Concentrate Questions and Answers Contract Law: Law Q&A Revision and Study Guide (3rd edn)

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p. 56

4. Terms of the Contract

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Abstract

The *Concentrate Questions and Answers* series offers the best preparation for tackling exam questions. Each book includes typical questions, answer plans and suggested answers, author commentary, and other features. This chapter explores the terms of the contract. It contains questions and answers concerning express and implied terms, how terms are to be identified, and how they are to be classified in order to determine what consequences flow from their breach. The chapter also considers two key debates: the basis on which the courts imply terms into contracts, and whether the courts approach the classification of terms highlights a tension in the law between certainty and justice.

Keywords: contract terms, express terms, implied terms, conditions, warranties, innominate terms, interpretation

Are you ready?

In order to attempt the questions in this chapter you must have covered the following areas in your revision:

- Express terms and how to distinguish such terms from mere representations;
- The rules relating to the interpretation of contractual terms;
- The implication of terms into a contract and the different bases for implication; that is, terms implied in fact, terms implied in law and terms implied by custom;

- Terms implied by the **Sale of Goods Act 1979**, terms implied by the **Supply of Goods and Services Act 1982,** and an understanding of the ambit of the **Consumer Rights Act 2015**;
- The classification of contractual terms into conditions, warranties, and/or innominate terms.

Key debates

Debate: on what basis do the courts imply terms into contracts?

Terms implied in fact by the courts are based upon the intention of the parties, whereas terms implied in law by the courts appear to be based on policy reasons. Both processes give rise to issues of clarity and certainty.

Debate: how courts approach the classification of terms highlights a tension in the law between certainty and justice.

The traditional classification of terms as either conditions or warranties concentrates on the nature of the term as determining the available remedies for breach. This arguably promotes certainty although it is not always easy to decide whether a particular term is a condition or a warranty. One possible drawback of such an approach is that it may allow the non-breaching party to terminate a contract for a trivial breach of a condition. By contrast, if a term is classified as an innominate term, then the courts focus on the seriousness of the breach to determine the remedy. Thus 'justice' may be achieved but certainty is sacrificed. What factors should a court take into account in classifying a term?

p. 57

Question 1

It is illogical and unjust for the law to classify contractual obligations as either conditions or warranties at the time of contract formation as this prevents the remedies for a breach of contract from properly reflecting the actual consequences of that breach.

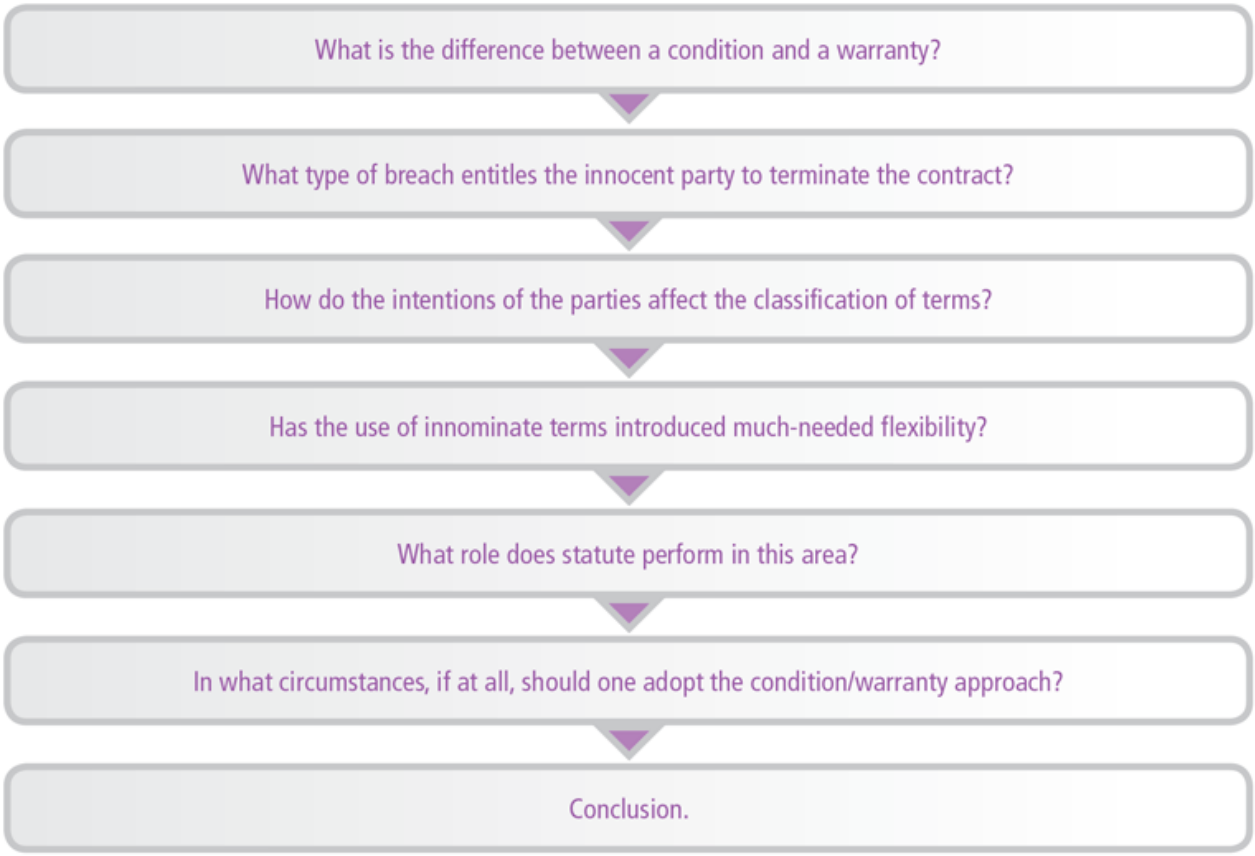
Discuss.

