CONTENTS OF A CONTRACT

REPRESENTATIONS AND MISREPRESENTATIONS.

General definition : A representation is a statement about a factual situation, current or historical, or about a person's state of mind, including an opinion or belief. Examples include a statement about the condition of a ship or its location, opinions or beliefs about the condition or location of the ship, statements about the vessel's ability to perform a particular task and statements about where the ship has been or what it has done. A misrepresentation is a false representation.

Distinctions : It is important to distinguish representations made as part of negotiations or otherwise, which give rise to remedies in their own right from other statements (or representations) which give rise to actions in other areas of contract. The above must also be distinguished from statements which are of no legal significance whatsoever. A statement may :-

a) be a representation which gives rise to remedies discussed in this section; or
b) become incorporated as a term of a contract[1] for example **s12-15 SOGA 1979** ; or
c) form the basis of a collateral contract **Esso Petroleum v Marsden** [2] : **Shanklin Pier v Detol Products** [3]; **City of Westminster Properties v Mudd** [4] or
d) be a mere tradesman's puff as alleged in **Carlill v Carbolic Smoke Ball Co**.[5] which gives rise to no rights whatsoever since no one relies on them or expects them to be true.
e) be a throw away remark, made in jest or casual conversation, with no expectation that anyone might take it seriously or rely upon it.

Categories of Misrepresentation : There are three categories of misrepresentation, namely i) fraudulent, that is to say intentional, ii) negligent but not intentional or deliberate and iii) purely innocent, that is to say the person making the misrepresentation acted neither fraudulently nor negligently when making the representation.

Compensation for Misrepresentation : Clearly, a person may suffer loss or damage if they rely on a statement which subsequently proves to be incorrect. Actions for compensation may be founded in tort or contract. However, the mere fact that a contract is involved does not automatically mean that the action will be founded in contract law. Indeed, most claims related to misrepresentation will be founded in tort.

Sources of Law governing Misrepresentation : The law concerning misrepresentation and misstatement is an amalgamation of Common Law and Equity, reinforced by **The Misrepresentation Act 1967**.

Ending an agreement induced by misrepresentation : Apart from claims for damages for misrepresentation and misstatement a party may seek to escape from a contract induced by misrepresentation. It is necessary therefore, to consider the various ways in which a contract may be brought to an end including the concept of **"*void ab initio*"** which takes the view that a contract had never come into being, to agreements ***voidable*** at the behest of the innocent party, by way of claims to the court under common law for rescission, to petitions to the court in equity for ***rescission***.

Significance of the distinction between the ways that contracts are brought to an end. Where a contract is void "***ab initio***" no payment is due for benefits derived out of purported performance of the agreement and no proprietary rights are transferred to third parties, whereas, when a contract is avoided or rescinded remuneration may be required in respect of any benefits derived by the other party to the agreement and because as and until the contract is avoided or rescinded it is possible for a third party to acquire property rights in the subject matter of the contract. Indeed, avoidance or rescission may not be permitted once a third party has acquired such proprietary rights.

1 It will be seen later however that the mere fact that a representation becomes a term of the contract does not deprive the innocent party of the right to a remedy on the basis of the misrepresentation.
2 **Esso Petroleum v Marsden** [1976]
3 **Shanklin Pier v Detol Products** [1957]
4 **City of Westminster Properties v Mudd** [1959] Ch 120
5 See the discussion on tradesmen's puffs above in respect of offer, acceptance and invitation to treat.

CHAPTER TWO

Misrepresentation, the Law of Contract and Terms of a Contract

A representation may later become incorporated into and become a term of the contract. If this happens a party is entitled to claim damages for breach of contract in the event that the representation, by virtue of the fact that it was false, leads to a breach of the term of the contract. If the relevant term is a condition, then a breach of the terms will also entitle the innocent party to repudiate the contract.

Marine insurance. By virtue of **s17-20 Marine Insurance Act 1906** a failure to disclose a material circumstance entitles the insurer to avoid the contract. **s26 Marine Insurance Act 1906** places a duty on the assured to designate the subject matter with reasonable certainty. Such designations are treated as warranties and by virtue of **s33 Marine Insurance Act 1906** become conditions that must be complied with exactly, whether material or not. A failure to comply discharges the insurer from liability. [6]

Title, passing off and intellectual property rights : **s12 Sales of Goods Act 1979** implied term as to good title is frequently breached by a misrepresentation.

Which is best, actions in Contract or in Tort ? The burden of proof for breach of contract is easier to discharge than the burden of proof to establish liability in tort. In order to claim damages for misrepresentation, the person seeking damages for misrepresentation must establish that he was induced by that representation to make the contract. A party is likely therefore to prefer to claim damages for breach of contract. Nonetheless, following the case of **Henderson v Merrett Syndicates,**[7] the party can plead breach of contract and claim in tort in the alternative, though of course there can be no double recovery. The difference in procedure between tort and contract may on times favour a claim in tort despite the availability of a claim in contract. However, by-enlarge a claimant will only base a claim on the grounds of tortious misrepresentation if the representation has not become a term of the contract.

Misrepresentation and the Law of Tort independent of Contractual Issues

An example of a situation where an action for damages is founded purely in tort without any reference to a contract would be where incorrect advice is given to a ship's captain to the effect that it is safe to enter a port at low tide. If the captain takes that advice and the ship founders or grounds the owners of the vessel could claim damages in tort to compensate for the loss suffered from following that advice. The compensation would cover both physical loss, such as damage to the hull of the vessel and related economic loss of profits flowing from delay.

Categories of misstatement in the Law of Tort unrelated to contracts.

1) **Deceit or Fraudulent Misstatement** : If the statement that it was safe to enter the port at low tide was made deliberately, knowing that it was incorrect, perhaps with the intention of causing loss or damage to the vessel an action for compensation would be founded in the tort of Deceit or Fraud. Whilst the measure of damages in tort is normally linked to the loss suffered, the law seeks to discourage fraud. In order to achieve this the court has the power to award punitive or exemplary damages where fraud or deceit is involved.

2) **Negligent Misstatement** : Under the general rules of negligence, if the statement was made negligently the captain would have to establish that the person making the statement owed him a duty of care, that the duty was breached and that the breach of duty caused loss that was not too remote. Providing the vessel's owners could surmount all three hurdles they would be able to recover for the physical damage to the vessel and related economic loss. However the rule that the law of tort will not provide compensation for pure economic loss unrelated to physical loss severely restricted the class of person who could claim in tort for misrepresentation or negligent misstatement. Thus, if the vessel in the above example suffered no damage to the hull and was merely delayed perhaps because the captain had to wait for a high enough tide to re-float the vessel, no compensation could be recovered. This anomaly was cured by the leading case of **Hedley Byrne v Heller** [8] which enables claimants to recover damages for pure economic loss resulting from negligent misstatements.

6 Liability in tort for negligent misstatement is covered in depth in the Chapter on Tort.

7 **Henderson v Merrett Syndicates** [1993]

8 **Hedley Byrne v Heller** [1964] AC 463

3) **Purely innocent misstatement** : There is no general liability in tort for statements which in the absence of deceit or negligence turn out to be incorrect. If for reasons beyond the actual or implied knowledge of the advisor in the scenario described above the vessel could not safely enter the port, the advisor would not be liable. Thus, if the port used to be safe for vessels to enter at low tide but had, unknown to anyone become unsafe because a change in tides had deposited a layer of silt on the seafloor, the owners of the vessel would not be able to recover.

Overview of Contracts, Misstatements and the Law of Tort.

A representation may induce a person to conclude a contract. If the contract subsequently proves to be disadvantageous to the induced party he may well seek redress before the courts. A contract induced by a misrepresentation may be repudiated, void, avoided or rescinded in appropriate circumstances. The party suffering loss will in appropriate circumstances be able to recover damages to compensate for that loss. Claims for damages and or to avoid, repudiate or rescind a contract, arising out of a misrepresentation are generally founded in tort under the common law or by virtue of the **Misrepresentation Act 1967.**

A representation may be made not only by a party to a contract but also by a third party who may or may not have had any interest in whether or not that contract came into being. Where this occurs there may be two independent actions by the induced party to the contract, firstly against the false representor for damages and secondly against the other party to the contract to secure release from the contract. See in particular **Yianni v Edwin Evans** [9]; **Smith v Eric Bush** [10]; **Harris v Wyre Forest D.C.**[11] ; **Ross v Caunters** ; **Whte v Jones** ; **Morgan Crucible v Hill Samuel** [12] ; **Caparo v Dickman** [13] but compare **Mutual Life v Evatt** [14]; **James McNaughton Paper Group v Hicks & Anderson & Co.**.[15]

Contracts, Misrepresentation and Equity

Relief could at one time also be sought in equity as a gloss on the common law but it is likely that the equitable provisions under the **Misrepresentations Act 1967** have now replaced the general rules of equity. The Statutory Equitable rules are distinct from the general rules of equity. Thus, the equitable relief available under the law following the merger of common law and equity by virtue of the **Judicature Act 1873-75**, is subject to the general principles of equity. As such relief remains at the discretion of the court. For example -

1 Equity, being a "shield not a sword" prevents equity from awarding damages for misrepresentation. In contrast to the common law however, Equity developed a discretionary power to provide financial relief to prevent injustice. This relief is far more limited than damages at common law. It does not seek to put the parties in the position they would have been in if the wrong had not occurred. It merely covers expenses which would not have otherwise been incurred but for the wrongdoing.

2 Equity provides relief in the form of rescission where the court is of the opinion that to continue the contract would be oppressive and lead to injustice. It is not a right.

3 Since the petitioner must enter the court with "clean hands" any hint of tainted character, wrongdoing or lack of bona fides could result in relief being denied.

4 The common law is governed by the Statutes of Limitation whereas Equity operates the far shorter limitations under the Doctrine of Laches which at the discretion of the court prevents a person who has "slept upon his rights" from asserting those rights if to do so would result in injustice to the other party.

By contrast, the **Misrepresentation Act 1967** refers to a person being "*entitled to rescind*" a contract, indicating that the equitable relief available under the Act is a right. Relief would not therefore be subject to the discretion of the court. Presumably therefore under the **Misrepresentation Act 1967** the party should be regarded not as a petitioner for relief but as a claimant for a right.

9 **Yianni v Edwin Evans** [1982] QB 438

10 **Smith v Eric Bush** [1989] 2 WLR 790

11 **Harris v Wyre Forest D.C.** [1989] 2 WLR 790

12 **Ross v Caunters** ; **Whte v Jones** ; **Morgan Crucible v Hill Samuel** 1991] Ch295

13 **Caparo v Dickman** [1990] 2 AC 605

14 **Mutual Life v Evatt** [1971] AC 793

15 **James McNaughton Paper Group v Hicks & Anderson & Co** [1991] 2 QB 113 and see later the discussion in the Chapter on Tort.

Thus, an understanding of the historical development of equitable relief in respect of misstatements and misrepresentations assists in understanding how and why the law has developed in the way it has in recent years. Furthermore, since the **Misrepresentation Act 1967** relies upon rights that existed prior to the passing of the Act, an understanding of the common law and equitable principles existing before the Act was passed is essential in order to understand when the provisions of the Act will apply. Finally, it is important to note that the **Misrepresentation Act 1967** allocates a specific burden on proof in each of its provisions which differs from that under the common law and equity.

Misstatements giving rise to other vitiating factors at common law and in equity.

"Non Est Factum" This is not my deed : Where a person is misled into signing a document having been misled about the contents or purpose the contract may, as discussed below, be vitiated both at common law on the dual basis of fraud and because there has been no meeting of mind and also in equity to prevent injustice. It is far easier to establish misrepresentation than "Non est factum".

Mistake : A lack of clarity in the communications between parties may result in an agreement which is flawed in some way because there has not been a genuine meeting of the minds. There are three basic forms of Mistake in contract law, namely Common, Mutual and Unilateral Mistake. Mistake is governed both by the common law and by equity and can lead variously to the contract being declared void for common mistake, or voidable at common law or susceptible to rescission in equity for mutual mistake. However, the normal rule is that a unilateral mistake will not vitiate a contract as for instance in **The Unique Mariner**,[16] where the master of a distressed vessel signed up for an LOF contract, mistakenly believing the tug Salivant which arrived on the scene and offered assistance to be another tug sent by the Unique Mariner's owners. The LOF was upheld by the court. [17]

Duress : Where a person is coerced against their will to enter into an agreement, as discussed later, the agreement may be vitiated at Common Law. Duress will often involve some element of misrepresentation, misstatement or non-disclosure. There is a fine line to draw between Duress and Misrepresentation.

Undue Influence : Where a person is induced by someone in a position of authority or superior respect to enter into an agreement, as discussed later, the agreement may be vitiated in Equity. Undue Influence will often involve some element of misrepresentation, misstatement or non-disclosure. There is a fine line to be drawn between Undue Influence and Misrepresentation.

