

Contract Law in Hong Kong

I INTRODUCTION TO CONTRACT LAW

1 Introduction

A contract is generally defined as a legally enforceable agreement. Contract law typically involves the legal issues arising from, and surrounding the formation, performance or breach of these agreements. For a Hong Kong-style treatment of contract law issues relating to formation, see paras 5-6 of the decision of Ma CJ, in *World Food Fair Ltd v Hong Kong Island Development Ltd* [2005] 1 HKC 594 (CA). The general purpose of this introduction is to give an overview of the core principles and issues that may arise in contract law.

Hong Kong contract law has evolved from the English law, which itself developed from the action of *assumpsit* (an action for the recovery of damages, by reason of the breach or non-performance of a simple contract either express or implied, and whether made orally or in writing – repealed by the UK Judicature Acts 1973 and 1975). This action, in turn, derives from the distinction in Roman law between voluntary obligations (contract law), and involuntary obligations (tort law).

On top of the framework of rules of equity and common law doctrines governing contract law, there is also a considerable body of Hong Kong legislation which although often modelled on the UK legislation, differs in several important respects, see the discussion of the individual Ordinances later in this work.

2 Role of the Basic Law

In Hong Kong, the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China ('Basic Law'), which is the current constitutional foundation for Hong Kong's legal system, enshrines certain aspects of the common law of contract in relation to its application in Hong Kong.

- Article 5 – The socialist system and policies shall not be practised in the Hong Kong Special Administrative Region, and the previous *capitalist system* and way of life shall remain unchanged for 50 years.

[Emphasis added]

The capitalist tradition is based on property rights and freedom to facilitate commerce. Therefore, these will be part of the common law of contract until at least 1 July 2047.

- Article 8 – The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region.

[Emphasis added]

In relation to the general law of contract (which is not exhaustive), the courts will most often have recourse to the Ordinances contained in this volume, and the rules of equity and common law principles as embodied in Hong Kong judicial decisions and persuasive overseas decisions. The equitable principles can be distilled into a short non-exhaustive list of twelve maxims, which represent equity's general concepts as follows:

- (1) Equity will not suffer a wrong without a remedy: *Li Pui Chuen v Chan Kam Ming* [1961] HKLR 495.
- (2) Equity follows the law: *Chin Lan Hong & Ors v Cheung Poh Choo* [2005] 3 HKC 225.
- (3) When equities are equal, the first in time prevails: *Chu Kit Yuk v Country Wide Industrial Ltd* [1995] 1 HKC 363.
- (4) He who seeks equity must do equity: *Ng Yat Chi v Max Share Ltd* [2001] 3 HKC 644.
- (5) He who seeks equity must come with clean hands: *Wong Siu Ying v Hui Chak Chuen & Ors* (Unreported, HCA 10380/1993, 24 March 1999, Edward Chan, Recorder).
- (6) Equity assists the diligent and not the tardy.
- (7) Equity is equality: *Official Trustee in Bankruptcy v Citibank Savings Ltd* [1999] BPIR 754.
- (8) Equity looks to the substance and not the form: *Hoenig v Isaacs* [1952] 2 All ER 176 (CA).
- (9) Equity regards as done that which ought to be done: *Mountney v Treharne* [2002] EWCA Civ 1174, [2002] BPIR 1126 (CA).
- (10) Equity imputes an intention to fulfil an obligation.
- (11) Equity will not assist a volunteer: *Pennington v Waine* [2002] 4 All ER 215, [2002] EWCA Civ 227, [2002] 2 BCLC 448, [2002] 1 WLR 2075 (CA).
- (12) Equity acts in personam: *Secretary for Justice v Hon Kam Wing* [2003] 1 HKLRD 524.

[2A.03] General note

This section is almost identical to section 4 of the Control of Exemption Clauses Ordinance (Cap 71), see the *Annotated Ordinances of Hong Kong*, Control of Exemption Clauses Ordinance (Cap 71) (2018 Reissue) [4.02].

[2A.04] Section 2A(1)(a): In the course of a business

Where a transaction is only incidental to a business activity, a degree of regularity is required before the transaction can be said to be an integral part of the business carried on and so entered into in the course of that business: see *R & B Customs Brokers Co v United Dominions Trust* [1988] 1 All ER 847, [1988] 1 WLR 321 (CA). See also [2.07] above.

