

1906, 50 *obiter* considering *The Modern Law of Guarantees* (English ed., 2003) 11–58.29.).

- (2) The liability of the guarantor is contingent upon the principal debtor defaulting in his primary obligation (*Rees v Berrington* (1795) 2 Ves. Jun 54; *Lakeman v Mountstephen* (1874) LR 7 HL 17; *Rickaby v Lewis*; *Bank of India v Murjani Industries (HK) Ltd* [1989] 2 HKLR 276, 282; *Hyundai Engineering & Construction Co Ltd v UBAF (Hong Kong) Ltd* [2012] 5 HKLRD 620; *Leighton LLC v Mongolia Energy Corp Ltd* [2015] [2015] 6 HKC 98.).

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The same principles will not apply where the terms of the guarantee impose a primary duty upon the promisor to honour the principal debtor's obligation(s). (*Kan Bau v Yeung Man Leung Vincent*; *Vossloh Aktiengesellschaft v Alpha Trains (UK) Ltd. MS Fashions Ltd v Bank of Credit and Commerce International SA (in liq) (No 2)*; *High Street Services Ltd v Samel Impexbond Ltd v Same* [1993] Ch 425. Conjoined cases in which the bank secured guarantees for companies' liability from its directors who executed mortgage deeds and/or letters of charge accepting liability as "principal debtor". Accordingly, the directors, having accepted liability as principal debtors, were under immediate liability to pay the companies' debts without a demand being made, and likewise the companies' liability was extinguished or reduced as a result of a set-off between the bank and the guarantor directors, by the amount standing to the credit of the directors' deposit accounts. *MS Fashions Ltd* [1993] was applied in Hong Kong in *William Young Hong Yui v Bank of Credit & Commerce Hong Kong Ltd (in liq)* [1994] 1 HKC 89. The decision is unreported but recorded at [1994] 2 HKC 89; with the extension of time for compliance application recorded at [1994] HKCA 532. In *ING Bank v Mr Tsui Tsin Tong* (CACV 354/1999, [2000] HKEC 326) it was held that the following term had the same effect "each guarantor irrevocably and unconditionally (a) as principal obligor guarantees to the Creditor prompt performance by the Debtor of all its obligations".) In such cases, the guarantee is often, in fact, in the nature of an on demand bond. For example, it is commonplace for performance bonds provided by banks to impose primary liability upon the guarantor for the performance of the underlying contract by the principal debtor. (*IIG Capital LLC v Van Der Merwe* [2008] EWCA Civ 542. *Cf. Carey Value Added, SL v Grupo Urvasco, SA* [2010] EWHC 1905; *Vossloh Aktiengesellschaft v Alpha Trains (UK) Ltd supra*, in which the English courts held that the guarantees in question did not create an obligation equivalent to an on-demand performance bond despite the inclusion of wording referring to the guarantor as having primary obligations; *Bitumen Invest AS v Richmond Mercantile Ltd FZC* [2016] EWHC 2957 (Comm); *CSSC Huangpu Wenchong Shipbuilding Co Ltd v Dry Bulk Services Ltd* (HCMP 1626/2016, [2016] HKEC 2739), which considered "on-demand" guarantees; for consideration of whether terms of guarantees require a demand to be made, see *FWD Life Insurance Co (Bermuda) Ltd v Cheng Wing Yiu Dumas* (HCMP 2365/2014, [2016] HKEC 1504) at [55]-[70].) In such a case, depending upon the terms of the guarantees, liability may not be contingent upon the default of the principal but will arise following the principal debtor making a demand for payment from the guarantor for the amount specified in the guarantee. A creditor can gain further protection against a guarantor by incorporating a "conclusive evidence clause" into the guarantee, which allow the creditor to certify the quantum owed under the guarantee (*IIG Capital LLC* [2008] EWCA Civ 542; *Maple Trade Finance Inc v Huge Best International Ltd* (HCCW 389/2010, [2011] HKEC 833); *ABM AMRO Commercial Finance plc v Ambrose McGinn, Ross Lawrence Beattie, Marcus Leek* [2014] EWHC 1674 (Comm); Andrews and Millett, *Law of Guarantees* (7th ed.) at 7-032). There is a strong presumption that, in a non-banking context, the payment obligation undertaken by a guarantor does not constitute an on demand performance guarantee in the absence of clear and unequivocal language describing the instrument as an on demand performance bond, or an on demand

performance guarantee, or some other term having similar legal effect (*Leighton LLC v Mongolia Energy Corp Ltd* [2015] 6 HKC 98.

### (c) Distinctions between contracts of guarantee and contracts of indemnity

Contracts of guarantee and contracts of indemnity perform a similar commercial function, in that both provide compensation to a creditor for the failure of a third party to perform his obligations. Nevertheless, there is a conceptual distinction between the two commercial instruments (*Duncan, Fox & Co v North and South Wales Bank* (1880) 6 App Cas 1, HL; *Tam Wing Chuen v BCCHK* [1996] 1 HKC 692. Considered in *MS Fashions v High Street Services* [1993] *Supra*; *William Young v BCCI* [1994] *supra*). In a contract of indemnity, the indemnifier undertakes an independent obligation which does not depend upon the existence of any other obligation of any other party (*State Trading Corp of India Ltd v ED&F Man Sugar Ltd* [1981] Com LR 235; *Esal (Commodities) Ltd and Reltor Ltd v Oriental Credit Ltd and Wells Fargo Bank NA* [1985] 2 Lloyd's Rep 546; *IE Contractors Ltd v Lloyds Bank Plc* [1990] 2 Lloyd's Rep 496; *Hyundai v UBAF* [2012] *Supra*). Thus, it has been observed that "a [contract] of indemnity is simply a [contract] to hold the indemnified person harmless against a specified loss." (*Firma C Trade Sa v Newcastle Protection and Indemnity Association* [1991] 2 AC 1, the then Goff LJ) In contrast, there can be no contract of guarantee unless there exists, or at least is contemplated, an obligation owed by the principal debtor to which the guarantee is secondary and subsidiary. Indeed, as set out above, the kernel of a contract of guarantee is that the guarantor assumes a secondary liability to the creditor for the default of another, the principal debtor, who remains primarily liable to the creditor (*Yeoman Credit Ltd v Latter* [1961] 1 WLR 828, 831, CA; *Goulston Discount Co Ltd v Clark* [1967] 2 QB 493; *Vossloh AG v Alpha Trains (UK) Ltd* [2011] 2 All E.R. (Comm) 307; *Argo Caribbean Group Ltd v Lewis* [1976] 2 Lloyd's Rep 289, 296, CA; *Philip Securities (HK) Ltd v Choi Bun Hung*, [2004] HKEC 403, [78] and [86].).

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### (d) Guarantees and "letters of comfort"

A contract of guarantee also must be distinguished from the once commonplace "letter of comfort" or "letter of intention" given by a party (eg a parent company), indicating in general terms that it would financially support a third party (eg a subsidiary company) (*Commonwealth Bank v TLI Management Pty Ltd* [1990] VR 510). It has been held that such documents create no legally enforceable obligations to anyone who negotiates with the third party upon the strength of the mere reassurance contained therein (*Kleinwort Benson Ltd v Malaysian Mining Corporation Berhad* [1989] 1 WLR 379; *Bouygues SA v Shanghai Links Executive Community Ltd* [1998] 2 HKLRD 479 (affirmed on appeal)); *Carillion Construction Ltd v Hussain and Hunt (Joint Liquidators of Simon Carves Ltd)* [2013] EWHC 685 (Ch)). A surety may seek to rely on a letter of comfort provided by a creditor to restrict its liabilities, or as an aid to construction of the contract of suretyship, or at the very least to provide the basis for an estoppel (*Ashwood Enterprises v Bank of Ireland* [2014] EWHC 2624 (Ch); Millett, *Law of Guarantees* (7th ed.) at 14-010).

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### (e) The form of the contract of guarantee

The Statute of Frauds (1677) requires that all guarantees under English law be in writing. However, under Hong Kong law most of the terms of the Statute have been repealed (Law Amendment and Reform (Consolidation) Ordinance (Cap 23) (1972) s 12; *Global*

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*Bridge Assets Ltd v Sun Hung Kai Securities Ltd* [2009] 3 HKC 445), therefore there is no bar to a guarantee taking the form of an oral contract (*Brilliant (Man Sau) Engineering Ltd v Prosperity Construction and Decoration Ltd* (HCA 38/2004, [2006] HKEC 1244) *Global Bridge Assets Ltd v Sun Hung Kai Securities Ltd* [2011] 4 HKC 9; Wilkinson and Sihombling, *Hong Kong Conveyancing Law and Practice* at Vol 1B, [403]. In *Golden Ocean Group Ltd v Salgaocar Mining Industries Pvt Ltd* [2012] 1 WLR 3674 the English Court of Appeal found that a first name written into an email was sufficient to authenticate a guarantee. The same case is authority for the proposition that the guarantee need not be evidenced by a single document, at least in contexts where the conclusion of email contracts are commonplace (see [21]-[22]).). The position reflects the fact that the English courts have mitigated the seemingly unfair results which can flow from the strict application of the Statute through recognising countervailing exceptions and equitable doctrines, which limit the effect of the Statute (*The Modern Law of Guarantees* (2nd ed.), *Supra* [3-55]-[3-78]. But see *Action strength Ltd v International Glass Engineering* [2003] AC 541). Where an oral guarantee is alleged, the applicant should seek to adduce extrinsic evidence to clarify the terms of the guarantee. Ideally, this should be through affidavit or affirmation evidence, or alternatively during the examination in chief (*Bank of America National Trust and Savings Association v Graham Harry Fountain* [1990] 1 HKLR 115, [1989] 2 HKC 253).

(f) *Contra proferentem* principle

7-07 The courts continue to apply the *contra proferentem* principle; viz., that ambiguous terms will be construed against the drafter of the contract. (*Jiangsu Golden Civil Building Group (Hong Kong) Co Ltd v Chau Wa Kin* [2007] 1 HKLRD 1, citing *Hongkong and Shanghai Banking Corp v Martel* [2003] 1 HKLRD 497, 505, as an illustration of the principle. See also consideration of the principle in *Vossloh Aktiengesellschaft v Alpha Trains (UK) Ltd* [2010] EWHC 2443 (Ch) at [51] citing *The Modern Contract of Guarantee* English Edition (2003) by O'Donovan and Phillips in support of the principle that an ambiguous term will in general be construed in favour of the guarantor and applying that approach to a conclusive evidence clause; *Meritz Fire & Marine Insurance Co Ltd v Jan de Nul NV* [2011] 1 CLC 48, [57] affirmed in *Meritz Fire & Marine Insurance Co Ltd v Jan de Nul NV* [2011] EWCA Civ 827; *North Shore Ventures Ltd v Anstead Holdings Inc* [2011] EWCA Civ 230, [46].) In general, the application of this doctrine benefits the guarantor because the terms of most guarantees are drafted by the creditor for whose benefit they operate (*Taylor v Corporation of St Helens* (1877) 6 Ch D 264; *Jiangsu Golden Civil Building Group (Hong Kong) Co Ltd v Chau Wa Kin* *ibid.*; *Whitecap Leisure Ltd v John H Rundle Ltd* [2008] 2 LI Rep 216 at [20] Moore-Bick LJ; *Meritz Fire & Marine Insurance Co Ltd v Jan de Nul NV, ibid.*) Although there is a line of authority which suggests that contracts of guarantee must be strictly construed in favour of the surety, recent English cases suggest that this approach may have been superseded by the general modern approach to contractual construction (*Harvey v Dunbar* [2013] EWCA Civ 952 at [28]-[32]).

2. Consideration

(a) The general rule

7-08 Every guarantee, which is not made in the form of a deed, must, as with any other contract, be supported by consideration (*Pao On v Lau Yiu Long* [1979] HKLR 225, 234; *BCCI Finance International Ltd v Aftab Ahmed* [1991] HKC 375; *ASG Brokerage Ltd*

*v Lai Cheuk Kwan* [2005] HKEC 387, 53). The mere existence of the debt or default of another person is not sufficient to support the guarantor's promise to the creditor (*BCCI Finance International Ltd v Aftab Ahmed*). Nor is past consideration adequate to bind the parties to a guarantee. (*Clifford v Turrell default* (1845) 1 Y & CCC; *National Westminster Bank v Cullinane* (1983) 80 LS Gaz; *BCCI Finance International Ltd v Aftab Ahmed*; *ASG Brokerage Ltd v Lai Cheuk Kwan*; Cf. *German Trade House International Ltd v Lau Wai Ki* [1996] 13 HKC 406. In *Pao On v Lau Yiu Long* [1980] AC 614, the Privy Council affirmed the general rule but held that consideration for a prior agreement may be sufficient consideration in the following circumstance. (i) The act was done at the promisor's request; (ii) the parties understood that the act was to be remunerated either by payment or the conferment of a benefit; and, (iii) the payment or conferment of benefit was legally enforceable.)

It is rare for a contract of suretyship to fail for want of consideration because even if that contract post-dates entry into the transaction giving rise to the obligations that it secures, the court will assess the commercial reality of the agreements. If the parties always envisaged that a guarantee would form a series of interlinked transactions, the guarantor cannot argue that the consideration provided by the creditor was past consideration simply because the guarantee was executed after the principal contract (*Andrews and Millett, Law of Guarantees* (7th ed.) at paras 2-009 and 2-011). However, if the agreement to provide security is genuinely an afterthought, it may fail for want of consideration (a recent example is *Huen Wai Kei v Chow Kwong Wa* [2014] 6 HKC 457). Yet, the courts approach the matter of the consideration in a realistic manner and in light of the commercial nature of the documents. Thus, the creditor's consideration can consist of a commercial advantage to the principal debtor, as opposed to a benefit to the guarantor, when the advantage is conferred upon the guarantor's request (*Leung Kwok Kwong v Bank of Credit and Commerce Hong Kong Ltd (In liq)* (1994 CA No 138/94); *German Trade House International Ltd v Lau Wai Ki*; *Hong Kong Conveyancing Law and Practice, Supra* Vol 1(B) at 402-405). For the courts have observed that where businessmen negotiate at arm's length, justice requires that they be held to their bargain unless exceptional circumstances point to the contrary (*Pao On v Lau Yiu Long* [1980] AC 614). Classic examples of the guarantor's consideration to support a guarantee include the forbearance of the creditor from suing the principal debtor, the creditor compromising existing proceedings, or supplying the principal debtor with goods on credit (*Andrews and Millett, Law of Guarantees* (7th ed.) at para 2-009 cf. *Discharge* in Defence section *infra*; *Fine Master Ltd v Nippon Circuits Ltd* (HCA 919/2010, [2013] HKEC 351).

(b) Lack of consent and want of authority

A guarantor can show that his consent to a guarantee was induced by an unjust factor to defend a claim upon a guarantee (for a recent example, see *Progress Bulk Carriers Ltd v Tube City IMS LLC* [2012] EWHC 273 (Comm) (17 February 2012)). The authorities have established that relief in such circumstances can arise in cases of mistake, undue influence, duress, lack of capacity, or disability (*Hong Kong Conveyancing Law and Practice, Supra* Vol 1(B) at [402] XIII 124. Economic duress is a frequent basis to claim there was vitiation within the context of commercial agreements), although the defence rarely provides a defence in practice; eg see *CTN. Cash & Carry Ltd v Gallaher Ltd* [1994] 4 AER 714 cf. *Borrelli v Ting* [2010] Bus LR 1718 (PC)). To avoid claims to rescind the guarantee upon one of the aforementioned grounds, it is advisable for banks to follow the guidance set out in the *Code of Banking Practice* upon agreeing guarantees with individual customers. The *Code* recommends that banks give written advice to guarantors to ensure that they understand their liability under guarantees (*Code of Banking Practice, The Hong Kong*

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Association of Banks and The DTC Association, February 2015 at Ch 24, available at: [http://www.hkma.gov.hk/media/eng/doc/code\\_eng.pdf](http://www.hkma.gov.hk/media/eng/doc/code_eng.pdf) (accessed 13 May 2017). The *Code* does not have statutory effect, nonetheless the issuing associations, viz. the Hong Kong Association of Banks and DTC Association, expect all financial institutions to comply with the guidance, and monitor compliance (*Vide Supra*, *Bankers* chapter at *Bullen, Leake and Jacob's Precedents of Pleadings* (18th ed., 2015), Ch 5). Therefore, it is advisable for banks to adhere to the *Code* to ensure that a consumer guarantor cannot set-up a defence upon the basis of an implied misrepresentation (*Vide infra*, section on *Misrepresentation*).