Contracts And The Consequences of Misrepresentation

Whilst the reasons for reaching the following conclusions are far from straightforward, it is submitted that the effects of a misrepresentation on a contract are as follows :-

a). **Fraudulent Misrepresentation** : At common law the innocent party can :-

i) recover punitive damages for deceit in the law of tort. **Derry v Peek.** [18]

ii) rescind the contract retaining or re-securing rights in property as in **Clough Mill v Martin** [19] concerning the operation of a Romalpa Clause and/or

iii) exercise self help and recover property as in **Re Eastgate**[20]

iv) give notice of proprietary rights purportedly deprived by the fraud, to the world at large, and demand return of the property – **Car & Universal Finance v Caldwell** [21]

v) use the deceit as a basis for defending a tort or contract action. **Berg v Sadler & Moore**.[22]

16 **The Unique Mariner** [1978] 1 Lloyd's Rep 438

17 The various types of mistake are considered in detail later.

18 **Derry v Peek** [1889]

19 **Clough Mill v Martin** [1984] 3 AER 982

20 **Re Eastgate**

21 **Car & Universal Finance v Caldwell** [1965] 1 QB 525

22 **Berg v Sadler & Moore**.

b). **Negligent Misrepresentation** : By virtue of The innocent party can either :-

i) claim ordinary damages by virtue either of **Hedley Byrne v Heller** or under the provisions of **s2(1) Misrepresentation Act 1967** and/or

ii) escape the contract, **s2(2) Misrepresentation Act 1967**. However the court has the power to refuse rescission of the contract but

iii) in the event that the court refuses rescission the party may receive an additional award of damages in lieu of rescission. **s2(2) Misrepresentation Act 1967** subject to limitations on recovery under **s2(3) Misrepresentation Act 1967.**

c). **Purely Innocent Misrepresentation**; It is now provided that :-

i) The induced party has the right to rescind the contract. **s1 Misrepresentation Act 1967**

ii) The court has the discretion to award damages or to rescind the contract under the provisions of **s2(2) Misrepresentation Act 1967**

What amounts to a misrepresentation in respect of contracts ?

The doctrine of laissez faire and freedom of contract resulted in the development of the notion of "Caveat Emptor" which means "Let the buyer beware". Whereas a person entering a contract must refrain from misrepresentation, he need not generally disclose material facts which he knows and it is for the buyer to be on his guard and look after his own interests and the quality of the bargain that he is making. It was stated in **Smith v Hughes**[23] that *'The passive acquiescence of the defendant in the self-deception of the plaintiff will not entitle the plaintiff to avoid the contract*.' There are a large number of exceptions to this general rule such as :-

a) Special relationships which can impose a duty of disclosure such as **Hedley Byrne v Heller.**[24]

b) Where a true representation becomes untrue. It was held in **With v O'Flanagan** [25] that there is a duty to correct it.

c) The disclosure of half truths which make something superficially true which would be untrue if all the facts were revealed as discussed in **Notts Patent Tile v Butler** [26] and in **Dimmock v Hallett.**[27]

d). Fiduciary relationships between partners, principal and agent, solicitor and client, and between promoter and company. **Caparo v Dickman** [28] : **Ross v Caunters** [29]: **White v Jones**.[30]

e). Contracts of 'Uberrimae fidei' or utmost good faith, as in insurance contracts as set out in **ss17-19 Marine Insurance Act 1906**, and in relation to family arrangements as demonstrated by **Gordon v Gordon**.[31]

f) The concept that a term will be implied into a contract, unless otherwise required by the parties, means that if a party fails to raise the matter the implied term prevails. In **Elliot Steam Tug Co Ltd v New Medway Steam Packet Co Ltd.**[32] the court held that there was an implied term that a vessel subject to a towage contract would be in an accessible position. The tug owner recovered damages for the additional expense involved in waiting for high tide before a tow.[33] line could be attached.

23 **Smith v Hughes** 1871 LR 6 QB 597

24 **Hedley Byrne v Heller** [1964] AC 465.

25 **With v O'Flanagan** [1936] Ch 575

26 **Notts Patent Tile v Butler** (1866) 16 Q.B.D. 778

27 **Dimmock v Hallett** [1866] 2 Ch App 21.

28 **Caparo v Dickman** [1990] 2 AC 605

29 **Ross v Caunters**

30 **White v Jones**.

31 **Gordon v Gordon** (1821) 3 Swan 400

32 **Elliot Steam Tug Co Ltd v New Medway Steam Packet Co Ltd** [1939] 59 Lloyd's Rep 35

33 Differentiate between the general rule of caveat emptor, reinforced by the concept that consideration must be adequate but need not be sufficient and any desire to rewrite the contract to make it fair. There is a limit to the extent, to which the courts will imply terms into a contract, on the basis of custom and practice and the common law and equitable doctrines of duress and undue influence which seek to provide that in particular circumstances that the contract is fair to the parties.

CHAPTER TWO

Contacts and the Definition of a Misrepresentation

Definition : A false statement, of fact, made by one party, to another, before or at the time of the contract being made, which induces that other party, to enter into the contract.

A false statement of fact : The representation must be false. Generally there must be some positive statement or conduct.

Silence and the duty of disclosure : Silence alone does not constitute misrepresentation. In **Keats v Lord Caduggan** [34] the defendant let a house to the plaintiff knowing that the claimant wished to occupy it immediately. The defendant knew the property was in a dilapidated state. The court held that no action would lie. The claimant should have investigated the property. The concept of "***caveat emptor***" applied. However, beware of the fact that in a large number of specific situations, in particular where a contract is considered to be "***Uberimae Fidei***" or "***in absolute good faith***" there is a duty of disclosure.

Acts can be the equivalent of statements. If a party to the contract does some positive act to conceal the true facts this may be sufficient to negative the general rule. In **Schneider v Heath** [35] the vendor of a boat with a rotten hull pushed the vessel into the water to conceal its true condition. The court held that he was liable for misrepresentation. See also **Spice Girls Ltd v Aprilia World Service**.[36]

A partial truth may amount to an untruth and impose a duty of disclosure. In **Dimmock v Hallett** [37] the vendor of land told the purchaser that farms on the land were fully let. The vendor had given some tenants notice to quit but he did not tell the plaintiff about this. The court held the plaintiff had grounds for relief.

Actions, signs and gestures may amount to a representation and thus require a positive disclosure to negative their adverse effect. In **Livesley v Wrathbone** [38] the plaintiff wanted at least 2 days work per week. The defendant had nodded and smiled when the plaintiff told this to the defendant during the negotiations for a contract of employment. The court held that the defendant's gestures amounted to a misrepresentation.

Notification of changes in circumstances : If a truthful statement becomes false some time between the date when made and the conclusion of the contract the representer has a duty of disclosure. In **With v O'Flanagan** [39] a doctor wished to sell his medical practice. He correctly stated that it was worth £2,000 / annum. Prior to the exchange of contracts which occurred 4 months later, the defendant fell ill and he employed a locum. The receipts fell drastically. The court held that the representation was to be held to be a term that continued up to the time of the contract being signed and the change of circumstances ought to have been communicated.

The representation must be one of fact. Representations must be distinguished from statements of opinion or law, neither of which normally forms grounds for relief.

Opinions : In **Bisset v Wilkinson** [40] a vendor wanted to sell two blocks of land to P for sheep farming. Both parties knew that the land had never been used for this purpose before. The vendor said during negotiations that the land should be able to carry 2,000 head of sheep. The court held that it was a statement of opinion.

Honest belief in opinions : If it can be shown that an opinion was not held by the representer, or that it was made in complete ignorance of the matter, and thus recklessly made, it may be deemed to be a statement of fact. In **Smith v Land and House Property Corp.**[41] a vendor told the plaintiff that the property was let to Mr Fleck, a desirable tenant, at a rent of £400 I annum. In fact, Mr Fleck had only paid his rent under pressure or not at all. The court held it to be a statement of fact. Mr Fleck could not be regarded as a desirable tenant.

34 **Keats v Lord Caduggan** [1851]
35 **Schneider v Heath** [1813]
36 **Spice Girls Ltd v Aprilia World Service** [2000]
37 **Dimmock v Hallett** (1866) 2 Ch App 21
38 **Livesley v Wrathbone** (1982)
39 **With v O'Flanagan** (1936) Ch 575
40 **Bisset v Wilkinson** [1927] AC 177
41 **Smith v Land and House Property Corp** [1884] 28 CH.D 7

Statements of intention : The representation must relate to an existing fact or a past event. Statements of intention or promise create no liability unless the statement misrepresents the state of the representer's own mind. In **Edgington v Fitzmaurice** [42] a prospectus of a company invited loans from the public to improve the business and to extend buildings. However, all the company wanted the money for was to repay existing debts. The court held that the prospectus contained fraudulent statements of fact.

A statement of abstract law will not constitute grounds for relief unless it is made wilfully. In **Territorial Army & Auxiliary Forces v Nicholls** [43] a statement that "the Rents Acts applied to property let to the Crown" was deemed a misrepresentation of law. The sole information was the wrongful assumption that the Crown was bound by the Rent Acts.

Compare this with **Sole v Butcher.**[44] Alterations were made to a house. The question was whether, as alleged by the defendant prior to the finalisation of the contract, alterations made to a property were so substantial as to constitute a change in the identity of the property taking it outside the rent capping provisions of the Rents Acts. The court first held that the alterations were not sufficiently substantial to override the provisions of the Rent Act and then went on to state that the misrepresentation was in the circumstances one as to fact.

The Misrepresentation must be made, directly or indirectly, to the other party. A statement made to a selected persons and not intended for further dissemination will not form the basis of a misrepresentation. Thus, in **Peek v Guerney** [45] a shareholder sued the promoters of a company on the basis of a false statement in a prospectus. The shareholder had bought the shares on the stock market from another stockholder. The House of Lords held that the prospectus was only intended for the first applicant for the shares and not subsequent purchasers.

If the representer intended the statement to be passed on then it is immaterial that the plaintiff is one of a larger class of persons. In **Andrews v Mockford** [46] a company issued shares that were standing at a low figure and wished to sell more. They sent a so-called expert to South Africa who reported fantastic gold strikes. This was intended to raise the price of the shares. The reports were false. The court held that the plaintiff could sue the directors regardless of where he had bought the shares.

The misrepresentation must induce the contract. Whether this has happened or not is a question of fact. There are several distinct stages involved in the process, which to a very large extent was subsequently adopted by the court in **Hedley Byrne v Heller.**[47]

First, it must be established that the statement was of such a nature as would be likely to induce a person to enter into a contract. All the circumstances of the case, including the standing of the person making the statement and how serious that person was when making it, are taken into account.

Second, it must be proved that the plaintiff was so induced. There is no inducement where the plaintiff knew the truth or where although the representation was false, it did not deceive the claimant or for some other reason the claimant did not rely on it. The fact that a claimant had the opportunity to ascertain the truth will not necessarily protect the defendant from the consequences of a misrepresentation.

In **Redgrave v Hurd** [48] a solicitor wanted a partner for his firm. He advertised his business in the Law Times offering a partnership and the sale of a house to the new partner. He represented the partnership as being worth £300 - £400 / annum. At an interview latter he showed receipts for £200 / annum. When asked to account for the difference he held up a bundle of documents indicating that there was additional business unaccounted for by the receipts. In fact the documents represented a mere £5 - £6 worth of business. The prospective partner did not examine them in detail, merely accepting them as an explanation. He then paid a

42 **Edgington v Fitzmaurice** [1885] 29 Ch.D 459
43 **Territorial Army & Auxiliary Forces v Nicholls** [1949]
44 **Sole v Butcher** [1950] 1KB 691
45 **Peek v Guerney** [1873] LR 6 HL 377
46 **Andrews v Mockford** [1896]
47 **Hedley Byrne v Heller** [1964].
48 **Redgrave v Hurd** [1881] 20 Ch.D 1

£100 deposit for the house with an outstanding £1,500 to pay. On discovering the truth he refused to complete on the grounds of fraudulent misrepresentation. The defendant claimed that the plaintiff could have discovered the truth by examination of the documents. The court held that the opportunity of discovering the truth was not sufficient to negative the inducement.

However, in **Horsefall v Thomas** [49] the claimant bought a cannon, which had a serious defect. The defendant attempted to conceal it by inserting a metal plug into a weak spot in the gun. The plaintiff never looked at the gun, which burst open when it was used. The court held that since the plaintiff had not inspected the gun the concealment of the weakness hadn't operated on his mind.

If the representee does investigate a representation and relies on his own findings there is no remedy if the representation proves to be false since the claimant will not have relied upon the representation. In **Attwood v Small** [50] the vendor of a mine greatly exaggerated the potential of the mine. The purchaser was prepared to accept provided the vendor's statements were checked out by experts. The expert made a full investigation and declared that the vendor's statements were true. The court held that the plaintiff relied on the investigator's findings not on the representation. The claim failed.

A representation need not be the sole or decisive inducement provided that in the circumstances it was an operating inducement for him to enter into the contract. In **Edgington v Fitzmaurice,**[51] in addition to the false inducement in a prospectus the plaintiff erroneously believed that he would be entitled to a charge on the company's assets. The court held that he could still rescind because he was materially misled by the prospectus.

Contract and The Three Categories of Misrepresentation.

Once it is shown that the misrepresentation is operative the state of the representer's mind must be ascertained since this is the governing factor in the distinction between the various categories of Misrepresentation, namely Fraudulent, Negligent or Innocent.

Fraudulent Misrepresentations at common law.

The common law Tort of Deceit provides a remedy for Fraudulent Misrepresentation. The claimant can recover damages and he can also recover for any loss resulting from the fraud in order to place him in a comparable position to that which he would have been in had the contract not been made.[52]

In **Derry v Peek** [53] a company ran a horse drawn tram service. They wanted to use steam vehicles. The directors thought the Board of Trade would give its consent as a matter of course. They issued a prospectus saying that they could run steam driven trams. The Board of Trade subsequently refused consent and the company was wound up. A shareholder sought to recover his loss in the Tort of Deceit The court held that the directors were not liable. Lord Hershaw said that in order to show fraud the misrepresentee must show that the statements were made knowingly or without belief in their truth, or recklessly, careless whether it be true or false. Here the directors had honestly believed what they said.

Equity has a concurrent jurisdiction with the common law in respect of Fraudulent Misrepresentation, though equity has not been invoked in this respect in recent times. A representee can/could sue for rescission and equity takes/took a more realistic view of restoring the parties to their former positions by taking into account any profit made or making allowance for deterioration to help make restoration.

Equity also developed the notion of constructive fraud, particularly where the parties were in a fiduciary or confidential relationship, as for example between solicitor and client, in circumstances which would constitute Negligent Misrepresentation today. It is likely that in such circumstances the equitable provisions have been displaced by the provisions of the **Misrepresentation Act 1967**.