Caution!

■ This essay question requires a *critical* examination of conditions and warranties, the consequences of their breach, and the development of the innominate term. In particular, you must be able to make a close analysis of the leading cases and display a critical awareness of the problems which have shaped the new developments in the law.

■ An appraisal should be undertaken of the relative merits of orthodox conditions/warranties dichotomy as compared with an approach which includes innominate terms.

Diagram answer plan



p. 58

Suggested answer

The promissory obligations of a contract are contained in its terms, and are traditionally classified as either conditions or warranties.[1] Broadly conditions are the important and fundamental obligations, whereas warranties are less important, subsidiary promises. In the nineteenth century, 'warranty' was often used by the judges to encompass all contract terms and the strict, twofold demarcation is relatively recent, having been originally expedited by a definition of these phrases in the **Sale of Goods Act 1893**. Importantly, a breach of condition allows the innocent party to terminate and/or claim damages whereas a breach of warranty allows only a claim in damages. The overriding notion of freedom of contract means that the court assesses the parties' intentions in order to decide whether a particular statement or clause is a condition or a warranty. Alternatively, statute may dictate that certain implied terms are conditions (eg the **Sale of Goods Act 1979 (SGA 1979), ss. 12–15**, although this terminology is singularly absent in the **Consumer Rights Act 2015 (CRA 2015)** which, instead, provides a menu of remedies for particular breaches of the provisions therein). The distinction is a crucial one as the right to terminate is of such importance and an opportunistic party may use a breach of condition as a way of enabling evasion of contractual obligations with the concomitant opportunity of entering into a more profitable contract with a third party. It is vital to establish how the two types of term are distinguished and whether the courts will always pay paramount attention to the parties' intentions.

[1] The opening paragraph explains the traditional classification of conditions and warranties and indicates any potential injustice that may arise from such classification.

The orthodox theory is that conditions and warranties are identifiable at the date the contract was formed. This approach has two peculiarities.[2] First, it is based upon the assumption that there is some essential substance which defines these obligations in the abstract and, secondly, it takes no account of the seriousness of the breach and its consequences. It is arguable that the only reason which should justify one party's termination of the contract is a breach by the other party which goes to the root of the contract, meaning that further performance is futile. Nevertheless, many undertakings have become definitive conditions by virtue of commercial usage, the operation of the doctrine of precedent and some statutory implied terms which are expressly declared to be conditions. In ***Arcos Ltd v EA Ronaasen & Son* [1933] AC 470**, the contract was to sell wooden staves of half an inch thickness for making cement barrels. Only a small percentage conformed to the specification but the remainder were nearly all less than nine-sixteenths of an inch thick. Although this made no

p. 59

↵ difference to the manufacture of cement barrels (ie the goods were merchantable and fit for their purpose), it was held that the buyer was entitled to reject the entire consignment for breach of the implied condition of description in **s. 13 of the Sale of Goods Act 1893** (now **1979**), even though there was evidence that the motive for the buyer's rejection was that the market price of timber had

fallen. A similar conclusion was reached regarding a breach of condition occasioning no loss in ***Re Moore & Co. and Landauer & Co.*** **[1921] 2 KB 519**, where Scrutton LJ pointed out that the breach *might* have had drastic consequences. With respect, such a hypothesis did nothing to justify the repudiation where there was no loss on the facts. This tunnel vision has little to commend it and developments in recent years are arguably preferable.[3]

[2] This paragraph starts by making a point about conditions and warranties and then uses case law and statute as evidence.

[3] The paragraph analyses the evidence in relation to the question, concluding that the classification may give rise to injustice. Interestingly ***Arcos*** was recently applied in ***Local Boy'z Ltd v Malu NV*** **[2021] EWHC 2439 (Comm)**.

First, where the contract labels its terms as conditions or warranties the court must attempt to implement the parties' intentions, but it is clear that the form of the contract should not be allowed to dictate its substance or injustice may follow.[4] ***Schuler (L) AG v Wickman Machine Tool Sales Ltd*** **[1974] AC 235** concerned a 'condition' in a four-and-a-half-year distributorship agreement that the distributor, Wickman, should visit six named customers once a week to solicit orders. This entailed an approximate total of 1,400 visits during the subsistence of the contract. Clause 11 of the contract provided that either party might terminate the contract if the other committed 'a material breach' of its obligations. The House of Lords refused to accept the contention that a single failure to make a visit should allow Schuler to terminate the entire contract, although Lord Wilberforce dissented.[5] Lord Reid said that the House was trying to discover intention as disclosed by the contract as a whole and while the use of 'condition' was a strong indication of intention, it was not conclusive. He considered that 'the fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result the more unlikely it is that the parties can have intended it.'

[4] The injustice of the condition/warranty classification is ameliorated by developments in the law. The first is the court's search for the intention of the parties.

[5] When using a case as evidence, note any lack of unanimity among the judges. ***Schuler*** highlights the tension in the law.

Secondly, the development of the innominate or intermediate term[6] arguably introduces a more logical flexibility to this area of law. In ***Hong Kong Fir Shipping Co. Ltd v Kawasaki Kisen Kaisha Ltd*** **[1962] 2 QB 26**, the Court of Appeal emphasized that the orthodox division of conditions and warranties could be rigid and inflexible in operation, meaning that a negligible breach of condition might allow repudiation while only damages would be available for a catastrophic breach of warranty. The condition that a ship should be seaworthy could thus be breached across a spectrum of possibilities from inconsequential inconveniences at one extreme to calamities involving

p. 60 ↵ substantial loss at the other. Diplock LJ held that such undertakings could not be categorized as conditions or warranties but that the legal consequences of the breach should 'depend upon the nature of the event to which the breach gives rise and … not … from a prior classification.'[7]

[6] Discussion of innominate terms is a key point in answering the question. Three paragraphs are devoted to an explanation and exploration of innominate terms.