#### (c) Deeds

- 7-11 A guarantee taking the form of a deed, must comply with the requirements for the execution of deeds set out in the Conveyancing and Property Ordinance (Cap 219) (s 19, 20 et. 23A Conveyancing and Property Ordinance (Cap 219)). The need to use a deed rather than a simple contract typically arises to allow an enforceable covenant where the consideration for the agreement is nominal. A deed is useful out of abundance of caution to respond to a claim that a guarantee lacked sufficient consideration to support the bargain. A further benefit of using a deed is that the limitation period for bringing a claim is extended from six to twelve years from the date when the cause of action accrues (s 4(3) Limitation Ordinance (Cap 377)).

#### (d) Discharge

- 7-12 A material alteration to a guarantee without the consent of the guarantor will provide a defence to an action upon the deed or contract (*vide infra* on Discharge for Material Alteration (see para 7-34) *The Lord Darcy and Sharpes Case*, (1583) 1 Leonard 282 74 ER 257 (alteration immaterial where the defendant benefited from the amendment); *Pigot's Case* (1614) 11 Co. Rep. 26b (deed); *Lo Lee Shi v The Hong Kong & Shanghai Banking Corporation* (1927) 22 HKLR 1 (bank notes); *Jiangsu Golden Civil Building Group (Hong Kong) Co Ltd v Chau Wa Kin* (guarantees); *Lombard Finance v Brookplain Trading* [1991] 1 WLR 271 (guarantee); *Raiffeisen Zentralbank Osterreich AG v Crossseas Shipping Ltd* [2000] 1 WLR 1135 (guarantee); *Bank of Scotland v Greville Development Company* [2014] EWHC 128 (Ch); *AVC Property Development Co Ltd v Joyful Grace Trading Ltd* (HCA 529/2013, [2016] HKEC 2125) (guarantee); H Au, *Atkin's Court Forms* (Hong Kong: Lexis Nexis, 2007) Contract Cap at *Discharge*, [90]). The guarantor also can be discharged where the creditor gives the principal debtor an extension of time to repay the debt (*Vide Infra* on Discharge for Extension of Time; *Cf. Leung Kwok Kwong v Bank of Credit and Commerce Hong Kong Ltd* (In liq) (1994) CA No 138/94), or where the principal debtor pays before payment becomes due (*Calvert v London Dock Co* (1838) 48 ER 774; *General Steam Navigation Co v Rolt* (1858) 141 ER 572, considered in *Trade Indemnity Co Ltd v Workington Harbour and Dock Board (No 1)*; *Hackney Empire Ltd v Aviva Insurance UK Ltd (formerly t/a Norwich Union Insurance Ltd)* [2012] EWCA Civ 1716, 77-79). The issue of discharge is considered in the Defences section below.

### 3. Enforcement

#### (a) The time when the liability of the guarantor arises?

- 7-13 The instance when liability arises, thereby allowing the creditor to enforce the guarantee, depends upon the construction of the terms of the contract (*National Westminster*

*Bank Plc v Hardman* [1988] FLR 302; *BCCI SA v Simjee* [1997] CLC 135). In general, liability will crystallise on the default of the principal debtor, and not until that time (*William Young Hong Yui v BCCHK Ltd (in liq)* [1994] 1 HKC 89). Upon default, the guarantor is immediately liable to the full extent of his obligation, and he is not entitled to require notice of the default, or that the creditor should have recourse first against the principal debtor (*Stimpson v Smith* [1999] 2 WLR 1292).

The aforementioned approach applies unless the terms of the guarantee prescribe that a demand is made upon the principal debtor to establish the guarantor's liability to the creditor (*Joachimson v Swiss Bank Corporation* [1921] 3 KB 110, 129; *William Young Hong Yui v Bank of Credit & Commerce Hong Kong Ltd*, (Unrep) 6 May 1994 CACV185/1993, *supra*; *GMAC Commercial Credit Development Ltd v Sandhu* [2001] EWCA Civ 1209; *Frans Maas (UK) Ltd v Habib Bank AG Zurich* [2001] CLC 89). Most modern forms of guarantees within the context of banking and finance law are payable upon demand (eg cl.3.2 *Model Deed of Guarantee and Indemnity* (2003 Ed.) published by The Hong Kong Mortgage Corporation Ltd. *Bank of India v Murjani Industries (HK) Ltd; MS Fashions Ltd v BCCI* (1993) 3 WLR 22; *William Young Hong Yui v Bank of Credit & Commerce Hong Kong* (HCMP 806/1993, [1993] HKEC 45) affirmed on appeal on another point [1994] 2 HKC 89; *Good Process Ltd v Grand Chest Ltd* (DCCJ 448/2004, [2005] HKEC 2048), [44-45]. For consideration of on-demand guarantees outside the field of banking law, see *Marubeni Hong Kong and South China Ltd v Mongolia* [2005] EWCA Civ 395; *IIG v Van Der Merwe* [2008] EWCA Civ 542; *Wuhan Guoyu Logistics Group Co Ltd v Emporiki Bank of Greece* [2012] EWCA 1629; *Leighton LLC v Mongolia Energy Corp Ltd* [2015] 6 HKC 98). The creditor's demand must comply with any requirements imposed by the guarantee as to its form and manner, which may extend to implied terms in relation to its form (*Shirlaw v Southern Foundries Ltd* [1939] 2 KB 206; *Associated Japanese Bank (International) Ltd v Credit Du Nord SA* [1989] 1 WLR 255; *ING Bank NV, Hong Kong Branch v Certain Deluxe Ltd* [2002] 3 HKLRD 402). In considering the requirements of a valid demand, the Court will focus upon the requirements stipulated in the guarantee in question where the so-called guarantee is payable on demand in this manner it will not have the characteristics of a true guarantee set out in Sections 1 and 4 (*Joachimson v Swiss Bank Corporation*, 121; *William Young Hong Yui v Bank of Credit and Commerce Hong Kong Ltd* [HCMP 806/1993, 1993] HKEC 45), 21. *ibid.*). The terms of the guarantee may impose further requirements where there are joint and several guarantors. (The terms of the guarantee will prescribe whether it is necessary for the creditor to make a written demand upon the guarantor for a guarantor to seek contribution from co-sureties, eg *Thomas v Nottingham Inc Football Club* [1972] 1 All ER 1176; *Hampton v Minns*.)

#### (b) Obligations owed by the creditor to the guarantor in relation to the security

In general, as noted above, the creditor owes no duty to the guarantor to realise any other security before enforcing the guarantee (*China and South Seas Bank v Tan* [1990] AC 536; *Lexi Holdings v Pooni* [2008] EWHC 1143 (Ch); *Kwong Ian (HK) Construction and Real Estate Development Co Ltd v Ip Pui Lam* (HCA 2078/2011, [2014] HKEC 2028). Nevertheless, where the creditor sells security taking the form of real property to reduce the debt owed by the principal debtor and the guarantor, he is under an obligation to precede by proper marketing; *Standard Chartered Bank v Walker* [1982] 1 WLR 1410; [1982] 3 All ER 938, CA), and in exceptional cases he may be under an obligation to delay a sale to attain a higher value for the security; for example, in a strongly rising market. (*Skipton Building Society v Stott* [2001] QB 261, the English Court of Appeal held that a creditor's failure to obtain the proper price of the security upon realisation reduced



the debt *pro tanto* by the difference between the security's market value and the price which the bank obtained. *Barclays Bank v Kingston* [2006] EWHC 533 (QB); *Halsbury's Laws of Hong Kong* [200.076] and [20.188]. Nevertheless, the duty is a limited one, as evident from *China and South Seas Bank* [1990]; *Lexi Holdings* [2008]; *ibid.* However, frequently contractual terms stipulate that the liability of the guarantor will not be affected or discharged by any act, neglect and/or default by the creditor (eg *Hackney Empire Ltd v Aviva Insurance UK Ltd (formerly t/a Norwich Union Insurance Ltd)*). To bind the parties, such terms must be clear and unequivocal (*Barclays Bank v Kingston*).

(c) Assignment

**7-16** The rights in the debt, supported by the guarantee, can be assigned by the creditor in the same way as any *chose in action* (*Hong Kong Conveyancing Law and Practice*, Vol 1(B) at [402]–[403] XIII 124; *Henry Boot Far East Ltd and Far East Consortium Ltd v Shine Construction Company Ltd (In Liq)* (HCA 002189/1986, [1988] HKEC 10); *Ghiranrdi v All Regal Corp Pty Ltd* [2001] WASC 366). To ensure an effective assignment, the assignor will have to, *inter alia*, assign the benefit of the principal obligation, and give notice to the guarantor of the assignment under the Law Amendment and Reform (Consolidation) Ordinance (Cap 23) (Law Amendment and Reform (Consolidation) Ordinance (Cap 23) s 9; *Bank of China (Hong Kong) Ltd v Chan Yeuk Wai*, 52). However, it is not possible to assign part of the benefit of a guarantee (*Bank of America National Trust and Savings Association v Fountain* [1990] HKLR 115, assignment of a portion of the guarantee by the guarantor will not discharge liability to the creditor), or a benefit consisting of a personal obligation (*Bank of China (Hong Kong) Ltd v Chan Yeuk Wai*; *Chitty on Contracts (General Contracts)* (London: Sweet & Maxwell, Vol 1, 32nd., 2012), 19-055-19-056).

**4. Contribution and Set Off**

(a) Contribution

**7-17** The plaintiff may join all or any of the persons liable under a guarantee as defendants to the action, whether their liability is joint and several, or several alone. However, a plaintiff creditor cannot be compelled to join all the co-guarantors, although the guarantors will retain rights of contribution against co-guarantors under s 3 Civil Liability (Contribution) Ordinance (Cap 377) and may join co-guarantor(s) as third parties (O 16, RHC eg *Wolmershausen v Gullick* [1893] 2 Ch 514; *Thomas v Nottingham Inc Football Club*; *Moulton v Roberts* [1977] Qd R 135; *Stimpson v Smith*). The principal debtor and the guarantor may, but need not, be sued in the same action (*Stimpson v Smith*). The Court will look to the express terms of the guarantee to decide the extent of the contribution of each co-guarantor (Law Amendment and Reform (Consolidation) Ordinance (Cap 23) s 15(3)). The terms of the guarantee will trump any collateral agreement between the guarantors on the apportionment of liability (*Hampton v Minns*).

(b) The guarantor's right to rely upon the principal's right of set off  
(*vide infra* Precedent V-4.)

**7-18** Upon a creditor claiming payment of the debt, a guarantor may rely upon any right of set-off or counterclaim which the principal debtor could plead against the creditor in

reduction of the guaranteed debt to reduce the claim against him under the guarantee and/or as a defence to the claim (*Silven Properties Ltd v Royal Bank of Scotland Plc* [2004] 1 WLR 997; *Barclays Bank v Kingston*, the position is based upon the indemnity principle); *Qiyang Ltd v Mei Li New Energy Ltd* (HCA 420/2011, [2013] HKEC 312); *Foshan Jiayu Import & Export Co Ltd v Douceur Fashions Ltd* (DCCJ 2847/2011, [2013] HKEC 1823). This reflects the principle of co-extensiveness.

(c) Express terms precluding set-off

Despite the general principle set out above, a guarantor may lose the right to rely upon a set-off or counterclaim where the guarantee provides otherwise. For example, by stating that the guarantor must pay a set amount to the creditor, irrespective of the accounting position between the principal debtor and the creditor (*The Fedora* [1986] 2 Lloyd's Rep 441; *Hong Kong and Shanghai Banking Corp v Kloekner & Co AG* [1990] 2 QB 514; *Coca-Cola Corporation v Finsat International Ltd* [1998] QB 43). The terms of a guarantee excluding the right of the guarantor to rely on a set-off or counterclaim were held to be enforceable in *Coca-Cola Corp v Finsat International Ltd* [1998] Q.B. 43 and applied in *Axa Sun Life Services v Campbell Martin* [2011] EWCA Civ 133; [2011] 2 Lloyds Rep 1; [2011] 1 CLC 312. It is unlikely that a guarantor not dealing as a consumer can challenge such clauses under the protective statutory provisions limiting unconscionable contract clauses in Hong Kong. (*The Fedora* [1986] 2 Lloyd's Rep 441; *Skipskreditforeningen v Emperor Navigation* [1998] 1 Lloyd's Rep 66; *United Trust Bank v Dohil* [2011] EWHC 3302, set off clauses held to be valid despite the English Unfair Contract Terms Act (1977) ("UCTA") limiting unreasonable contractual terms.

In Hong Kong, s 8 Control of Exemption Clauses Ordinance (Cap 71) limits unconscionable contract clauses in a similar way. For an example of the limited application of the Ordinance within the context of banking transactions concerning commercial parties see *Bank of China (Hong Kong) Ltd v Fung Chin Kan* (2002) 5 HKCFAR 515. On the other hand, within the context of a consumer contract the courts have been more willing to intervene as evident in *Hang Seng Credit Card Ltd v Tsang Nga Lee* [2000] 3 HKLRD 33. In addition, a more onerous duty will also be imposed in cases where the bank owes a fiduciary duty; eg *Esquire (Electronics) Ltd v Hong Kong and Shanghai Banking Corp Ltd* [2005] 3 HKLRD 358, in which it was held that the defendant-bank was under a fiduciary duty to do the best for the customer, and also was subject to the self-dealing rule prohibiting the bank from dealing in a transaction to gain a commercial advantage. Nonetheless, a creditor ought to ensure adherence to the common law principles governing incorporation of onerous contract clauses, such as the red hand principle (*Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163).

(d) Set off where the security is a legal mortgage

A similar position is found in relation to the guarantor's right to seek possession of the security where it takes the form of a legal mortgage. The guarantor of a loan secured by a mortgage over property cannot usually resist the creditor's/mortgagee's claim for possession of the property by relying upon the fact that the principal debtor has a claim for unliquidated damages by way of set-off against the creditor (*National Westminster Bank Plc v Skelton* [1993] 1 WLR 72; *Ashley Guarantee Plc v Zacaria* [1993] 1 WLR 62, CA; *China United Holdings Ltd v Lam How Mun Peter* (Unrep) (1 June 2005) HCA 1589/2003 *Dunbar Assets v Dorcas* [2013] EWCA Civ 864). The restriction applies even when the set off exceeds the amount secured.

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delivery of the goods, or documents of title, may amount to conversion (*Hollins v Fowler*). The exception in Hong Kong is the statutory protection in the case of a sale in market overt found in the Sale of Goods Ordinance (Cap.26). A sale made other than in accordance with a representation, whether true or not, by which the seller induced the owner of the goods to part with its possession, amounts to conversion.<sup>24</sup>

**13–19** Any other wrongful disposition of goods having the effect of depriving the owner of the use of them permanently or for a substantial time, is conversion.<sup>25</sup>

(viii) *Conversion by wrongful dispossession*

**13–20** A wrongful dispossession of the owner's goods by removal or misdelivery amounts to conversion if there is an intent to convert them to the use of the taker or some third party, or otherwise to deal with them in a manner inconsistent with the rights of the owner *Fouldes v Willoughby; Lancashire and Yorkshire Rly Co, London and North Western Rly Co and Greaser Ltd v Mac Nicoll* (1918) 88 LJKB 601. Where a person delivers goods with a view to changing the property in them and the delivery does not take place with the authority of the true owner or the person entitled to delivery of the goods, he may be liable in conversion *Yien Yieh Commercial Bank Ltd v Kwai Chung Cold Storage Co Ltd* [1988] 2 HKLR 569 (CA). Similarly, a delivery by mistake amounts to conversion if it is inconsistent with the claimant's right to possession *He-ro Chemicals Ltd v Jeuro Container Transport (HK) Ltd* (HCCL000105/1992, [1993] HKEC 161). However, a person may be protected from being sued by an effective exemption clause (*Yien Yieh Commercial Bank Ltd v Kwai Chung Cold Storage Co Ltd*).

**13–21** A person may also be liable to conversion if he allows a third party to take the goods of the owner without the authority of the true owner, where there exists a principal and agent relationship between the owner and the person being sued *Tyrone Crystal Ltd v European Asian Bank* (HCA011547/1982, 13 December 1984).

(ix) *Subject-matter of conversion*

**13–22** The goods or chattels that form the subject-matter of conversion can be anything that can be possessed.<sup>26</sup> In short, it has the meaning as "goods" as defined in the Sale of Goods Ordinance, which includes all personal chattels other than things in action and money, emblements, industrial growing crops, and things attached to or forming part of the land that is agreed to be severed before sale or under the contract of sale.

