, he has incurred, in remedying the defects in the car.

Well cannot recover the cost of repairing his car. The rule is that where a person suffers economic loss which is not consequent upon any physical injury or damage to his property, he has no claim against the wrongdoer in negligence. On the other hand, a person can recover pure economic loss in contract.

However, there is no contract between Well and the manufacturer or the car dealer. Therefore, Well cannot sue either of them.

29 *Rondel v Worsely* [1969] 1 AC 191. This position has been changed in England by *Arthur JS Hall & Co v Simons* [2002] 1 AC 615. Now, barristers can be held liable there. However, being a post-1997 case, it has only persuasive value in Hong Kong.

30 *Ross v Caunters* [1980] Ch 297.

31 [2018] 3 HKC 246.

9.064 In *Lam Mo Bun v Hong Kong Aerosol Co Ltd*,[57] discussed above, the defendants argued that the plaintiff was contributorily negligent because he should not have sprayed the insecticide when the washing machine was operating. The plaintiff, however, was held not to be contributorily negligent. The court said that an ordinary person using the product would know from the label on the insecticide spray that it contained something inflammable that might catch fire if sprayed on or near a flame, or could explode if punctured or heated. However, since the label did not state what gas was used, he would not necessarily know that a concentration of the released gas could cause an explosion. Even if he knew the gas was inflammable, he would not know the amount required to produce an explosion since he was not an expert. Even if the plaintiff had sprayed a large quantity of insecticide in the kitchen, he could not have foreseen that that might cause an explosion. The warning label on the insecticide did not mention such a possibility.

(e) No tortious liability for pure economic loss

9.065 As noted earlier, if a negligently manufactured product causes physical injuries or property damage to the ultimate user, the user can claim all financial losses flowing from his injuries or property damage. However, if the product does not cause any physical injuries or property damage, but is only defective in the sense that it is not fit for the consumer's purpose or requires some repairs, the consumer cannot sue the manufacturer in tort. Pure economic losses of this kind do not give rise to liability beyond contract.[58] If the consumer has a contract with the manufacturer, he may be able to sue for breach of that contract.

6. BREACH OF DUTY

(a) An objective standard—test of reasonable person

9.066 The existence of a duty of care alone does not give rise to any liability. The plaintiff must further prove that the defendant has breached his duty by failing to measure up to an objective and impersonal standard, namely, that of a reasonable person.[59] A person breaches a duty of care if he fails to do something which a reasonable person would do, or has done something which a reasonable person would not do.[60] In *Donoghue v Stevenson*, the manufacturer breached its duty towards the plaintiff because a reasonable manufacturer of ginger beer would have ensured that the ginger beer that was sold was fit for human consumption.

9.067 In *Chau Kei Man Rayman v Chaters Auction Ltd*,[61] the plaintiff consigned five valuable teapots to the defendant to sell them at an auction. The teapots were not sold. Four of the five teapots were found to have been damaged. The court held that the defendant breached its duty not to expose any teapots to any risk of damage while in its possession. In another case, the plaintiff underwent laser and facial treatment at a beauty centre run by the defendant. She suffered 2% facial burn injury. The defendant was held liable for the plaintiff's injury as the

57 [2001] 1 HKLRD 540.

58 See the section on "Pure Economic Losses Arising from a Defective Product" in para.9.037.

59 See *Tsang Wai Hung v Trustful Engineering & Construction Co Ltd and Ors* [2017] HKCU 195. See the discussion of the court on the breach of duty of care in negligence by an occupier towards its visitors.

60 *Blyth v Birmingham Waterworks* (1856) 11 Ex 781, 156 ER 1047. See also *Chiu Chit v Bank of China (Hong Kong) Ltd*, which is discussed in para.9.115.

61 [2018] 3 HKC 225.

defendant by his failure to perform the treatment up to a reasonable standard exposed the plaintiff to a risk of injury which the defendant knew or ought to have known.[62] A reasonable person is a person like you and me. He is not supposed to be extra powerful, extra courageous or one having unlimited wisdom. The standard that the law imposes is not concerned with the idiosyncrasies of a person. *Moy Ngain Gyi v Leung Chi Kuen*[63] furnishes an interesting example when a bus driver could be liable for injury to a passenger inside the bus. A 68-year-old woman boarded a bus driven by the defendant after her son and granddaughter. The bus driver suddenly braked to avoid a cyclist before the plaintiff was able to sit down. This caused the plaintiff to lose her balance. Her left knee and lower leg hit against the railings causing a fracture of her left tibia and other injuries. The plaintiff sued the bus driver and his employer. The court held the driver liable for breaching his duty of care to the plaintiff. His employer was held vicariously liable. The court explained that the driver was not negligent in driving off before the plaintiff was properly seated. He breached his duty to the plaintiff by not driving the bus safely, "smoothly, without abnormal and sudden movement." A store owner must make sure that the payment outside its store was safe for customers entering the store to purchase food and vegetables. Where the pavement is slippery and a customer slips and falls and is injured due to this, the store owner will be liable for the customer's injury.[64]

9.068 Special standards are applied in the case of children and professional or skilled persons.

Ho Ka Yin v Express Security Ltd
[2011] 4 HKLRD 395

P was born with a condition called osteogenesis imperfecta (brittle bone disease). P was using a wheelchair lift operated by D's staff. She was pushing herself off a wheelchair lift to ascend a set of stairs to gain entry to a shopping mall. The whole wheelchair under the control of D's staff toppled over. P fell and injured herself.

Held:

(1) D owed a duty of care to users of its wheelchair lift and this extended to its staff operating the lift. They were responsible for the safe entry of the wheelchair onto the platform and the safe egress at the end of the journey.

(2) "In determining whether there has been a breach of the duty of care by the conduct of the staff falling below the standard of care that can reasonably be expected of them, it seems to me that it would be legitimate to take into account, amongst other matters, the following:

(a) The nature of the wheelchair user's disability insofar as it is apparent or made known to the staff;

62 *Cheung Wing Yee v Angel Kiss Ltd* [2016] HKCU 111. See also *So Kai Hau v YSK2 Engineering Co Ltd* [2018] HKCFI 1803.

63 [2017] 3 HKLRD 782. See also, *Wong Heung Wing Wingo v Johnson Cleaning Services Co Ltd* [2017] HKCU 1096.

64 *Or Bik Yuk Maxway Corp Ltd* [2020] 1 HKLRD 259.