49 **Horsefall v Thomas** [1862] 1 H&C 90
50 **Attwood v Small** [1838] 6 Cl & Fin 232
51 **Edgington v Fitzmaurice** [1885] 29 Ch.D 459
52 See **Doyle v Olby (Ironmongers) Ltd** 1969
53 **Derry v Peek** (1889) 14 App Cas 337

Negligent Misrepresentation at common law.

This comprises misrepresentations that are innocent of fraud. Such representations may be honestly made. However the representor will have had no reasonable grounds for believing the representation to be true. The common law was originally prepared to rescind or set aside the contract but the plaintiff could not sue for damages prior to the case of **Hedley Byrne v Heller,**[54] largely because of the way that the rule against the recovery of pure economic loss was enforced by the courts at the time. It was stated in **Hedley Byrne**[55] that damages are recoverable for negligent misstatements and that a duty of care exists where there is a special relationship between the person making the statement and the person to whom it is made. A bank gave a negligent reference to a company who as a result lent money to the subject of the inquiry. The inquirer subsequently went bankrupt. The bank was however legally protected by a disclaimer and so was not held liable in the circumstances. The general principle developed in **Hedley Byrne v Heller** has subsequently been affirmed by the courts and forms the bed-rock of later developments in liability for negligent misstatement at common law.

The availability of and effectiveness of exclusion or exemption clauses, such as the one which protected the bank in **Hedley Byrne v Heller**, have subsequently been severely restricted by case law, by the provisions of **The Unfair Contract Terms Act 1977** and by European Community consumer protection legislation.

Negligent Misstatement and the Misrepresentation Act 1967

s2(1) Misrepresentation Act 1967 : Damages for misrepresentation.

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 grounds to believe and did believe up to the time the contract was made that the facts represented were true.

Thus, **s2(1) Misrepresentation Act 1967** provides a statutory right to damages for negligent misrepresentations which induce a contract.[56] Unlike the common law where the onus of proof lay on the plaintiff, under the Act the onus of proof is on the defendant to show that he was not negligent. That apart, the liability is still founded in the law of tort since it builds on an exception to proof of fraud under the tort of deceit.

s2(1) Misrepresentation Act 1967 specifically refers to the concept of Fraudulent Misrepresentation but applies to negligent misrepresentations by description, in that the representor will be liable "unless he proves that he had reasonable grounds to believe and did believe up to the time the contract was made that the facts represented were true". The words Negligent Misrepresentation" are not used but clearly anyone who makes a statement without reasonable grounds for believing the veracity of the statement acts negligently. There is no liability for purely innocent misrepresentation under the provision since the misrepresentor is one who believes in and has reasonable grounds for believing the representation.

Wholly Innocent Misrepresentation.

This is a misrepresentation made wholly innocently of fraud or negligence. The equitable remedy of rescission is, or at least was, available to a victim of wholly innocent misrepresentation but there were no damages.

Equity developed what is known as indemnity in order to protect a misled party against obligations which may have been created as a result of the contract. It is somewhat narrower than damages and the sole object was to assist rescission by restoring the parties to the position they were in before the contract.

In **Whittington v Searle-Hayne,**[57] **t**he claimant, a poultry farmer wanted to lease the defendant's premises. The defendant said the drains were in a sanitary state and the lease was executed. The water supply became contaminated by the drains. The manager became ill. The poultry died. The plaintiff wanted to rescind the contract and sought indemnity to cover the value of stock, loss of profit on sales, the loss of the breeding

54 **Hedley Byrne v Heller** [1964] AC 465

55 'Obiter', because the plaintiff actually failed to recover

56 See **East v Maurer** [1991] and **Royscot Trust Ltd v Rogerson** [1991].

57 **Whittington v Searle-Hayne** (1900) 82 LT 49

season, medical expenses for the manager's illness, rent, rates and money spent on out buildings and the cost of renewing drains forced on the plaintiff by the Local Authority. The court held that the lease could be rescinded and that by way of indemnity the claimant could recover the cost of the rent, rates and money spent on the drains, as costs incurred under the covenants under the lease and by occupation of the property (since the defendant would benefit from this expenditure). However, items of business loss could not be recovered.

Innocent Misrepresentation and the Misrepresentation Act 1967

s1 Misrepresentation Act 1967 : Removal of certain bars to rescission for innocent misrepresentation.

Where a person has entered into a contract after a misrepresentation has been made to him, and –

a) the misrepresentation has become a term of the contract; or

b) the contract has been performed;

or both, then, if otherwise he would be entitled to rescind the contract without alleging fraud, he shall be so entitled, subject to the provisions of this Act, notwithstanding the matters mentioned in paragraphs (a) and (b) of this section.

This firstly reaffirms the right to repudiate a contract for breach of a term of a contract.

Secondly, it removes restrictions on the right to avoid a contract and the availability of rescission that arose out of the performance of a contract, in particular where a third party may have acquired rights in the subject matter of the contract. However, rescission may be difficult if the property cannot be recovered, in which case damages might be far more apposite.

s2(2) Misrepresentation Act 1967. Damages for Misrepresentation

Where a person has entered into a contract after a misrepresentation has been made to him otherwise than fraudulently, and he would be entitled by reason of the misrepresentation, to rescind the contract, then, if it is claimed, in any proceedings arising out of the contract, that the contract ought to be or has been rescinded, the court or arbiter may declare the contract subsisting and award damages in lieu of rescission, if of opinion that it would be equitable to do so, having regard to the nature of the misrepresentation and the loss that would be caused by it if the contract were upheld, as well as to the loss that rescission would cause to the other party.

First, under section 2(2) damages **may be awarded** for innocent misrepresentation at the discretion of the court, but damages are **not** available as of right.

Secondly in respect of negligent misstatement, since the right to avoid the contract afforded by the Act on the basis that Equity prior to the Act afforded the innocent party to a contract induced by negligent misstatement the right to petition for rescission may be taken away at the discretion of the court, in the event that this right is taken away the Act provides compensation "in lieu" of that right to rescission. The result is that the claimant may receive two awards of damages. However, this is not double recovery since the second set of damages is to provide for any inconvenience suffered from loss of the right to end the contract. Note that the measure of damages is governed by section 2(3) outlined below. Note also that the damages under s2(1) may on occasions be paid by a third party misrepresentor, whereas the damages for s2(3) may be paid by the other party to the contract.

s2(3) Misrepresentation Act 1967. Damages for Misrepresentation

Damages may be awarded against a person under subsection (2) of this section whether or not he is liable to damages under ss(1) thereof, but where he is so liable any award under the said ss(2) shall be taken into account in assessing his liability under the said ss(1).

The effect of this provision is not entirely clear. Clearly a claimant can receive damages for claims based on both ss(1) and ss(2) and can recover for both, so there is a potential for a form of double recovery. However, do the word "***shall be taken into account***" mean that

1 in assessing damages under ss(1) the court must bear in mind how much has been awarded under ss(2) or

2 does it mean that damages under ss(1) will merely top up any damages awarded under ss(2) ?

If the latter is the case, there might be little point in claiming under ss(2) in a situation where the damages awarded under ss(2) are less than or the same as those awarded under ss(1), though of course, since it is not possible to predict in advance what the court will award, this will not deter a party from claiming under both subsections in appropriate circumstances.

The Right to Avoid or Rescind a contract.

A party misled by a misrepresentation can avoid or affirm the contract. If the party decides to rescind he can do this without the court's help. Using the Common Law remedy of self help he can then take back property transferred under the contract. The rescission should be communicated first, though if the misrepresentation was fraudulent it is sufficient if he takes all possible actions to communicate the rescission.

In **Car & Universal Finance v Caldwell** [58] the defendant was fraudulently induced to sell a car to a purchaser for a dud cheque. When the cheque was dishonoured the defendant told the police & the A.A. immediately, though the purchaser was not traced. Subsequently the purchaser sold the car to the plaintiff who bought the car in good faith. The court held that the defendant had showed sufficient intent to rescind and so ownership reverted to him.

Limits of rescission.

Affirmation : The right to rescind is lost if the contract is affirmed by words or conduct. In **Skoley v Central Railway of Venezuela** [59] the plaintiff purchased shares following a misrepresentation. He subsequently accepted a dividend. The court held that the right to rescission had been forfeited.

Passage of time / the doctrine of laches. Lapse of time bars rescission. In **Leaf v International Galleries**[60] the plaintiff bought a picture from the defendant who innocently misrepresented it as being a Constable. 5 years latter the plaintiff discovered that it wasn't a Constable when he tried to resell it. He sought rescission of the original contract with the defendant, and recovery of the price. The court held that the lapse of time barred the rescission.

Third party interests : Once a bona fide purchaser for value has acquired rights in the subject matter of the contract before rescission then the right is lost. In **Phillips v Brooks**,[61] a fraudster obtained jewellery by deception. The fraudster resold the jewellery to an innocent purchaser. The court held that it was now too late to rescind. See however the effect of **s1 Misrepresentation Act 1967** discussed above. Whilst rescission is problematical once a third party has gained an interest in the subject matter of a contract, there will be occasions when the third party is willing to return the goods thus making rescission entirely feasible.

Damages in Lieu of Rescission. Under the provisions of **s2(2) Misrepresentatjon Act 1967** the words "in lieu of" mean in the place of or instead of so clearly where damages are awarded under s2(2) the statute prevents rescission.

Clauses excluding liability for misrepresentation.

s3 Misrepresentation Act 1967 (As amended by **s8 Unfair Contract Terms Act 1977**).[62]

If a contract contains a provision which would exclude or restrict

(a) any liability to which a party to a contract may be subject by reason of any misrepresentation made by him before the contract was made; or

(b) any remedy available to another party to the contract by reason of such a misrepresentation;

*that provision shall be of no effect except to in so far as it satisfies the requirement of reasonableness as stated in **s11(1) Unfair Contract Terms Act 1977**; and it is for those claiming that the terms satisfies the requirement to show that it does.*

The Tort of Hedley Byrne v Heller, Misrepresentation and The Act

Whilst the **Misrepresentation Act 1967** now covers the same area of law as **Hedley Byrne v Heller** in respect of negligent misstatements that induce contracts, it should be remembered that the Tort of Misrepresentation is far wider than the **Misrepresentations Act 1967** and that there is a general liability in tort for misrepresentations that cause loss to the plaintiff where there is no requirement for a contract to be induced. The law now recognises concurrent liability in tort and contract and has recently recognised new areas of liability for negligent misstatement in respect for instance of references and in certain situations elements of the Hedley Byrne test have been dispensed with.

58 **Car & Universal Finance v Caldwell** (1961) 1 Q.B. 525

59 **Skoley v Central Railway of Venezuela** (1867)

60 **Leaf v International Galleries** (1950) 2 KB 86

61 **Phillips v Brooks** (1919) 2 KB 234

62 See later discussions on exclusions clauses and the effects of the Unfair Contract Terms Act 1979

CHAPTER TWO

The Importance of Misrepresentation

Standard form contracts are very common in the shipping industry. Pre-contractual negotiations may be prolonged and complex, especially since the planning period can involve many external factors such as the availability of goods and markets before the actual need for a vessel become established. Many of the things discussed in the pre-contractual stage may not be reflected by the standard form charterparties used by the industry. As such, many of the factors which induced a party to make the contract will not be incorporated into the charterparty. Any remedy that might be available for false statements that induced a party to make the contract must be founded therefore on misrepresentation and not on breach of contract.

THE TERMS OF A CONTACT

The contents of a contract determine the extent of each party's rights and duties and the remedies available for breach of contract. The contents of the contract are sometimes referred to as terms. In written contracts these terms may be described as conditions, warranties and innominate terms or as clauses or articles. A contract may simply list the respective duties of the parties, without bothering to describe them in anyway whatsoever. The remedies available for the breach of contractual provisions are determined by the comparative importance of the provisions which have been broken. Express provisions are determined by what the parties have expressly stated, orally or in writing. Provisions may also be implied by law, custom or trade usage

Discovery and Express Provisions of a Contract. The provisions of an entirely oral contract have to be determined by what the parties have said. There is absolutely no reason, from a legal point of view, in a contract being entirely oral. However, since what the parties said is a question of fact to be determined by the court, the outcome of a dispute can be somewhat uncertain.

In **Smith v Hughes**,[63] the court had to decide whether the parties contracted for 'Good Oats' or for 'Good Old Oats' ? This had to be determined from what they had said. This was important since 'New Oats' were bad for horses and therefore quite unsuitable for the buyer's needs. Whilst it would be impractical to resort to written contracts for minor transactions such as small purchases in shops, it is much safer to use a written form for larger contracts especially in business. For this reason oral construction contracts and charterparties are rare.

There is seldom a problem discovering what the contents of a written contract are. However, interpretation of the meaning of the words used in a written contract is a job for the courts. The terms of a written contract can be in more than one document and it is important therefore to know when documents can be joined together and when they cannot. This is known as joinder of documents. Separate documents may be construed together if there is a reference in one document expressly referring to the other. If not, joinder will depend on whether or not there is an express implication in one document that there are terms applicable to the document in the other.

The admissibility of parole evidence, that is to say “spoken words” is problematical. In general parol evidence will not be admitted to add to, vary or contradict a written contract. See **Jacobs v Batavia & General Plantations Trust Ltd**.[64]

Exceptions where extrinsic evidence is admissible. There are a number of exceptions to the general rule in Jacobs v Batavia, namely :-

a) To prove the invalidity of a contract, but not its contents ie to prove fraud or mistake or misrepresentation.
b) The Parol Evidence Rules only excludes extrinsic evidence which modifies the terms of a contract. Parol evidence can be used to support or rebut an implied term to show that the skill of or expert advice of the seller may have been relied upon.
c) Parol evidence may be admitted to show that the contract does not operate or has ceased to operate, to prove a determining event such as an agreement to provide goods as long as a project continues.