**13–23** The exclusion of "money" is slightly misleading. Money in specie (ie coins and notes) can be converted: it is money in the abstract (eg in a bank account) which cannot be. Negotiable instruments and title deeds are primarily documents creating "things in action" but they are at the same time physical objects, pieces of paper. If the piece of paper is unlawfully converted, the damages will be assessed on the basis of the value of the rights created by the document.<sup>27</sup>

<sup>24</sup> *Webster v General Accident Fire and Life Assurance Corp Ltd* [1953] 1 QB 520.

<sup>25</sup> *Parker v Godin* (1728) 2 Stra 813; *Powell v Hoyland* (1851) 6 Exch 67; *Singer Manufacturing Co v Clark* (1879) 5 Ex D37; *Winter v Bancks* (1901) 17 TLR 446.

<sup>26</sup> *Friedel v Castlereagh* (1877) 11 ICLR 93.

<sup>27</sup> *Kleinwort v Comptoir National d'Escompte de Paris* [1894] 2 QB 157; *Midland Bank Ltd v Reckitt* [1933] AC 1.

If, by reason of a fraudulent alteration, the piece of paper is valueless (eg, fraudulently altered cheque), no rights arise from it and a claim in conversion will fail.<sup>28</sup> **13–24**

Both choses in possession and choses in action could be a subject-matter of conversion.<sup>29</sup> **13–25**

(x) *The right to sue*

The claimant must show that at the time of the conversion he was either in actual possession of the goods or entitled to immediate possession of them.<sup>30</sup> It is not necessary to show a title of absolute ownership. Title unaccompanied by either actual possession or an immediate right to possession is insufficient to support an action in conversion. The title to possession must be a legal title: an equitable title will not be sufficient.<sup>31</sup> **13–26**

Even a person in possession of goods that he has acquired under an illegal contract may have a right to sue in conversion those who wrongfully interfere with his possession of goods as he has a title good against everyone except the true owner or someone claiming under him.<sup>32</sup> **13–27**

The interest on which the claimant relies must have been vested in him at the time of the act of conversion.<sup>33</sup> Thus, a claimant may not sue if he has parted with the property in the goods at the time of the alleged conversion,<sup>34</sup> unless the right to sue passed to the claimant as part of the transfer of the goods to him.<sup>35</sup> **13–28**

Where goods have been bailed, who is to be treated as being in possession of the goods as entitled to possession will depend on the terms of the bailment. If the bailment confers exclusive possession on the bailee as long as the bailment lasts, only the bailee can maintain an action for conversion as the bailor has no immediate right to possession. Examples of such bailments are letting on hire, pledging or delivering the goods to someone who acquires a lien.<sup>36</sup> If, before action, the bailor has transferred to the defendant the ownership of the goods, the bailee cannot recover more than the value of his own interest; and the defendant, relying upon such a transfer, is not setting up a *jus tertii*, but as donee or assignee of the tertius, his own right.<sup>37</sup> **13–29**

An unpaid vendor protected by his lien has exclusive possession. The purchaser cannot bring an action unless he has rendered the price and thus become immediately entitled to possession.<sup>38</sup> **13–30**

<sup>28</sup> *Smith v Lloyds TSB Bank Plc* [2001] QB 541, [2001] 1 All ER 424.

<sup>29</sup> *PBL Publication (Hong Kong) Ltd v Marks Hundred Co Ltd* (CACV91/1987, 25 November, 1987); *Lau (No.2)* (1989) 19 HKLJ 235.

<sup>30</sup> *Trafigura Beheer BV Amsterdam v China Navigation Co Ltd & Harvest Fortune Shipping Ltd (Third Party)* citing *Hiort v London and North Western Railway Co* (1879) LR 4 ExD 188; *Elias Neil David v Cheng Sui Chu* [2019] 1 HKLRD 397.

<sup>31</sup> *The Winkfield* [1902] P 42; *MCC Proceeds Inc v Lehman Bros International Europe* [1998] 4 All ER 675.

<sup>32</sup> *Lo Chi Ming v Shum Kin Yuen* [1969] HKLRD 10, following *Sajan Singh v Sardara Ali* [1960] AC 167 and *Central Newbury Car Auctions Ltd v Unity Finance Ltd* [1956] 3 All ER 905.

<sup>33</sup> *The Future Express* [1993] 2 Lloyd's Rep 542; *Smith (Administrator of Cosslett Contractors Ltd) v Bridgend CBC* [2002] 1 AC 336.

<sup>34</sup> *Jarvis v Williams* [1955] 1 All ER 108.

<sup>35</sup> *Bristol and West of England Bank v Midland Ry* [1891] 2 QB 653.

<sup>36</sup> *Milgate v Keble* (1841) 3 M & G 100.

<sup>37</sup> *Eastern Construction Co Ltd v National Trust Co Ltd and Schmidt* [1914] AC 197.

<sup>38</sup> *Lord v Price* (1874) LR 9 Exch 54, considered in *Yien Yieh Commercial Bank Ltd v Kwai Chung Cold Storage Co Ltd*.



- 13-31** If the bailee commits an act inconsistent with the bailment that terminates the bailment or entitles the bailor to do so, the bailor has the necessary right to possession to sue the bailee or any transferee from him.<sup>39</sup> A breach of bailment by a pledgee or an unpaid seller does not give the pledgor or buyer a right of action; only if redemption or payment of the price is tendered can they sue.<sup>40</sup>
- 13-32** A bailee at will (eg the borrower under a gratuitous loan) has a concurrent possession with his bailor: either may sue. However, an action by one is a bar to an action by the other. A servant or agent may have merely custody of the goods, and possession will remain exclusively with the employer or principal who alone can sue.
- 13-33** As mere possession will suffice to ground an action, a finder or other person who has come into actual possession of goods may sue in conversion, as he has title except that he cannot sue the actual owner.<sup>41</sup> A co-owner can sue his fellow owner in conversion where the goods have been destroyed or disposed of, whether or not such disposal was effective to transfer title to the transferee.<sup>42</sup>

## (xi) Relief

- 13-34** Under the common law, if goods have been wrongfully taken out of possession of the owner, the claimant can ask for an order of delivery up of goods or payment of its value at the date of conversion. If the goods have been taken unlawfully out of the claimant's possession he may lawfully retake them, and is justified to use reasonable force against a person who resists him.<sup>43</sup>

## (xii) Damages

- 13-35** The starting point for the measure of damages is the value of the goods at the date of the conversion,<sup>44</sup> together with any consequential damages that are not too remote to be recoverable in law.<sup>45</sup> The value of the goods is the market price of the goods at the date of conversion.<sup>46</sup> However, there is no set general or universal rule for assessing damages and normally the claimant will obtain damages based on the actual loss suffered.<sup>47</sup>
- 13-36** If the value of the goods has declined, the claimant may recover damages assessed by reference to the value at the date of conversion thereby preventing the tortfeasor profiting from his wrongdoing.<sup>48</sup> On the other hand, a claimant is under a duty to take reasonable steps to mitigate his loss, so if the value of the goods has increased between the date of conversion and the date of judgment, the claimant may be awarded additional damages but he needs to take steps to reduce his loss.<sup>49</sup>

39 *Jelk v Haward* [1905] 2 KB 460.

40 *Halliday v Holgate* (1868) LR 3 Exch 299.

41 *Armory v Delamirie* (1722) 1 Stra 505.

42 *Fennings v Lord Grenville* (1808) 1 Taunt 241.

43 *Blades v Higgs* (1861) 10 CBNS 713.

44 *Wo Loong Hing v Zung Fu Co* (1953) 37 HKLR 213.

45 *General and Finance Facilities Ltd v Cook's Cars (Romford) Ltd* [1963] 2 All ER 314.

46 *J & E Hall Ltd v Barclay* [1937] 3 All ER 620.

47 *BBMB Finance (Hong Kong) Ltd v Eda Holdings (in liq)* [1991] 2 All ER 129. See also *Heung-a-Shipping Co Ltd v New Rank (Holdings) Ltd* (HCCL 234/1997, [2001] HKEC 144).

48 *BBMB Finance (Hong Kong) Ltd v Eda Holdings (in liq)*, following *Solloway v McLaughlin* [1938] AC 247.

49 *Sachs v Miklos* [1948] 2 KB 23.

If the value of the goods has been increased by the wrongdoer before or after he had converted them (eg by repairing or improving the goods), the claimant cannot profit from that increase.<sup>50</sup> **13-37**

## (b) Trespass to goods

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

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

A deliberate taking away, out of possession, from the claimant is the most obvious form of trespass to goods, as is any unpermitted contact or damage to another's goods. Both are direct and immediate interference. It is not clear whether the tort is actionable without damage. The defendant's conduct must be blameworthy so that in the absence of negligence, accidental damage will not amount to trespass.<sup>51</sup> However, deliberate conduct (in the erroneous belief held by the defendant that he was acting lawfully) does not amount to a defence if the act otherwise amounts to trespass.<sup>52</sup> **13-40**

## (i) The right to sue

The only person who can normally sue is the person in possession (*factum animus*) of the goods at the time of trespass. In certain cases, there may not even be an immediate control over the goods but an intention to so exercise physical control must be obvious. A trustee with legal title to the goods is treated as being in possession although physical possession may be with the beneficiary.<sup>53</sup> A bailment at will confers a joint possession on bailor and bailee and either may sue. An owner may be in possession through a servant or agent. The personal representatives of a deceased may sue in trespass notwithstanding the fact that probate or letters of administration have not been granted. **13-41**

## (ii) Relief and damages

A claimant succeeding in an action of trespass of goods may be entitled to general or nominal damages. The claimant will be entitled to full value of the goods (*Wilson v Lombank Ltd*) or at least minimal nominal damages. The claimant may be allowed to receive full market price or the cost of replacement.<sup>54</sup> The claimant may also be entitled to loss of profits or loss of use of such goods where the damages to the goods are not too remote.<sup>55</sup> **13-42**

50 *Reid v Fairbanks* (1853) 13 CB 692; *Greenwood v Bennett* [1973] QB 195.

51 *National Coal Board v JE Evans & Co* [1951] 2 KB 861 — the case of damage to an underground cable caused without negligence.

52 *Wilson v Lombank Ltd* [1963] 1 WLR 1294.

53 *White v Morris* (1852) 11 CB 1015.

54 *Hall v Barclay* [1937] 3 All ER 620.

55 *Page v Ratcliff* (1852) 1 LJCP 57.



*(c) Detinue*

**13-43** Detinue is one of the oldest actions in common law. Generally speaking, it is the wrongful retention of the possession of a goods or the failure to deliver up the goods when demanded.<sup>56</sup> Merely keeping another's goods does not amount to detinue, it requires proof of demand and refusal, after reasonable time, to comply with the demand.<sup>57</sup>

**13-44** An action for detinue lies where a person takes possession of the goods of another and a valid demand is made for them by the owner, an unqualified and unjustified refusal to deliver them up entitles the owner to sue in detinue.<sup>58</sup> A person cannot be sued where he does not have a duty to return the goods, or where he does not withhold or detain goods in defiance of the claimant.<sup>59</sup> A bailee may also be liable for detinue where he negligently or unlawfully parts with possession of the goods and cannot return it to the bailor after a demand for its return is made by the bailor.<sup>60</sup>

*(i) The right to sue*

**13-45** A person whose goods have been detained by another, and who has made a specific demand for the goods followed by a refusal of return has the right to sue the defendant. The claimant must make a specific demand.<sup>61</sup> A demand is specific if it states where and to whom the goods must be returned<sup>62</sup> and may be made orally.<sup>63</sup> On the other hand, the refusal to deliver the goods must be unqualified and unjustified.<sup>64</sup>

*(ii) Relief and damages*

**13-46** Under the common law, if goods have been wrongfully taken out of possession of the owner by detinue, the claimant can ask for specific restitution, delivery of goods or payment of its value at the date of the judgment along with damages for its detention. Unlike conversion, the measure of damages is the value of the goods, not at the date of detinue, rather, it is the market value of the goods at the date of judgment (*BBMB Finance (Hong Kong) Ltd v Eda Holdings (in liq)*). The claimant may also claim any consequential damages which is not remote or in the reasonable contemplation of the parties at the date of the judgment.<sup>65</sup>

<sup>56</sup> *Jones v Dowle* (1841) 9 M & W 19.

<sup>57</sup> *Clayton v Le Roy* ([1911] 2 K.B. 1031); *Tsun Fat Finance Co Ltd v Commissioner of Police* [2003] 1 HKLRD C3.

<sup>58</sup> *Baldwin v Cole* (1704) 6 Mod Rep 212.

<sup>59</sup> *Clements v Flight* (1846) 16 M & W 42.

<sup>60</sup> *Reeve v Palmer* (1858) 5 CB (NS) 84.

<sup>61</sup> *Nixon v Sedger* (1890) 7 TLR 112.

<sup>62</sup> *Gunton v Nurse* (1821) 2 Brod & Bing 447.

<sup>63</sup> *Tsun Fat Finance Co Ltd v Commissioner of Police*.

<sup>64</sup> *Solomons v Dawes* (1794) 1 Esp 81.

<sup>65</sup> *Phillips v Jones* (1850) 15 QB 859.

## Claims by Owner or Person Entitled to Possession

## Conversion by taking

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

## Particulars

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

And the Plaintiff therefore claims:

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

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

[Signed]

[Statement of truth]



## 1. Causes of Action

- 20-01** An action of fraud would usually include one or more of the following distinct causes of action:
- (1) fraudulent misrepresentation or deceit;
  - (2) conspiracy;
  - (3) unlawful interference/inducing breach of contract;
  - (4) bribery;
  - (5) money had and received;
  - (6) constructive trusts: knowing receipt and dishonest assistance.
- 20-02** There are also likely to be claims to trace assets in equity or, perhaps, at common law. The essential elements of each of these claims are dealt with below.

## 2. Pleading Fraud

- 20-03** Before pleading fraud the pleader should have regard to the material and evidence available, in the light of the requirements of the pleader's professional code of conduct, O.18, r.12 of the Rules of the High Court and the standard of proof which will be required at trial.
- 20-04** Barristers and solicitors may not draft any originating process, pleading, affidavit, witness statement or notice of appeal containing any allegation of fraud unless they have clear instructions to make such an allegation and have before them reasonably credible material, which as it stands establishes a prima facie case of fraud: see the Code of Conduct of the Bar of the Hong Kong Special Administrative Region, para. 10.23(b) and; see also para. 6.6(c) of the Law Society's Code of Advocacy for solicitor advocates.
- 20-05** It is the duty of counsel not to put a plea of fraud on the record "unless he has clear and sufficient evidence to support it".<sup>1</sup> The effect of the relevant equivalent provision in the Code of Conduct of the Bar of England and Wales<sup>2</sup> was discussed in *Medcalf v Weir*.<sup>3</sup> In that case Lord Bingham stated that at a preparatory stage the requirement is not that counsel should necessarily have evidence in admissible form, but that he should have "material of such a character as to lead responsible counsel to conclude that serious allegations could properly be based upon it". A pleader may be entitled to take into account that further facts and evidence of dishonesty may turn up before trial, or even during trial.<sup>4</sup>
- 20-06** Where he wishes to rely on them in support of his claim, a claimant is required specially to set out in his particulars of claim any allegation of fraud, details of any misrepresentation,

1 *Associated Leisure Ltd v Associated Newspapers Ltd* [1970] 2 QB 450, 456 (Lord Denning MR), which was applied by Mortimer J (as he then was) in *Waychong Enterprises v Chang Kwei Sheng* (HCA4298/1983, 14 October 1985) in disallowing a plea of fraud and dishonesty; see also *Global Bridge Assets Ltd v Sun Hung Kai Securities Ltd* [2011] HKEC 1418.

2 The then para. 606(c) of the English Bar Code of Conduct, the now rC9(2)(c), *Part 2: Code of Conduct of the BSB Handbook* (Version 4.3) of the Bar of England and Wales.

3 [2003] 1 AC 120 (followed in *Ma So So Josephine v Chin Yuk Lun Francis* [2004] 3 HKLRD 294 and applied in *Yau Chiu Wah v Gold Chief Investment Ltd* [2003] 3 HKLRD 553).