[7] The flexibility inherent in the use of innominate terms is explained.

The ***Hong Kong*** reasoning has been endorsed in subsequent decisions. In ***Cehave NV v Bremer Handelsgesellschaft mbH, The Hansa Nord*** **[1976] QB 44**, the contract was for the sale of citrus pulp pellets for use in animal food. The contract price was £100,000, an express term being that the goods should be shipped 'in good condition'. The buyer sought to reject the goods for a relatively minor breach. In fact, the market in such goods had fallen dramatically at the delivery date and the buyer eventually bought the same goods from a third party for £30,000 *and* used the pellets for cattle food. The buyer argued that rejection was permissible under both the statutory implied condition of merchantability and the express condition relating to quality. The court held that the **Sale of Goods Act 1893** (now 1979) did not exhaustively define all obligations in a sale of goods contract as either conditions or warranties and that the express provision was an innominate term, breach of which, on the facts, did not permit rejection of the goods. The court assumed that merchantability was an immutable statutory condition but that, on the facts, the sellers were not in breach of that condition. The notion of the innominate term was similarly approved by the House of Lords in ***Reardon Smith Line Ltd v Yngvar Hansen-Tangen*** **[1976] 1 WLR 989** with Lord Wilberforce casting doubt upon the decisions in ***Arcos*** and ***Re Moore*** (although interestingly ***Arcos*** was recently applied in ***Local Boy'z Ltd v Malu NV[2021] EWHC 2439 (Comm)***). More recently in ***Ark Shipping Co LLC v Silverburn Shipping (IoM) Ltd (The Arctic)*** [2019] EWCA Civ 1161 the Court of Appeal, in the context of a charterparty, held that, unless it is clear that a term is intended to be a condition (or indeed a warranty), it would be treated as an innominate term if the consequences of breach could be trivial or very serious.

Although the innominate term is arguably an attractively logical proposition, there may nevertheless be instances where the necessity for commercial certainty and predictability demand that the parties should be able to classify a term of the contract at the time of its formation.[8] This is particularly so if there is no disparity of bargaining strength between them. Provisions relating to *time* are often crucial as are the precise descriptions of unascertained, future goods, such as a sale of commodities. In ***The Mihalis Angelos*** **[1971] 1 QB 164**, for example, a stipulation as to when a ship should be 'expected ready to load' under a charterparty was held to be a condition and, likewise, a notice of readiness to load in ***Bunge Corp. v Tradax Export SA*** **[1981] 1 WLR 711** (compare ***Universal Bulk Carriers Pte Ltd v Andre et Cie SA*** **[2001] EWCA Civ 588, [2001] 2 Lloyd's Rep 65**, ***Grand China Logistics Holding (Group) Co. Ltd v Spar Shipping AS*** **[2016] EWCA Civ 982** and ***DD Classics Ltd v Chen*** **[2022] 3 WLUK 476**).

p. 61

[8] The limits of innominate terms are noted and the tension in the law is once again highlighted.

Thirdly, **s. 15A of the SGA 1979**[9] provides that where a non-consumer buyer would have the right to reject goods by reason of a breach of any of the implied conditions in **ss. 13–15** but the breach is 'so slight that it would be unreasonable for him to reject [the goods]', the breach 'is not to be treated as a breach of condition but may be treated as a breach of warranty'. The principal target of **s. 15A** is thus the decision in ***Arcos Ltd v EA Ronaasen & Son***, referred to earlier (see also the **SGA 1979, s. 30(2A)**) although **s. 15A(2)** does allow the parties to exclude expressly the operation of **s. 15A**. (Note that the **CRA 2015** does not affect this analysis as the **CRA 2015** focuses exclusively on 'consumer' contracts, ie those between traders and consumers, leaving the **SGA 1979** in this respect to apply as between businesses.)

[9] An amendment to the **Sale of Goods Act 1979** has sought to address the arguable injustice seen in cases such as ***Arcos v Ronaasen.***

In conclusion,[10] there is still room to implement the definitive intentions of the parties expressed as conditions and warranties. Lord Wilberforce dissented vigorously in ***Schuler*** and would not assume 'contrary to the evidence, that both parties to this contract adopted a standard of easy-going tolerance rather than one of aggressive, insistent punctuality and efficiency'. Such tensions will always be present where freedom of contract meets policy-interventionism but combining innominate terms with the orthodox classification of conditions and warranties allows the courts to tread a middle path between rigid, and sometimes unjust, rules on one side, and indeterminate flexibility on the other.

[10] The overall conclusion addresses the tension in the law between certainty and the need to achieve a just result.

Looking for extra marks?

■ Ensure that you show your appreciation of the uncertainties in the classifications set out in the suggested answer for Question 1. For example, what constitutes a *serious* breach of an innominate term allowing termination of obligations under a contract?

■ In **s. 15A of the SGA 1979** the use of the words 'slight' and 'unreasonable' create uncertainties. A critical exploration of the section illuminates the tension in the law of promoting certainty or achieving justice.

Question 2

p. 62 ↵ The distinction between terms implied by the courts in fact and terms implied by the courts in law is clear, but the processes of implication are uncertain in operation.

