ANSWERS - SELF TEST - TERMS AND BREACH OF CONTRACT

1. What distinguishes a pre-contractual statement that is a term from a pre-contractual statement that is only a mere representation? (2)
A pre-contractual statement will be a term if the statement maker was promising or guaranteeing the truth of that statement. *(1)* A pre-contractual statement will be a mere representation if, although there was no promise as to truth it is nevertheless a statement which induced the making of the contract *(1).* (A statement can, of course, be both - i.e. induce the making of the contract and amount to a promise that the statement is true).

2. What is the basic test for determining if a pre-contractual statement is a contractual term or mere representation? (1)
The intention of the parties as objectively ascertained, i.e. was the intention that the statement maker was making a binding promise as to the truth of his statement? If so, it is a term. *(1)*

3. What differences exist where the statement is a term and where it is a representation in terms of the remedy of damages? (3)
(a) Damages as of right (breach of term); on proof of fault i.e. fraud or negligence (misrepresentation). *(1)*
(b) Breach of contract = contractual measure of damages, whereas misrepresentation = tortious measure of damages. *(1)*
(c) Remoteness rule is different. Breach of contract - recover for losses within the reasonable contemplation of both parties when they made the contract as probable result of its breach. Remoteness test for fraud or negligent misrepresentation (s.2(1) MA 1967) = all direct loss regardless of foreseeability. *(1)*

4. What is the effect of signature to a written document? (1)
Bound by the terms that the written document contains (L'Estrange v Graucob) unless signature obtained as a result of fraud or misrepresentation *(1). This is subject to legislative regulation of these terms, e.g. UCTA 1977 and UTCCR 1999.*

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5. Explain the methods used by the Court of Appeal in *J. Evans v Andrea Merzario* to avoid the operation of the parol evidence rule. (2)

The parol evidence rule applies to written contracts and rules out evidence of other terms. However, the rule only applies to *written* contracts and the majority of the CA in Evans v Andrea Merzario (Roskill and Geoffrey Lane LJJ) held that the contract was not entirely written – but partly written and partly oral, i.e. they considered that the oral statement was a term *(1)*. The other member of the Court of Appeal (Lord Denning) reached the same conclusion by means of a finding that the oral assurance constituted a collateral contract (the consideration for which was the entering into of the main written contract). Parol evidence rule did not apply to this separate oral contract (whose terms overrode the inconsistent provisions of the written agreement) *(1).*

6. How may a party seek to ensure that he gives reasonable notice of written terms that (s)he seeks to include in an oral contract? (3)

(a) Reasonable steps to bring existence of clause to notice of people in general *(1).* Must be visible.

(b) In contractual document. *(1)*

(c) In time, i.e. before or at the time that the contract was made. *(1)*

7. What did Lord Denning say in *Thornton v Shoe Lane Parking* about the process of contract formation in

(a) ticket cases (2)

(b) contracts involving automatic machines (2)?

(a) Ticket cases. (i) Offer = issue of ticket *(1)* (ii) Acceptance occurs when customer takes the ticket and retains it without objection. *(1)* Incorporation occurs in time and the ticket terms are incorporated.

(b) Automatic machines. (i) Offer = made by machine *(1)* (ii) Acceptance = putting money in slot or activating the machine. *(1)* Therefore any terms on the ticket or goods dispensed by the machine are not incorporated because they are too late.

8. Distinguish between terms implied in fact and terms implied in law. (4)

(a) *Terms implied in law*

(i) as a "necessary" incident of that type of contract i.e. "necessary" because of the subject matter of this type of contract. *(1) Note that what is "necessary" in this*

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context is determined by considerations of reasonableness, fairness and policy – Crossley v Faithful & Gould Holdings Ltd.
(ii) implied into all contracts of that particular type as matter of policy. *(1)*

(b) *Terms implied in fact*
(i) implied because strictly necessary either in order to give business efficacy to that particular contract *(1)* and/or
(ii) to give effect to the obvious intentions of both parties. *(1)*