It is for the person claiming that a party does not deal as consumer to prove that he does not. 'It is difficult to imagine that the court would treat a person who trades in very large sums of foreign currency, through an attorney and other agents or assistants as one who did not make the various foreign exchange contracts in the course of a business': *Natamon Protapakorn v Citibank NA* [2005] HKCU 1648 (unreported, HCA 190/2005, 23 November 2005) per Muttrie DHCJ.

In another example case, a printing press is not something which is ordinarily supplied for private use and certainly not for consumption: *Artech Printing Ltd v Yee Fat Printing Equipment Ltd* [2000] HKCU 695 (unreported, CACV 92/2000, 19 September 2000) per Rogers, Acting CJHC.

[2A.05] Definitions

For 'contract of sale', 'business' and 'goods' see section 2 above.

 PART I

FORMATION OF THE CONTRACT

CONTRACT OF SALE

3. Sale and agreement to sell

- (1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price. There may be a contract of sale between one part owner and another.
- (2) A contract of sale may be absolute or conditional.
- (3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale; but where the transfer of the property in the goods is to take place at a future time or subject to some condition

thereafter to be fulfilled, the contract is called an agreement to sell.

- (4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

[3.01] UK comparison

Cf section 2 of the Sale of Goods Act 1979.

[3.02] Section 3(1): Contract of sale

This term is used throughout the Ordinance in a broad sense and includes both a sale and an agreement to sell (within the meaning of subsection (3) above). Transactions in the form of a contract of sale are excluded from the provisions of the Ordinance if they are intended to operate by way of mortgage, pledge, charge or other security: see section 62(4) below. Note the definitions of ‘contract of sale’ and ‘goods’ in section 2 above.

A contract of sale must be distinguished from an option to purchase. The definition of the former postulates a buyer, that is, a person who buys or agrees to buy goods: *Helby v Matthews* [1895] AC 471, [1895–1899] All ER Rep 821; see also *WM Cory & Son Ltd v Inland Revenue Comrs* [1964] 3 All ER 66, [1964] 1 WLR 1332 (not affected on this point by the judgment of the House of Lords [1965] AC 1088, [1965] 1 All ER 917), in which the dicta in *Felston Tile Co Ltd v Winget Ltd* [1936] 3 All ER 473, were disapproved.

A contract where the value of materials supplied is of relatively little value compared to the work and labour involved is not a contract of sale but a contract for work and labour: see *Robinson v Graves* [1935] 1 KB 579, [1935] All ER Rep 935 (CA) (commission to paint a portrait) (cf *Mak Ping Kui trading as Yet Hing Knitting Garment Factory v Millionice Limited trading as Blessings Trading Company* [2001] HKCU 350 (unreported, HCA 940/1998, 25 April 2001) at p 17). The central question is what constitutes the ‘essence’ of the contract in question: 鄧展聯 *Tang Chin Luen & Anor v Cool Wedding Ltd* [2016] HKCU 2604 (unreported, HCSA 68/2015, 1 November 2016). See further *Clay v Yates* (1856) 1 H & N 73 (contract to print work, materials to be supplied to printer: held to be work and labour); *Lee v Griffin* (1861) 1 B & S 272, [1861–1873] All ER Rep 191 (artificial teeth held to be contract of sale); *Love v Norman Wright (Builders) Ltd* [1944] KB 484, [1944] 1 All ER 618 (contract to supply and fit blackout curtains held to be contract of sale); *J Marcel (Furriers) Ltd v Tapper* [1953] 1 All ER 15, [1953] 1 WLR 49 (contract to make fur coat held to be contract of sale); *Philip Head & Sons Ltd v Showfronts Ltd* [1970] 1 Lloyd’s Rep 140, (1969) 113 SJ 978 (contract to supply and lay carpet held to be contract of sale); *Mitsubishi Elevator Hong Kong Co Ltd v Marriot Engineering & Construction Co Ltd* [2017] HKCU 2355 (unreported, DCCJ 3970/2011, 15 September 2017) (contract for the manufacture and installation of a lift, lump sum price included without specific item on labour costs, held that work and labour are ancillary to the transfer of the lift and hence the contract was for the supply of

goods). It is however possible for a single contract to be both a contract for the supply of goods and services: *Wood v TUI Travel Plc* [2017] PIQR P8, [2017] EWCA Civ 11.

