Distinction between representation and terms of the contract

Damages cannot be awarded for a statement that merely constitutes an innocent (as opposed to negligent or fraudulent) misrepresentation inducing the contract, whereas damages and termination may be awarded for breach of a contractual term.

The courts look objectively at the circumstances to determine whether or not an express pre-contractual statement was a promise or a representation. There are, however, guidelines that may assist in court:

- The time that has elapsed from the making of the statement to the formation of the contract may be a factor. The less time, the more likely it is to be a term of the contract, the longer gap, the harder it will be to argue that the statement was significant
- Objectively, the more important the statement in the context of the contract, the more likely it is to be a term of the contract. Where the party arguing that the statement is a term has reasonably relied on the statement and has placed importance on the statement it is more likely to be a term.
- If a statement is made during the negotiation and the agreement is subsequently reduced to writing, any statement not included in the written contract will be regarded as a representation. This is consistent with the parol evidence rule. It may however constitute a collateral contract.
- The relative knowledge and expertise of the parties. If the person making the statement was an expert or had more knowledge about the matter than the other party, the statement is more likely to be a term.

Oscar Chess Ltd v Williams

The defendant traded in his old second-hand car to the plaintiff dealers in part payment for a new one. The defendant had described his old car as a 1948 Morris, this being the date of the first registration of the vehicle shown in its registration papers. On this basis the plaintiff allowed him £290 trade-in. However, eight months later the plaintiff discovered that the vehicle was a 1939 model and not a 1948 model. A previous owner of the vehicle must have fraudulently altered the date in the logbook.

The plaintiff dealers sought to recover £115 as damages, being the difference in value between a 1939 and a 1949 model. The Court of Appeal held that the plaintiff's claim failed. Williams did not promise that the car was a 1948 model, it was an innocent misrepresentation for which damages would not be awarded.

Collateral contracts

A further possibility is that a statement, although not an actual term of the contract, may be treated by the court as a collateral contract, that is, collateral to the main contract, and damages may be recovered for breach of that collateral contract. This device is used where the main contract has been reduced to writing to get around the parol evidence rule. However, it must meet the three criteria:

- It must not be inconsistent with the terms of the main contract

Hoyt's Pty Ltd v Spencer

The defendant sub-leased certain premises to the plaintiff. The written sub-lease contained a proviso entitling the defendant to terminate it on giving four weeks' notice in writing. The defendant subsequently terminated the sub-lease. The plaintiff claimed damages for breach of a verbal promise, given by the defendant prior to the sub-lease being signed, that he would not terminate it unless required to do so by the head lessor. It was held that the defendant's verbal agreement not to terminate the sub-lease and the proviso in the written sub-lease giving him an unqualified right to terminate it were inconsistent, therefore the verbal agreement was unenforceable.

- It needs to be emphasised that a court will only treat a statement or representation a collateral contract where it is satisfied that the statement was intended to have contractual effect.

  JJ Savage & Sons Pty Ltd v Blakney
  B was contemplating purchasing a motor boat from S who built and sold boats. During negotiations B sought written advice of S as to various engines which might be used to power the boat. In his letter of reply, S commented on three types of engines and recommended one in particular, stating it to have an "estimated speed [of] 15 mph". Relying on this statement B contracted to buy the boat with the engine recommended by S. the contract contained no reference to the capacity of the boat to achieve any particular speed. When the boat's maximum speed proved to be only 12 mph, B sued S for damages for breach of alleged collateral warranty in respect of the statement concerning the estimated speed. The High Court held that "B's claim failed since S's statement, although inducing B to enter into the contract, constituted a representation only and not a collateral warranty. In the court's view it was not sufficient simply to show that one party would not have entered into the contract but for the statement made by the other since 'such a fact is but a step in some circumstances towards the only conclusion which will support a collateral warranty, namely, that the statement so relied on was promissory and not merely representational'."

- Consideration must be given by promisee - usually consideration is entering the main contract.

  Conditions, warranties and innominate terms
  The reason for distinguishing between the significance of terms is that breach of a condition entitles the innocent party to terminate the contract and/or claim damages, whereas a breach of warranty only entitles the innocent party to damages for the loss they have suffered; there is no right to terminate for a breach of warranty.
  A condition is a term which "does to the root of the matter, so that a failure to perform it would render the performance of the rest of the contract … a thing different in substance from what the defendant has stipulated for". It is sometimes described as a term without which the party for whom the term was included would not have entered the agreement without an assurance of compliance.