9. Distinguish strict contractual obligations and qualified contractual obligations and give an example of each. (4)
(a) Strict contractual obligations
(i) Are absolute and must be properly and precisely performed or the party owing that obligation will be in breach. No excuse (subject only to de minimis). *(1)*
(ii) Examples are most provisions of the sale and supply legislation e.g. s.12(1) SGA 1979 or delivery obligation. *(1)*
(b) Qualified Contractual obligations
(i) Duty is to take reasonable care and exercise reasonable skill. No obligation to achieve a particular result and only need to perform to this qualified standard. *(1)*
(ii) Examples = Liverpool C.C. v Irwin or s.13 SGSA 1982 (contract for supply of service - carry out service with reasonable care and skill) *(1).*

10. What are the legal consequences of a breach of contract? (2)
(a) Damages as of right *(1)*
(b) But contract remains in existence and both must perform future obligations unless is a repudiatory breach of contract. If it is a repudiatory breach, then injured party has the option of terminating the contract (i.e. both parties' future obligations under the contract) or affirming, in addition to claiming damages*(1)*. See additionally position of consumer buyers under legislation, discussed in Q13.

11. What constitutes a repudiatory breach of contract? (2)
(a) Breach of a condition *(1)*
(b) Breach of a non-condition (you may use innominate term here if you wish) and the effects of the breach are so serious that they deprive the injured party of

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substantially the whole benefit which it was intended he should obtain under the contract. (i.e. HKF test is satisfied). *(1)*
You may ALSO have mentioned renunciation and/or incapacitation.

12. Is a term a condition where the parties classify it as such? (2)
No, not necessarily. It depends upon the nature of that term in relation to the contract as a whole. *(1)* (Schuler v Wickman). *(1)*

13. What is the significance of s.15A Sale of Goods Act 1979 (as inserted by the Sale and Supply of Goods Act 1994)? (2)
S.15A SGA 1979 modifies the normal remedy in the case of breaches of ss.13-15 "conditions" *(1)* so that although statute classifies these terms as conditions, where

(a) the actual breach is so slight that it would be unreasonable for the buyer to reject (terminate); and

(b) the buyer is not dealing as a consumer *(1)*,

only the remedy of damages may be available.

Note also s.48A-F of the SGA 1979 (as amended by the Sale and Supply of Goods to Consumers Regulations 2002) allowing consumer buyers to have additional options in some circumstances in the event that goods delivered do not conform to the contract of sale either on delivery or within six months of delivery. In other words, a consumer buyer's remedies for breaches of express terms or implied terms under ss.13-15, are not limited to termination but could alternatively extend to the right to require the seller to repair or replace or to reduce the purchase price. Similar changes are made to the SGSA 1982 and to the Supply of Goods (Implied Terms) Act 1973 re hire purchase contracts.

14. What are the advantages and disadvantages of using the effects of the breach test to determine the right to terminate the contract? (3)
Advantage: Flexibility and prevents injured party using a minor breach of "condition" to allow him to escape from a bad bargain. (Weir refers to this as "repressing sharp practice"). Instead, the right to terminate will depend upon the consequences of the particular breach. *(1)*
Disadvantages:
(i) Causes uncertainty (promotes inefficiency) *(1)*

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(ii) Risk to injured party if he makes the wrong decision about the breach being repudiatory and it is later decided that it is not repudiatory. Injured party will be in wrongful repudiation and will be liable accordingly although the original breach was by the guilty party. Therefore, Weir argues that this approach "rewards incompetence" (by the guilty party). *(1)*

15. What is the case authority for the fact that if the innocent party chooses to affirm the contract following an anticipatory repudiatory breach, he can continue to perform the contract and claim the contract price? (2)

White & Carter (Councils) Ltd v McGregor HL 3:2 *(2)*

16. What are the limitations on the availability of the principle mentioned in question 15? (3)

Lord Reid's *(1)* limitations

(a) Innocent party must be able to continue with his performance without the co-operation (active or passive) of the guilty party (Hounslow LBC v Twickenham Garden Developments), at least where the performance obligation is entire (Ministry of Sound (Ireland) Ltd v World Online Ltd), i.e. there is no obligation to payment without that performance *(1);* and

(b) Innocent party must have a legitimate interest (financial or otherwise) in performing the contract rather than claiming damages (Ocean Marine Navigation v Koch Carbon, The Dynamic). *(1)*

The second limitation is a limitation on the innocent party's right to affirm following an anticipatory repudiatory breach whereas the first limitation relates to the ability to be able to claim the contract price.

Points scored [maximum of 40] =

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