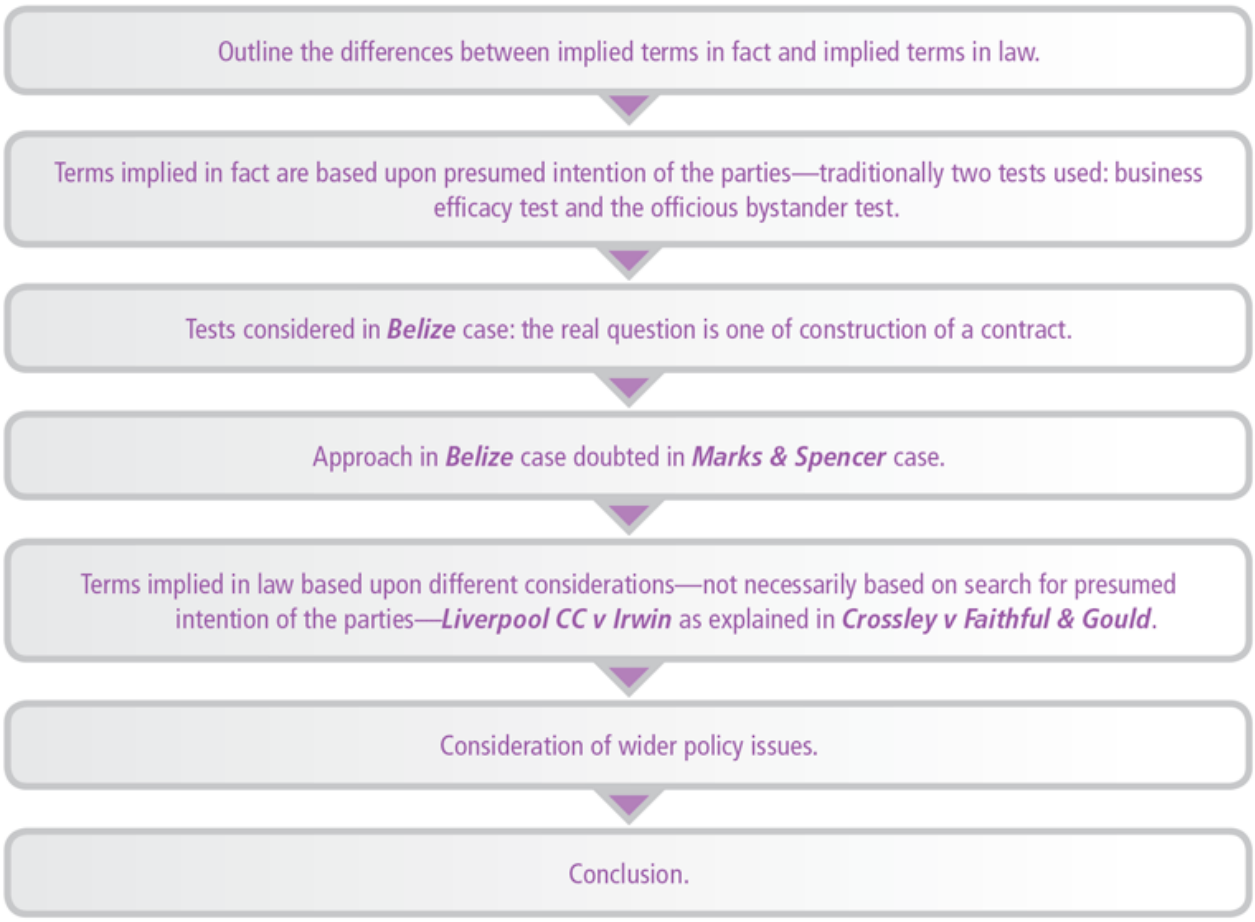
Discuss.

Caution!

■ This question focuses upon implied terms and the bases for implication. A clear structure based on PEA will help you organize the material you choose to use.

■ As the question is broad you will have to ensure you cover the points raised but may not have time to write in detail about all of the relevant case law.

Diagram answer plan



p. 63

Suggested answer

An important source of contractual terms is the process of implication whereby the law supplements those terms expressly agreed by the parties. Broadly, a court may imply a term as a matter of *fact* or as a matter of *law*. It is clear that the processes of implication *in fact*, which seeks to identify terms based upon the intention of the parties, and implication *in law*, which is based on wider considerations, are theoretically distinct.[1] The operation of the processes of implication raises questions of, first, how is the intention of the parties to be found and, secondly, what is meant by wider considerations?

[1] Note the question refers to terms implied by the courts. Terms may be implied by statute, eg the **Sale of Goods Act 1979** and the **Supply of Goods and Services Act 1982**. The question does not require a consideration of such terms.

Terms implied in fact are an attempt by the courts to give effect to the unexpressed common intentions (objectively assessed) of the parties.[2] Broadly in such circumstances the court is concluding that the parties have reached an agreement but have failed to fully state the terms of the agreement (objectively assessed). The courts, however, must not write/rewrite the contract for the parties—and certainly, the reasonableness of a term is not sufficient to permit implication (***Liverpool City Council v Irwin*** **[1977] AC 239**); the role of the courts is to give effect to that unexpressed intention, objectively assessed (***J N Hipwell & Son v Szurek*** **[2018] EWCA Civ 674**). Traditionally, the courts have employed two different tests that both seek to identify the intention of the parties: the business efficacy test and the officious bystander test.[3] The business efficacy test considers whether a contract needs a term to make the contract work as the parties would usually have included such a term had they thought about the issue: ***The Moorcock*** **(1889) 14 PD 64**. The officious bystander test requires the courts to consider whether a term is so obvious that it must have been intended by the parties to be a term of the contract, as its inclusion goes without saying. In ***Shirlaw v Southern Foundries (1926) Ltd*** **[1939] 2 KB 206** MacKinnon LJ said the test is if, while the parties are contracting, an officious bystander were to suggest an express provision for their agreement, they would 'testily suppress him with a common, "Oh, of course!"' The tests have the same purpose—that is, finding the intention of the parties—but reflect different ways of identifying that intention;[4] under the business efficacy test the term must be necessary to make the contract work as intended, whereas the officious bystander test focuses on the term being so obvious that there is no need for it to be expressed. The exact relationship of the tests was not always clear,[5] although Lord Simon in ***BP Refinery (Westernport) Pty Ltd v Shire of Hastings*** **(1977) 180 CLR 266** appeared to suggest that the tests were cumulative but overlapping. These tests were reviewed by the Privy Council in ***AG of Belize v Belize Telecom Ltd*** **[2009] UKPC 10**. Lord Hoffmann ↵ said that the implication of terms in fact was part of the process of construction of a contract.[6] His Lordship said that if 'some provision ought to be implied in an instrument, the question for the court is whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean' and viewed the traditional tests not as independent tests to be satisfied but different ways of 'expressing the central idea that implied terms must spell out what the contract actually means'. This analysis, of subsuming the process of implication within the process of interpretation of a contract, caused controversy among academic writers and some uncertainty in the courts; for example, see Arden LJ's comments in ***Stena Line Ltd v Merchant Navy Ratings Pension Fund Trustees Ltd*** **[2011] EWCA Civ 543**. Hooley (2014)[7] welcomed Lord Hoffmann's analysis but commented that the traditional tests existing alongside Lord Hoffmann's restatement of the law caused uncertainty and that further reference to the tests should be avoided. Lord Hoffmann's