4 See *Brown v Bennett (No 2)* 1 WLR 713, 750, [112] (Eng CA) (Neuberger J) (considered in *Pine Enterprises Ltd v Cyber Strategy Ltd* [2009] HKEC 482 (CFI)), discussing the effect of the observations of Lords Hope and Hutton in *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1 (Eng HL) (see also *Great Source Enterprises Ltd v Sino Estates Management Ltd* [2004] 4 HKC 49, 62; and *Peter Geoffrey De Krassel v Vincent Julia Chu also known as Zhu Liang* [2010] 2 HKLRD 937 in relation to the pleading or maintaining of an allegation of dishonesty).

details of all breaches of trust and notice or knowledge of facts (O.18, r.12 of the Rules of the High Court). The facts must be so stated as to show distinctly that fraud is charged.<sup>5</sup> Where any inference of fraud or dishonesty is alleged, the party must list the facts on the basis of which the inference is alleged.<sup>6</sup> As to particulars of knowledge, it has been said that it is sufficient when alleging fraud that the pleading expressly states that the defendant had the relevant knowledge, it being open to the defendant then to seek particulars if necessary.<sup>7</sup> It should be noted, that notwithstanding that *Rigby v Decorating Den Systems Ltd* was a pre-CJR case, the CFI in *Yong Weng Chye v Ho Yu Kuen* (a post-CJR case) nevertheless cited the principle laid down in *Rigby v Decorating Den Systems Ltd* to support its analysis. Whether the principle in *Rigby v Decorating Den Systems Ltd* is applicable post-CJR seems to be uncertain and that from English commentary the better course post-CJR is to set out full particulars of knowledge at the outset; note, also the commentary in *Hong Kong Civil Procedure 2020*.<sup>8</sup> A "rolled up" plea of the "knew or ought to have known" variety is not a clear and unequivocal allegation of actual knowledge and will not support a finding of fraud.<sup>9</sup>

The standard of proof required at trial is the civil standard of a preponderance of probability. It is not an absolute standard. A civil court, when considering a charge of fraud, will naturally require for itself a higher degree of probability than which it would require when asking if negligence is established. It does not adopt so high a degree as a criminal court, but it still does require a degree of probability commensurate with the occasion.<sup>10</sup> Put it another way, in a fraud case if the act in question is more inherently improbable, more compelling will be the evidence needed to satisfy the court on a preponderance of probability.<sup>11</sup>

Unlike the legal position of the UK, summary judgment proceedings are not applicable to any action that includes a claim based on an allegation of fraud: O.14 r.1(2)(b) of the Rules of the High Court.

Although the standard of proof required at trial will not be applied on any interim application, such as an application for a Mareva injunction, on such an application the claimant will have to show the court that he has a good arguable case on the evidence available.<sup>12</sup>

5 *Garden Neptune v Occidental* [1989] 1 Lloyd's Rep 305, 308, applied and followed in *Deak Perera Far East Ltd v Deak* [1995] 2 HKC 28; *Davy v Garrett* (1878) 7 ChD 473, 489 (Eng CA), followed in *Scales v Wong William* [1983] 2 HKC 199 and applied in *Aktieselskabet Dansk Skibsfinsiering v Wheelock Marden & Co Ltd* [1994] 2 HKC 264.

6 *Chancery Guide* (2016) 10.1; *Queen's Bench Guide* (2018) 6.7.3; *Commercial Court Guide* (10th ed., 2017) C1.3(c)(i).

7 *Rigby v Decorating Den Systems Ltd* (Eng CA); see also *Yong Weng Chye (楊榮財) v Ho Yu Kuen (何汝權)* (HCA 1303/2009, [2010] HKEC 408) and *CY Foundation Group Ltd (中青基業集團有限公司) v Best Max Holdings Ltd* (2014) 17 HKCFAR 863.

8 Vol.1, para. 18/12/21, p.478.

9 *Belmont Finance v Williams* [1979] Ch 250, 268 (Millett LJ) (Eng CA); see also *Wheelock Marden & Co Ltd v Aktieselskabet Dansk Skibsfinsiering* [1990] 2 HKC 148, 151.

10 *Hornal v Neuberger Products Ltd* [1957] 1 QB 247 (Eng QB), applied in *HKSAR v Lee Ming Tee* [2004] 1 HKLRD 513; *Blyth v Blyth (No 2)* [1966] AC 643 (Eng HL), see also *AG v Tsui Kwok Leung* (1991) 1 HKLR 40, 45 (Kempster JA) with whom the rest of the Court of Appeal agreed; *Aktieselskabet Dansk Skibsfinsiering v Brothers* [2000] 1 HKLRD 568, 518; *Parks v Clout* [2003] EWCA Civ 893 (Eng CA).

11 *ADS v Brothers* [2000] 1 HKLRD 568, 574-575.

12 *United Bank Ltd v Hussein* [2000] 3 CPLR 270; see also *Shen Fat Furniture Co Ltd v Joy Global Joint Co Ltd* (HCA 2221/2007, [2007] HKEC 2010) (CFI in Chambers) and *Ferromin Ltd v Nittetsu Shoji Co Ltd* (HCCL 41/1998, [1999] HKEC 1392).



## 3. Pre-emptive Remedies

**20-10** Often in claims based on fraud the claimant will seek injunctive relief before or at the outset of the action. The relief is likely to take the form of claims to preserve assets pending judgment and enforcement, to preserve evidence or for information and evidence required to formulate properly the claim against the prospective defendant. The most common forms of injunctions obtained are Mareva injunctions, search orders (Anton Piller orders) and orders to produce information and evidence under the *Norwich Pharmacal Co v Customs and Excise Commissioners*<sup>13</sup> and *Bankers Trust Co v Shapira*<sup>14</sup> jurisdictions. It is outside the scope of this section to set out a detailed analysis of the principles on which the courts will grant relief of this nature: for this see the commentary to the Rules of the High Court O.29, r.1 [at paras. 29/1/58–29/1/86] and r.8 [at paras. 29/8/20–29/8/34] in *Hong Kong Civil Procedure 2020*. The drafting process is somewhat simplified by the requirement to use standard form draft Mareva Injunctions and Anton Piller Orders: see PD11.2 (Mareva Injunctions and Anton Piller Orders).

## (a) Misrepresentation

**20-11** Misrepresentation straddles negligence and fraud, and may arise under any of the following separate sets of circumstances:

- (1) where the misrepresentation is made dishonestly, that is fraudulently, in a common law action of deceit;
- (2) where the misrepresentation is made innocently, that is not fraudulently, under s.3 of the Misrepresentation Ordinance (Cap.284 of the Laws of Hong Kong);
- (3) where the misrepresentation is made negligently, in a common law action for negligent misrepresentation under the doctrine of *Hedley Byrne (Hedley Byrne & Co Ltd v Heller & Partners Ltd)*<sup>15</sup>;
- (4) where the misrepresentation is made in breach of statutory duty, in an action for breach of such duty, for example under s.108 of Securities and Futures Ordinance (Cap.571 of the Laws of Hong Kong) or s.94 of Banking Ordinance (Cap.155 of the Laws of Hong Kong).

**20-12** The action in deceit is dealt with below.

## (b) Non-fraudulent misrepresentations

**20-13** Where the representation is not made fraudulently, which, to the extent to which it applies, has altered the former principle of law that no such action would lie for a mere innocent misrepresentation, not made negligently and not amounting to a warranty.<sup>16</sup> Section 3(1) of the Misrepresentation Ordinance. provides as follows:

“Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the

person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true”.

The extension of liability for misrepresentation to innocent misstatements under s.3 of the Misrepresentation Ordinance and to negligent misstatements under the doctrine of *Hedley v Byrne* may well mean that, in many cases, the claimant needs not and perhaps should not undertake the heavier burden of pleading and proving a charge of fraud. Where charges of fraud are made which are not sustained, the judge has the power to order the party making such charges to pay the costs occasioned thereby.<sup>17</sup>

<sup>13</sup> [1974] 1 AC 133 (Eng HL).

<sup>14</sup> [1980] 1 WLR 1274 (Eng CA).

<sup>15</sup> [1964] AC 465 (Eng HL); see also *The Bank of East Asia Ltd v Tsien Wui Marble Factory Ltd* [2000] 1 HKLRD 268.

<sup>16</sup> See *Heilbut, Symons & Co v Buckleton* [1913] AC 30 (Eng HL), applied in *Bank of India v Surtani Murlidhar Parmanand (t/a Ajanta Trading Corp)* [1994] 1 HKC 7.

<sup>17</sup> *Parker v McKenna* (1874) LR 10 Ch App 96 (Eng CA).



*Delaware Mansions* may be considered to have been overtaken by the subsequent cases cited.<sup>56</sup> This seems to have been followed as the rationale for the decision in *Northumbrian Water Ltd v Sir Robert McAlpine Ltd*<sup>57</sup> upheld on appeal at [2014] EWCA Civ 685 — though note that no claim was made in *Rylands v Fletcher*, which the Judge considered might have been used to establish the requisite liability), following an albeit brief review of the *Cambridge Waters* case and *Transco Plc v Stockport MBC*,<sup>58</sup> where it was accepted that without negligence a simple case of isolated escape would not satisfy the requirements of nuisance, but might satisfy, subject to the further specifics of *Rylands v Fletcher*, that rule. However, this approach would not seem to apply to cases where the defence of statutory authority is in play<sup>59</sup> (See also *Lam Yuk Fong v Attorney General*<sup>60</sup> in which the Defendants had moved their refuse collection point to outside the Plaintiff's premises. The Plaintiff claimed in nuisance for the dumping of refuse near the collection point by strangers. In defence, the Defendants claimed that they were merely exercising statutory powers and duties conferred upon them under s.9 of the Waste Disposal Ordinance and were thus not responsible for the illegal dumping of refuse by strangers. The Court held that s.9 did not provide protection for the Defendants as by the use of reasonable care, the nuisance caused could have been avoided. Section 9 could only have provided protection if the inevitable result of the act authorised was a nuisance). Note, too, that Lord Bingham in this case ([6]) considered it appropriate to retain even if for a small category of case, liability even in the absence of fault. It may also be considered to apply, but perhaps be limited to cases where a "reasonableness" element is applicable, such as "adopting" or "continuing" a nuisance commenced by another.<sup>61</sup> In *Gavin v Community Housing Association Ltd*,<sup>62</sup> it was said at para [24] that "It is now accepted that liability in nuisance is fault-based and that the defendant must be shown to have used his land in a way which he knows or ought to have foreseen would cause damage to his neighbour" (effectively, it might be thought, taking the law back to that stated in 1940 in *Sedleigh-Denfield v O'Callaghan*:<sup>63</sup> liability for nuisance is not, at least in modern law, a strict or absolute liability; applicable to private nuisance, though outside *Rylands v Fletcher*).

30-22 Although the issue of a lack of requisite degree of care is therefore required in private nuisance, it is still generally advisable for a plaintiff to adopt a general approach that in most nuisance cases the fact that a defendant has exercised all due care is no defence<sup>64</sup> (The Court of Final Appeal followed the decision in *Cambridge Water Co* and held that (at 495-496) "it is clear that negligence is not an essential element of public nuisance. However, this does not mean that liability is strict or absolute. It means that where a defendant does an act with knowledge or presumed knowledge that it may result in a nuisance hazard causing injury to the public, it is no answer for him to say that he took all

reasonable care to avoid causing injury if his act turns out to be causative of a foreseeable type of harm".) (*ACL Electronics (HK) Ltd v Bulmer Ltd* [1992] 1 HKC 133) (The Court of Appeal affirmed the decision of the Court below that the defendant was liable for nuisance notwithstanding that it had installed double vinyl flooring in its premises to prevent condensation to the ceiling of the plaintiff's premises immediately below whilst the defendant was using an air-conditioning machinery in its premises)).

Reasonable care is relevant specifically as a defence in cases where liability is said to arise as a result of the escape of things which are naturally on the land.<sup>65</sup> The test of knowledge of the danger posed by the nuisance is "knowledge or presumed knowledge". The fact that damage is greater than that foreseen, where of the relevant type, will not afford a defence.<sup>66</sup> However, where a liability may arise for a defendant along the lines of *Holbeck Hall Hotel Ltd v Scarborough BC*<sup>67</sup> and *Bybrook Barn Centre Ltd v Kent CC*,<sup>68</sup> it has been emphasised that that liability is a measured duty of care, with a lower potential to impose on a landowner than under nuisance or *Rylands v Fletcher*. Even so, no such duty should be imposed before the defendant is put on notice of what he is required to do.<sup>69</sup> The Court of Appeal has carried out a useful review into the basis of liability in cases such as natural nuisances in *Vernon Knights Associates v Cornwall Council*<sup>70</sup> which merits being cited more fully as to the summary of the law in such cases, certainly where the defendant is a public authority. At para [49], Jackson LJ, while not presuming to paraphrase the vast body of learning on the subject, drew the following principles from the authorities:

- (1) A landowner owes a measured duty in both negligence and nuisance to take reasonable steps to prevent natural occurrences on his land: "A defendant may be liable even if the acts causing nuisance are not on its land."<sup>71</sup>
- (2) In determining the content of the measured duty, the court must consider what is fair, just and reasonable as between the two neighbouring landowners. It must have regard to all the circumstances, including the extent of the foreseeable risk, the available preventive measures, the costs of such measures and the resources of both parties.
- (3) Where the defendant is a public authority with substantial resources, the court must take into account the competing demands on those resources and the public purposes for which they are held. It may not be fair, just or reasonable to require a public authority to expend those resources on infrastructure works in order to protect a few individuals against a modest risk of property damage.

Needless to say, this will involve detailed factual investigation and analysis in any given case, an outcome his Lordship noted had been highlighted as long ago as 1905 in the South Australia Supreme Court in *Havelberg v Brown*.<sup>72</sup> See now, too, cases where mutual (though not necessarily co-existent) liabilities may arise in nuisance for adjoining neighbours (superjacent and adjacent) as a result of events not of themselves giving rise to a

56 Note, from *Hobbs (E) (Farms) Ltd v Baxenden Chemicals Co Ltd* [1992] 1 Lloyd's Rep 54, [34], that nuisance would require a similar element of fault or failure to take reasonable care.

57 [2013] EWHC 1940 (TCC).

58 [2004] 2 AC 1.

59 See *Marcic v Thames Water Utilities Ltd* [2004] 1 All ER 135, [2004] BLR 1, 91 ConLR 1.

60 [1987] HKLR 263.

61 See *Transco Plc v Stockport MBC* [2004] 2 AC 1, [96] (Lord Walker) (and see below).

62 [2013] EWCA Civ 580, [2013] 2 P & CR 17.

63 [1940] AC 880, 904 (Lord Wright).

64 *Reinhardt v Mentasti* (1889) 42 ChD 685; *Bamford v Turnley* (1862) 3 B&S 66 (distinguished on other grounds in *Baxter v Camden LBC* [1999] 1 All ER 237 (CA), affirmed on appeal to the House of Lords ([1999] 3 WLR 939); and *Cambridge Water Co v Eastern Counties Leather* [1994] 2 AC 264, *Leung Tsang Hung v The Inc Owners of Kwok Wing House* (2007) 10 HKCFAR 480.

65 *Leakey v National Trust* [1980] QB 485; *Russell v Barnet LBC* (1984) 271 EG 699; *Goldman v Hargrave* [1967] 1 AC 645 (PC); although see *Bruce v Caulfield* (1918) 34 TLR 204 in which no liability attached to the defendant for the fall of a poplar tree in an exceptional gale.

66 *Holbeck Hall Hotel Ltd v Scarborough BC* [2000] QB 836 (CA)

67 *Ibid.*

68 [2000] 20 EG 158.

69 See *Stockport Metropolitan BC v British Gas Plc* [2001] Env LR 763, [53].

70 [2013] BLR 519, [2014] Env LR 6.

71 See *Lippiatt v South Gloucestershire CC* [1999] 3 WLR 137, (1999) 1 LGLR 865; and *cf Dwr Cymru Cyfyngedig (Welsh Water) v Barratt Homes Ltd* [2013] 1 WLR 3486, [57], obiter" from causing damage to neighbouring properties.

72 [1905] SALR 1.



liability in nuisance before knowledge of a potential nuisance or an actual nuisance has arisen.<sup>73</sup>

- 30–25** Reasonable care is relevant generally to cases of adopting or continuing a nuisance.<sup>74</sup>
- 30–26** As a result a danger due to lack of support is to be dealt with along the *Leakey v National Trust* principles,<sup>75</sup> but where the lack of support is alleged to arise from non-feasance, as opposed from misfeasance, the degree of damage that is foreseeable in the circumstances is relevant (*ibid.*).
- 30–27** The English Court of Appeal has upheld application of the principles in *Leakey v National Trust* to cases where support has been withdrawn, where an easement of support had been established but also recently in cases where no easement of support was made out.<sup>76</sup> There may now be said to be, in some circumstances, a duty on the owner of the supporting land or building to take positive steps to maintain and continue support (including to protect against physical damage likely to result from wind effects).<sup>77</sup> Such positive steps may be required at the time of, or consequential on, his act of, for example, demolishing his own property.<sup>78</sup>
- 30–28** The measure of reasonableness will be assessed against the particulars of the defendant, including, it appears, their financial resources.<sup>79</sup> This test applies where the source of a nuisance was created at a time when it was not reasonably foreseeable that the relevant type of harm would be created, and where, when such type of damage so arising subsequently becomes reasonably foreseeable, the source of the damage suffered from the nuisance is “out of control” of the defendant.<sup>80</sup> As a result, pleadings should set out the basis for a defence alleged on these grounds, and a defendant should require the plaintiff to set out specifically what failings are relied upon in support of the claim that the defendant failed to exercise reasonable care.