63 **Smith v Hughes** [1871] LR.6. Q.B. 597
64 **Jacobs v Batavia & General Plantations Trust Ltd**. [1924] 1 Ch 287.

d) Parol Evidence can be admitted to add to but not to contradict the contract, by proving that a custom or trade usage was to apply to the contract or it was used to help construe a contract by showing that some of the words were used in a custom or trade usage meaning as in **Hillas v Arcos**.[65]

e) Where the document contains only part of the agreement, the remainder being by word of mouth then extrinsic evidence is admissible.

In **Walker Properties Inc. v Walker,**[66] the defendant had orally stipulated that he wanted to use the garden and the two basement rooms for storage of furniture before he agreed to lease a flat. The lease did not mention this. The court held that the oral terms must be written into the lease.
In **Couchman v Hill**,[67] the defendant put his heifer up for auction and described her as unserved. The catalogue for the sale stated that the usual conditions of sale prevailed, as an express term and that the auctioneers were not liable for mistakes. The auctioneers confirmed orally that the cow was unserved. Sometime after it died as a result of being in calf at the time of auction. The court was prepared to hold that the oral statement was part of the contract.

Which express statements form part of the contract ? Whether a statement is a representation or a term is primarily a question of intention. If the parties have indicated that a statement is to be regarded as a term the courts will implement that intention. In other cases however it may be necessary to have recourse to the following guidelines.

A statement is likely to be considered as a term of the contract if the person to whom it was made wouldn't have entered into the contract but for the statement as in **Couchman v Hill.** See also **Bannerman v White**[68] where prior to contracting the defendant made it clear that he would not buy hops that had been treated with sulphur. The plaintiff assured the defendant that no sulphur had been used on his crops and supplied the defendant with a sample. However, five out of 300 acres had been so treated. When the defendant discovered this he repudiated the contract. The court held that he was entitled to do so.

A statement is not treated as a term of a contract if the person hearing it is expressly asked to ascertain for himself that it is true. In **Ecay v Godfrey**,[69] the seller of a boat said that it was sound but added that the buyer should have it surveyed. The court held that this advice negatived any intention as to the soundness of the boat being a term. If the representor has any special or knowledge relative to the representee concerning the agreement, the court may conclude that any statement made by such a party is a term. In **Oscar Chess v Williams,**[70] the seller was a private individual to whom a car had been sold as a Morris 10, 1948 model, but with a forged log book. The car was in fact a 1939 model worth a lot less. The seller sold it to the plaintiff as a 1948 model. The court held that this statement was not a term of the agreement, as the seller had no special knowledge, whereas the buyers as car dealers did. Compare this with **Dick Bentley Productions Ltd v Harold Smith Motors Ltd**.,[71] where a dealer sold a Bentley saying that it had only done 20,000 miles since it had had an engine changed, whereas it had in fact done 100,000. The court held that this was a term.

A statement made during the negotiations which is not a term of the contract may be enforceable as part of a collateral contract if it is intended to be legally binding and is supported by separate consideration. Thus in **City of Westminster Properties v Mudd,**[72] a tenant signed a lease containing covenants to use the property for business purposes only. He was induced to sign the lease by an oral assurance that the lessors would not object to his continuing to reside on the premises as he had done in the past. This was a collateral agreement even though the oral assurance contradicted the lease. The Misrepresentation Act 1967 diminished the need for collateral contracts in this context, but they may still be relevant in certain circumstances.

65 **Hillas v Arcos**.
66 **Walker Properties Inc. v Walker** [1947] 127 L.T. 204
67 **Couchman v Hill** [1947] K.B. 554
68 **Bannerman v White** 1861
69 **Ecay v Godfrey** [1814] 80 H.L. 286.
70 **Oscar Chess v Williams** [1957] 1 W.L.R. 370
71 **Dick Bentley Productions Ltd v Harold Smith Motors Ltd.** [1965] 1 W.L.R. 623.
72 **City of Westminster Properties v Mudd** [1959] Ch 120.

In **Esso Petroleum v Marden**,[73] a tenant was induced to take a lease on a petrol station by a statement made by an experienced salesman on the company's behalf that the sales would reach 200,000 gallons a year. Actual sales fell far short of the target. The court held that the statement although a representation amounted to a collateral contract. Furthermore they held that Esso had special knowledge.

Certainty : A contract may be void if the terms are not reasonably certain or if a term is uncertain it may be disregarded if the rest of the contract makes sense without it. In **Scammell v Ouston,**[74] an arrangement to acquire a van 'on H.P. terms' was too vague to be an enforceable contract. In commercial transactions a court may be prepared to enforce an ostensibly vague agreement by reference to trade custom or previous dealings between the parties.

In **Hillas v Arcos,**[75] a contract for the supply of timber in 1930 included an option for the following year. The supplier claimed that the option was invalid since it contained no specific details of the type of timber or the port of arrival. The court held that these details could be inferred from the contract for 1930. If an uncertain term is actually meaningless then exceptionally the court may be prepared to sever the provision if it is clearly superfluous. In **Nicolene v Simmonds**,[76] a contract for the sale of goods contained the words 'I assume ... that the usual conditions of acceptance apply.' The Court of Appeal held that since there were no usual conditions of acceptance the words were meaningless and could be ignored.

Timing of the statement : Where there is a distinct interval in time between the making of the statement and the conclusion of the contract this may indicate that the parties do not intend the statement to be a term. In **Routledge v McKay**,[77] a vehicle registration document stated that a motor bike was made in 1941, whereas unknown to the seller it was in fact made in 1930. Seven days before the sale the buyer asked the seller when it was made and was told 1941. The buyer claimed damages for breach of warranty. The court held that this was a false representation, not a term. Accordingly, in the absence of fraud, the action failed. Of course the outcome might well be different today in the light of the Misrepresentation Act 1967.

Statements or assurances as to where a vessel is, or its carrying capacity may not get incorporated into a contract. If they are not incorporated the remedy will lie in misrepresentation if the statements prove to be false. The test to distinguish between representations & contractual terms has been to look at the intention of the parties. In **Heilbut Symons & Co v Buckleton,**[78] the court stated that the key question is "How do the courts determine the intentions of the parties ?" The answer is that the courts apply an objective test. It is not the minds of the parties to the contract but rather, a question of what a reasonable man would infer.

Where the agreement is in writing statements appearing in the written contract will normally be regarded as terms. Not every statement made during the period of time leading up to the conclusion of a contract amounts even to a representation. Advertising puffs are exaggerated claims that are used to attract a potential buyer's attention which are clearly not intended to be taken seriously. In **Carlill v Carlill Smokeball Co**,[79] one of the attempted defences was that the references to guarantees to cure colds in the advert were mere advertising puffs. The more incredulous the claim the easier it is to show that it is a mere advertising puff. Advertising puffs are more likely regarding consumer products than in relation to construction and shipping contracts.

Implied Terms Terms can be implied into a contract by custom, by statute, or by necessary implication by the courts, to give a contract necessary business efficacy.

Terms implied by Custom. A custom will only be incorporated, if there is nothing in the express terms, or in the necessary implied terms of the contract to prevent its inclusion and where the conclusion seems consistent with the terms of the contract as a whole.[80] The parties are presumed to have contracted by

73 **Esso Petroleum v Marden** 1976
74 **Scammell v Ouston**
75 **Hillas v Arcos** 1932
76 **Nicolene v Simmonds** 1953
77 **Routledge v McKay** 1954,
78 **Heilbut Symons & Co v Buckleton** [1913] A.C. 30
79 **Carlill v Carlill Smokeball Co**
80 See **Hillas v Arcos**. supra foont note 154

reference to the customs prevailing in a trade or locality in question unless they have shown a contrary intention. Customs of a port are an example of this in shipping law.

The court in **British Crane Hire V Ipswich Plant Hire** [81] looked at customary practice in the trade to the effect that it was usual in the plant hire business that the person hiring heavy plant should indemnify the owner of the plant for any damage caused to the plant, howsoever caused, during the period of hire. Such a term was incorporated into the standard form contract. The parties agreed hire rates. However, after the defendant had taken charge of a drag-line crane but before the contract was signed, the crane sank in muddy ground. The court held that the defendant had to indemnify the plaintiff.

Terms Implied by Statute. Parliament regulates the terms and conditions of many forms of contract and many statutes introduce terms into contracts whether the parties to the contract want such terms or not. The most common services in international trade relate to the contract of carriage and allied services such as loading brokers, shipping agents and marine insurance. The Sale of Goods Acts and The Carriage of Goods By Sea Act 1971 (Hague and Hague-Visby Rules) are an important source of statutory implied terms. Marine Insurance is governed by the Marine Insurance Act 1906 and by the Standard Form I.C.C. Insurance Policies. The E.C. is committed under Title IV Transport to developing a common transport policy Article 74 and now extends through regulations to sea transport. Title V : Common Rules on Competition and approximation of laws Chapter 1 Rules on Competition governs all industries in the E.C. which have been subject to E.C. Regulations and Directives on anti-competition practices. There is a growing body of E.C. Regulations governing freight charges and conditions of carriage subsequent to articles 85-87 which have to be adhered to. The Commission has special powers to act as a court and fine shipping companies that operate monopolies on shipping routes and cases such as the **West Africa Shipping Case** [82] show that the E.C. can fine companies large amounts of money for breach of the regulations. Furthermore, minimum standards for carriage of Goods are governed by the Hague, Hague Visby and Hamburg Rules.

Discovery of Terms by the Courts. The courts have made it clear that they will not make contracts for the parties, so that the term to be implied must be extremely clear as demonstrated in **The Moorcock**.[83] The defendant agreed in consideration for charges for landing and storing cargo, to allow the plaintiff to discharge goods at their jetty. The boat was damaged at low water as a result of settling on hard ground. The defendant was liable for damages in breach of an implied term that they would take reasonable care to see that the berth was safe. Some writers claim **The Moorcock** is just about as far as the courts are likely to go in this direction. It should be noted however that in International Trade and Carriage of Goods that there are a wide variety of such implied terms relating to safe ports, employment of the vessel, requirements regarding the seaworthiness of a vessel and direct passage without deviation. Whether these exist because they are discovered by the courts or because of custom of the trade is not really important. What matters is that they exist and are enforced by the courts.

Classification of Terms : Contracts tend to contain a variety of provisions, some of which are said to be Terms of the Contract. Provisions in respect of choice of law, jurisdiction and arbitration whilst important are not usually deemed to fall under the ambit of Terms of the Contract. In **The Mahkutai**,[84] it was held that a jurisdiction clause is exclusive to the parties to the agreement. In order to incorporate such a clause into a new contract a mere reference to the terms of another contract is insufficient. The parties to the new contract must write out the provision in full, or at least specifically incorporate all jurisdiction provisions of the old contract into the new one. There are three types of term, namely conditions, warranties and innominate terms which can, depending on the circumstances, be either a condition or a warranty. The significance of the classification is that the legal consequences of breach of condition and breach of warranty are quite different.

81 **British Crane Hire v Ipswich Plant Hire** 1975
82 **West Africa Shipping Case**
83 **The Moorcock**. 1889. 14 Prob. Div. 64
84 **The Mahkutai** [1966] 2 Lloyd's Rep 1 P.C.

Conditions : Some text books start discussing conditions by reference to the concepts of Fundamental Breach and Fundamental Term. Whilst these concepts do not apply to domestic sales they appear to have a role to play in maritime law. A fundamental term relates to a provision that goes to the root of the contract. Thus in a contract for the provision of X in exchange for Y the exchange of X for Y is deemed to go to the nub of the agreement and is thus said to be fundamental to the contract. This concept has been identified in particular with the agreed voyage route and the notion that deviation is breach of a fundamental or very important term. The concept will be referred to later when exclusion clauses are discussed. For present purposes however discussion will be confined to conditions.

Conditions are similar to fundamental terms in that the nub of a contract is often stated to be a condition. Thus, if the provision of Grade A beans is made a condition of the contract and the buyer receives Grade B beans instead he can, as the innocent party, refuse to load the cargo and can also sue the seller for damages. Even something which might otherwise be considered to be a minor stipulation in a contract can be specified to be a condition of the contract by the parties. A fundamental term will invariably be a condition, though the parties are able to expressly down grade the importance of terms which might otherwise be considered to be conditions.

If there is a breach of condition then however slight that breach might be the innocent party can elect to rescind the contract and sue for damages for breach and or waive the breach and reserve the right to damages by way of protest. The innocent party is the only person who can use breach of condition to escape the contract. The guilty party cannot use his breach as a way of escaping the contract.

The innocent party not only can but in fact must, once he knows or is deemed to have known through constructive knowledge of a breach of condition, elect to either rescind the contract or to waive the breach and claim for damages If an innocent party with knowledge of a breach continues with the contract without doing anything he is deemed to have unconditionally waived the breach and is thus prevented from latter avoiding the contract. The unconditional nature of the waiver means that he cannot recover damages for the breach. Waiver will occur either through passage of time and inactivity or through some act indicating an intention to continue with the contract.

Condition precedent : Much difficulty has resulted from the use of the word condition. Sometimes, whether or not the contract is to be performed or not will depend on whether the parties have agreed to a "Condition Precedent", which can be precedent either to the contract or to its performance. In **Pym v Campbell,**[85] an agreement to buy an invention was subject to the opinion and valuation placed on the invention by an expert. Likewise in **Bentworth Finance v Rubert**,[86] a contract to sell a car depended on the handing over of the vehicle registration document.

Condition subsequent : The contract may be subject to a condition subsequent, that is to say the obligation will cease on the happening of an event. In **Head v Tattersal,**[87] the defendant sold a horse to the plaintiff guaranteeing it to have hunted with the Bicester Hounds. The plaintiff was able under the contract to return the horse the following Wednesday if it did not perform according to description. Without the plaintiff's fault the horse was injured and it was found that it had not hunted with the Bicester Hounds. The plaintiff sued for the price. The court held that a contract of sale had come into existence and the term on which the plaintiff could return the horse was condition subsequent which he could take advantage of.

