

## Commercial Law – PART C

### Unconscionable contracts Ordinance (UCO) Requirements (on K's post Oct 1995)

**S5: If with respect to a contract for sale of goods or supply of services in which one party dealing as consumer, the court finds the contract or any part of the contract to have been unconscionable in the circumstances the contract was made, the court may offer reliefs.**

- **S3 Dealing as a consumer**- assumption of dealing as a consumer until proven by party against.(s3(2)).
  - Contract was made was not in the course of Business, meaning some degree of regularity in respect of transaction or the transaction is an integral part of the contracting party's business- R&B Customs Broker v United Dominions
  - The seller makes the contract in the course of a business:- which is a broad definition that incorporates as long as it is not a purely private sale outside confines of the business even if one off sale- (Stevenson v Rogers)
  - The goods passed in pursuance of the contract are of the type ordinary supplied for private use.
  - S3(2)- a buyer who buys under sale by auction or competitive tender is not dealing as a consumer
  
- **S2 Contract for supply of services**- a contract where a person agrees to carry out a service
  - S2(2)(b) regardless of whether goods are transferred, bailed or whatever the nature of consideration for which services are carried out.
  - Including credit card agreements (Hang Seng Credit v Tsang Nga Lee)
  - Goods have the same definition as s2SOGO-
    - Chattels (Not money unless collector item coin -Moss v Hancock), Emblems, Industrial crops, things attached or forming part of the land agreed to be severed(severance essential- Sanders v Pilcher)
    - NOT: electricity, human parts, IP, software, information.
  
- **Unconscionable (s5(2) demonstrated by the party claiming unconscionability) : S6(1)factors non exhaustive** to determine whether a contract or part of it is unconscionable in the circumstances relating to the contract at the time it was made- (Chum Kit Ching)
  - Relative bargaining positions (Shum Kit Ching- D had to have knowledge of P's weakness and had to have knowingly taken advantage of such weakness)
  - Whether consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interest of the other party (Tung Ho Wah- exclusive jurisdiction can be necessary to protect legitimate interests)
  - Did the consumer understand the documents relation to the supply of goods and services (s6(1) (c) Shum Kit Ching) (no: lawyer Citibank v Au Wai Lun)
  - Small prints may be s6(1)(c) not to give proper opportunity to read and comprehend the terms (Shum Kit Ching)
  - Was the consumer under undue influence or pressure from the suppliers
  - Was there an alternate choice for the consumer from another party (Hang Seng Credit).
  
- S6(2) The court shall not have regard to any unconscionability arising from circumstances that were not reasonably foreseeable at the time the contract was made.

- **S5(1) Reliefs**- court to determine this with regard to the conduct of the parties to the proceedings in relation to the performance of the contract since it was made
  - Refuse to enforce the contract
  - Enforce the remainder of the contract without the unconscionable part
  - Limit the application of or revise or alter the unconscionable part to avoid any unconscionable results.
- **Defence**: as long as reasonable notice had been given, the consumer will be bound by the terms of the contract including those incorporated by reference, if they were unhappy after reasonable notice, they are open to reject the offer (Hood v Anchor Line)
- Customer had ample opportunity to inspect the terms: (Citibank v Au Wai Lun)

**s7(2) this ordinance will apply even if there are terms that states that another jurisdiction that is not HK will be governing the contract, where (Tung Ho Wah v Star Cruises)**

- the term appears to the court to have been imposed wholly or mainly for the purpose of enabling the party imposing it to evade the operation of this ordinance
  - the consumer is a habitual resident of HK and has taken essential steps necessary for making the contract were taken there.

## Control of Exemption Clauses Ordinance

- Exemption clauses are ones that avoids or limits civil liability for breach of contract or negligence or breach of duty.
- Similar to s57 SOGO that voids any contractual sale of goods terms that exempt the implied undertakings as to title, freedom from incumbrances and quiet possession (e.g. description, quality or fitness of the goods s15-17 SOGO in a consumer and non consumer sale(this is subject to reasonableness test).
- S11(3) CECO disregards the implied terms of s15-17 SOGO for its purpose.