p. 64

approach has now been considered by the Supreme Court in ***Marks & Spencer plc v BNP Paribas Services Trust Co. (Jersey) Ltd*** **[2015] UKSC 72**.[8] Lord Neuberger, giving the view of the majority, stated that while the express terms of a contract have to be interpreted before implication of terms may be considered, the processes of interpretation and implication are different. He limited the impact of Lord Hoffmann's approach by saying it should be viewed as 'inspired discussion' not as 'authoritative guidance on the law of implied terms'. His Lordship added that the law on the implication of terms remained unchanged following the ***Belize*** case and was based on the application of the tests of 'business necessity' and 'obviousness'. Some clarification was given to the relationship between the tests in that they are to be viewed as alternatives as only one needs to be satisfied for a term to be implied in fact (see also ***Wigan BC v Scullindale Global Ltd [2021]*** EWHC 779 (Ch) for a rare example of where only one of these tests was satisfied). Lord Carnwath was more favourable towards the ***Belize*** case, but accepted that the case did not relax the 'traditional, highly restrictive approach to implication of terms'. It is still a strict process requiring a proposed implied term to be necessary, not merely reasonable, and the evidence must suggest that both parties intended the same term and it must not be inconsistent with the express terms of the contract.

2 This is the point of discussion in the paragraph.

3 The point is then developed by explaining what tests have been employed to discover the intention of the parties.

4 As part of the evidence an explanation is needed of how the intention of the parties is to be determined.

5 The analysis links to the question.

6 The ***Belize*** case was significant and the uncertainties it created must be explored.

[7] Introducing a relevant academic comment not only evidences breadth of reading but adds to the analysis presented in an answer.

[8] The ***Marks & Spencer*** case now explains the impact of the ***Belize*** case and must be discussed. See also ***Yoo Design Services Ltd v Iliv Realty PTE Ltd*** [2021] EWCA Civ 560.

The process of implying terms *in law* is not based on a search for the intention of the parties (although the parties may seek to exclude the operation of such terms, subject to, for example, legislative controls) but on the courts identifying terms to be implied into contracts of a particular type:[9] for example, employment contracts, building contracts, and landlord and tenant contracts. The concern here is that the courts are deciding what should be terms of a contract, in effect writing the contract ↵ in part. The leading case on this process of implication is ***Liverpool CC v Irwin***. This case concerned responsibility for common areas in a block of flats in a contract between a local authority landlord and a tenant of a flat. The House of Lords implied a term into the contract that the landlord would take reasonable care to maintain the common areas of the block of flats in reasonable repair. The majority said the term was to be implied into contracts of that type as a matter of 'necessity', although it is to be noted that Lord Cross used 'reasonableness' as the basis for implication in law.[10] What the House of Lords did not articulate in ***Liverpool CC v Irwin*** was the ambit of necessity or the meaning of reasonableness (although there has been some oscillation in tests, see ***Agbeze v Barnet Enfield and Haringey Mental Health NHS Trust*** [2022] I.R.L.R. 115). Lord Bridge in ***Scally v Southern Health and Social Services Board*** **[1992] 1 AC 294** said that terms implied in law were based on 'wider considerations'. In ***Crossley v Faithful & Gould Holdings Ltd*** **[2004] EWCA Civ 293**, Dyson LJ said that the test of necessity was 'elusive' and 'protean', acknowledging the uncertainty of the test.[11] (It may be added that the use of 'necessary' in relation to terms implied in fact also creates some terminological confusion.) His Lordship then stated that rather than focusing on 'the elusive concept of necessity', it was better to recognize that in part 'the existence and scope of standardised implied terms raise questions of reasonableness, fairness and balancing competing policy considerations'. This acknowledges that the courts are looking at issues of policy in deciding whether a particular type of contract should be subject to a particular term. Peden (2001) suggests a number of policy considerations underpin this process of implication, such as which party is better able to bear the loss, the parties' bargaining positions, the size of the burden, and the effect on society. She further suggests that the courts are involved in a weighing process, but to maintain flexibility the list of policies is not exhaustive and the weight attaching to them is not fixed. An illustration of the impact of wider considerations may be seen in ***Crossley v Faithful & Gould Holdings Ltd***, where the Court of Appeal refused to imply a term in law that employers will take care for employee's economic well-

p. 65

being. Two reasons given for this decision were, first, the House of Lords had refused to imply such a broad term in ***Scally v Southern Health and Social Services Board*** and, secondly, such a term would create an 'unfair and unreasonable burden on employers'.