Warranties : A warranty is a minor term of the contract. Breach of a warranty entitles the innocent party only to sue for damages. There is no right to rescind or avoid the contract for breach of warranty. The notion of implied waiver does not apply to warranties. Damages for breach of warranty are available as of right. The only requirement is that a claim for damages is made within the contractual or statutory time limit for submitting a claim. As discussed above in relation to conditions, a distinction must be made between ordinary warranties and things which are said to be 'warranted' in marine insurance contracts. Similarly, s61 S.O.G.A. 1979 states that a 'warranty (for the purposes of the Act) means an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the

85 **Pym v Campbell** 1856
86 **Bentworth Finance v Rubert** 1976
87 **Head v Tattersal** 1871

breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated."

Express classification of terms by the parties. The parties to a contract sometimes describe provisions as conditions or warranties. They may do this in order to achieve establish a hierarchy of importance within the various provisions of the contract so that the consequences of a breach of those provisions described as conditions will be more serious than the consequences of a breach of provisions described as warranties. Although such a classification by the parties is indicative of their original intention it is not conclusive. The legal effect of such provisions will be construed by the court in the light of all the evidence. The problem is most likely to arise if there is an inconsistency between the description of the provision and the stated consequences of breach in the contract.

In **Schuler v Wickeman Tool Sales Ltd.**[88] the court said that In the instant case the word condition simply meant stipulation. Note however, that if the consequences of breach are also spelt out in the contract there will be no room for the court to alter its meaning. It is the consequence after all, far more than the label, that the parties to the contract are concerned with. The clearest and most consistent forms of self classification would be as follows, either :-

XXXXXX is a condition, a breach of which will entitle ..... to terminate the contract

or

YYYYYY is a warranty, a breach of which will entitle ..... to damages consequent on the breach.

In the normal course of things the courts will accept the classification of a term by the parties and will not reclassify such a term since the courts should not alter the commercial intentions of the parties. If the parties describe the consequences of breach then it is the express consequence which prevails not the classification, not because the courts reclassify the term but simply because there is an inconsistency in the terminology employed in the contract and as per **The Julia**.[89]

Classification is used in the Sale of Goods Act. s11(3) S.O.G.A. 1979. A condition whilst not defined directly, is recognised by inference. "Whether a stipulation In a contract of sale is a condition, the breach of which may give rise to a right to treat the contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract; and a stipulation may be a condition, though called a warranty in the contract."

Classifications recognised by the courts. Certain types of term have been recognised by the courts, in the absence of classification to the contrary in the contract, to be either conditions or warranties. Thus there is a judicial presumption that the contract route is to be treated by the courts as a condition even if not expressly stated to be a condition. The speed of a vessel is normally regarded as a warranty by the courts. A contract could however rebut the presumption and state that it is a condition that a vessel is capable of a certain speed.

Care must be taken regarding judicial classification in some older cases. It is very important to look not at the label given to the provision by the court but rather to look at the consequence of breach ascribed to the term by the court. The courts have in the past sometimes stated that a provision is a warranty but then described the consequences of its breach in a way that would justify it being classified as a condition in modern times. This is because the courts and businessmen were at one time very lax and inconsistent in the use of terminology and in particular because the word “warranty” can used in two different ways. A warranty can mean a minor term (as opposed to a condition). This is the modern meaning of warranty. Unfortunately warranty can also mean a guarantee (this expression is often used on pieces of paper that accompany consumer goods bought in shops). In carriage it was sometimes used to signify that a state of affairs was warranted or guaranteed by a party to the contract as a fact. Such a guarantee is tantamount to a condition. Warranty is still used in this way in Marine Insurance. A failure to comply with the insurance warranty automatically results in a marine insurance policy being rendered void. The so called 'warranty of ship's class' at the commencement of a voyage has been held to be a condition of the contract.

88 **Schuler v Wickeman Tool Sales Ltd** [1974] A.C. 235

89 **The Julia** [1949] A.C. 293 H.L.

Sections 13-15 Sale of Goods Act 1979 contain terms for consumer/business contracts but innominate terms between parties to the contract who are not consumers. If the breaches are minor and do not justify rejection the terms are warranties under section 15A but are otherwise to be treated as conditions. Whilst cases such as **Re Moore & Landaur**,[90] have been regarded as harsh the old law had the merit of certainty. A seller may be far more willing to challenge rejection by a buyer now, since there is a possibility that the court might agree with him. A threat of litigation may force buyers to forego rights in order to avoid court costs. In international trade such uncertainty is unwelcome.

Innominate Terms : Some books refer to innominate terms as hybrid or intermediate terms. An Innominate Term is a term of a contract that is not classified as a condition or a warranty (ie un-named) by the parties to the contract and is not one of those special terms that has been recognised by the courts as being a condition or warranty. The court could elevate the term to this special status. However sometimes the court does not feel that it wishes to create a fixed precedent for the future regarding the nature of the term and prefers to take a more flexible approach to the consequences of breach of such a term. The result is a half way house between conditions and warranties. Denning stated in **Hong Kong Fir v Kawasaki Kissen Kaisha** [91] that it may be " foolish to describe terms in a fixed classification ". Sometimes there is a need to look at the consequences of the breach and so the parties should be able in respect of such stipulations to 'Wait & see' what the consequences of the breach are. If the consequence is so serious that it deprives the contract of its commercial validity then it becomes a condition. If not, it is a warranty.

These are a relatively, though not altogether, modern innovation. The advantage over binding judicial classification as that it is more flexible and therefore the courts have more leeway to determine the justice of a case. The disadvantage is a loss of certainty in the meaning of contractual provisions. It is possible that some terms that have been previously classified by the common law will in future be treated as innominate. We in turn will have to 'wait and see'. If the parties expressly classify a term then the uncertainty of what the courts might make of such a term is avoided and the notion of innominate terms does not arise.

Judicial Application of Innominate Terms : The consequences of breach are a question of fact to be determined by the court and is relatively straight forward. The far more difficult issue concerns how the courts determine and evaluate the seriousness of the consequences of breach. Clearly there are times when the consequences are obviously quite minor and other times when it is clear that the consequences are very significant. The problem lies in the grey area between both extremes. The courts have been faced by two different approaches to the problem.

One approach is similar to the literal rule adopted for statutory interpretation. The court looks at what the parties stated when they entered into the contract. The court, not the parties, then decides whether the breach goes so directly to the substance of the contract so that non-performance may be considered a substantial failure to perform the contract in the light of the stated objectives or requirements. This method has the advantage of predictability but is dependant on the contract containing sufficiently clear terms for the approach to be adopted. It differs from prior discussions on the judicial categorisation of a provision as being a warranty or condition in that no precedent is set for the future. The finding of the court is limited in application to the contractual provisions of the case. A similar provision might be dealt with differently in a later case.

In **The Mihalis Angelos**,[92] the owners of a ship promised the charterer that it would be expected ready to load about the 1st of July at the port of Hai Phong, the capital of North Vietnam. On the 17th of July it was clear that it would be some time before the ship would reach the port. The charterer cancelled the agreement. The court held that the clause that the ship was to be ready to load by about the 1st of July was a condition of the contract and its breach entitled the charterer to repudiate the contract. The court was helped by the fact that the contract specified the 18th July as a cancelling date if the vessel was not delivered at that time.

The case also discusses the concept of anticipatory breach. Whilst time was judged to be of essence in respect

90 **Re Moore & Landaur**

91 **Hong Kong Fir v Kawasaki Kissen Kaisha**

92 **The Mihalis Angelos** [1971] 1 Q.B.. 164

of this case no binding judicial classification of the time provisions resulted. A breach of provisions regarding delivery dates in a later case could be held to be a breach of warranty if the provisions of the contract attached less significance to the provision. It is possible that cases involving judicial classification discussed above could be treated as merely being examples of this process. The result is that some apparently settled classifications could be distinguished in the future.

The other approach is to classify the breach by its nature. The court awaits the breach and the court, not the parties, measures that breach against the value of performance of the whole contract. This approach is broader and concentrates less on specific provisions of the contract. Use of this method is facilitated if the contract lacks clear provisions and hopefully would not be used where the parties used terms which place a strong emphasis on a particular objective.

In **Hong Kong Fir Shipping v Kawasaki Kisen Kaisha** [93] before the. C.A. the defendant chartered a ship from the plaintiff for 24 months from its date of delivery. The ship was to be in every way seaworthy. On the way to Saka, a major Japanese port, a delay occurred amounting to five weeks, as a result of engine failure. The ship was described as having antiquated machinery. Then, a further fifteen-week delay occurred due to the incompetence of the staff. The ship would have been out of action for 7 of the 24 months of the charter. The defendant repudiated the contract. The plaintiff sued for damages and wrongful repudiation. The court held that the defendant was not entitled to repudiate and should only have claimed for damages. The court took the attitude that it should await the breach and calculate the damages by reference to performance of the whole contract. Not all the terms could be classified as conditions or warranties. The court introduced the innominate term and said that seaworthiness was such a term. The contract still had 17 months to run which still amounted to a substantial benefit for the charterer. In the circumstances of the case the breach of the innominate term amounted to a breach of warranty.

The Hong Kong Fir principle was applied to a sale of goods in **Cehave v Bremer.**[94] A consignment of citrus pellets was not in good condition when shipped contrary to the requirement8 of the contract. The Court of Appeal held that there was a breach of an innominate term. Although not in good condition the pellets were resaleable. The buyers had not been deprived of substantially the whole benefit of the contract. They were only entitled to damages.

The so called "warranty of seaworthiness" was in fact treated in precisely this way for many years by the courts long before Hong Kong Fir and so the invention of innominate terms was not really novel. This is yet another example of the terminology being used in a very imprecise way by the courts over a very long period of time. For many years the courts have tended to treat unseaworthiness as a breach of condition entitling the innocent party to reject a vessel at delivery time, but normally treated unseaworthiness that became evident after sailing as a breach of warranty entitling the innocent party merely to claim damages consequent on that breach. Again compare the Marine Insurance provision "Warranted Seaworthy" gives rise to the automatic abrogation of the contract.

Whilst the decision as to classification regarding all the facts and circumstances of the case is made not by the parties but by the court, it is often made to determine whether a party was justified in treating the contract as being at an end or not. Judicial determination in hindsight after the event is not entirely satisfactory since the only way to settle the matter is through the courts. The parties can hardly criticise the courts however, since it is they who caused the problem in the first place by not dealing with the issue of classification themselves at the 6utset when the terms of the contract were agreed.

A mid-way position seems to have been reached by the House of Lords in **Bunge Corporation v Tradax S.A.** [95] The sellers contracted to sell to the buyers 15,000 tons of soya bean meal, in three shipments of 5,000 tons, each to be delivered in May, June & July. Clause 7 of the Standard Form Terms required that the buyers give at least 15 days notice of the vessel's probable readiness. By a valid notice given by the buyers under another clause of the contract, the period of delivery was extended by one calendar month. Thus the last day for

93 **Hong Kong Fir Shipping v Kawasaki Kisen Kaisha** [1962] 2 Q.B. 26.
94 **Cehave v Bremer** [1976] Q.B. 44.
95 **Bunge Corporation v Tradax S.A.** [1981] 2 All ER 513.

notice of the May instalment was the 12th of June and the last day of shipment the 30th of June. Notice was not given till the 17th of June. The court held that Clause 7 was a condition of the contract. The H.L. stated obiter dicta that there are circumstances where the parties, as soon as a contract is concluded, can decide whether a term is a contract or a warranty. Construction of the term can be based on express classification or by necessary implication. The H.L. approved the concept of the innominate term pioneered by the C.A. but said the wait and see technique was only to be used in respect of terms that were innominate. Where, as here, the term broken was a condition from the outset, the innocent party could regard himself as discharged even if the breach had not deprived him of substantially the whole of the benefit of the contract.

Provisions as to time in international trade contracts are conditions. They are made to ensure that the parties can fulfil future obligations. There were about 50 future changes of ownership to follow sequentially on the contract in question before the goods would have reached their final destination. The House of Lords distinguished between provisions as to time and terms of a flexible nature such as seaworthiness. Such terms could be broken by slight or major departures from the contract. It is unlikely that the parties would have intended that the innocent party could treat the contract as repudiated for every minor breach. **Bunge v Tradax** keeps open the option for the courts to classify certain terms as being, by necessary implication, conditions from the outset even if not so named by the parties. The significance of cases which have created these judicial classifications is retained. An innocent party who seeks to apply the necessary implication test however still runs the risk of getting it wrong. If as in Hong Kong Fir the court decides the term was in fact innominate and classifies the term as a warranty he becomes the guilty party and has to pay damages to the other party.

Summary : Classification of a term can arise in a number of ways.