### Conditions

- 1) S4CECO - Party to a contract deals as a consumer (R&B customs Brokers)
- 2) The other party makes the contract in the course of a business (Stevenson v Rogers)
- 3) In the case of a contract by SOGO, the goods passing under or in pursuance of the contract are of the type ordinarily supplied for private use or consumption.
- 4) S3 CECO- Reasonableness Test.
  - S3(1) reasonable if the term was a fair and reasonable one given
    - Circumstances
    - Ought reasonably to have been
    - Known or in contemplation of the parties
    - WHEN THE CONTRACT WAS MADE
  - S3(2): for determining seller's liability or miscellaneous contracts under which goods passed , take regard to Schedule 2 CECO as well as s3
  - S3(4) CECO: Language of Term/ Notice.
    - Notice: the requirement of reasonableness is satisfied if the court determines that it would be fair and reasonable to allow reliance on it having regard to all circumstances obtaining when the liability arose or would have arisen.
    - Language: Oriental Pear v Bank of Taiwan: look at whether the language the terms or notice is expressed in is one that is understood by the suffering person. May not

be reasonable if the language is not understood by the person as against whom another seeks to rely.

- S3(6): Restriction of liability to a specified sum of money – reasonableness depends on
  - The resources which he could expect to be available to him for the purpose of meeting the liability should it arise
  - How far it was open to him to cover himself by insurance
- BURDEN OF PROOF s3(6):
  - Up to person claiming that a contract term or notice satisfies the requirement of reasonableness to prove that it does.
- Schedule 2 Reasonableness Guidelines
  - Look at bargaining positions of the parties, take into account alternative means by which the customer's requirements could have been met
  - Whether the customer received an inducement to agree to the term
  - Whether the customer knew or ought reasonably to have known the existence and extent of the term
  - Where the term excludes or restricts any relevant liability if some condition is not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition to be practical
  - Whether the goods were ordered by special order of the customer.
- S11 CECO (exclude liability on implied terms): LIABILITIES under s14 SOGO of sellers implied undertakings as to title cannot be excluded nor could s15-17 SOGO be excluded or restricted
- S11(3) Other than in non consumer sale (Business to business)- only in so far as the term satisfies the requirement of reasonableness – see sch 2
- **S7: Excluding liability of negligence** (subject to sch1 setting out contracts or situations that s7 is not applicable)
  - Only applies to business liability (e.g. liability for breach of obligations or duties arising from things done or omitted to be done by a person in the course of business)
  - Cannot restrict liability for death or personal injury resulting from negligence
    - Breach of contractual term to take reasonable care or exercise reasonable skill in the performance of the contract or at common law.
  - Cannot restrict liability for loss or damage unless reasonable
  - Notice of the contractual term to exclude negligence does not mean the P has indicated his voluntary acceptance of risk, To rely on defence of volenti, D must do more than point out existence of the term or notice to the claimant.
- **S8 Liability arising in contract- subject to sch1 restrictions**
- Only applies to business liability
- That is liability for breach of obligations or duties arising from things done or omitted to be done by a person in the course of a business.
- As against that party, the other cannot by reference to any contract term
  - When himself in breach of contract, exclude or restrict any liability of his in respect of the breach or
  - Claim to be entitled
    - To render a contractual performance substantially different from that which was reasonably expected or

- In respect of whole of his contractual obligation to render no performance at all, except in so far as the contract term satisfies the requirement of reasonableness.
- **Schedule 1 exceptions**
  - Any contract of insurance
  - Any contract so far as it relates to the creation or transfer of an interest in land
  - Any contract relating to rights or interest to IP
  - Any contract so far as it relates to the formation or dissolution of a company
  - Any contract relation to the creation or transfer of securities
  - Or participant of SFO activities.
- **S14CECO: Parties cannot evade liability by means of a secondary contract**

## Supply of Services (Implied Terms) Ordinance

When party deals as a consumer s4(1) SSO

- He does not make the contract in the course of a business (R&B customs Brokers- degree of regularity or transaction integral party of the contracting party's business)
- The other party does make the contract in the course of a business and
- The services provided under the contract are of a type ordinarily supplied or provided for private consumption

There is a contract for the supply of a service s3(1) SSO

- A contract where a supplier agrees to carry out a lawful service
- S3(2) employment contracts is not one of service, nor does there need to be any goods that are transferred or bailed by way of hire under the contracts
- Wong Mee Wan v Kwan Kin- (death speed boat) Look at the true nature of the defendants business, **if it was known to the plaintiff** that they are mere agents, then they should not be liable, their duty is to ensure that the party the agents are linking the customer to are respectable.