### 7. Statutory Authority

- 30–29** Reliance on statutory authority should be pleaded specifically. Usually a defendant will also have to plead that there was no negligence on its part in relation to the execution of the acts so authorised.
- 30–30** Ordinances often provide for the carrying out of activities which interfere with the enjoyment of land. If the statute confers only a permissive power, then it must be exercised in such a way as not to interfere with private rights.<sup>81</sup> The defendant may have the burden of proving that any nuisance was the inevitable result of carrying out the activity

73 *Abbahall Ltd v Smea* [2003] 1 WLR 1472, as to the former neighbour situation; and *Coope v Ward* [2015] EWCA Civ 30, as to the latter neighbour situation.

74 See *Transco Plc v Stockport MBC* [2004] 2 AC 1, [96] (Lord Walker).

75 *Holbeck Hall Hotel Ltd v Scarborough BC* [2000] QB 836 (CA).

76 *Coope v Ward* [2015] EWCA Civ 30.

77 *Rees v Skerrett* [2001] 40 EG 163, [31] (CA).

78 *Ibid.*, [33]. (Note that this case is able to be cited under the English Practice Direction (Citation of Authorities) [2001] 1 WLR 1001, although only one party attended, as the ruling is intended to extend the present English law.)

79 *Goldman v Hargrave* [1967] 1 AC 645 (PC) and *Leakey v National Trust* [1980] QB 485, applied in *Leung Tsang Hung v The Inc Owners of Kwok Wing House* (2007) 10 HKCFAR 480.

80 *Cambridge Water Co v Eastern Counties Leather* [1994] 2 AC 264.

81 See *Metropolitan Asylum District v Hill* (1881) 6 App Cas 193; and *cf. Hunter v Canary Wharf Ltd* [1997] AC 655.

empowered by statute, in order to establish a defence.<sup>82</sup> The defendant must prove they used reasonable care in doing the statutory work.<sup>83</sup>

In *Marcic v Thames Water Utilities Ltd*,<sup>84</sup> the House of Lords upheld arguments, rejected by the Court of Appeal, that there could be no claim in nuisance where a sewerage undertaker was charged by statute to provide a service, necessarily limited as to extent and degree by statute-based financing rules applicable to the undertaker.<sup>85</sup>

### 8. Isolated Act or State of Affairs

A single isolated escape might cause an actionable nuisance provided that the nuisance arises from the condition of the defendant’s land or premises or activities. A single negligent act does not necessarily constitute a private nuisance,<sup>86</sup> but a nuisance may be caused by an isolated incident of damage resulting from a course of conduct.<sup>87</sup>

The “negligent” interruption of a supply of gas by a third party has been held not to be actionable as a private nuisance, on the grounds that it does not involve an invasion of any substance or form of energy into a person’s property.<sup>88</sup> The reference to “negligence” in the circumstances of the case is not altogether clear as nuisance per se was or is not generally required as a premise for the actionable case. However, see para. [30–19] above.

### 9. Relevant Type of Damage

An actionable nuisance arises when a reasonably foreseeable (relevant) type of damage is caused.<sup>89</sup> The concept of reasonable foreseeability of damage really “concerns . . . not that of foreseeability alone, but of foreseeability as an aspect of reasonableness”.<sup>90</sup> The

82 See *Allen v Gulf Oil Refining Ltd* [1981] AC 1001; *Yu Shu Tung v Buk Cheong Lung* (A6531/1989, 7 November 1991).

83 See *Lam Yuk Fong v Attorney-General* [1987] HKLR 263 (see n.16 above), *Tate & Lyle Industries Ltd v Greater London Council* [1983] 2 WLR 649; and *Potter v Mole Valley DC* (1982) CLY 2266.

84 [2004] 1 All ER 135, [2004] BLR 1; 91Con LR 1.

85 This was cited with approval in *Leung Tsang Hung v The Inc Owners of Kwok Wing House* [2007] 10 HKCFAR 480, where it was considered that a claim of this nature would involve the court’s intervention in high-level policy decisions regarding the allocation of public resources in the obviously inappropriate setting of an individual claim brought in public nuisance or negligence.

86 *SCM United Kingdom Ltd v WJ Whittall & Son Ltd* [1971] 1 QB 337.

87 See *British Celanese Ltd v AH Hunt (Capacitors) Ltd* (1969) 1 WLR 959, *SCM United Kingdom Ltd v WJ Whittall & Son Ltd* [1971] 1 QB 337). See also *Spicer v Smea* [1946] 1 All ER 489 (defective electric wiring causing fire); *Bolton v Stone* [1951] AC 850 (cricket ball); and *Castle v St Augustine Links Ltd* (1922) 38 TLR 615 (golf ball); and see *Crown River Cruises Ltd v Kimbolton Fireworks Ltd* [1996] 2 Lloyd’s Rep 533 (one-off firework display); *Colour Quest Ltd v Total Downstream UK Plc* [2009] EWHC 823 (Comm), [2010] 2 Costs LR 140 (one-off petroleum explosion) (judgment of Steel J reversed in part on appeal under the name of *Shell UK Ltd v Total UK Ltd* [2010] 3 WLR 1192, [2011] 1 QB 86, but not on this point).

88 *Anglian Water Services Ltd v Crawshaw Robbins & Co Ltd* [2001] 1 BLR 173 (Stanley Burnton J).

89 *Cambridge Water Co v Eastern Counties Leather Plc* [1994] 2 AC 264; *Chan Ying Wah v Bachy Soletanche Group Ltd* [2005] 2 HKLRD 176 or impending (see above).

90 See *Network Rail Infrastructure Ltd (t/a Railtrack Plc) v CJ Morris (t/a Soundstar Studio)* [2004] EWCA Civ 172 (applied in *Lam Suk Yee v Inc Owners of Kam Kin Mansion* (CACV 24/2019, [2019] HKCA 1289, [2019] HKEC 3749))—and thus encompasses also aspects of remoteness ([33] and [34] (Buxton LJ)).



fact that damage is greater than that foreseen, but still of the relevant type, will not afford a defence.<sup>91</sup> Reasonable foreseeability must imply some understanding of the chain of events which is putatively foreseen.<sup>92</sup> Furthermore, damage is foreseeable only when there is a real risk of damage, that is, one that would occur to the mind of a reasonable person in the position of the defendant, and one that he would not brush aside as far-fetched.<sup>93</sup> This dictum was applied to the detriment of a plaintiff in *Hamilton v Papakura DC*,<sup>94</sup> where the Privy Council said further, in the context of that case, "The mere fact that certain herbicides may kill or damage certain plants at certain concentrations does not itself establish such a risk" ([39]).<sup>95</sup>

**30-35** A defendant should plead specifically a denial that the relevant type of harm was reasonably foreseeable at the relevant time. This defence succeeded in *Cambridge Water Co v Eastern Counties Leather Plc*.<sup>96</sup>

**30-36** For the third type of nuisance no actual financial loss need be suffered. In such cases, if diminution of capital value cannot be established because there is no permanent loss, diminution in letting value may be used. If that is not feasible by reason of reasonableness or practicality, general loss of amenity may be used. Physical inconvenience and distress is not the appropriate basis.<sup>97</sup>

**30-37** Personal injury should not now be within the scope of nuisance, but rather be pleaded, if available, within negligence.<sup>98</sup> By way of apparent contrast, the Court of Appeal did not exclude actions for personal injury in public nuisance cases Claimants in the *Corby Litigation v Group Corby BC*.<sup>99</sup>

**30-38** Where damage has been suffered but that damage can only be said to have become reasonably foreseeable at a date later than the initial acts/omissions giving rise to the state of nuisance, no liability attaches in respect of those earlier acts/omissions, save where the consequences of those earlier acts still pose a threat of damage or are causing damage in which case liability will arise if the source of the damage is not "out of control" of the defendant.<sup>100</sup> Such avoidance of liability should be pleaded specifically by the defendant.

## 10. Causal Effect

**30-39** The acts of the defendant asserted must be an effective and substantial cause of the damage alleged.<sup>101</sup> Thus they must have "materially contributed" to the damage alleged to

<sup>91</sup> *Holbeck Hall Hotel Ltd v Scarborough BC* [2000] QB 836 (CA).

<sup>92</sup> *Arscott Coal Authority* [2005] EWCA Civ 892, [58] (CA) and see also *Hughes v Riley* [2005] EWCA Civ 1129, [2006] 1 P&CR 29.

<sup>93</sup> *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty (Wagon Mound No.2)* [1967] 1 AC 617, 643. [2002] UKPC 9.

<sup>94</sup> See also *Coleman v British Gas Services Ltd*, 27 February 2002, Lawtel (HC), where the Court rejected a claim for psychological injury arising from a fear of carbon monoxide poisoning induced after a period of potential actual harm with no physical harm resulting.

<sup>95</sup> See, too, *Ellison v Ministry of Defence* (1997) 81 BLR 101, where this defence was relied on successfully.

<sup>96</sup> See generally *Dobson v Thames Water Utilities Ltd and OF- WAT* [2007] EWHC 2021 (TCC).

<sup>97</sup> *Hunter v Canary Wharf Ltd* [1997] AC 655.

<sup>98</sup> [2008] EWCA Civ 463.

<sup>99</sup> See *Cambridge Water Co v Eastern Counties Leather Plc* [1994] 2 AC 264; and *Anthony v Coal Authority* [2005] EWHC 1654 (QB), and the comments above under reasonable care.

<sup>100</sup> *Paterson v Humberside CC* (1996) 12 Const LJ 64.

have been suffered.<sup>102</sup> A specific point in pleadings to this effect by the plaintiff will usually only be required where there is a denial that the acts alleged against the or a specific defendant caused or substantially caused the damage asserted by the plaintiff. See also, in a negligence and personal injury context, *Fairchild v Glenhaven Funeral Services Ltd, Fox v Spousal (Midlands) Ltd, Matthews v Associated Portland Cement Manufacturers (1978) Ltd*,<sup>103</sup> where the House of Lords held liability established where it was proved that the plaintiffs had suffered the injury complained of, where each defendant was held to have materially contributed to that situation even though it was not possible to identify which defendant was specifically responsible to each defendant for its actions actually provoking the onset of the injury in question.<sup>104</sup>

There are two main categories of nuisance pleaded in civil law: private and public nuisances. **30-40**

## 11. Private Nuisance

Instances of private nuisance. The specific instance(s) of nuisance should be pleaded fully. Examples include: **30-41**

- (1) Water seepage. Water seepage from upper flat to lower flat is a common source of dispute in Hong Kong. The burden of proof is on the plaintiff to prove the source of the seepage. In most water leakage litigation, expert evidence will play an important role.<sup>105</sup> Where the Plaintiff alleges that the source of the water seepage is from common parts of the building, the Incorporated Owners' of the building should be joined as party. In *Parlaco Ltd v New Accord Holdings Ltd*,<sup>106</sup> the plaintiff claimed against the 2nd defendant (the Incorporated Owners) in negligence and in respect of alleged breaches of its duties as manager of the building under s.18 of the Building Management Ordinance (Cap.344). The 2nd defendant is said to have been under a duty to maintain and repair the waterproof membrane on the roof. However, the Court found the 2nd defendant not liable since it was found that the demolition work carried out by the 1st defendant was the predominant cause of the water leakage.
- (2) Noises: Another common type of nuisance for people in Hong Kong, most of whom live in multi-storey buildings, is noise. In *So Kwok Yan Bernard v Lau Wing Chung*,<sup>107</sup> the Court held that even if one were to put aside footfall and dragging of furniture noises (which the defendant says are normal daily activities), the unexplained frequent impacts of hard objects onto the floor, often occurred in late

<sup>102</sup> See *Lofus-Brigham v London Borough of Ealing* [2003] EWCA Civ 1490 (citing the Paterson ruling with approval), applied in *Berent v Family Mosaic Housing* [2011] EWHC 1353 (TCC) (affirmed on appeal: [2012] EWCA Civ 961, [2012] BLR 488).

<sup>103</sup> [2003] 1 AC 32 (HL).

<sup>104</sup> See, too, applying *Fairchild* to single defendant cases: *Sienkiewicz v Greif (UK) Ltd* [2011] AC 229.

<sup>105</sup> *Larbons Ltd v Kuo You Weaving Factory Ltd* (DCCJ 934/2006, [2007] HKEC 1378); *Tong Chi Ying v Shum Ping Kuen Benson* (DCCJ 3566/2004, [2010] HKEC 1479); 皇河實業有限公司 v *Wan Chiu Yuen* (DCCJ 4448/2011, [2015] HKEC 609); *Lam Kit Yee v Lam Shuk Lam* (DCCJ 3115/2011, [2017] HKEC 474); *Lam Ting Kwan v Teamwell Corp Ltd* (DCCJ 17/2016, [2019] HKDC 1593, [2019] HKEC 3827); *Chim Kwan Wo v Inc Owners of Peony House East Block* (DCCJ 5125/2016, [2020] HKDC 111, [2020] HKEC 378).

<sup>106</sup> HCA 1665/2010, [2015] HKEC 397.

<sup>107</sup> DCCJ 2324/2012, [2015] HKEC 459.



hours of the night or early morning before 7:00 am, cannot be said to be reasonable, nor is something that an ordinary resident of a multi-storey building in Hong Kong is expected to be put up with. In *Bhatti Bhupinder Singh v Lee Chiu Tak*,<sup>108</sup> the Court granted an interlocutory injunction based on nuisance caused by noise and held that any noise falling within s.4 of the Noise Control Ordinance, under which it was an offence to cause or permit noise which was a source of annoyance to emanate from domestic premises between 11:00 pm and 7:00 am, seemed to be prima facie unreasonable and would cause serious interference with the quiet enjoyment of the plaintiff's flat and there was a serious question to be tried as to whether such noise amounted to actionable nuisance.

- (3) Trees overhanging a neighbour's land.<sup>109</sup> It is submitted that the cases where nuisance was held to arise from trees overhanging a highway causing damage in some way may, following *Hunter v Canary Wharf Ltd* (above), need to be revisited in this respect see, as an example pre- *Hunter*; *Noble v Harrison*;<sup>110</sup> and post- *Hunter*; *Hurst v Hampshire CC*,<sup>111</sup> insofar as the judgment suggested a claim could lie at the suit of a highway user. It has been held that by adoption of a highway sufficient property vests in the local authority with regard to pre- and post-adoption trees so as to ground a claim in nuisance, and that absence of a claim for breach of statutory duty did not prevent a claim in nuisance.<sup>112</sup> The latter could probably also have been sustained on the grounds in negligence or breach of statutory duty.
- (4) Tree roots encroaching on a neighbour's land.<sup>113</sup> An interference with an easement is a nuisance of this kind.
- (5) Causing physical damage to a neighbour's land, such as by causing water to overflow.<sup>114</sup> See also *Blue Circle Industries Ltd v Ministry of Defence*<sup>115</sup> for damage by radioactive materials.
- (6) Causing physical damage to a neighbour's land by vibrations.<sup>116</sup> Cracks appeared on walls in various parts of plaintiff's premises caused by excessive vibrations produced by renovation work at defendant's premises directly above.<sup>117</sup>
- (7) Causing physical damage by fumes;<sup>118</sup> failing to prevent the escape of gas causing asphyxiation of livestock.<sup>119</sup>

108 [2019] 5 HKLRD 719.

109 *Lemmon v Webb* [1895] AC 1.

110 [1926] 2 KB 332.

111 [1997] 44 EG 206 (CA).

112 *Chapman v London Borough of Barking and Dagenham*, Transcript, 13 July 1998 (CA).

113 *Russell v Barnet LBC* (1985) 83 LGR 152; *Hurst v Hampshire CC* [1997] 44 EG 206; *Solloway v Hampshire CC* (1981) 79 LGR 449; and *Delaware Mansions Ltd v City of Westminster* (1998) 61 Con LR 10. See also *Loftus-Brigham v London Borough of Ealing* [2003] EWCA Civ 1490; *Eiles v Southwark LBC* [2006] EWHC 1411 (TCC); and *Hilda's Montessori Nursery Ltd v Tesco Stores Ltd* [2006] EWHC 1054 (QB).