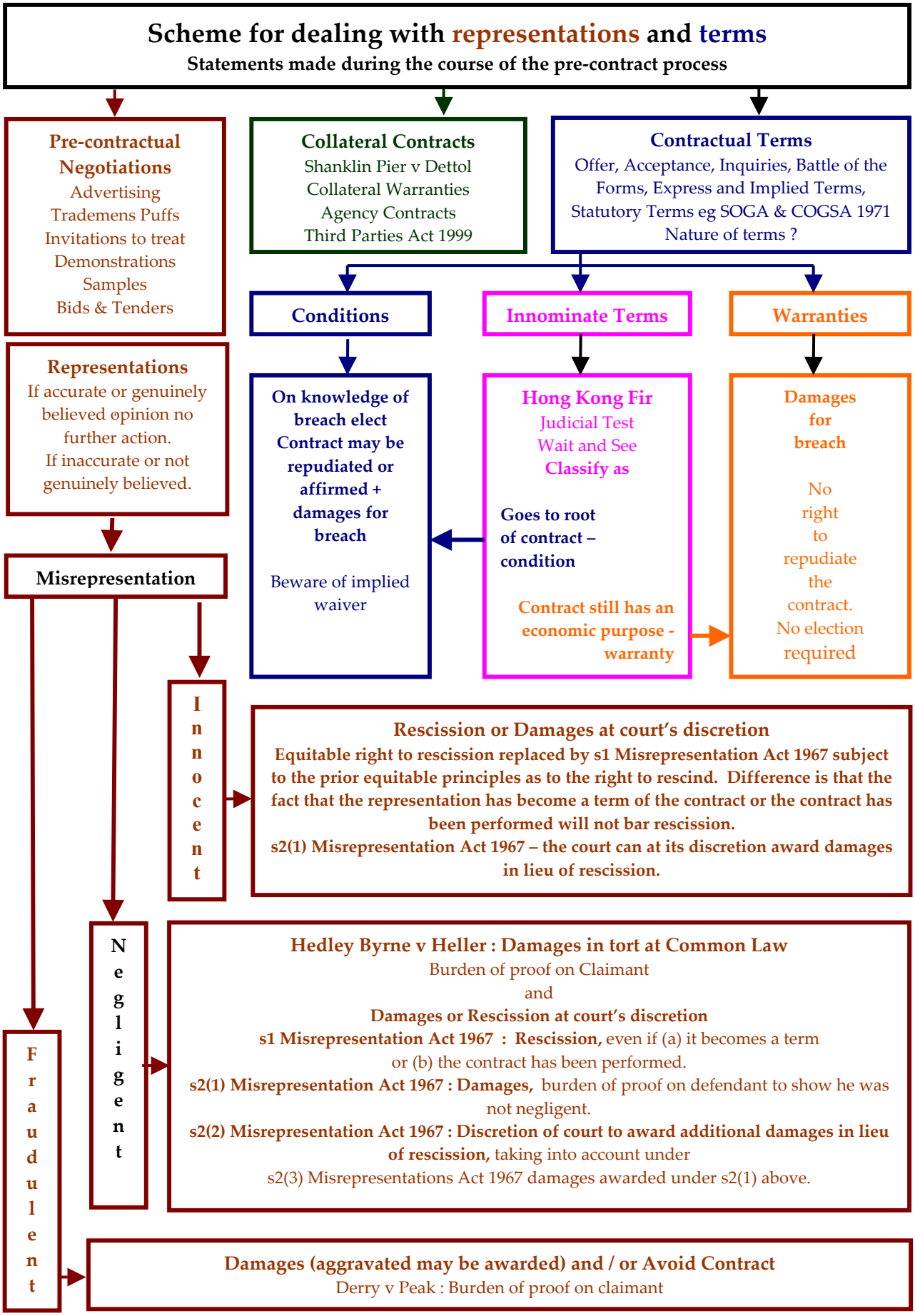
1 **Express** : The contract can expressly classify terms as conditions or warranties. Providing the wording of the contract does not then contradict itself by providing an inconsistent meaning the courts will then accept that classification and its ramifications in the event of breach.

2 **Common Law Classification** : Even where the parties have failed to classify a term, the courts and the custom of the trade have resulted in an accepted hierarchy regarding common duties. Thus a term requiring a ship to sail directly from one port to another without deviating or calling in at intermediate ports is treated as a condition even if the contract is silent on the matter of classification. By contrast, the capacity of a vessel, its speed and its fuel consumption are treated as warranties entitling the innocent party to damages only. Nothing stops the parties expressly making any of these conditions but if the contract is silent on the matter the court automatically treats such terms as warranties.

3 **Implied Common Law Terms** : Terms Implied into contracts, such as the common law requirement that a port be safe for a vessel to enter, use and leave in safety and that a vessel be seaworthy have also been classified by the courts. Again, there is nothing preventing the parties from inserting an express provision into a contract in respect of such common law implied terms and of expressly classifying them. However, if the contract is silent on the matter, the court implies the term and its common law classification.

4 **Statutory Terms** : Finally Parliament can imply conditions and warranties automatically into contracts through statute and classify the term at the same time as with the s13 & 14 Sale of Goods implied Conditions. Often Parliament also provides the remedy for breach, in which case the statutory remedy whatever it is applies and classification as such is irrelevant.

5 **The innominate term** : The contract and the common law are silent - leaving the court to make the classification on the basis of all the facts and circumstances of each individual case. Despite the novelty of the terminology 'Innominate' coined in Hong Kong Fir this process has been used for over two centuries the courts and is really nothing new at all.


Scheme for dealing with representations and terms
Statements made during the course of the pre-contract process
Pre-contractual Negotiations
Advertising
Trademens Puffs
Invitations to treat
Demonstrations
Samples
Bids & Tenders
Collateral Contracts
Shanklin Pier v Dettol
Collateral Warranties
Agency Contracts
Third Parties Act 1999
Contractual Terms
Offer, Acceptance, Inquiries, Battle of the Forms, Express and Implied Terms, Statutory Terms eg SOGA & COGSA 1971
Nature of terms ?
Conditions
Innominate Terms
Warranties
Representations
If accurate or genuinely believed opinion no further action.
If inaccurate or not genuinely believed.
On knowledge of breach elect Contract may be repudiated or affirmed + damages for breach
Beware of implied waiver
Hong Kong Fir
Judicial Test
Wait and See
Classify as
Goes to root of contract – condition
Contract still has an economic purpose - warranty
Damages for breach
No right to repudiate the contract.
No election required
Misrepresentation
Innocent
Rescission or Damages at court's discretion
Equitable right to rescission replaced by s1 Misrepresentation Act 1967 subject to the prior equitable principles as to the right to rescind. Difference is that the fact that the representation has become a term of the contract or the contract has been performed will not bar rescission.
s2(1) Misrepresentation Act 1967 – the court can at its discretion award damages in lieu of rescission.
Negligent
Hedley Byrne v Heller : Damages in tort at Common Law
Burden of proof on Claimant
and
Damages or Rescission at court's discretion
s1 Misrepresentation Act 1967 : Rescission, even if (a) it becomes a term or (b) the contract has been performed.
s2(1) Misrepresentation Act 1967 : Damages, burden of proof on defendant to show he was not negligent.
s2(2) Misrepresentation Act 1967 : Discretion of court to award additional damages in lieu of rescission, taking into account under s2(3) Misrepresentations Act 1967 damages awarded under s2(1) above.
Fraudulent
Damages (aggravated may be awarded) and / or Avoid Contract
Derry v Peak : Burden of proof on claimant

Terms Clauses and Articles. The contents of many standard form contracts are expresses or enumerated as clauses or articles. Whilst these clauses may in fact contain terms and conditions there can be problems incorporating such clauses or articles into other contracts simply by stating that one contract is subject to the terms or conditions of that other contract. The problem has centred around certain provisions in a contract regarding jurisdiction (choice of law and forum), exclusion clauses, limitation clauses, time bars and arbitration clauses. In the absence of an express reference to these provisions they may not be incorporated into the new contract. This is because the courts have entered into semantic arguments as to whether or not such provisions are in fact terms or conditions. There is some justification for drawing such distinctions in that unlike conditions these provisions do not result in a breach of contract and are merely descriptive of contractual processes. Furthermore, it is possible to distinguish between general terms and those that are part of a personal agreement. This distinction is confirmed by the approach of the Brussels and Lugano Conventions to choice of jurisdiction and arbitration clauses, In particular where standard form contracts are often made for the benefit of third parties who later seek to rely on the contract. In the absence of statutory provisions preventing the use of such clauses clarity is the best way of ensuring that such provisions are legally transposed from one contract to another by expressly referring to them.

Exclusion Clauses : Exclusion clauses are designed to limit or exclude obligations which would otherwise attach to one of the parties to the contract. Whether the defendant can rely on the clause to escape liability for a contractual obligation depends on whether the clause has been incorporated into the contract; and if, as a matter of construction, the clause covers the obligation in question. In this respect regard should be paid to the common law rules and to the Unfair Contract Terms Act 1977 and allied subsequent consumer legislation.

Incorporation of an exemption clause. If a person signs a contractual document containing exemption clauses, he is bound by them. In **L'Estrange v Graucob,**[96] the plaintiff signed a contract for a cigarette vending machine without reading it. The contract contained a large amount of "small print'. The machine proved defective. The plaintiff claimed damages for breach of the implied condition as to fitness for purpose under s14(1) Sale of Goods Act 1893 (Now s14 S.O.G.A. 1979). The court held that the plaintiff's claim failed. The contract contained a clause which excluded the implied condition. The plaintiff had signed the contract. It was irrelevant that she had not read it.

Curtis V Chemical Cleaning Co.[97] **t**he claimant took her wedding dress to the cleaners. She was asked to sign a document, which contained a clause stating that the dress was "accepted on condition that the company is not liable for any damage". The plaintiff queried the reason for this. She was told that the company would not accept liability for damage done to beads and sequins on the dress. The claimant signed the form. The dress was returned badly stained. The court held that the exemption clause only covered damage to beads and sequins and not stains since it was limited by the oral representation.

In **McCutcheon v David MacBrayne Ltd**.[98] the plaintiff got his brother-in-law (X) to get his car transported between a Scottish Island and the mainland for him. When this had been done in the past the plaintiff had sometimes signed a receipt containing exemption clauses which excluded liability for goods lost due to the negligence of the crew. The exclusion clauses were also printed on the wall of the shipping company's booking hall. Neither the plaintiff nor his brother in law had ever bothered to read the conditions of carriage though they knew they existed. On this occasion the contract was concluded orally. A receipt later issued to X contained the exclusion clauses but they were not part of the contract since they were issued too late. The defendant claimed the exclusion clauses were part of the contract since there had been a previous course of dealings. The court held that this contract differed from previous dealings. The exclusion clauses were not incorporated into the contract of carriage.

Exclusion clauses are often displayed on notice boards. The court will only enforce an exemption clause if the party affected was adequately informed of it when he accepted. The notice must have been brought to his attention before the contract was concluded. An exclusion clause will not be binding if it is

96 **L'Estrange v Graucob** (1934)
97 **Curtis v Chemical Cleaning Co.** [1957].
98 **McCutcheon v David MacBrayne Ltd** (1984)

communicated after the contract is made. Thus, in **0lley v Marlborough Court Hotel**,[99] a notice in a hotel bedroom stated that " The proprietors will not hold themselves responsible for articles lost or stolen". The court held that the notice was not part of the contract. The contract was concluded before the plaintiff saw the notice.

An exclusion clause will not be incorporated as a binding term of a contract if it is contained in a document which is not intended to bear contractual terms. In **Chaplelton v Barry U.D.C**.[100] deck chairs were stacked on the beach with a sign saying they cost 2p for 3 hours to hire. Customers would help themselves and pay for the hire to an attendant who would issue a receipt when he came around. The canvas on The plaintiff's deck chair was rotten and resulted in the plaintiff injuring his back. He claimed damages. The defendant relied on exemption clauses on the back of the receipt. The court held that the plaintiff was entitled to assume all the conditions were on the notice board. Nothing drew his attention to the words on the back of the receipts.

Conditions on tickets will not become part of the contract unless the defendant has done sufficient to draw the plaintiff's attention to their existence. Provided the defendant has done this the plaintiff will be bound even if he didn't see them. In **Parker v S.E.Railway Co**.[101] a cloakroom ticket costing 2p had the words see back on the front side. On the back a condition excluded the railway company's liability for goods over £10 in value A notice on the cloakroom wall carried the same message : The plaintiff claimed for the loss of his bag. The court held that whether or not the defendant had done all that was reasonably sufficient to give the plaintiff notice of a condition was a question of fact. In this case the defendant had done enough.

In **Thompson v L.M.S. Railway Co**.[102] the face of a ticket stated 'excursion : For conditions see back.' The back side said it was issued subject to details on the time table and Excursion Bills also drew attention to conditions on the time tables. The timetables cost 6p. The conditions excluded liability for injury. The plaintiff could not read. The court held that the company had done all that was reasonable to draw the plaintiff's attention to the conditions. Her inability to read was immaterial. She could not claim for injuries sustained during the journey.

In **Thornton v Shoe Lane Parking Ltd**.[103] the plaintiff parked his car in a multi-story car park. A notice proclaimed at the entrance that customers parked their cars at their own risk thus exempting liability for damage to the car. An automatic vending machine issued the ticket which claimed on the rear to exempt all liability for damage to the car and loss of property from the car plus all liability for personal injury. The plaintiff was injured when collecting his car due to the defendant's negligence. The court held that the defendant had not drawn the clause attempting to exclude liability for personal injury to the plaintiff's attention since all the other notices talked only of liability for damage to the car. By the time the ticket was issued, since it was automatic and afforded the plaintiff no chance to refuse to contract. The contract was complete when the plaintiff put the money in the machine. The ticket was issued subject only to conditions advertised on the walls and visible by the plaintiff prior to putting the money in. The clause exempting liability for personal injury was too late to form part of the contract.

Even in the absence of sufficient notice it is still possible for an exclusion clause to be incorporated providing there has been a previous course of dealing between the parties on the same terms. The previous course of dealing must have been consistent as demonstrated by **McCutcheon v David MacBrayne**.[104]

In **Hollier v Rambler Motors,**[105]. the defendant orally agreed to repair the claimant's car On two of the previous five occasions that the defendant had carried out such repairs he had required the plaintiff to sign an invoice which contained an exclusion clause exempting the defendant from liability for fire. No invoice was produced. The car was damaged by fire due to the defendant's negligence. The plaintiff claimed

99 **0lley v Marlborough Court Hotel** (1949)
100 **Chaplelton v Barry U.D.C**. (1940).
101 **Parker v S.E.Railway Co**. (1877).
102 **Thompson v L.M.S. Railway Co**. (1930).
103 **Thornton v Shoe Lane Parking Ltd**. (1971).
104 **McCutcheon v David MacBrayne**.
105 **Hollier v Rambler Motors** (1972).

damages. The court held that the exemption clause could not be imported into the oral contract. There had not been a sufficient course of dealings nor had the dealings been consistent.