9 The answer considers the basis for the courts implying terms in law.

10 Pointing to differences in the reasoning of the judges further demonstrates that the process of implication is not without its problems.

11 More uncertainties are highlighted, again addressing the issue raised by the question.

A final point to consider is that while in ***Scally*** a term was implied in law requiring an employer to inform its employees of a valuable right within a contract (an amendment to the contract that had been agreed by an employer's representatives and trade unions on behalf of the employees) the decision was limited. The House of Lords said that the term was not to apply to employment contracts in general, but only in limited circumstances.[12]

12 This approach leads Phang (1993) to argue that the difference between the terms implied in law and terms implied in fact are becoming less distinct.

p. 66 ↵ In conclusion,[13] it can be seen that the courts are involved in two reasonably distinct processes, one is a search for the intention of the parties, terms implied in fact, and the other is a search for terms to be implied into all contracts of a particular type based on necessity and wider considerations, terms implied in law. Although some House of Lords authority perhaps suggests that the distinction is not wholly distinct in effect. While the basis of each process may be identified, the application of each gives rise to significant uncertainty. This is seen in the terminological problems, a lack of clarity in relation to the tests to determine the intention of the parties, and the failure of the courts to articulate clear grounds for terms to be implied in law.

13 The conclusion draws together the analysis and in summary links it to the question.

Looking for extra marks?

■ This question may be approached in a variety of ways. You could use specific cases to illustrate the points made in further depth at the expense of breadth.

■ There is a significant academic literature which may be used in answering Question 2. For example, Richard Hooley in 'Implied Terms After *Belize Telecom*' (2014) 73 CLJ 315 counters the point that Lord Hoffmann's approach in ***Belize*** creates uncertainty as it is stated at too high a level of abstraction to be useful, by arguing that the 'business efficacy' and 'officious bystander' tests are also beset by problems of certainty.

Question 3

Steven, an antiques dealer, advertises in an antiques journal that he has an aeroplane for sale. The advertisement appears on 1 March and reads:

A rare opportunity to acquire a special collectable item. A biplane which belonged to the early flying ace, Sir George Ditcher, has come on the market for the first time. Sir George was an early member of the Royal Flying Corps and was the person upon whom Wiggles, the fictional flying hero, was based. £85,000, or nearest offer.

Boris, the owner of a museum dedicated to items connected with the First World War, contacts Steven on 15 March to discuss the sale. Steven shows Boris a large collection of letters written by Sir George Ditcher which describe an aeroplane, of the same type as the one offered for sale, as 'my little buzz-bomb'. Steven also points out numerous letters written to Sir George Ditcher by the author of the Wiggles books. On 10 April, Boris agrees to buy the aeroplane for £85,000 and a brief written contract is entered into which makes no mention of Sir George Ditcher or Wiggles.

Boris displays the biplane at his museum describing it as 'previously owned by Sir George Ditcher, the real-life Wiggles'. It has now been established that, although he did fly it, the aeroplane never belonged to Sir George Ditcher and that there were ten other people who had as strong a claim as Sir George Ditcher to be the basis of the Wiggles character. Boris claims that Steven is in breach of contract.

Advise Boris.