114 *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 and *Lambert v Barratt Homes Ltd (Manchester Division)* [2009] All ER (D) 275 (March); [2009] 32 EG 70, upheld in part on appeal [2010] EGLR 59, [2010] Env LR D8.

115 [1999] Ch 289.

116 *Grosvenor Hotel v Hamilton* [1894] 2 QB 836.

117 *Wong Wai Tak Belinda v Smart Team International Investment Ltd* [2011] 3 HKC 322.

118 *Manchester Corp v Farnworth* [1930] AC 171; and *Anthony v Coal Authority* [2005] EWHC 1654(QB).

119 *Willis v Derwentside DC* [2013] EWHC 738 (Ch); [2013] Env LR 31.

- (8) Damage to interest in property by interference with amenity rights<sup>120</sup> including by such diminution of a right to light as to cause a nuisance.<sup>121</sup>
- (9) Glare from mirror-clad buildings.<sup>122</sup>
- (10) Barking dogs<sup>123</sup> and howling dogs.<sup>124</sup>
- (11) Persons on the premises sniffing glue.<sup>125</sup>
- (12) Failing to move off travellers.<sup>126</sup> And see *Lippiatt v South Gloucestershire CC*<sup>127</sup> as regards travellers causing a nuisance; and *Khan and Khan v Harrow Council and Kane*.<sup>128</sup>
- (13) Interference with rights of access to and engagement of rights in land.<sup>129</sup>
- (14) Hanging and burying dead fish and placing buckets of excreta, creating unpleasant sight and obnoxious smells.<sup>130</sup>

## 12. Acts Intending to Annoy

It has been held that an act which is done intending to annoy and actually annoying may be actionable even in circumstances that if done without the intention they would not be actionable as nuisance.<sup>131</sup> In *Hunter v Canary Wharf Ltd*,<sup>132</sup> it was suggested obiter that doing a malicious act for a purpose of interfering with (there, television reception) should be actionable in nuisance when without the malice it would not be actionable (Lord Cooke of Thompson, at p.721). It has been said, in the context of economic torts, that an act otherwise lawful although harmful does not become actionable because done simply with an intent to annoy.<sup>133</sup> It is unclear whether an intentional act designed to cause distress would allow for damages for distress, which damages are otherwise irrecoverable (though see now in cases of physical damage to one's home, where modest damages under this head were awarded.<sup>134</sup> Such a cause of action and damages recoverable may be actionable

120 *St Helens Smelting Co v Tipping* (1865) 11 HLC 62.

121 See *Midtown Ltd v City of London Real Property Co Ltd*, *Joseph v City of London Real Property Co Ltd* [2005] All ER (D) 164 (January); and *Regan v Paul Properties DPF (No 1) Ltd* [2007] Ch 135.

122 *Bank of New Zealand v Greenwood* [1984] NZLR 525.

123 *Phillips v Crawford* (1973) 72 LGR 199 and *Clemons v Stewart* (1969) 113 SJ 27.

124 *Manley v New Forest DC* [2007] All ER (D) 76 (November) (see s.5(3) of the Noise Control Ordinance).

125 *Sykes v Holmes* [1985] Crim LR 791.

126 *Page Motors Ltd v Epsom & Ewell BC* (1981) 125 QB 51.

127 [1999] 3 WLR 137, (1999) 1 LGLR 865.

128 [2013] EWHC 2687 (TCC).

129 *H Waterman v Boyle* [2009] 21 EG 104, [2009] 10 EG 111, though there would have to be a substantial interference (a comment meant to reflect the exceptional circumstances required for such a case to succeed).

130 *Elias Neil David v Cheng Sui Chu* [2019] 1 HKLRD 397 upheld on appeal at [2020] HKCA 31, [2020] HKEC 65.

131 *Hollywood Silver Fox Farm v Emmett* [1936] 2 KB 468.

132 [1997] AC 655.

133 *OBG Ltd v Allan* [2007] I.R.L.R. 608, [144]. See, too, to like effect *C v D* [2006] EWHC 166, [46] (QB).

134 *Eiles v Southwark LB* [2006] EWHC 1411 (TCC), [2006] All ER (D) 237; *Berent v Family Mosaic Housing* [2012] EWCA Civ 961, [2012] BLR 488; and in *Khan v Harrow Council* [2013] EWHC 2687 (TCC) (all cases of physical damage by tree roots).



agreement to the contrary (s.14(1)). Compensation shall be provided by the employer to the employee when the exploitation of the latter's work is beyond what the parties could have reasonably contemplated at the time of creation of the work (s.14(2)). A work may have joint authors where it is produced by the collaboration of two or more authors and the contribution of each author is not distinct (s.12(1)). As to commissioned works, see s.15. Copyright ownership in commissioned works depends on the provisions of the agreement between the author and the commissioner of the work (s.15(1)). If no agreement is made, the author of the work remains the first owner of the copyright, however, in such case, the commissioner shall be entitled to an exclusive licence to exploit the commissioned work and has the power to restrain any exploitation of the commissioned work for any purpose against which he could reasonably object (s.15(2)).

**48-14** Both the prospective and subsequent ownership of copyright are provided for in ss.101-104 of the Copyright Ordinance which deal with transmission of copyright (including future copyright) by assignment, by testamentary disposition and by operation of law. Generally copyright is personal or moveable property (s.101(1)).

**48-15 Affidavit Evidence on Subsistence and Ownership of Copyright.** Section 121 of the Copyright Ordinance provides a short-cut for proving copyright subsistence and ownership in legal proceedings. It is not, however, compulsory to rely on S.121 and copyright may be proved by evidence from witnesses. An affidavit made in compliance with the requirements of s.121 may be admitted without further proof in any proceedings under the Ordinance. It has been held by the Court of Final Appeal in *Tse Mui Chun v HKSAR*<sup>3</sup> that for such an affidavit to be admissible, all requirements for information to be supplied under s.121(1)(a)-(e) must be strictly complied with. The case also raised the question whether such affidavit might be produced for the benefit of a corporate body listed as the author of the work (recognised in *HKSAR v Chan Tak Tim*.<sup>4</sup> Section 121 has since been amended by the Copyright (Amendment) Ordinance 2007 to clarify that a body corporate may be recognised as an author. The impact of a minor irregularity on the affidavit document has been examined in *HKSAR v Chen Mei Ling*.<sup>5</sup> As long as the affidavit is in strict compliance with the format laid down in the Copyright Ordinance, the Court is bound to presume in the absence of evidence to the contrary that what was stated in the affidavit is true (s.121(3)(b), see *Golden Bright Manufacturer Ltd v Sunlight Electronic Toys Manufacturing Co Ltd*).<sup>6</sup> In *Satellite Television Asian Region Ltd v Alpha Communication Technology Ltd*<sup>7</sup> it was held that a s.121 affirmation could be made by a plaintiff's solicitor on the plaintiff's behalf. The Court or the party on whom the affidavit was served may require the deponent to give evidence and the Court may require the deponent to attend before court (s.121(8)).

**48-16 Rights of Action.** The owner of copyright in a work has the right to sue for infringement of copyright (s.107(1)). So has an exclusive licensee (s.112) but where the owner and the exclusive licensee have concurrent rights of action both must be parties except if the Court gives leave (s.113(1)), or for the purpose of obtaining interim relief (s.113(5)). If proceedings have already been commenced by either the copyright owner or the exclusive licensee, the other party can join the proceedings after their commencement.<sup>8</sup>

<sup>3</sup> [2004] 1 HKLRD 351.

<sup>4</sup> [2004] 3 HKLRD 112, [10].

<sup>5</sup> [2008] HKEC 1927.

<sup>6</sup> [2007] 2 HKLTD 589.

<sup>7</sup> [2007] HKCU 1372.

<sup>8</sup> On the bringing of a copyright infringement action in a case of concurrent rights, see *Swing Studio Entertainment Ltd v Excel Media Technologies Ltd* [2001] HKEC 1150.

Copyright in a work is infringed by any person who, not being the owner of the copyright and without the license of the owner, does or authorises another to do any of the "acts restricted by the copyright" in Hong Kong (s.22). Restricted acts are further defined as copying the work (s.23), issuing copies of the work to the public (s.24), renting the work to the public (s.25), making available copies of the work to the public (such as over the internet) (s.26), performing, showing or playing the work in public (s.27), broadcasting or including the work in a cable programme service (s.28), or making an adaptation of the work or doing any of the above in relation to an adaptation (s.29 and note the definition of "adaptation"). These are acts of primary infringement. The infringing acts have to take place in the Hong Kong territory for an action to be brought.<sup>9</sup>

Secondary infringement comprise acts of importing or exporting infringing copy (s.30), possessing or dealing with infringing copy (s.31), providing means for making infringing copies (s.32), permitting use of premises for infringing performance (s.33), and provision of apparatus for infringing performance (s.34). The term "infringing copy" is defined in s.35. To establish secondary infringement, the plaintiff must establish that infringing the act was done by a person who knows or has reason to believe infringing copies were being dealt with or that an infringing act was being committed (as appropriate).

Infringement occurs if a substantial part of work is taken, whether directly or indirectly (s.22(3)).<sup>10</sup> It is quality rather than quantity of what is taken that counts.<sup>11</sup> The Ordinance provides numerous exceptions to the general rules on infringement-see ss.36-88 inclusive.

**Statement of Claim.** The statement of claim must contain the following allegations: **48-20**

- (1) the title of the Plaintiff to sue, ie as owner or exclusive licensee;
- (2) the subsistence of copyright in the work, which must be identified with precision;
- (3) the infringement by the defendant; and
- (4) the relief claimed.

The statement of claim must be verified by a statement of truth (O.41A, r.2 of the Rules of the High Court). **48-21**

Under ss.115-117 of the Copyright Ordinance certain presumptions arise which are relevant to literary, dramatic, musical and artistic works, sound recordings, films and computer programs. The main presumptions are: **48-22**

- (1) if the name of the author or publisher of a literary, dramatic, musical or artistic work appears upon it, then that person is presumed, until the contrary is proven to be the author/publisher as appropriate;
- (2) in the case of sound recordings, films and computer programs, where such works bear a statement that a named person was the owner of the copyright, or the director or producer of the film, or the principal director, the author of the screenplay, the author of the dialogue or the composer of music specifically created for and used in the film, or that the works were first published in a specified year or in a specified country, then that statement is admissible as evidence of the facts stated and is presumed to be correct unless the contrary is proven.

The allegation of infringement by the defendant should show that he has committed or authorised the commission of one or more of the "restricted acts" without the license of the **48-23**

<sup>9</sup> *Golden Bright Manufacturer Ltd v Sunlight Electronic Toys Manufacturing Co Ltd* [2007] 2 HKLTD 589.

<sup>10</sup> For guidance on the meaning of "substantial part", see *Designers Guild Ltd v Russell Williams (Textiles) Ltd* [2001] FSR 11.

<sup>11</sup> *Ngai Kwong Co Ltd v Kenic Plastic Factory Ltd, Ngai Kwong Industrial Co Ltd v Lee Kwok Kay (t/a Metro Corp)* [1986] HKLY 174. In relation to typographical arrangements, see also *Newspaper Licensing Agency Ltd v Marks & Spencer Plc* [2002] RPC 4.



plaintiff. Where secondary infringement is relied upon it is essential to plead knowledge which is a necessary ingredient of infringement in such cases. In accordance with O.18 of the Rules of the High Court, particulars should be given. It is not strictly necessary to give particulars of those parts of the defendant's work which are alleged to infringe the plaintiff's copyright but it is highly desirable that this should be done and is probably essential where it is alleged that the defendant has taken only a (substantial) part of the plaintiff's work.<sup>12</sup> The usual course is to give particulars of the main resemblances between the respective works, if necessary in a separate schedule to the particulars claim. This may be done by marking up a copy of the plaintiff's and defendant's works so as to identify the parts relied upon.

**48-24** Damages for infringement of copyright are at large<sup>13</sup> but if the plaintiff claims damages in the action itself then a claim for special damage should be pleaded. If the plaintiff claims additional damages under s.108(2) then he must set out the grounds relied upon in support, eg that a benefit accrued to the defendant by a flagrant infringement.

**48-24** If delivery up of infringing copies is sought under s.109 it is necessary to plead the facts necessary for that section to apply, although they may coincide with those constituting a plea of secondary infringement. Delivery up is available where a person:

- (1) has an infringing copy of a work in his possession, custody or control for the purpose of or in the course of any trade or business; or
- (2) has in his possession, custody or control an article specifically designed or adapted for making copies of a particular copyright work, knowing or having reason to believe that it has been or is to be used to make infringing copies.

Generally, an application for an order for delivery up must be made within six years from the date on which the infringing copy or article was made (s.110).

## 2. Relief

**48-26** The remedies obtainable in an action for infringement of copyright are provided for in ss.107-111. Section 107(2) provides generally that "all such relief by way of damages, injunctions, accounts or otherwise is available to the plaintiff as is available in respect of the infringement of any other property right." The Ordinance also provides some special rules relating to copyright alone.

- (1) **An Injunction.** This is the normal remedy and is granted even though the plaintiff has not proved actual damage, provided that damage is likely to be caused to the plaintiff.<sup>14</sup> However, the form of injunction granted may be tailored to match the wrong committed and threatened.<sup>15</sup>
- (2) **Damages for Infringement.** These are at large.<sup>16</sup> Whilst therefore it is not necessary to allege damage, if any special damage or loss is claimed this should

<sup>12</sup> See *Oliver v Dickin* [1936] 2 All ER 1004 and *N & P Windows Ltd v Cego Ltd* [1989] FSR 56.

<sup>13</sup> *Fenning Film Service Ltd v Wolverhampton, Walsall and District Cinemas Ltd* [1914] 3 KB 1171.

<sup>14</sup> *Morn Creations Ltd v Gap Ltd* [2016] HKCU 2329, [2016] HKCFI 2344 (CFI); *Borthwick v Evening Post* (1888) 37 ChD 449.

<sup>15</sup> *Coflexip SA v Stolt Comex Seaway MS Ltd* [1999] FSR 473, but reversed on the facts at [2001] RPC 5; *Microsoft Corp v Pluto Technology Ltd* [1999] FSR 834.

<sup>16</sup> See *Fenning Film Service Ltd v Wolverhampton, Walsall and District Cinemas Ltd* [1914] 3 KB 1171.

be specifically pleaded.<sup>17</sup> Damage for copyright infringement can involve loss of profits, price reduction, and damage to reputation<sup>18</sup> Another approach for calculating compensatory damage is to assess what would have been agreed between a willing licensor and a willing licensee.<sup>19</sup>

In addition s.108(2) provides that such additional damages as the justice of the case may require may be awarded, having regard to all the circumstances and in particular to the flagrancy of the infringement any benefit accruing to the defendant, and the completeness, accuracy and reliability of the defendant's business accounts and records.

Flagrancy of the infringement implies "the existence of scandalous conduct and included deliberate and calculated copyright infringement".<sup>20</sup> In *Ozen Corp v Takmay Industrial Co Ltd*,<sup>21</sup> the Court held that the reprehensible conduct of the defendant, lies and deceptions, attempt to delay and frustrate the plaintiff's claim evidenced the flagrancy of the infringement.<sup>22</sup>

Section 108(1) protects an innocent infringer from a claim for damages, but not from any other remedy.<sup>23</sup>

(3) **An Account of Profits.** This equitable remedy is granted at the plaintiff's option instead of damages. An election need not be made until the plaintiff has established infringement. The defendant may be ordered to provide limited disclosure in order to allow the plaintiff to make an informed choice as to the likely entitlement in the case of each of the alternative remedies.<sup>24</sup> The principles applicable to an account of profits are discussed in *Potton v Yorkclose Ltd*<sup>25</sup> and *Celanese International Corp v BP Chemicals Ltd*.<sup>26</sup>

(4) **Delivery up.** Section 109 provides that the copyright owner may apply to the court for the delivery up to him or such other person as the court may direct of infringing copies of his work and, subject to proof of the requisite knowledge, any articles "specifically designed or adapted for making infringing copies." Section 111 provides that an application may be made for infringing copies or articles delivered up under s.109 to be forfeited to the copyright owner or destroyed or otherwise dealt with. The court is obliged to consider whether remedies available in an action for infringement of copyright would be adequate to compensate the copyright owner and to protect his interests.

<sup>17</sup> For the principles in assessing damages, see *Blayney (t/a Aardvark Jewellery) v Clogau St David's Gold Mines Ltd* [2002] EWCA Civ 1007, [2003] FSR 19.

<sup>18</sup> For an example of assessment of each claim, see *Konstar Industries Ltd v Hung Sang Metal Plastic Factory Ltd* [2004] HKEC 1578.