In a contract for supply of a service s5 SSO

- in the course of business- R&B customs Brokers
- there are implied terms to (Feerni Development- solicitor owes a duty of care to his clients to carry out services with reasonable care, but advocate in court or before any tribunal are exempt from the provision)
- to take reasonable care and skill and within a reasonable time (meaning a standard of care to be expected of a professional man must be based on events as they occur in prospect- Duchess of Argyll.)
- If mere agent in supplying of a service, the appellant will have a duty and burden to show that it had exercised due care in the selection of a competent contractor- Chea Kam Wing v Kwan Kin

Possible breaches liable for damages for breach of contract

- Time (s6 SSO):
  - If time for completion is not fixed by the contract nor was it determined in the course of dealing between the parties, on a question of fact, there is an implied term that the supplier will carry out the service within a reasonable time.

- Consideration (s7 SSO)
  - Where the consideration is not expressed, nor determined in the manner agreed by the contract nor during the course of dealings, there is an implied term that party contracting with the supplier will pay a reasonable charge (which is a question of fact)

#### Exclusion of implied terms S8(1) SSO

- CONSUMER- It is not possible for a supplier to restrict its liability under the implied terms when contracting with a consumer
- Non-CONSUMER- S8(2) Where against other persons, such implied liability may subject to CECO be negative or varied by express agreement in the course of dealing between the parties.

## Money Lenders Ordinance (MLO)

MLO is for the protection of persons dealing with money lenders from excessive interest rates and extortionate stipulations from the loan and the licensing of persons carrying on business as money lenders.

S23 MLO- A unlicensed money lender may not recover principal lent or interest unless he has complied with the MLO or unless it would be inequitable not to permit recovery or enforce security under the agreement. It is up to the court's discretion of equitable.

#### Money lenders (s2 MLO)

- Person whose business is to make loans or advertise or announce himself in any way as carrying on that business
- Exceptions in part 1 schedule 1 or with regard to a loan specified in part 2 schedule 1.
- Burden is on the borrower to prove that the lender was a money lender
- TEST: at the time of the loan, the business of the person was that of loan making- Chow Wun Sing v Yiu Chun Luk
- One off loans or small number of loans in inconclusive- Conroy v Kenny
- S3- MLO does not include loans from and to banks that are authorised institutions(Banking Ordinance)
- LICENSING: s7 MLO- registrar of companies and the commissioner of police have power to regulate who may carry on the business of a money lender

FORMALITIES- s18(1) non compliance renders the contract unenforceable unless inequitable to do so.

- A) The enforcement of a loan agreement can only be so if the S18 Contract formalities are met
  - In writing (memorandum or note may be in different documents but must refer to terms and conditions of the loan- Stronger Offer)
  - In writing within 7 days of entry into the agreement
  - S18(b) personally signed by the borrower
  - A copy of the agreement must be given to the borrower at the time of signing
  - No agreement if not signed by borrower before the loan was made or any security was given
- B) Formalities of the Writing
  - Name and address of money lender and borrower and any surety
  - The amount
  - Date of agreement and loan making

- Terms of repayment
- Forms of security for the loan
- Interest rates
- Exclude floating rates (china everbright finance)
- A declaration as to the place of negotiation and completion of the agreement for the loan

Protection from interest rates payable.

- Acceptable rate of up to 48% per annum
- S25(3)- above 48% is presumed to be extortionate but below 60% per annum MAY be considered reasonable by the court with regards to the circumstances
- S24(1) prohibits a rate above 60% per annum- automatic offence and s24(2) that agreement shall not be enforceable in any case.
- S25(1)- court if finding transaction is extortionate, may reopen the transaction so as to do justice and make such orders as it sees fit having regard to all the circumstances.
  - What is extortionate S25(2): requires debtor to make payments grossly exorbitant or grossly contravenes ordinary principals of dealing regarding factors such as:
    - S25(4) Interest rate prevailing at the time of loan agreement
    - S25(5) Age experience and business capacity
    - The degree of financial pressure and nature of that pressure
    - S25(6) the degree of risk accepted by lender
    - His relationship to the debtor
    - Whether there was a specious cash price quoted for any goods or services

S25(7)- court may allow applications under MLO by debtor notwithstanding that the time for repayment of loan or instalment has not arrived.