  Associated Newspapers Ltd v Bancks
  Bancks contracted to prepare a weekly drawing relating to a cartoon character, "Ginger Meggs", for the plaintiff newspaper company which in turn undertook to present the drawing each week as a full page feature on the front page of the comic section of its Sunday newspaper. As a result of problems arising from a newsprint shortage, Bancks' "Ginger Meggs" cartoon appeared on page three of the comic section of the newspaper instead of on page one as provided by the contract between the parties. This occurred on three consecutive Sundays, whereupon Bancks wrote to the plaintiff to the effect that he no longer regarded himself as bound by the contract because of the plaintiff's breach. The High Court held that its undertaking to publish Bancks' cartoon on the front page of the comic section constituted a condition of the contract, breach of which entitled him to treat the contract as an end. The High Court held that the term was a condition.

- A warranty is regarded as of lesser significance or importance than a condition

  Bettini v Gye
  Gye, the director of an opera company contracted for the exclusive services of B as a singer in opera and concerts for a period of three months. The contract contained a provision that B

would be in London at least 6 days before the commencement of his engagement for rehearsals. B, through illness, only arrived 2 days earlier, whereupon G refused to accept his services and treated the contract as an end. It was held that in the circumstances the term was not a condition but a warranty and, accordingly, through G was entitled to damages for loss he has suffered for B's breach of contract, he has not been entitled to treat the contract as terminated.

- The High Court of Australia has approved of a third category - the innominate term. After some uncertainty about the status of this third category, the innominate term was declared part of Australian law. Whether a term of a contract is a condition or warranty depends on determining the intention of the parties to the contract. Ascertaining that intention, and thus deciding whether the term if to be treated as a condition or warranty, is often no easy matter as the above cases demonstrate.
  In some cases, it may be more appropriate to look at the nature and effect of the breach in deciding what remedy should be available to the innocent party, rather than determining the remedy by simply asking whether it is a condition or warranty of the contract that has been breached.

  Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd
  The plaintiffs chartered a ship for a period of two years. A term of the contract required the shipowners to provide a seaworthy ship that was "in every way fitted for ordinary service". They also promised to "maintain her in a thoroughly efficient state in hull and machinery during service. There was a 57 day delay in delivering the ship in a seaworthy condition because of the incompetence of the engine room personnel. A further 91 days were likely to be lost because of the need to repair the vessel's engines. In all, it would be 20 weeks before the charterers could sail the ship. They terminated the contract, arguing that this was a breach of the "seaworthiness" condition. The plaintiffs argued that the defendant' actions were repudiation of the contract and sued for damage.
  The court decided that, although the plaintiffs were obviously in breach of their promise to provide a seaworthy ship, this was not a condition because the delays caused by the breach, in context of a two-year charter, were not so great as to deprived the defendant charterers of the substantial part of the benefit of the contract.

Exclusion clauses

Function of exclusion clauses

It is to exclude liability of one or both parties under the contract. Such clauses have traditionally been regarded in a negative light because parties who rely on them are often in a dominant position and abuse that dominance by incorporating unreasonably wide clauses into standard form contract, aware that the other party cannot realistically read or object to the clause or, if he or she does, will face the same exclusion clause elsewhere.
The use of exclusion clauses in consumer contracts is restricted or prohibited by the Parliament and the courts have used various strategies to restrict their impact on consumers. However, where the parties have negotiated an arm-length commercial contract, exclusion or limitation clauses are regarded as a conscious attempt to allocate risk.
To determine whether an exclusion clause is effective, the courts may consider whether the exclusion clause is, in fact, a part of the contract. If the clause is incorporated in the contract, the courts may need to consider the meaning of the clause - the extent to which it protects the party seeking to rely on it.

The incorporation issue

The person seeking to rely on an exclusion clause must show first that it has in fact become part of the contract. This may be achieved in one of the following ways:

- **By signature**
  An exclusion clause, like any other term, will be incorporated into a contract if it is contained in a signed document.

  L'Estrange v F Graucob Ltd
  L bought a cigarette vending machine from G and signed a document headed "Sales Agreement". The agreement which L did not read, contained a number of clauses, including an exclusion clause that said:
  "This agreement contains all the terms and condition under which I agree to purchase the machine specified above and any express or implied condition, statement or warranty, statutory or otherwise not stated herein is excluded."
  L sued for breach of contract when the machine did not work properly. The court held that the exclusion clause was effect because L has signed the contract even though she did not read the contract.

  Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd
  Finemores (taken over by Toll) entered into a contract with Richard Thomson Pty Ltd (said to be acting for Alphapharm) to store and transport goods being imported for Alphapharm. It was alleged Finemores performed this contract negligently, causing loss to Alphapharm. Finemores sought to escape liability by relying upon an exclusion in its contract with Thomson. It was held that Finemores would not rely on the exclusion clause, because it did not form part of the contract and because Thomson has not been acting for Alphapharm when entering into the contract.