<sup>19</sup> *Oriental Press Group Ltd v Apple Daily Ltd* [1998] 2 HKLRD 976.

<sup>20</sup> *Microsoft Corp v Able System Development Ltd* [2002] 3 HKLRD 515.

<sup>21</sup> [1994] HKEC 1.

<sup>22</sup> See also *Kokkia Inc v Microgear Technology Ltd* [2016] HKCU 2378, [2016] HKCFI 1643 (CFI), followed by Lok J in *Owndays Co Ltd v Professional Optometrist Ltd* [2019] HKCU 4874, [2019] HKCFI 3147 (CFI).

<sup>23</sup> For the principles in assessing additional damages see *Nottinghamshire Healthcare v News Group Newspapers* [2002] EWHC 409, [2002] RPC 49 and *Microsoft Corp v Able System Development Ltd* [2002] 3 HKLRD 515.

<sup>24</sup> *Island Records Ltd v Tring International Plc* [1995] FSR 560 cited in *Television Broadcast Ltd v Hong Kong Cable Television Ltd* [2005] HKEC 1240.

<sup>25</sup> [1990] FSR 11.

<sup>26</sup> [1999] RPC 203.



### 3. Moral Rights

- 48-27** The Copyright Ordinance contains detailed provisions for three moral rights. They are associated with certain copyright works namely literary, dramatic, musical or artistic works and films. The authors of such copyright works or the director of a copyright film have the right to be identified as such (s.89 — right to be identified) and the right not to have their work subjected to derogatory treatment (s.92 — the right of integrity). Any person also has the right not to have such works falsely attributed to him as author or, in the case of a copyright film, as director (s.96 — the false attribution right). The right to be identified and the rights of integrity last as long as copyright in the work (s.97(1)) exists. The false attribution right continues for 20 years after the person's death (s.97(2)). Moral rights are not assignable but are transmissible upon death (ss.105 and 106).
- 48-28** There are numerous exceptions and qualifications to all three rights which mean that in practice they possess much more limited rights than their brief descriptions suggest. For example there is no infringement of the right to be identified unless the right has been asserted, either specifically or generally (s.90). The right does not apply to anything done by the employer of an author where the employer is the first owner of copyright under s.14 (s.91(3)).
- 48-29** The right to be identified and the right of integrity do not apply to works made for the purpose of reporting current events, or for publication in a newspaper, magazine or similar periodical, or in collective works of reference such as dictionaries. They do not apply to computer programs or computer-generated works.
- 48-30** **Infringement.** Reference must be made to the appropriate section in order to ascertain the precise acts which constitute infringement of any particular moral right.
- 48-31** There are two elements necessary for infringement of each of the right to be identified, the right of integrity and the false attribution right. The first is the lack of identification, the derogatory treatment or the false attribution. The second is the act of putting the "adulterated work" before the public. Generally and in so far as the context allows, the infringing acts are publishing the work commercially, performing the work in public (exhibiting in the case of artistic works), broadcasting the work, including it in a cable programme, or issuing copies of a film or sound recording to the public which include the work.
- 48-32** **Remedies.** Infringements of any of the moral rights are actionable as a breach of statutory duty owed to the owner of the right (s.114(1)). In the normal way an injunction to restrain further infringement may be claimed. In relation to the right of integrity, s.114(2) expressly provides that the court may grant an injunction on terms prohibiting the doing of any act unless a suitable disclaimer is made. It appears that the right to claim additional damages under s.108(2) is confined to infringements of copyright and does not apply to moral rights.
- 48-33** **Statements of Claim.** The statement of claim must contain the following allegations:
- (1) the subsistence of the right in the plaintiff;
  - (2) the infringement by the defendant;
  - (3) the relief claimed.
- 48-34** The statement of claim must be verified by a statement of truth (O.41A, r.2).

### 4. Rights in Performances

- 48-35** Part III of the Copyright Ordinance provides rights in performances which are independent of copyright or the moral rights. The rights are concerned not only with unfixed performances but also fixations of them, both immediate and subsequent.

Rights are conferred upon both the performer and the person having the exclusive fixation rights in relation to the performance. Generally rights are conferred upon the performer since his consent is required for the exploitation of his performance. The person with the fixation rights gains an ability to protect those fixation rights. **48-36**

The Copyright Ordinance confers upon the performer two types of rights: performers' economic rights (which are transmissible *inter vivos*) and performers' non-economic rights (which are transmissible only by testamentary disposition). **48-37**

**Definitions and Qualification.** The rights apply to the following unfixed performances: a dramatic performance (which includes dance and mime), a musical performance, a reading or recitation of a literary work, and a performance of a variety act or any similar performance. The rights are also concerned with the following fixation, whether film or sound recordings: those made directly from the unfixed performance; those made from a broadcast of or cable programme including the performance; and those made directly or indirectly from another fixation of the performance. Performer's rights arise in respect of qualifying performances — those given in Hong Kong or elsewhere by an individual domiciled or resident or having a right of abode in Hong Kong or elsewhere (s.201). Fixation rights arises in respect of a qualifying person (s.208(2)(b)) who is an individual domiciled or resident or having a right of abode in Hong Kong or elsewhere or a body corporate incorporated under the law of any country, territory or area (s.234). The Copyright Ordinance provides protection to a qualifying person so long as its country, territory or area provides reciprocal protection to Hong Kong performers or person having fixation rights (s.236). Except for a country, territory or area which is a party to a bilateral or multilateral copyright or related right convention to which Hong Kong is also party, it is in the power of the Chief Executive Council to assess whether a country, territory or area satisfies the requirement of reciprocity. **48-38**

**Infringement.** The performers' economic rights can be infringed: **48-39**

- (1) by copying a fixation of a qualifying performance (s.203);
- (2) by issuing copies of a fixation of a qualifying performance (s.204);
- (3) by making available to the public, copies of a fixation of a qualifying performance (s.205).
- (4) by renting to the public copies of a sound recording in which the whole or a substantial part of a qualifying performance is fixed (s.207A).

Performers' non-economic rights can be infringed: **48-40**

- (1) by making a fixation of a qualifying performance or by transmitting such a performance live (s.202);
- (2) by exploiting a fixation of a qualifying performance (s.206);
- (3) by importing, exporting, possessing or dealing with an illicit fixation of a qualifying performance (s.207).

The rights of the person having the fixation rights are infringed by essentially the same acts as the performers' non-economic rights (ss.209-211), except for the live transmission of a performance (available only for performers' non economic rights). **48-41**

**Remedies.** In an action for infringement of performers' economic rights, the performer is entitled to all such remedies as are available in respect of infringement of copyright (s.220). Infringement of performers' non-economic rights is treated as a breach of statutory duty (s.227). The normal remedies will be an injunction and damages. There is power to order delivery up of infringing fixation of performances (s.228). **48-42**

**Statements of Claim.** The statement of claim must contain the following allegations: **48-43**

- (1) the title of the plaintiff to the right;
- (2) subsistence of the right;



- (3) the infringement by the defendant;
- (4) the relief claimed.

48-44 The statement of claim must be verified by a statement of truth (O.41A, r.2).

48-45 There are no presumptions relating to title or subsistence. It will be necessary to plead facts which provide title to the right and that the performance in question is a qualifying one.

48-46 Generally, performers' rights statements of claim will be closely analogous to copyright statements of claim. For that reason no examples will be given here.

### 5. Defence — Copyright Infringement

48-47 **Grounds of Defence.** The range of possible defences includes:

- (1) There is no "work" in which copyright can subsist;
- (2) The alleged copyright work did not qualify for copyright protection;
- (3) Copyright has expired;
- (4) The plaintiff cannot establish title to copyright;
- (5) The defendant is entitled to the copyright, either at law or in equity;
- (6) The alleged infringement was licensed, expressly or impliedly, directly or indirectly, by the copyright owner;
- (7) The alleged infringement is an act expressly permitted under copyright legislation;
- (8) The plaintiff does not establish infringement; ie copying is alleged, the defence is one of independent origin or copying is established, but a substantial part is not reproduced;
- (9) The alleged infringement was innocent (s.108(1)) in which case the plaintiff is not entitled to damages, without prejudice to any other remedy.

48-48 Sections 48-88 of the Copyright Ordinance provide for acts which are permitted in relation to copyright works. In addition to general permitted acts there are provisions relating to education, libraries and archives, public administration, computer programs, typefaces, works in electronic form and miscellaneous provisions relating to literary, dramatic, musical and artistic works, films and sound recordings, and broadcasts and cable programs, adaptations, and designs.

48-49 Some of the more important permitted acts are fair dealing for research or private study (s.38); fair dealing for criticism, review or news reporting provided a sufficient acknowledgement is given (s.39); the incidental inclusion of a work in an artistic work, sound recording, film, broadcast or cable programme (s.40) and acts related to works for persons with a print disability (ss.40A to 40F).

48-50 The provisions relating to designs are of particular importance in relation to artistic works. Reference should be made to the section on designs and in particular the effect of s.87 which provides that copyright works with a "corresponding design" enjoy a shorter term of copyright.

48-51 The pleading of the defence depends very much upon the individual facts of the case. However, where it is sought to rely upon any statutory defence the pleading should adhere closely to the words of the section relied upon. Further, by virtue of O.18, r.13(5), where the defendant denies an allegation he must state his reasons for doing so and if he intends to put forward a different version of events from that given by the plaintiff, he must state his own version. The defence must be verified by a statement of truth (O.41A, r.2).

### 6. Defence — Moral Rights

**Grounds of Defence.** The four moral rights are each subject to limitations and qualifications which cut down the scope of the rights. Consequently there are numerous possible defences. Those which apply generally to all four rights are: 48-52

- (1) The right is not infringed;
- (2) Consent (s.98(1));
- (3) Formal waiver under the Ordinance, which can be general or specific (s.98(2),(3));
- (4) Informal waiver under the common law, saved by s.98(4);
- (5) The right does not apply;
- (6) The right has expired.

In addition there are defences which are specific to a particular moral right and which can be identified from the applicable sections of the Ordinance. Exceptions and qualifications to the moral rights are set out in the following sections: 48-53

- (a) Right to be identified — need for right to be asserted (s.90); exceptions (s.91);
- (b) Right of Integrity — exceptions to the right (s.93); qualification of the right (s.94).

By way of example it is a defence to alleged infringement of the right to be identified if it can be proved that the right was not asserted so as to bind the defendant in relation to the act complained of (s.90). Examples of Defences are given below. In relation to specific defences the Defence should adhere as closely as possible to the wording of the statute. In accordance with O.18, r.13(5) where the defendant denies an allegation he must state his reason for doing so, and if he intends to put forward a different version of events from that given by the plaintiff, he must state his own version. The Defence must be verified by a Statement of Truth (O.41A, r.2). 48-54

### 7. Defence — Rights in Performance

**Grounds of Defence.** Having checked that the right claimed does apply and that there has been a qualifying performance the following defences can be considered: 48-55

- (1) Consent, given either by the owner of the right or by someone from whom the right is derived, which may be specific or general (s.226);
- (2) Consent given by the Copyright Tribunal if the whereabouts or the identity of the person entitled to the right of reproduction cannot be ascertained by reasonable inquiry (s.213);
- (3) The alleged infringing act is a permitted act (Division II of Part III of the Copyright Ordinance);
- (4) A belief on reasonable grounds that consent had been given results in no damages (ss.202(3) and 209(2));
- (5) The making of a fixation of a performance or the copying of such fixation were made for private and domestic use (ss.202(2) and 203(1)).

Division II of Part III of the Copyright Ordinance provides for a number of permitted acts in relation to rights in performances. Generally the permitted acts mirror the relevant acts which are permitted in relation to copyright and which are set out in ss.48-88 of the Ordinance. 48-56

In relation to specific defences, the Defence should adhere as closely as possible to the wording of the statute. In accordance with O.18, r.13(5), where the defendant denies an allegation he must state his reason for doing so, and if he intends to put forward a different version of events from that given by the plaintiff, he must state his own version. The Defence must be verified by a statement of truth (O.41A, r.2) and relevant documents should be attached. 48-57



element on the part of the defendant (intent or recklessness as to whether the victim would suffer injury will suffice).<sup>27</sup>

### 3. Personal Data (Privacy) Ordinance

**55-17** The PDPO was enacted in 1996 to implement the recommendations of the Law Reform Commission of Hong Kong's report on Reform of the Law Relating to the Protection of Personal Data (1994).<sup>28</sup> It was reviewed and amended in 2012, mainly to regulate the use of personal data in private marketing, and also to provide assistance in relation to certain proceedings brought under the PDPO.<sup>29</sup>

**55-18** The PDPO's primary goal is to regulate the handling by others of living individuals' personal information. It is not designed to protect invasions of privacy or unwanted publicity.<sup>30</sup> The PDPO remains concerned only with privacy in relation to personal data, not privacy rights in general. Intrusive behaviour that does not involve the recording of information or does not intend to identify an individual will not trigger the PDPO.

**55-19** Remedies under the PDPO are largely administrative, with complaints to the Privacy Commissioner for Personal Data and a possible appeal of his decision to the Administrative Appeals Board (AAB). However, the PDPO does provide a civil remedy for individuals to seek compensation from those who wrongfully handle their personal data.<sup>31</sup> Nevertheless, given the PDPO was never intended to protect victims of unwarranted privacy intrusion, it has largely proved to be unsuitable for this purpose. Civil claims for damages have all been unsuccessful.

**55-20** Personal data under the PDPO is extremely widely defined. It covers any data capable of being accessed or processed in Hong Kong relating to a living individual (the data subject) from which it is practicable to identify the data subject.<sup>32</sup> This could include opinions, beliefs, activities and preferences.<sup>33</sup> The personal data concerned may be held in print or digital form on a wide variety of media and can comprise visual, written or typed information.<sup>34</sup>

<sup>27</sup> *Ibid.*; *Law Ka Yan Thompson v Ho Kang Wing* (HCA 1926/2015, [2020] HKEC 493).

<sup>28</sup> See <https://www.hkreform.gov.hk/en/docs/rdata-e.pdf>.

<sup>29</sup> For details on the 2012 amendments, see [https://www.pcpd.org.hk/english/data\\_privacy\\_law/amendments\\_2012/files/ordinance2012\\_overview\\_e.pdf](https://www.pcpd.org.hk/english/data_privacy_law/amendments_2012/files/ordinance2012_overview_e.pdf).

<sup>30</sup> As Ribeiro JA pointed out in *Eastweek Publisher Ltd v Privacy Commissioner for Personal Data* [2000] 2 HKLRD 83, the PDPO does not purport to protect "personal privacy" but "information privacy". As such, the PDPO is not intended to establish general privacy rights against all possible forms of intrusion into an individual's private sphere.

<sup>31</sup> PDPO s.66.

<sup>32</sup> *Ibid.*, s.2(1). Regarding identification, in *Kenneth Poon Sai Ho v Privacy Commissioner for Personal Data* (AAB 16/2000, 4 October 2000), the AAB confirmed the decision of the Privacy Commissioner that an OAP's Octopus card beeping and triggering a light at the toll gate did not identify the complainant, only that he was over 65 years of age. From this, it was not reasonably practicable to identify the complainant.

<sup>33</sup> PDPO s.2(1).

<sup>34</sup> *Ibid.* Unless it can be shown that personal information has been recorded, the PDPO will not be invoked. For example, the act of following someone may be an invasion of privacy for the subject but it will not trigger the PDPO which requires information to be recorded in some way: *Data Protection Principles in the Personal Data (Privacy) Ordinance: From the Privacy Commissioner's Perspective* (Hong Kong: Office of the Privacy Commissioner for Personal Data, 2nd ed., 2010) para. 3.25, referring to *Eastweek Publisher Ltd v Privacy Commissioner for Personal Data* [2000] 2 HKLRD 83.