#### ILLEGAL MONEY LENDING

- S22(1)
  - Payment of compound interest
  - Only bullet payments allowed
  - Interest rates increase on default, unless default is made on due date of any sums payable the money lender shall be allowed to charge simple interest on that sum from date of default until sum is paid at an effective rate not exceeding the effective rate payable in respect of the principal apart from any default.
    - Flying Mortgage- courts discretion on judgment rate or contractual interest rate on outstanding principals.

Court's discretion

- May make suitable variation to the agreement where it would be not inequitable to enforce even money lender did not fully comply with the requirements- Emperor Finance v La Belle
- Court must balance the circumstances when arriving at their decision for discretion- Strong Offer.
  - Money lenders need to make an effort to comply with the MLO requirements.

Exemptions from MLO

- S33A- general exemptions, the registrar may after consultation with the financial secretary by notice in the gazette, give exemption
- S33B- a person may make an application in the prescribed form and fees to the registrar to be exempted from all or any of the provision of the MLO
- Loans under Part 2 Schedule 1
  - A loan made to a company secured against the company's properties that are s80 CO registerable

- Pawn broking transaction by a licensed pawnbroker which is regulated by the pawnbrokers Ordinance
- Chit-fund loan: which is where participants subscribe periodically to a common fund and that fund is put up for sale or payments to participants by auction or tender

## Pawnbrokers Ordinance

It is a consensual or possessory security created by contract

- Pawn is a pledge effected by bailment to be kept by the pawnbroker until the debt is discharged, there must be an actual or constructive delivery of chattel pawned to the pawnbroker.
- Borrower has general property in the goods but the pawnbroker obtains special property in the goods and has the right to detain and an inherent right of sale if the debt is not paid by the due date

Pawnbroker - defined in s2

- s2- Person carrying on business by advancing on interest or in expectation of profit, gain or reward of sums of money on security of goods taken by such person in pawn.
- S4- requires a license, otherwise s11 it is an offence committed and may be subject to a fine \$20,000 and imprisonment of 1 year.
- S13- required to give borrower a ticket in the specified form
- S12 must enter detail of the loan in general book kept by pawnbroker
- If he is not a pawnbroker he may be a money lender

Pawnor

- S19(1) no person shall pawn goods owned by another without being duly authorised by the owner (Chan Pak Yeung)
- S18(2) offence to provide false information to a pawnbroker.

Pawn goods

- s21: cannot take ID cards, passport, warrant card, bank savings or deposit account book, photograph of the borrower or owner of the goods or any member of the borrower's family or goods with marked sign indicating them to belong to the state.
- Nemo dat rule: if goods not belong to pawnor is pawned, nemo dat states that he cannot give a better title than he has subject to any estoppels. Property of stolen goods remains with person from whom they were stolen. (Chan Pak Yeung)
- S23- court to decide who will get the goods and to apportion the loss between the owner and the pawnbroker on the basis of fault and carelessness. (Legrand jewellery v wo fung pawnshop)

Pawn terms

- s21 cannot take pawn from person unless identity of the borrower is verified and that they are not under 17 years old
- S11PO- not exceeding a maximum monthly simple interest is 3.5% per lunar month-schedule 2,
  - if it does exceed, the loan is unenforceable,
  - rendering the borrower entitled to redeem goods without payment of interest or any charges incidental to the loan

- s11(4) PAWNBROKERS cannot charge compound interest or demand or take payment other than principal interest or the prescribed sum for expenses
- S3 PO- Max pawn loan amount \$100,000- stipulated by schedule 1
- S15- upon presentation of the pawn ticket and the full amount due and interest within 4 lunar months from date of advancing loan money, pawnbroker shall deliver the pawn goods
- A wrongfully entered pawn is unenforceable in terms of any interest and cost associated with the loan- s11(3).

## Consumer Council –Consumer Council Ordinance

### Forestalling and Mediating Disputes between consumers and business

- Helps make enquires and log complaints and provide pres shipping advice along with helping mediation of disputes before the consumer takes the problem up with small claims tribunal
- Expose malpractices of traders for dishonesty
- Take up situations with the hk police on trade malpractices
- Helps Shenzhen consumer association

### Ensures product and quality safety

- By conducting tests on consumer products

### Collect market information on services and goods

### Improving legal protection for consumers

- Look at initiatives to improve consumer rights and help protect them.