When both parties to the contract are in business it appears that knowledge of the existence of the clause on the part of the plaintiff (as opposed to its content) will suffice in order to bind the plaintiff if there has been a previous course of dealings. In **Hardwick Game Farm Ltd. V Suffolk A.P.A**. [106] 3 or 4 previous dealings per month over a 3 year period were held to be sufficient to import into an oral contract conditions that were contained in an invoice which regularly followed the oral offer and acceptance and consequent contract for the supply of feeding-stuff for livestock.

Construction of exclusion clauses : The Contra-Preferentem Rule.

The courts will construe a contract as a whole (i.e. interpret the words in the contract) and determine whether exclusion clauses in the contract cover the breach that has occurred. Liability can only be excluded by clear words. This is called the *contra preferentem rule.* The courts will construe any ambiguity in an exclusion clause against the interests of the person seeking to rely on the clause to escape liability.
Distinguish between limitation and exclusion clauses. The rules of construction governing clauses which limit the amount of damages that may be claimed, for example 'in *case of damage we will pay up to £100 for loss damage or injury'* are more flexible than those governing exclusion clauses which seek to exclude liability altogether. A typical exclusion clause might state *'we accept no liability whatsoever for loss damage or injury'.* The contra preferentem rule is not applied to clauses limiting liability.

In **Ailsa Craig v Malvern Fishing**,[107] Wilberforce L stated that "Clauses of limitation are not regarded by the courts with the same hostility as clauses of exclusion: this is because they must be related to other contractual terms, in particular to the risks to which the defending party may be exposed, the remuneration which he receives, and possibly also the opportunity of the other party to insure."

The Contra Preferentem Rule. The wording of an exclusion clause should in the case of doubt be construed against the person seeking to rely on the clause. If a clause has two possible meanings the meaning least favourable to the person seeking to rely on the clause is used.[108] A further reason why the exemption clause failed was that the court held that whilst it exempted the defendant from liability from fire it did not cover fires caused by negligence. It only covered fires which happened without the defendant's fault.

In **Wallis & Wells V Pratt & Haines,**[109] the plaintiff bought grass seed from the defendant. An exemption clause exempted liability from all implied warranties. The seed was for giant grass not Common English Grass as ordered and thus failed to comply with its description which represented a breach of the condition under s13 S.O.G.A. The court held that the exclusion clause covered warranties but not conditions. The plaintiff's claim for damages succeeded. Likewise, in **White v John Warrick**,[110] the plaintiff hired a bike from the defendant who had undertaken to maintain the bike. An exemption clause excluded liability for personal injury to the hirer. The court held that the exclusion clause was ambiguous. It could be taken to cover liability in tort or contract. The court held that liability for breach of contract for failing to maintain the bike was excluded. However, the plaintiff still had a valid action in the tort of negligence for the injury which he had sustained whilst using the defectively maintained bike.

In **British Crane Hire v Ipswich Plant Hire,**[111] the court held that where the parties contract from a position of equal strength, on a business footing, the contra preferentem rule will be applied less rigidly. Courts are more likely to recognise the validity of the clause, even if slightly ambiguous, if there is a regular course of dealings and the conditions are well known In the trade.

Fundamental Breach and the Requirement of Reasonableness in Exclusion Clauses. Prior to 1977, the courts had developed a body of law to the effect that an exclusion clause could not protect a party from liability for a serious or fundamental breach of contract, even where, on its true construction, the wording of

106 **Hardwick Game Farm Ltd. v Suffolk A.P.A**. 1969 H.L.
107 **Ailsa Craig v Malvern Fishing**. [1981].
108 See **Hollier v Rambler Motors** [1912]
109 **Wallis & Wells v Pratt & Haines** [1911]
110 **White v John Warrick** [1953]
111 **British Crane Hire v Ipswich Plant Hire** [1975]

the clause covered the breach which had occurred. This "Doctrine of Fundamental Breach" affirmed by the House of Lords in **The Suisse Atlantique**,[112] was subsequently over-ruled by the same court in **Photoproductions v Securicor.**

It was held in **Photoproductions v Securicor** reaffirming an *obiter statement in* **The Suisse Atlantique** that there was no rule of substantive law that an exclusion clause could not cover a fundamental breach. In **The Suisse Atlantique** the problem was avoided since the court asked whether or not on the construction of the contract the clause in question in fact covered the alleged breach. It did so there was no breach. Thus, if a clause is sufficiently well constructed then, clearly it would by implication have been possible to exclude liability for a Fundamental Breach whatever that phrase may be deemed to cover.

In **The Suisse Atlantique** the plaintiff chartered a vessel to carry coal for two consecutive years worth of voyages. Laydays were provided in respect of loading and unloading, with a demurrage clause for excess loading time at $1,000 for every excess day. The charterer used up 150 days of demurrage and had to pay the ship owner $150,000. However the shipowner could have earned more money by rechartering the vessel to someone else. The shipowner claimed there was a Fundamental Breach of contract. The court held that there was no fundamental breach since the contract contained a liquidated damages clause which prevented the breach from being something that went to the root of the contract because it was what the parties had bargained for. The shipowner had to abide by his contract.

The court nonetheless felt that it would be ridiculous for a party to be able to make a contract and then escape all liability for performing what he had been paid to do contradicting the obiter suggestion that Fundamental Breach was no longer relevant. The ratio decidendi of **The Suisse Atlantique** was notoriously difficult to discern. The problem was that if the Doctrine of Fundamental Breach continued to apply, it introduced yet another method of categorising the contractual rights and duties created by a contract in addition to that of conditions and warranties.

Application of the criteria to establish what constituted a fundamental breach of contract proved to be practically impossible. Thus in **Photoproductions v Securicor,**[113] and under the Unfair Contract Terms Act 1977 the common law and statute law has consequently abandoned this method of categorisation and sought more practicable methods of limiting the scope of exclusion clauses.

The problem was the result of trying to extend the scope of deviation cases in Maritime Law to other areas of contract law. The deviation cases state that the contracted route of a ship may not be deviated from. The named route and the stated location of a ship at the time of the contract are Express Terms of the Contract and constitute a condition of the contract. The remedy for a breach of a condition however slight the breach and irrespective of whether its effect is fundamental or not is to allow the other party to elect whether or not he wishes to reaffirm the contract and sue for damages or alternatively to rescind the contract and sue for damages. However, there has always been the ability to insert a freedom to deviate clause in a charterparty or bill of lading.

In **Joseph Thorley V Orchis**.[114]. an exclusion clause in the Bill of Lading covered damage to goods by negligence of stevedores. The Contract of Carriage stated that the vessel was in Limmassol bound for London. The vessel deviated via Turkey, Palestine and Malta. The deviation broke the terms of the contract. The contract thus became liable to rescission. The plaintiff rescinded the contract. Since the contract no longer existed the exclusion clause became invalid and the defendant became liable in tort for the negligence of the stevedores.

In **Photo Productions V Securicor Transport**, Securicor were hired to guard a building. The guard lit a fire to keep warm which got out of hand and destroyed the building (The guards I.Q. was questionable but no criminal intent was disclosed). The contract excluded liability for fire's caused by negligence. The court upheld the exclusion clause. Note that if Securicor had been negligent in hiring the guard fore example because he had had a record of arson then the exclusion clause would not have covered that negligence

112 **The Suisse Atlantique** [1967]
113 **Photoproductions v Securicor**
114 **Joseph Thorley V Orchis** [1907]

under the contra preferentem rule. The right to cause of action in this case arose before the U.C.T.A. 1977 came into force and so was not applicable, though clearly the court was emboldened by the Act and clearly followed its basic provisions.

In **Ailsa Craig Fishing Co. v Malvern Fishing Co**.[115]. Securicor were hired to supply a security service at a harbour. Due to negligence a fishing boat sank at a loss Qf £65,000 The contract limited the defendant's liability to £1,000. Again, the court upheld the validity of the limitation of liability clause.

In **George Mitchell v Finney Lock Seeds,**[116] the defendant, a seed merchant sold £192 of cabbage seeds to the plaintiff, a farmer. The seeds were of an inferior standard and for the wrong variety of cabbage. The plaintiff's crop failed. An exclusion clause exempted the defendant from liability and was valid on a true construction of the clause. However the court held that such clauses are subject to the requirement of reasonableness which is to be measured by the relative bargaining power of the parties and the ability of one or both parties to insure against loss. In the present case the Defendant had often settled claims out of court in the past giving rise to an inference that the exclusion clause would not be rigidly relied on so reliance was unreasonable. Small farmers had virtually no bargaining power against a large seed suppliers who could say 'Accept my terms or go without'. The defendant could easily have insured against risk of failure of the seeds so the plaintiff was allowed to recover damages.[117]

The Unfair Contract Terms Act 1977.(U.C.T.A. 1977)

s2(1) U.C.T.A. 1977. *Liability for death or personal injury resulting from negligence cannot be excluded or restricted by any contract term or notice. Any clause or notice purporting to have this effect is ineffective, that is to say it is void ab initio (from the outset).*

s2(2) U.C.T.A. 1997 *: The exclusion or restriction of liability for negligent acts causing other loss or damage is allowed but only insofar as the term or notice satisfies the requirement of reasonableness:*

s3(2)(a) U.C.T.A. 1977 *: Where one party "deals as consumer" or on the other party's written standard terms of business, then the other party cannot exclude liability for breach of contract, except subject to the requirement of reasonableness.*

s3(2)(b) U.C.T.A. 1977 *: Terms purporting to entitle the other party to render:*

(i) performance substantially different from that reasonably expected; or

(ii) no performance at all: must also be reasonable where consumers are concerned.

s6 U.C.T.A 1977 *states that in contracts for the sale of goods (and H.P.) the implied terms as to title (s12 Sale of Goods Act 1979) cannot be excluded or restricted under any circumstances. Additionally, ss13-15 Sale of Gods Act 1979 cannot be excluded or restricted as against a person dealing as consumer, though they can be excluded in a non-consumer sale if the exclusion clause is reasonable.*

s12 U.C.T.A 1977. *A person "deals as consumer" if he does not contract in the course of a business & the other party does so contract.*

The Requirement of Reasonableness.

s11(1) U.C.T.A. 1977 *: The test of 'Reasonableness' is that the term must be a fair and reasonable one having regard to all the circumstances which were, or ought reasonably to have been known to or in the contemplation of the parties when the contract was made. The burden of proving reasonableness lies on the person seeking to rely on the clause.*

In contracts for the sale of goods, guidelines for the determination of reasonableness have been laid down *by the Courts* as follows

a) The strength of the bargaining position of the parties relative to each other, taking into account the availability of another source of supply; **George Mitchell v Finney Lock Seeds** and **British Crane Hire Corp v Ipswich Plant Hire.**[118]

b) Whether the customer received an inducement to agree to the term, e.g. where goods are offered more cheaply with an exclusion clause but more expensively without one. **R.W.Green v Cade Bros. Farms.**[119]

115 **Ailsa Craig Fishing Co. v Malvern Fishing Co**. (1981).

116 **George Mitchell v Finney Lock Seeds** [1982]

117 See now also the statutory provisions in schedule 2 U.C.T.A. 1977.

118 **British Crane Hire Corp v Ipswich Plant Hire.**

119 **R.W.Green v Cade Bros.Farms** [1978]

c) Whether the customer ought to have known of the existence and extent of the term. This refers to knowledge or awareness of the clause via trade custom and previous dealings. **Hardwick Game Farm v Suffolk A.P.A.**[120]

d) Whether the goods were manufactured, processed or adapted to the special order of the customer.

The criteria of reasonableness developed by the courts has been endorsed and extended by the U.C.T.A. 1977. Case law still provides examples of how the courts would apply the new statutory provisions. Schedule 2 U.C.T.A. 1977. The matters to which regard is to be had in particular for the purposes of s6(3) U.C.T.A. 1977. (*Trades persons dealing with trades persons and the requirement of reasonableness before an implied term under sections13, 14 or 15 of the Sale of Goods Act 1919 can be excluded*) are any of the following which appear to be relevant

a) The strength of the bargaining positions of the parties relative to each other, taking into account (among other things) alternative means by which the customer's requirements could have been met

b) whether the customer received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other persons, but without having to accept a similar terms;

c) whether the customer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and nay previous course of dealing between the parties);

d) 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 would be practicable;

e). whether the goods were manufactured, processed or adapted to the special order of the customer.

Regarding contracting 'in the course of a business' see **R & B Customs Brokers v U.O.T**.[121] which limits liability under the U.C.T.A. to activities which are an integral part of the business. A business may be a consumer customer in respect of purchases not related to its business.

s26(1)&(3) U.C.T.A. 1977 The Act does not apply to contracts for the international sale of goods. This means many sales involving carriage of goods by sea are not governed by the Act and recourse must be had in such situations to the common law laid down by **Photo Productions v Securicor** & **George Mitchel v Finney Lock Seeds.** It does however apply to the carriage of goods between ports in the U.K.

See further **Overseas Medical Supplies Ltd v Orient Transport Services Ltd**.[122]

The Unfair Terms in Consumer Contracts Regulations 1994 SI 1994/3159.

The U.T.C.C.R. 1994 represented the U.K. version of The Unfair Terms in Consumer Contracts Directive 93/13 E.E.C. The E.C. sought to establish a uniform regime in member states to govern unfair terms in contracts. The E.C. Directive is limited in scope to consumer contracts but further legislation in respect of business to business relationships is anticipated.