- **By giving reasonable notice**
  The party seeking to rely on the clause must show that, in the absence of a signed document, the exclusion clause was brought to notice of the other party before or at the time of the contract was made. Often there is no signed document to refer to but an exclusion clause may be contained either in a notice on the premise where the contract is made, or in a document which is simply handed over, for example, ticket, voucher, receipt.
  The basic principle in these situations is that the exclusion clause will form part of the contract if party seeking to rely on it can show that they had taken steps that were reasonably sufficient in the circumstances to give notice of the exclusion clause to the other contracting party.

- **Notice must be given before contract made**
  Exclusion clause must be brought to notice of the contracting party before or at the time the contract is made. If notice of the exclusion clause is given after the contract has been made, it will have no effect.

  Olley v Marlborough Court Ltd
  The plaintiff and her husband booked into the defendant's hotel. They went up to their room where on one of the walls a notice was displayed stating that "the proprietors will not hold themselves responsible for articles lost or stolen unless handed to manageress for safe custody". The plaintiff's furs were stolen from the rooms as a result of negligence on the part of the hotel staff. It was held that the defendants were liable for the loss since the exclusion clause was not incorporated in the contract. Thus, the contract has already been made before the plaintiff and her husband went up to their room and so the notice could not thereafter affect her rights.

  Baltic Shipping Co v Dillon

The plaintiff booked for a cruise on the defendants' cruise ship. It was stipulated on the "Booking Form" that the "Contract of carriage for travel…will be made only that the time of issuing the tickets and will be subject to the conditions and regulations printed on the tickets. These conditions and regulations are available to all passengers at any CTC Cruises offices…". The tickets were issued to the plaintiffs six week after payment and 2 weeks before departure, contained conditions limiting the defendants' liability for loss of baggage or personal injury. The plaintiff lost her belongings and suffered personal injuries when the ship sank owing to negligent navigation of the vessel. It was held that the defendants could not rely on the conditions on the tickets since they had not been sufficiently brought to the plaintiff's attention and therefore did not form part of the contract.

Thornton v Shoe Land Parking Ltd
Thornton was attending an engagement at the BBC. He drove to the defendants' new automatic carpark. At the entrance was a notice "all cars parked at owner's risk". He drove in and received a ticket which contained in small print on the bottom left hand corner the words "issued subject to conditions…displayed on the premises". A set of printed conditions displayed in a panel on a pillar opposite the machine included a provision exempting the defendants from liability for injury to a customer. Thornton was run down and injured when he returned to collect his car. It was held that the exclusion clause did not exempt the defendants from liability since they had not done what was reasonably sufficient to being the clause to Thornton's notice.

- **What is "reasonable" when the exclusion clause term is harsh, onerous or unusual?**

Interfoto Picture Library Ltd v Stiletto Visual Programs Ltd
Interfoto ran a library of photographic transparencies. They delivered, upon request, some 47 transparencies to Stiletto who had not dealt with Interfoto before. The delivery note in the bag had conditions on it which said that if the transparencies were held for longer than 14 days, a fee would be paid. The conditions were supposed to be the conditions of bailment - if Stiletto wished to use the transparencies, a fresh contract has to be agreed. Stiletto retained them for an extra 2 weeks and as asked to paid £3,783, which they refused. It was held that due to the onerous conditions, Interfoto must fully and fairly bring the condition to the defendant's attention.

- **Is this document "contractual" in nature?**
If the documents containing the clause is one which is a reasonable person would not expect to contain contractual terms, that is, would regard it merely as a receipt or voucher, then an exclusion clause contained in it cannot be relied upon to exclude liability.

Causer v Browne
Causer took a dress for dry cleaning to Browne and received at the time of deposit a docket on the face of which appeared printed conditions purporting to exempt the firm from liability for loss or injury. When the frock was returned to C, it was found to be damaged.
The court, in deciding that B was liable for damages and had not discharged the onus of providing that the printed conditions modified the contract, took into account:

- The docket may not be seen as one which contained conditions, rather one to product when collecting the frock.
- The burden was on the firm of proving that the person receiving the docket was aware, or ought to be treated as aware, that it was delivered not merely as a voucher or receipt, but was intended to convey him the knowledge of the special conditions upon it and that the person delivering it intended to modify the effect of the contract.

- **If the scope of an exclusion clause is misrepresented, its effect will be limited**