### CONSUMER LEGAL ACTION FUND

- Consumer Council is the trustee of the CLAF through a declaration of trust granted by the government
- Assists consumer to bring or defend representative action that acts on behalf of a group of consumers with the same interest in the matter.
- Recovers cost from defendants in successful cases and a contribution of 10% of the benefits gained
- But do not require payment from consumer if case is unsuccessful unless it was a wrongful claim by the consumer.
- Objective is to bring a TEST CASE for a precedent for the future.

#### - WHO IS ELIGIBLE

- Consumer/ group of consumers involved in a matter which relates to consumer transactions such as
  - Unmerchtable goods
  - Restrictive trade practices
  - Unfair and unconscionable contract terms
  - Exemption clauses in consumer contracts
  - False or misleading advertising
  - False trade descriptions
  - OR if your case involves significant public interest and you have exhausted all other means and do not qualify for legal aid.
- FACTORS considered by the trustee
  - The potential for large groups being adversely affected



- Whether court action is most effective means to resolve the circumstances
  - Cost effectiveness to not cause undue financial burden to the fund
  - Chance of success
  - Bargaining power
  - Financial power of the other party
  - If the matter can promote consumer cause and deterrent to unscrupulous business practices
- APPLICATION
- No means testing
  - Financial resources of applicants are merely taken into account
  - Pay a non refundable fee of \$100 for cases within small claims tribunal and \$1,000 for other courts
  - Sign an agreement with assisted consumer which governs relationship with the trustee
- Winnings
- Pay council actual legal costs and expenses less any cost payable by and recovered from the other party
  - All other sums paid for your matter out of the fund
  - 10% of amount of money won.
  - Small claims: capped at 25% contribution of damages recovered
  - Other courts: capped at 50% contribution of damages recovered

#### PAST CASES

- Against Lehman mini bonds

## Law of Guarantees

#### Legal nature

- Secondary contract and not a standalone obligation.
- Where a guarantor undertakes to the creditor for the debtor liabilities, usually on its default
- If debt guaranteed is void, guarantor's obligations are also void
- Obligation only arises dependent on the guaranteed obligation (Moschi v Lep Air: in exception cases courts may ignore the principal altogether)
- Re Mitchell: court may hold guarantor liable notwithstanding that the principal obligation guaranteed never arises or becomes unenforceable or cease to exist
- Where the liability of the debtor is unenforceable, the liability of the guarantor may depend on whether the contract is one of guarantee or an indemnity
- Most bank will ensure it is 'on demand' so once default they can demand from the guarantor
- Also liable to pay damages liable from the debtor to the creditor (Moschi v Lep)

#### Indemnity- BANKS USUALLY TAKE BOTH

- Primary binding obligation to indemnify a party for a specified loss which may incur (Birkmyr v Darnell)
- A primary stand alone obligation which is independent of the liability or default of another party
- Does not need to be in writing to be enforceable

- Must give regards to the essential nature in order to decide whether or not it is really no more than a guarantee- Yeoman Credit

#### Types of Guarantee

- a) Discreet and continuing guarantees
  - Discrete: Guarantor, guarantees the fixed indebtedness of the debtor arising from a specific transaction
  - Continuing: obligations extends over a series of transaction between the debtor and creditor under the terms of a master agreement, the guarantor's liability is not fixed but varies according to the debtor's outstanding indebtedness and may accrue with use of that facility and continues as long as there is a debtor creditor relationship between the parties.
- b) Limited guarantees
  - on a fixed sum or part of the debt, could be considered a separate debt so once discharged the liabilities are also discharged (Goodwin v Gray)
  - Guarantee of the entire indebtedness with a fixed limit of liability Re Sass

#### Contract of guarantee

- Must meet basic standards of a contract
- May be orally made (Actionstrength v Inglen)
- S14 LARCO: no need to state consideration for guarantee,
  - Be in writing
  - Signed by the party charged
- Generally contracts are construed in favour of the guarantor- Blest v Brown

#### Guarantor's rights once repaid the debt- s15 LARCO

- May use most rights of set off or counter claim that arose before the borrower defaulted, which the borrower has against the bank to reduce its liability
- Once paid, guarantor will also be entitled to be indemnified by the debtor in default if the debtor had requested the guarantor to give the guarantee. (Anson v Anson), or if it was necessary to give the guarantee what was just and reasonable to reimburse (Owen v Tate)
- doctrine of subrogation
  - Entitled to any security the bank holds for the borrower known or unknown to the guarantor (Forbes v Jackson)
  - Takeover creditor's rights against the debtor