For further distinctions between a contract of sale and other transactions, see *Halsbury's Laws of Hong Kong* (2nd Edn) Vol 45 on Sale of Goods and *Chalmers' Sale of Goods* (18th Ed) pp 79–83.

For special provisions concerning auction sales, see section 60 below.

[3.03] Section 3(1): Goods

'Goods' are defined in section 2 as including all chattels personal other than things in action and money and as including, in particular, emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale: see section 2(1) above.

[3.04] Section 3(1): Seller

The seller is a person who sells or agrees to sell goods: see section 2(1) above.

[3.05] Section 3(1): Property

Property means the general property in the goods, and not merely a special property: see section 2(1) above.

[3.06] Section 3(1): Buyer

The buyer is a person who buys or agrees to buy goods: see section 2(1) above. A person holding a mere option to buy has not 'agreed to buy': *Helby v Matthews* [1895] AC 471, [1895-1899] All ER Rep 821.

[3.07] Section 3(1): Price

The price must be money, either paid or, if the transaction is a credit one, agreed to be paid; but it is sufficient to constitute a sale if only part of the consideration is money: *Sheldon v Cox* (1824) 3 B & C 420; *Buckley v Lever Bros* [1953] 4 DLR 16. See also *Halsbury's Laws of Hong Kong* (2nd Edn) Vol 45 on Sale of Goods; and as to ascertainment of price, see section 10 below.

[3.08] Section 3(1): Part owner

See *Beed v Blandford* (1828) 2 Y & J 278; *Nicol v Hennessey* (1896) 1 Com Cas 410. Ownership of goods may be split up, as in the case of a pledge, where a pledger claims the general property but the pledgee acquires a special property with the right of sale in the event of certain occurrences. This provision recognises the above situation, considering that seller and buyer must be different persons under normal circumstances. See also *Halsbury's Laws of Hong Kong* (2nd Edn) Vol 45 on Sale of Goods, and *Chalmers' Sale of Goods* (18th Ed) pp 78, 79.

[3.09] Section 3(2): Absolute or conditional

For the distinction between a conditional sale and an option to purchase, see *Marten v Whale* [1917] 2 KB 480.

[3.10] Section 3(3): Property ... is transferred; transfer of the property

For an example of how the requirement of an 'agreement to transfer property' is analysed, see: *PST Energy 7 Shipping LLC and Anor v OW Bunker Malta Ltd & Anor* [2016] AC 1034.

As to transfer of property as between seller and buyer generally, see sections 16–20 below. See also *Mischeff v Springett* [1942] 2 KB 331, [1942] 2 All ER 349, where part of a cargo of sardines was sold and it was held that this was an agreement for sale until the goods were appropriated to the contract. The property may pass even though transfer of possession has been postponed: see *Watts v Seymour* [1967] 2 QB 647, [1967] 1 All ER 1044.

See, further, as to the transfer of property, *Halsbury's Laws of Hong Kong* Vol 23 (2008 Reissue) on Sale of Goods, and *Chalmers' Sale of Goods* (18th Ed) pp 140–159.

[3.11] Section 3(4) : Agreement to sell

An agreement to sell does not amount to sale, and therefore does not amount to publication within the Control of Obscene and Indecent Articles Ordinance (Cap 390) section 2(4): *R v Chan Chiu Cheung* [1989] 2 HKLR 446.

4. Capacity to buy and sell

- (1) Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property:
Provided that where necessaries are sold and delivered to an infant or minor, or to a person who, by reason of mental incapacity or drunkenness, is incompetent to contract, he must pay a reasonable price therefor.
- (2) In this section, *necessaries* (必需品) means goods suitable to the condition in life of such infant or minor or other person, and to his actual requirements at the time of the sale and delivery.

[4.01] UK comparison

Cf section 3 of the Sale of Goods Act 1979.