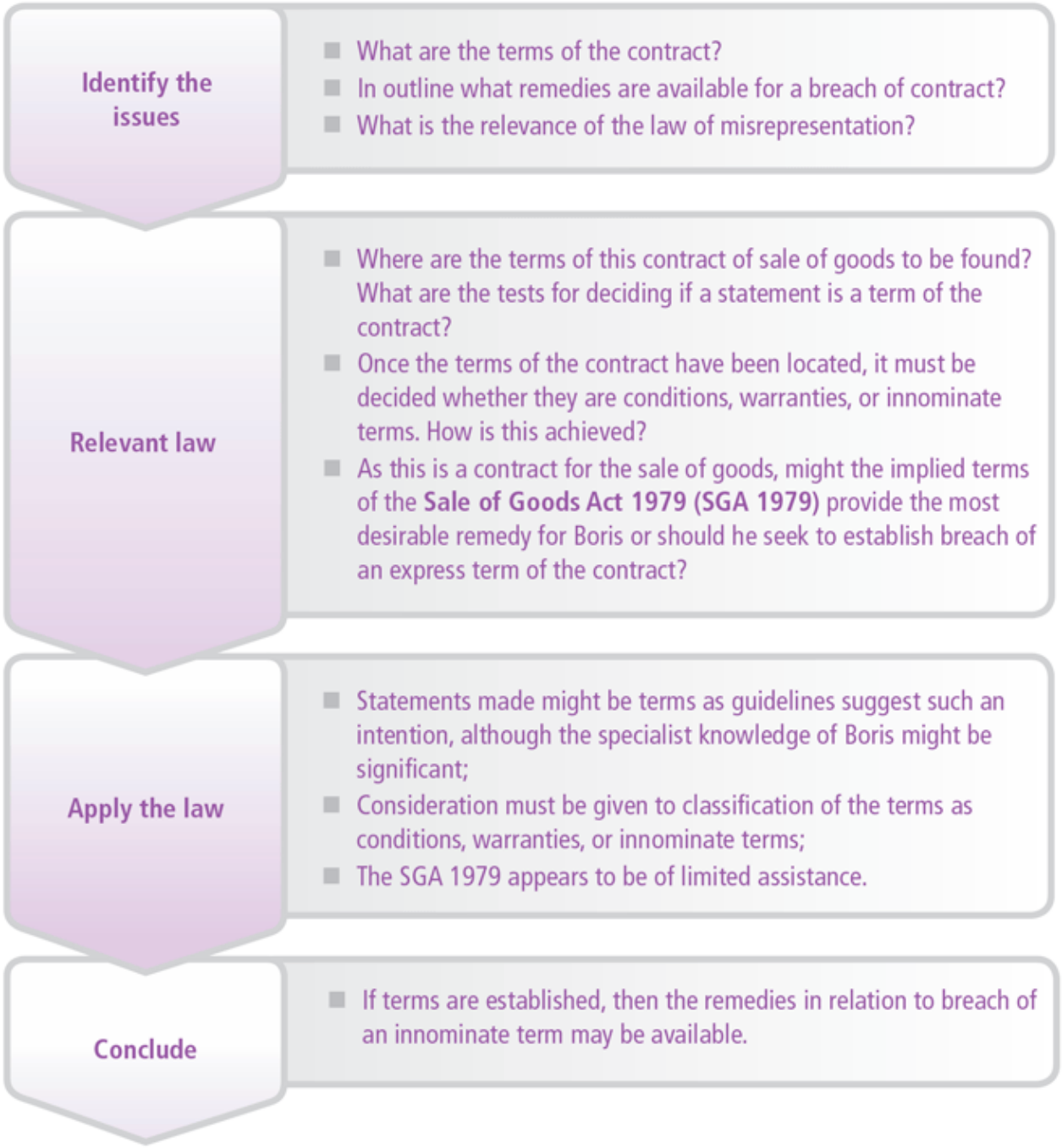
p. 67

Caution!

■ A clear structure is essential. Three broad questions should be answered. First, where is the contract to be found? Secondly, what are its terms? Thirdly, what remedies exist if the seller is in breach of a term of the contract? Use this chronological progression to ensure a logical and readable answer.

■ There is a large amount of material to include in an answer to this question and not all points can be given equal weight—for example, to provide context, reference should be made to misrepresentation but only briefly.

Diagram answer plan



p. 68

Suggested answer

This question concerns the terms of a contract and the remedies for breach of any such term.[1] Not all statements made in connection to a contract are contractual in nature; some may be mere representations and some may be commendatory 'puffs' which lack any legal value. A seller of goods must be able to praise them *within a certain latitude* without legal consequence but if his/her statements are untrue statements of fact which induce the buyer to enter into the contract, an action may lie in misrepresentation. If the parties have a contract, it is natural to think of contractual remedies first and misrepresentation second; and that was certainly the position prior to the **Misrepresentation Act 1967**.[2] However, **s. 2(1)** of that Act introduced potent remedies for (essentially) negligent misrepresentation and placed the burden of proof on the representor to show that there was not negligence. This is therefore an attractive remedy but there are still advantages in proving a term.[3] First, if the contract is in writing, a term may be easier to prove than a misrepresentation (although it seems that, in some circumstances, a particular statement can be *both* a term and a misrepresentation). Secondly, it is not an essential requirement that a proposed term *induced* the buyer, and, thirdly, although a statement constituting a term is usually one of fact, there is no requirement that it *must* be. Where is the contract between Steven and Boris to be found and what are its terms?

[1] The subject matter of the question is clearly identified in the opening sentence.

[2] Indicates that the same facts may give rise to different legal consequences, ie a statement made may be a term and/or a representation.

[3] Advantages of pursuing an action for breach of contract over one for misrepresentation are considered.

It was established in ***Heilbut, Symons & Co. v Buckleton*** **[1913] AC 30** that the *intention* of the parties is the key to determining whether or not a statement is a term of the contract.[4] Sometimes it is suggested that the key is the intent of the *maker of the statement* (did he/she warrant its truth and accuracy rather than merely expressing an opinion?) but this is criticizable in that it does not sufficiently accentuate the effect of the statement on the other party and his/her justifiable *reliance* upon it. More recent cases have tended to emphasize these factors and in ***Evans (J) & Son (Portsmouth)***

Ltd v Andrea Merzario Ltd **[1976] 1 WLR 1078**, Lord Denning, referring to ***Heilbut***, said that 'much of what was said in that case is entirely out of date'. Guidelines on determining the intention of the parties can be found in the relevant case law.

[4] How to determine whether a statement is a term or not is explained.

First, a lengthy interval between the making of the relevant statement (in the advertisement) and the conclusion of the contract *may* indicate that the statement does not have contractual force.[5] In ***Routledge v McKay*** **[1954] 1 WLR 615** an interval of one week between statement and contract was sufficient to deny any contractual intent to the statement. There it was the sale of a motorcycle but much depends on the facts, and if the contract and its subject matter are complicated, longer time may be allowed in order to verify statements. The interval of some five weeks between advertisement and contract is thus not necessarily fatal to Boris's claim.

p. 69

[5] This paragraph shows a clear application of IRAC, as do the following paragraphs.

Secondly, the courts are influenced in their decision by any special knowledge that the maker of the statement may possess.[6] It is presumed that an owner of goods knows their condition and consequent weight attaches to his/her statements (see ***Harling v Eddy*** **[1951] 2 KB 739**—owner of a heifer who 'absolutely guaranteed' her sound condition) but it is possible that Boris, as an expert on the First World War, knows more than Steven and should have verified the statements in the five weeks before contract. This reasoning was influential in the decision in ***Oscar Chess Ltd v Williams*** **[1957] 1 WLR 370**, where it was held that the statement of a car's age made by its owner (the defendant) was not a term of the contract as the plaintiff car dealer had specialist knowledge and could/should have verified the statement. This test may therefore militate against Boris.

[6] In searching for the intention of the parties note that a guideline may indicate an outcome which conflicts with the outcome of another guideline.

