

## TABLE OF CONTENTS

<b>Introduction and Conclusion Template.....</b>	<b>1</b>
<b>Term or Mere Representation?.....</b>	<b>2</b>
<b>Classification of Terms .....</b>	<b>3</b>
<b>Express Terms.....</b>	<b>5</b>
<b>Implied Terms .....</b>	<b>10</b>
<b>Construction of Terms.....</b>	<b>12</b>
<b>Misrepresentation.....</b>	<b>13</b>
<b>Duress .....</b>	<b>17</b>
<b>Presumed Undue Influence.....</b>	<b>18</b>
<b>Actual Undue Influence.....</b>	<b>20</b>
<b>Unconscionable Conduct.....</b>	<b>22</b>
<b>Differentiating Undue Influence and Unconscionable Conduct.....</b>	<b>25</b>
<b>Discharge by Breach.....</b>	<b>26</b>
<b>Discharge by Repudiation.....</b>	<b>28</b>
<b>Discharge by Frustration.....</b>	<b>29</b>
<b>Effect of Termination.....</b>	<b>31</b>
<b>Elect to Terminate or Affirm.....</b>	<b>33</b>

**Introduction:**

There is a valid contract on foot between [\_\_\_\_\_] and [\_\_\_\_\_], as all the elements of contract formation have been established.

[\_\_\_\_\_] seeks advice regarding [\_\_\_\_\_].

The key issue arising concerns [\_\_\_\_\_].

The advice for [\_\_\_\_\_] considers [\_\_\_\_\_].

<b>Terms</b> <ol style="list-style-type: none"> <li>1. Does the statement form part of the contract (incorporation)?</li> <li>2. What does the term mean (construction)?</li> <li>3. What is the effect/significance of the term (classification)?</li> </ol>	<b>Exclusion Clause</b> <ol style="list-style-type: none"> <li>1. Does the clause form part of the contract (incorporation)?</li> <li>2. What is the legal effect of the clause? Does it cover the breach?</li> </ol>
<b>Misrepresentation</b> <ol style="list-style-type: none"> <li>1. Was the statement a representation of fact?</li> <li>2. Did the statement intend to induce the defendant into the contract?</li> <li>3. Did the defendant rely on the statement when entering the contract?</li> <li>4. Is it fraudulent or innocent?</li> </ol>	<b>Duress</b> <ol style="list-style-type: none"> <li>1. Was there illegitimate pressure in the way of threatened or actual unlawful conduct?</li> <li>2. Did this conduct cause the plaintiff to enter into the agreement?</li> </ol>
<b>Actual Undue Influence</b> <ol style="list-style-type: none"> <li>1. Capacity to influence</li> <li>2. Influence was exercised</li> <li>3. Influence was undue</li> <li>4. Bought about the transaction (causation)</li> </ol>	<b>Presumed Undue Influence</b> <ol style="list-style-type: none"> <li>1. Prove context of relationship &amp; transaction</li> <li>2. Raise presumption</li> <li>3. Presumption needs to be rebutted</li> </ol>
<b>Unconscionable Conduct</b> <ol style="list-style-type: none"> <li>1. Special disadvantage</li> <li>2. Knowledge</li> <li>3. Exploitation</li> </ol>	<b>Frustration</b> <ol style="list-style-type: none"> <li>1. Unforeseen event</li> <li>2. Radically different</li> <li>3. Not self-induced</li> </ol>

**Conclusion:***Vitiating Factors*

The contract is voidable at the discretion of the innocent party, who will either elect to rescind the contract or affirm it. Once rescinded, the parties are restored to their pre-contractual positions. UNLESS title has passed to an innocent 3<sup>rd</sup> party, in which case the parties are unable to be restored.

*Breach*

The contract is terminated at the discretion of the innocent party, who will either elect to terminate or affirm the contract. The contract is discharged prospectively, with losses lying where they fall: See 'effect of termination'.