The PDPO regulates the acts of those who collect, hold, use or transfer personal data (data users). Data users may be individuals or companies and organisations of all types.<sup>35</sup> Vicarious liability of employers and principals for the acts of employees and agents, respectively, is assumed.<sup>36</sup> **55-21**

#### (a) Data protection principles

The Ordinance is framed around six DPPs contained in Sch.1 of the PDPO, which broadly cover the collection, use, storage and transfer of personal data. The Principles must be observed as part of compliance with the PDPO.<sup>37</sup> The most relevant from the perspective of litigating privacy rights is Principle 1, relating to the collection of personal data. **55-22**

#### (b) Principle 1 — collection

DPP 1 concerns how and why data users collect personal data. There are three main requirements: **55-23**

- (1) Personal data must be collected in a way that is lawful and fair.<sup>38</sup>
- (2) Personal data may only be collected for a valid purpose directly related to a function/activity of the data user.<sup>39</sup>
- (3) Data collected should be necessary for, or directly related to, that purpose, and must not be excessive.<sup>40</sup>

#### (i) Collection statements

A data user must take all practicable steps to ensure that the data subject is informed, on or before the collection of personal data: **55-24**

- (1) whether it is obligatory or voluntary to provide the personal data and, if obligatory, the consequences of failing to supply the data;<sup>41</sup>
- (2) the purpose (in general or specific terms) for which the data are to be used and the classes of persons to whom the data may be transferred.<sup>42</sup>

#### (ii) *Eastweek Publisher Ltd v Privacy Commissioner for Personal Data*

Collection is not defined in the PDPO but the term was litigated in *Eastweek Publisher Ltd v Privacy Commissioner for Personal Data*.<sup>43</sup> Eastweek's photographer took photos of people unknown to him or Eastweek in public for an article critiquing the fashion sense of those featured. A photograph of the complainant had been taken using a long-range lens without her knowledge or consent. After it appeared in Eastweek's magazine, the complainant's colleagues made fun of her. She complained to the Commissioner who **55-25**

<sup>35</sup> PDPO s.2(1).

<sup>36</sup> *Ibid.*, s.65(1).

<sup>37</sup> *Ibid.*, s.4(1).

<sup>38</sup> DPP 1(2).

<sup>39</sup> DPP 1(1).

<sup>40</sup> *Ibid.*

<sup>41</sup> DPP 1(3)(a).

<sup>42</sup> DPP 1(3)(b).

<sup>43</sup> [2000] 2 HKLRD 83.



The requirements under DPP 4 are anchored to practicability, which are defined under the PDPO as “reasonably practicable”.<sup>61</sup> Therefore, this is not an absolute requirement of security. Steps taken should be proportionate to the degree of sensitivity of the data and the consequences of a security breach. In today’s digital environment where cyber security is at the forefront of many organisations’ and governments’ minds, the requirements for security are likely to evolve to a higher standard and this will impact DPP 4.

- (4) Principles 5 and 6: Access and correction — Data subjects have various rights relating to the use of their personal data by data users. DPP 5 and DPP 6 cover the two principal rights of access and correction. A data subject is entitled to (a) ascertain whether a data user holds personal data about him/her;<sup>62</sup> (b) request access to that personal data;<sup>63</sup> and (c) request correction of that personal data.<sup>64</sup> A data user must comply with a data access or data correction request or notify the data subject of its reasons for refusing such request within 40 days of receipt of the request.<sup>65</sup>

#### (d) Exemptions

- 55–32 There are various exemptions under the PDPO which serve to bring the processing of certain personal data by data users outside its scope. In the personal privacy context, personal data held solely for the purposes of journalism by a news reporting organisation is exempt from the requirements of the PDPO.<sup>66</sup> Complaints may be made against media organisations only when personal data has been published or broadcast.<sup>67</sup> In addition, personal data held for domestic or recreational purposes,<sup>68</sup> or held by the government for security, defence<sup>69</sup> and collection of tax,<sup>70</sup> is also exempt.

#### (e) Consequence of breach

- 55–33 Potential breaches of the PDPO give the data subject a right to complain to the Privacy Commissioner for Personal Data.<sup>71</sup> The Commissioner may investigate the complaint, and he enjoys considerable powers of investigation (including the right to enter premises and

61 PDPO s.2(1).

62 DPP 5.

63 DPP 6. A fee may be levied by the data user in relation to such a request. See s.18 of PDPO for the procedure for making a data access request, s.19 of PDPO for how data users should comply and s.20 of PDPO for the procedure data users should take if they wish to refuse a data access request.

64 PDPO s.22.

65 *Ibid.*, s.20 contains the grounds on which a data user may refuse to comply with a data access request.

66 *Ibid.*, s.61.

67 *Ibid.*, s.61(1)(b)(i).

68 PDPO s.52. This is a broad exemption. An often-cited example is a personal Christmas card list of names and addresses. Issues may arise if this is then used for another purpose, without consent, for example, for a credit reference: *Data Protection Principles in the Personal Data (Privacy) Ordinance* (n 34 above) para. 12.6.

69 PDPO s.57.

70 *Ibid.*, s.58.

71 *Ibid.*, s.37. Complaints may follow Form OPS001 available at [https://www.pcpd.org.hk/english/complaints/how\\_complaint/complaint/complaint.html](https://www.pcpd.org.hk/english/complaints/how_complaint/complaint/complaint.html).

require the production of evidence).<sup>72</sup> In practice, the Commissioner receives a significant number of complaints,<sup>73</sup> most of which are resolved informally by conciliation, with the data user undertaking to change its practices and sometimes offering compensation to affected data subjects.

If the Commissioner decides there has been a breach and the matter cannot be resolved informally, it may serve an enforcement notice on the data user.<sup>74</sup> This will usually require the data user to remedy the breach and take steps to prevent recurring breaches. Breach of an enforcement notice is a criminal offence, punishable by a fine up to HK\$100,000 and up to two years imprisonment.<sup>75</sup> To date, there have been no prison sentences handed down and the largest fine imposed on a data user is HK\$30,000.<sup>76</sup>

The data user may appeal an enforcement notice to the AAB within 14 days.<sup>77</sup> Similarly, the data subject may appeal a decision by the Commissioner not to issue an enforcement notice.<sup>78</sup>

The Commissioner has no power to award compensation to a data subject who suffers damage. The data subject’s only remedy lies under s.66, which creates a civil right and cause of action for the data subject to sue the data user for monetary compensation when the former has suffered damage by reason of breach of the PDPO.

#### (f) Private claims under s.66

Section 66 allows an individual who suffers damage by reason of a contravention of the PDPO by a data user to lodge a claim in the District Court<sup>79</sup> for compensation (including for injury to feelings) from that data user for that damage.<sup>80</sup> The data user may have a defence if he/she can show that reasonable care was taken to avoid contravention or, if the complaint is that data are inaccurate, it was received in this way from the data subject or a third party.<sup>81</sup>

Section 66 claims have been few and far between. Over the course of the PDPO’s existence, not more than 15 cases have been brought and none have been successful. They have usually been brought by litigants in person dissatisfied with the findings of the Commissioner/AAB. All claims brought have been dismissed as lacking merit or a necessary

72 PDPO s.38.

73 The Commissioner has received an increasing number of complaints per year, close to 2,000.

74 PDPO s.50.

75 *Ibid.*, s.50A.

76 This related to the direct marketing provisions enacted in 2013. A telecommunications service provider failed to comply with a customer’s opt out request to cease using his personal data in direct marketing: *HKSAR v Hong Kong Broadband Network Ltd* [2018] 2 HKLRD 1049.

77 PDPO s.50(7).

78 *Ibid.*, s.39(4).

79 Pursuant to s.66(5) of PDPO, proceedings brought under s.66(1) of PDPO should be commenced in the District Court. However, the jurisdiction of Court of First Instance is not ousted. In appropriate circumstances, the District Court may order the case to be transferred to the Court of First Instance: *Lee Kwok Tung Albert v Chiyu Banking Corp Ltd* [2018] 2 HKLRD 273, [4.21]. The Court of Appeal found that the judge had properly ordered transfer from the District Court to the Court of First Instance to consolidate the s.66(1) of PDPO claim with other claims arising out of common issues of fact and law. The Court of Appeal refrained from discussing whether a claim based not only on s.66(1) of PDPO but also other causes of action could be commenced in the first place in the Court of First Instance, as this issue was not before the court.

80 PDPO s.66(1) and 66(2).

81 *Ibid.*, s.66(3).



causal link. Several have been highly criticised as attempts by vexatious litigants to re-litigate matters “dressed up” as injury to feelings for “ridiculous sums”.<sup>82</sup>

(g) Proposed reform to the PDPO

55-39 On 20 January 2020, the Constitutional and Mainland Affairs Bureau, a government agency responsible for the implementation of the Basic Law in Hong Kong, issued a paper on proposed amendments to the PDPO (the Paper). While these amendments seek to align the PDPO with international standards and to address challenges to personal data protection arising from rapid technological developments, they do not appear to have potential impact on the causes of action under the PDPO in civil proceedings. The Paper is currently at the Legislative Council Panel for formal review and discussion, and as of this date, no specific amendments have been put forward yet.<sup>83</sup>

4. Copyright

55-40 Certain privacy interests may be protected under the Copyright Ordinance. An action can only be brought by the owner of the copyright which may limit the utility in certain privacy contexts.

55-41 By way of example, an infringement of copyright will result where a person copies or publishes a private letter or family photograph where copyright is owned by another.<sup>84</sup> There is also *obiter dicta* to the effect that the law should deny copyright protection to those who have been guilty of invasion of the privacy of public figures by taking their photographs on private occasions without their consent.<sup>85</sup>

5. Basic Law and Hong Kong Bill of Rights

55-42 Privacy interests find a degree of protection in the Basic Law and in the Hong Kong Bill of Rights (contained in s.8 of the Hong Kong Bill of Rights Ordinance (Cap.383)). The relevant sections are reproduced below.

55-43 Basic Law arts.28, 29 and 30:

“Article 28, Basic Law

The freedom of the person of Hong Kong residents shall be inviolable.

No Hong Kong resident shall be subjected to arbitrary or unlawful arrest, detention or

82 For example, in *Lee Chick Choi v Best Spirits Co Ltd* (HCA 2045/2012, [2014] HKEC 1994), the plaintiff sought damages in the sum of HK\$14,475,849 under s.66 of the PDPO, stemming from alleged loss of income as a result of terminated employment and alleged breach of the PDPO by the former employer. In *Yuen Oi Yee Lisa v Charoen Sirivadhanabhakdi* (HCMP 1/2017, [2017] HKEC 426), a similar claim was brought and found to be completely without merit by the Court of Appeal. Restrictive Proceedings Orders were imposed.

83 Legislative Council Panel on Constitutional Affairs: Review of the Personal Data (Privacy) Ordinance (LC Paper No. CB(2)512/19-20(03)) (Legislative Council Review Paper on the PDPO).

84 Law Reform Commission Report (n 1 above) para. 2.14.

85 *Oriental Press Group Ltd v Apple Daily Ltd* [1997] 2 HKC 515, 529-530.

imprisonment. Arbitrary or unlawful search of the body of any resident or deprivation or restriction of the freedom of the person shall be prohibited. Torture of any resident or arbitrary or unlawful deprivation of the life of any resident shall be prohibited.

Article 29, Basic Law

The homes and other premises of Hong Kong residents shall be inviolable. Arbitrary or unlawful search of, or intrusion into, a resident’s home or other premises shall be prohibited.

Article 30, Basic Law

The freedom and privacy of communication of Hong Kong residents shall be protected by law. No department or individual may, on any grounds, infringe upon the freedom and privacy of communication of residents except that the relevant authorities may inspect communication in accordance with legal procedures to meet the needs of public security or of investigation into criminal offences.”

Article 14, Hong Kong Bill of Rights:

55-44

“Protection of privacy, family, home, correspondence, honour and reputation

(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

(2) Everyone has the right to the protection of the law against such interference or attacks.”

As fundamental rights, these provisions will be given a generous interpretation<sup>86</sup> and provide a basis for private citizens to constitutionally challenge laws or governmental conduct which interfere with these rights.<sup>87</sup> 55-45

However, this does not mean that these rights are absolute; these rights can be restricted, although restrictions will be interpreted narrowly.<sup>88</sup> In order to legitimately interfere with these rights, the restrictions must be constitutionally valid, meaning the government should meet the burden of showing that the purported restriction is both prescribed by law and necessary.<sup>89</sup> 55-46

Breach of the Basic Law provisions does not create any cause of action based on breach of the articles alone.<sup>90</sup> Such breach may nonetheless form the basis for a civil action, such as battery or trespass in the case of an unlawful search of a person or property.<sup>91</sup> Breach of the Hong Kong Bill of Rights on the other hand does create a cause of action.<sup>92</sup> 55-47

86 *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4, 28-29; *Leung Kwok Hung v HKSAR* (2005) 8 HKCFAR 229, 248.

87 Their application to the legal relations between private citizens is limited: see Johannes SC Chan and CL Lim, *Law of the Hong Kong Constitution* (Hong Kong: Sweet & Maxwell, 2nd ed., 2015) para. 17.027.

88 *Gurung Kesh Bahadur v Director of Immigration* (2002) 5 HKCFAR 480, [24]; *Leung Kwok Hung v HKSAR* (2005) 8 HKCFAR 229, 248.

89 *Leung Kwok Hung v HKSAR* (2005) 8 HKCFAR 229, 248; *Democratic Party v Secretary for Justice* [2007] 2 HKLRD 804, 818.

90 Law Reform Commission Report (n 1 above) para. 6.11.

91 Chan and Lim (n 87 above) para. 22.011.

92 Hong Kong Bill of Rights Ordinance s.6.



**Breach of confidence and s.66(1) PDPO  
mixed claim**

**Statement of Claim**

**Parties**

55-S1

1. The Plaintiff is a professional working as a nutrition scientist.
2. At all material times, the Defendant was a limited liability company incorporated in Hong Kong under the Companies Ordinance (Cap.622). The Defendant was at all material times:
  - 2.1 the owner and operator of a fitness, diet and well-being tracking app available on iOS and Android (*App*); and
  - 2.2 the owner and operator of a website popular amongst the Hong Kong health and fitness community (*Website*).

**Confidential Personal Information, restriction  
on use and duty owed to the plaintiff**

3. In or around 15 December 2017, the Plaintiff downloaded and installed the App. The Plaintiff immediately created an account with the Defendant via the App.
4. As part of the account creation process, the Plaintiff accepted an information collection statement containing the following words:
 

“[The Defendant] may use collected personal data for the purposes of analysing usage of the App, providing customer support, managing and providing the App (including for targeting advertisement) and further developing the App and other of the [Defendant]’s services and products.”
5. In particular, the account creation involved the Plaintiff disclosing the Plaintiff’s name, age, gender, district, profession, email address, a profile picture, height and weight. The Plaintiff used the App over the course of three months from 15 December 2017 to 15 March 2018, during which it collected various health-related information whilst the Plaintiff was exercising, including heart rate, distance travelled, gyro sensor data, location and time elapsed (together the Confidential Personal Information).

**Particulars**

- 5.1 Personal details regarding an individual’s health, physical well-being and location history are private and confidential.
- 5.2 The Defendant knew or ought reasonably to have known from the nature of the information that it was fairly and reasonably to be regarded as private and confidential.
- 5.3 The Confidential Personal Information constituted personal data which had been collected by the Defendant pursuant to the

Personal (Data) Privacy Ordinance (Cap.486) (PDPO), as particularised below:

- 5.3.1 it related directly to the Plaintiff;
  - 5.3.2 it was practicable for the identity of the Plaintiff to be directly or indirectly ascertained; and
  - 5.3.3 it was in a form in which access to or processing of the data was practicable.
6. The Confidential Personal Information was imparted in circumstances importing a reasonable expectation of privacy and therefore an obligation of confidence. It was not imparted for use on the Defendant’s Website.
  7. The Plaintiff at no time consented to the Defendant’s publishing of the Confidential Personal Information.

**Publication of Personal Data**

8. In April 2018, the Defendant published an article on the Website comparing and contrasting the effectiveness of exercise routines and preferences by occupation and district (Article). The Article used the Plaintiff as a case study and disclosed her age, height, weight, profession, district and specifics of her exercise routine (type of exercise, length and location). The specifics of her exercise routine revealed irregular workouts of varying lengths, below average level of fitness and a lack of improvement over a three month period.
9. In or around May 2018, the Plaintiff was alerted to the Article by colleagues who followed the Website. They said that it was clear that the person described in the Article was the Plaintiff because:
  - 9.1 the Article referred to the Plaintiff’s gender, profession and district;
  - 9.2 the Plaintiff was the only nutrition scientist working in the district; and
  - 9.3 the Plaintiff was named in various comments on the Article.
10. On 18 May 2018, the Plaintiff contacted the Defendant by email to ask that reference to the Plaintiff and the Confidential Personal Information in the Article on the Website be removed. The Plaintiff received no reply and repeated her request in or around 23 May 2018, which has been ignored to date.

**Particulars of Breach**

11. The disclosure and publication of the Confidential Personal Information was not authorised. Its inclusion in the Article was a breach of the duty of confidence owed by the Plaintiff to the Defendant.
12. The collection and publication of personal data about the Plaintiff by the Defendant was in breach of the requirements enunciated under Data Protection Principles 1 and 3 of Sch.1 of the PDPO, namely:
  - 12.1 that all practical steps be taken to ensure that the data subject is explicitly informed on or before collecting the data of the purpose