The U.T.C.C.R. is limited in two ways, firstly to consumer / business relationships and secondly in that it only applies to standard form contracts where the terms are not negotiated between the parties and where one party imposes terms on the other from a position of strength. The U.T.C.C.R. will therefore have a very limited impact on International Trade Contracts simply because consumer's are seldom involved in these types of sales. Contracts of carriage are covered by the regulations only if a consumer is involved because the regulations affect all contracts for both goods and services. However with the exception of the removal of private property its impact on carriage contracts is minimal.

The Unfair Terms in Consumer Contracts Regulations 1999 replaced the 1994 Regulations. The Regulations prohibit the use of unfair terms in consumer contracts, which have not been individually negotiated.

120 **Hardwick Game Farm v Suffolk A.P.A.** (1969);

121 **R & B Customs Brokers v U.O.T**. [1988] 1 W.L.R. 321

122 **Overseas Medical Supplies Ltd v Orient Transport Services Ltd** [1999] 2 Lloyds Reports 273

They do not apply to contracts of employment succession, family law or the incorporation and organisation of companies & partnerships.

Under Regulation 4 "Unfair term" means any term which contrary to the requirement of good faith causes a significant imbalance in the parties' rights & obligations under he contract to the detriment of the consumer.

Schedule 2 1994 Regulations provided that in making an assessment of good faith, regard shall be had to:-

- The strength of the bargaining positions of the parties
- Whether there was an inducement to agree to the term
- Whether there was a special order for the goods
- The extent to which the supplier dealt fairly & equitably with the consumer

These rules were removed by the 1999 regulations but it is difficult to believe that they will not continue to be used. The effect of the regulations is to render certain terms in consumer contracts unfair. In addition in assessing whether a term is unfair, the following factors must be taken into account:

- The nature of the goods & services in the contract
- The circumstances surrounding the conclusion of the contract
- All the other terms of the contract or any contract on which it is dependent

It is also stated that any terms must be written in plain intelligible language & that where they are unclear, they will be construed against the seller.

Two forms of redress are available under these regulations:

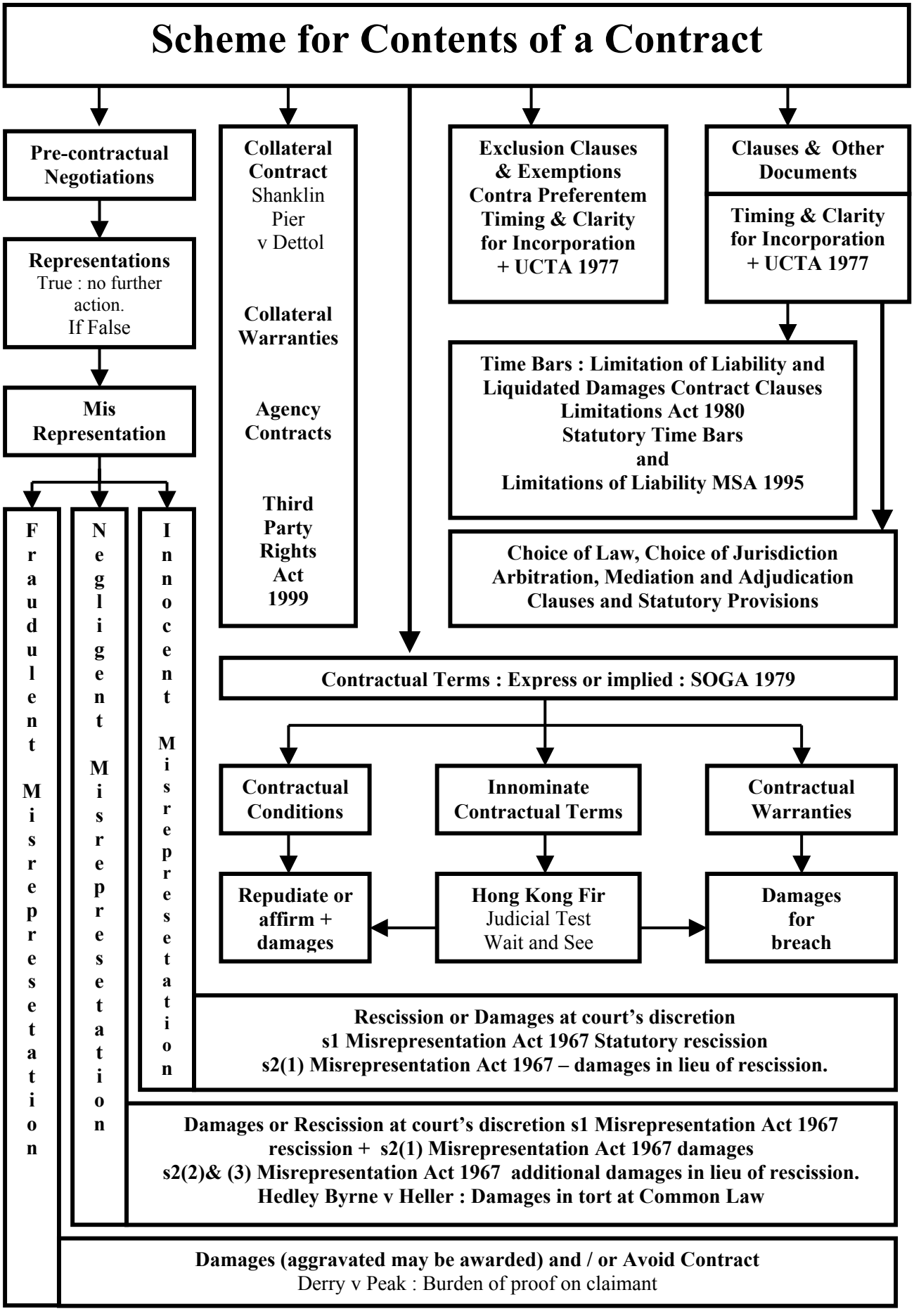
a. if a term is deemed to be unfair. it will not be binding on the consumer. The remainder of the contract will be binding if it can continue in existence without the unfair term.

Director General of Fair Trading v First National Bank plc 2000, the first case on the Regulations, stated good faith as

"*the good faith element seeks to promote fair & open dealing. and to prevent unfair surprise and the absence of real choice. A term to which the consumer's attention is not specifically drawn but which may operate in a way which the consumer might reasonably not expect may offend the requirement of good faith. Terms must be reasonably transparent & should not operate to defeat the reasonable expectations of the consumer. The consumer in choosing to whether to enter into a contract should be put in a position where he can make an informed choice*'"

b. a complaint can be made by an individual, a consumer group or a trading standards dept to the Director General of Fair Trading. who is empowered to seek an injunction against the unfair term. He can bring an action against suppliers, manufacturers, franchisers & trade associations as well as sellers. (Note the differences between the Regulations & the UCTA 1977)

The Regulations cover any unfair term, not just exclusion clauses or limitation clauses. It is still necessary to use the common law rules to see if the clause has been properly brought to the other's attention & is clear in its expression. If this is the case, then both the Unfair Contract Terms Act and the Unfair Terms in Consumer Contracts Regulations must be examined to see if the term will be allowed to operate.


Scheme for Contents of a Contract
Pre-contractual Negotiations
Representations
True : no further action.
If False
Mis Representation
Fraudulent Misrepresetation
Negligent Misrepresetation
Innocent Misrepresetation
Collateral Contract
Shanklin Pier
v Dettol
Collateral Warranties
Agency Contracts
Third Party Rights Act 1999
Exclusion Clauses & Exemptions
Contra Preferentem
Timing & Clarity for Incorporation
+ UCTA 1977
Clauses & Other Documents
Timing & Clarity for Incorporation
+ UCTA 1977
Time Bars : Limitation of Liability and Liquidated Damages Contract Clauses
Limitations Act 1980
Statutory Time Bars
and
Limitations of Liability MSA 1995
Choice of Law, Choice of Jurisdiction
Arbitration, Mediation and Adjudication
Clauses and Statutory Provisions
Contractual Terms : Express or implied : SOGA 1979
Contractual Conditions
Innominate Contractual Terms
Contractual Warranties
Repudiate or affirm + damages
Hong Kong Fir
Judicial Test
Wait and See
Damages for breach
Rescission or Damages at court's discretion
s1 Misrepresentation Act 1967 Statutory rescission
s2(1) Misrepresentation Act 1967 – damages in lieu of rescission.
Damages or Rescission at court's discretion s1 Misrepresentation Act 1967
rescission + s2(1) Misrepresentation Act 1967 damages
s2(2)& (3) Misrepresentation Act 1967 additional damages in lieu of rescission.
Hedley Byrne v Heller : Damages in tort at Common Law
Damages (aggravated may be awarded) and / or Avoid Contract
Derry v Peak : Burden of proof on claimant

CHAPTER TWO

Self Assessment Questions : Contents of a Contract

1) Why is it important to establish whether a statement is a term of a contract or not?

2) Discuss the 'parol evidence' rules and exceptions to the rules.

3) What tests do the courts apply to determine whether or not words in a contract amount to
   a) Introductory gambits of no legal significance?
   b) Representations not amounting to terms of the contract?
   c) Terms of the contract?
   d) Meaningless verbiage? Will meaningless words be void or is the whole contract void?

4) Distinguish between **Oscar Chess v Williams** and **Dick Bentley Productions v Harold Smith**.

5) When will terms be implied by a) the courts? b) custom? c) Statute?

6) What effect do sample goods have on a contract? What happens if house does not live up to the standard of a show house on a building site? Would it make any difference if prospective buyers were advised to consult an independent surveyor before concluding a contract?

7) How do the courts distinguish between conditions. warranties and innominate terms and what is the significance of the distinction?

8) Grabbit and Run are a firm of antique exporters who leaflet housing estates advising that their resident expert Mr Conman will soon be in the area valuing antiques and that the firm is prepared to purchase items at very advantageous prices from the public.
   Mr Conman calls on Mrs Angel to see if she wants anything valued. He sees a piano inscribed Richards Furnishings London in the parlour and asks Mrs Angel about the piano. She explains that it came to her from her great aunt Virtuoso Vera. a famous concert pianist in the 1930's. She explained that she didn't know what make it was but that her son's piano teacher Mr Bumble had asked her to let him know if she ever wanted to sell it since it was such a beautiful piano. Mrs Angel knew that he played a Beckstein and presumed that it must be a very valuable piano if Mr Bumble had been prepared to buy it and use it in place of his Beckstein.
   Mr Conman knew that high quality pian6s ofien bore the name of the retailer rather than the manufacturer and concluded that the piano was in fact a Steinway and thus a very valuable antique piano worth about £25.000. Mr Conman told Mrs Angel that whilst the piano was very nice it was worth only about £100 but that since he was looking for a piano for his young daughter Lucy he was prepared to give her £150 since he was far too busy to go shopping around for one. Mrs Angel accepted the offer. On inspection of the piano in Grabbit and Run's warehouse it was discovered that the piano was in fact quite unexceptional and was made by Tune Furnishers Ltd for Richards Furnishings Ltd and since it was in good condition it had a market value of about *£255.*
   a) What remedy if any is available to Mr Conman and Grabbit and Run?
   b) What remedy if any would be available to Mrs Angel if the piano was valuable?

THE LAW OF INTERNATIONAL TRADE AND CARRIAGE OF GOODS

Self Assessment Questions : Exclusion Clauses

1) John deposited his brief case containing valuable papers in an overnight storage locker at Cardiff railway station. He put a 50p piece into the machine and received a ticket and a key to recover his property. The face of the ticket contained details of how to open the locker and a warning that the user should look after the key carefully. In small print at the foot of the ticket were the words. 'For conditions please turn over.' On the rear of the ticket it stated that the duties and liabilities of the bailee are defined as follows. 'There shall be no duty and no liability in respect of loss or damage to parcels deposited whether caused by negligence. breach of contract (fundamental or otherwise) or in any other matter. and in NO circumstances shall any money be returned or compensation paid to the bailor.

2) What is the general purpose of exemption clauses? To what. extent are such clauses valid at common law?

3) To what extent is it true to say that the courts lean against exemption clauses? How do the courts construe such clauses?

4) Is a blind man bound by conditions printed on a ticket which a normally sighted person could not fail to know about?

5) Fred bought a sandwich from a vending machine in the refectory for 20p. A slip of paper displayed on top of the cling film wrapper of the sandwich stated that 'no guarantee is given as to the edibility of this product and no liability will be accepted for breach of condition implied by statute or otherwise.' The meat in the sandwich contained a large piece of sharp bone which dislodged on Fred's teeth when he took the first bit and cut his gum severely. What claim if any has Fred against the refectory proprietors?

6) Lovelorn and his girlfriend Diana took a ride on a fairground boat through a 'Tunnel of Love'. Lovelorn was given two tickets at the cashier's desk which he handed over to the attendant on boarding the boat without looking at them. The boat capsized in the tunnel due to a defect in its construction and Lovelorn and Diana were both seriously injured. What remedies are available to them if a) there was a large notice at the entrance declaring that 'All passengers ride at their own risk' and b) on the back of the tickets were the words 'The proprietors will not be held liable for injuries to passengers in the Tunnel of Love' however caused.

7) To what extent is it possible to exclude liability in a contract for loss suffered by non trade consumers in the light of the U.C.T.A. 1977?

8) Explain the distinction in the U.C.T.A. 1977 between contracting parties who happen to be either a non-trade consumer and a businessman or where both parties are businessmen.

9) Why have the courts rejected the Doctrine of Fundamental Breach as a basis for vitiating exclusion clauses incorporated into contracts and what safeguards have the courts developed to replace Fundamental Breach in relation to exclusion clauses?

10) The importance of the Doctrine of Fundamental Breach as a basis for vitiating exclusion clauses incorporated into a contract has been greatly diminished by statute and the safeguards developed by the courts have now also been reinforced by statute in relation to exclusion clauses. Discuss.