## IS THE STATEMENT A TERM OR MERE REPRESENTATION?

- When it is intended to be promissory in nature, and the statement maker warrants its truth: *Oscar Chess v Williams*

### Difference between a representation and term?

- Representation which may induce the representee to enter into the contract, but which are not guaranteed are described as “mere” representations.
- What distinguishes them is the intention of the statement maker to guarantee its truth.

### Objective test

Of whether an intelligent bystander would reasonable infer that a warranty was intended:

*Oscar Chess v Williams*

### Factors to take into account:

#### 1) Whole of circumstances approach:

- Intention can only be deduced by looking at the totality of the evidence: *Hospital Products Ltd v Unites States Surgical Corporation*

#### 2) Language of the statement

- Was the statement promissory in nature: *Oscar Chess v Williams*

#### 3) Relative knowledge and expertise of the parties

- distinguish statements of opinion from guarantees: *Oscar Chess v Williams*

#### 4) Content and importance of the statement

- The more important the content, the more likely parties intended it to be a term: *Van Den Esschert v Chapell*

#### 5) Timing of the statement

- Proximity between the statement made and entry: *Harling v Eddy*

#### 6) Existence of a written memo

- If the parties execute a memorandum of the terms of the contract which does not include a pre-contractual statement, the representee will find it difficult to establish the statement was a term: *Routledge v McKay*

### *Oscar Chess v Williams*

**FACTS** Williams sold his car to Oscar Chess. At the time of sale both parties assumed it was a 1948 Morris, and Williams described it as such since this is how it was shown in the registration book. Oscar Chess later discovered it was a 1939 model, and sued for damages.

**ISSUE** Was the model a term of the sale?

**HELD** Williams statement was no more than an innocent misrepresentation, and did not amount to a promise or guarantee, so as to become a term of the sale.

## CLASSIFICATION OF TERMS

<i>CONDITION</i>	<i>WARRANTY</i>	<i>INTERMEDIATE TERM</i>
Right to terminate the contract & sue for damages.	NO right to terminate. Must continue with the contract but may sue for damages.	A choice of remedy depending upon the severity of the breach.

### CONDITION

#### Root of the contract

- Lies at the root of the contract and is so important that any breach entitles the innocent party to terminate further performance & claim for damages  
*L Schuler AG v Wickman Machine Tool Sales*

#### A thing of different substance

- Goes 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 of different substance from what was stipulated for  
*Bettini v Guy*

#### Would not have entered into the contract

- The promise is of such important that the promisee would not have entered into the contract unless they had been assured of a strict of substantial performance of the promise  
*Tramways Advertising v Luna Park*

### INTERMEDIATE TERM

A term which cannot be classified as either a condition or warranty, will be categorised depending on the severity of the breach. It is necessary to ask; is the term one which could be breached in both a minor AND major way?

*Hong Kong Fir Shipping v Kawasaki Kisen Kaisha*

- E.g. 'Promise of a vessel being in every way sea worthy' could be breached both majorly or minor.

## FACTORS RELEVANT TO CLASSIFICATION

1. Objective test determining intention	<i>Heilbut Symond &amp; Co v Buckleton</i>
2. Designation by the parties (e.g. 'time is of the essence' or 'any breach will give right to terminate')	<i>Shevill v Builders Licensing Board</i>
3. Previous judicial decisions on a similar term	<i>Maredelanto v Bergbau-Handel</i>
4. Need for certainty rather than waiting to assess gravity of any breach	<i>Bunge Corporation v Tradax Export SA</i>
5. Language (e.g. 'we guarantee')	<i>Tramways Advertising v Luna Park</i>
6. Context of the term within the contract as a whole (e.g. where other terms have been given an express right to terminate, it would suggest term in question is not a condition):	<i>DTR Nominees v Mona Homes</i>
7. Whether damages are an adequate remedy	<i>Associated Newspapers v Bancks</i>