#### Discharge of Guarantor's liability

- By payment
- Release of the debtor by the creditor (price v Barker) But guarantor's liability will not be discharged merely because the creditor accepts a scheme of composition under the Bankruptcy Ordinance.
- By agreement to give time to debtor to repay without securing against the guarantor will discharge the agreement- Webb v Hewett

## Protection of Vulnerable Consumers

### Duress

- Barton v Armstrong: illegitimate improper pressure on a person to enter into a contract
- Of the person-burden of proof that the coercer to prove that the force had no effect on the weaker party

- On proper- burning other's property
- Economic- unequal of bargaining powers and a coercion of the will (Pao On)

### **Undue Influence**

- Actual influence-
  - CIBC Mortgages v Pitt:
  - other party had the capacity to influence the complainant,
  - the exercise was undue
  - exercise brought about the transaction
  - burden of proof on the complainant
  - agreement is voidable
  - no need to show the agreement was disadvantageous
- Presumed undue influence
  - Relationship of the parties that one party put 'trust and confidence in the other' dominant party
  - Voidable unless dominant party can prove that no undue influence was in fact exercised
  - Special relationship- irrefutable presumption that position of influence exists but not necessarily exercised unduly- Barclays bank v O'Brien
  - No special relationship e.g. husband and wife, but may be shown if one party puts themselves entirely in the hands of the other- Esquire Electronics
- IT must then be shown that there is something about the agreement which calls for an explanation then up to the dominant party to rebut the presumption and show that there was no undue influence. Etridge,
- **Effect on 3<sup>rd</sup> party**
  - Traditionally unaffected unless an agent or had knowledge of the undue influence
  - But in Li Sau Ying v Bank of China: influencer persuades influence to deal directly with a third party, and transaction calls for an explanation and is non commercial, there should be an enquiry
    - To take reasonable steps to ensure the influenced understands the practical effect
    - Communicate directly with the influenced and best to have her solicitors to give written confirmation of her understanding of the transaction
    - Provide influenced and their solicitors with all the financial information related to the transaction
    - If bank has reason to be suspicious they must inform the solicitors representing the influenced

### **Misrepresentation**

#### Misrepresentation Ordinance

- A clear false statement of a material fact or law (Fletcher v Krell)
- Addressed to the party misled
- Intended and does induce the party misled to enter into the contract (Attwood v Small).
- Mere puffs of statements of opinion or intention are not a misrepresentation (Smith v Land)

#### 1) Fraudulent Misrepresentation

- i. It is fraudulent where it is made knowingly, or without any believe in its truth, or recklessly,
- ii. The test is subjective

#### 2) Negligent misrepresentation

- i. Maker honestly believed the statement he made was true
  - ii. Where there is a Hedley Byrne duty of care between the two parties.
  - iii. Test of whether a reasonable man would have made that statement
- 3) Innocent Misrepresentation
- i. Maker shows that he had reasonable grounds to believe his statement was true

**REMEDIES: Misrepresentation, undue influence and duress renders the contract voidable- to put the party back to pre contractual position**

S3(2) General discretion for the court to award damages instead of rescission, having regard to the nature of the misrepresentation and the loss that would be caused by it if the contract were upheld and the loss from rescission on the parties (Thomas Witter v TBP Industries).

- Rescission
  - Innocent party has prima facie right to rescind the contract
  - Puts the parties back to the pre contract position
  - BARS TO RESCISSION s2 MO
    - Affirmation- party decides to continue with the contract- Long v Lloyd
    - Lapse of time-Allcard v Skinner
    - Impossible to restore the pre contractual position- Vigers v Pike
    - Bona fide third party rights have been acquired- Phillips v Brooks
- Damages s3(1) MO
  - If loss was suffered after a misrepresentation
  - Only if negligent and fraudulent misrepresentations
  - S 2MO - court has discretion to award damages instead of ordering rescission in innocent misrepresentation
  - Damages in lieu of rescission

Defence: Person making misrepresentation statement had reasonable grounds to believe and did believe up to the time of the contract that the facts represented were true

**S4 Exclusion of misrepresentation liabilities**

- Clause must be reasonable
- Representor to prove reasonableness
- Reasonableness is the same as s3(1) CECA
- Assessed at the time when the contract was made rather than in the light of subsequent developments
- BUT CANNOT EXCLUDE LIABILITY FOR FRAUDULENT MISREPRESENTATION- HIH Casualty v Chase Manhattan Bank.