Thirdly, it is important to assess the overall importance of the statement in the light of the contract and its effect on the other party. Is the statement both crucial and pivotal in the contract's formation? In ***Schawel v Reade*** **[1913] 2 IR 64** and ***Bannerman v White*** **(1861) 10 CB (NS) 844** this test meant that the statements were terms. In ***Schawel*** the buyer stopped his examination of a horse when he was told that it was sound, and in ***Bannerman*** a buyer of hops asked whether they had been treated with sulphur, adding that he would not bother to ask the price if they had been so treated. Similarly, in ***Esso***

Petroleum Co. Ltd v Mardon **[1976] QB 801** the defendant's doubts as to the plaintiff's forecasted 'throughput' of petrol were quelled by the latter, and the statement was thus held to be a term. It is arguable that the provenance of the aeroplane is the dominant factor in this contract, as evidenced by the fact that it is displayed with its history at Boris's museum.

Finally, the presence of a written contract might indicate that the parties' intentions are crystallized therein. The parol evidence rule is surrounded by countless exceptions and it is quite possible to have a contract which is partly written and partly oral *if the parties so intend* (***Couchman v Hill*** **[1947] KB 554**—oral assurance dominated the written sale catalogue). Alternatively, the court might construe the statements regarding the aeroplane's history as a collateral contract, thereby avoiding the parol evidence rule. In ***Andrews v Hopkinson*** **[1957] 1 QB 229**, for example, the plaintiff had a primary contract with a finance company to take a car on hire purchase and a collateral contract with the defendant car dealer that it was 'a good little bus'. ↵ It is suggested that Boris may succeed in establishing a term but subject to the caveat that he is a specialist/expert buyer who did not provide for his requirements in a written contract.[7] As some prominent decisions show a distinct tendency to revert to nineteenth-century principles of laissez-faire (eg ***Photo Production Ltd v Securicor Transport Ltd*** **[1980] AC 827**), a court might thus castigate Boris's laxity.

p. 70

[7] The application of some of the guidelines may point towards an intention that the statement is a term. However, specialist knowledge points in the opposite direction.

If the statements are terms of the contract it must be decided whether they are conditions, warranties, or innominate terms.[8] A condition is a major stipulation which allows the innocent party to terminate and/or claim damages, whereas a warranty sounds only in damages. Again, the distinction between these two types of term depends upon the parties' intentions (objectively assessed) at the date of contract. As the statements are not in the written contract they cannot be *labelled* as either conditions or warranties, and the contract is not one of an established commercial type where precedent may suggest that certain undertakings are conditions. It may be that the court would consider the statements regarding the aeroplane to be innominate terms which means that, instead of a prior classification of contract terms, the effects of the breach will provide the necessary yardstick for the court's decision. In ***Reardon Smith Line Ltd v Yngvar Hansen-Tangen*** **[1976] 1 WLR 989**, for example, it was held that a different numbering of a ship (showing the yard where it was built) from the one specified in the contract was insufficient to allow rejection of the vessel when it was up to specification in every other respect. It is arguable that the statements regarding the aeroplane cause a serious breach which goes to the root of the obligation, thereby allowing Boris to repudiate the contract. On the facts of the problem, damages alone may not 'remedy' this breach.

[8] Once the terms of the contract have been established, the classification of the terms must be explored.

It is imperative that Boris attempts to establish an express term of the contract as it would appear that the implied terms of the **Sale of Goods Act 1979** will be of little avail.[9] The implied conditions in **s. 14** relating to satisfactory quality and fitness for purpose may not assist here; for example, in ***Harlingdon and Leinster Enterprises Ltd v Christopher Hull Fine Art Ltd*** **[1991] 1 QB 564**, a forged painting was held to be of 'merchantable quality' (the predecessor of 'satisfactory quality'). Moreover, **s. 13** relating to the description of the goods would seem to be ineffective on the facts of the problem. The reason for this is that, apart from commercial sales of future, unascertained goods where description is crucial, the courts have restricted **s. 13** to descriptive words which *identify the subject matter* of the contract. This involves a metaphysical distinction between the subject matter of the contract and its attributes but, as defective food was still held to be food in ***Ashington Piggeries Ltd v Christopher Hill Ltd*** **[1972] AC 441**, it seems indisputable that, although the aeroplane ↵ lacks many of the professed attributes, it is nevertheless an aeroplane, there being compliance with the essence of the bargain within **s. 13**.

p. 71

[9] This paragraph briefly explains that the identification of an express term is vital as statutorily implied terms may be inapplicable.

In conclusion,[10] while Boris may be able to pursue an action for misrepresentation, the focus of this advice, in accordance with Boris' explicit claim, is on a possible breach of contract. In order to be successful, he probably must establish that the statement made is an express term of the contract, any statutorily implied terms seem of little assistance on the facts. The guidelines to establish the intention of the parties on this point, as discussed earlier, may point to a term. The term established may be innominate, and given that the breach of the term by Steven is serious, Boris may repudiate the contract and claim damages.

[10] A general conclusion then pulls together the arguments completing the analysis of the question.

Looking for extra marks?

■ A good student will show the examiner an overall knowledge of the area and be able to put the law in perspective when delineating the options available to the disgruntled buyer.

■ Ensure you cover the main points raised by the facts of the question; concentrate on analysing the facts stated. For example, there are a number of facts that invite discussion of the existence of a term, but little factual context for discussing the remedies available to Boris in great detail.

Taking things further

■ Courtney, W. and Carter, J.W., 'Implied Terms: What *Is* the Role of Construction?' (2014) 31 JCL 151.

Critically considers Lord Hoffmann's classification of factual implication, in ***Attorney General of Belize v Belize Telecom Ltd*** **[2009] UKPC 10***, as an exercise in the construction of the contract.*

■ Peden, E., 'Policy Concerns Behind Implication of Terms in Law' (2001) 117 LQR 459.

Explores the factors that the courts will take into account when deciding whether to imply terms in law.

■ Peel, E., 'Terms implied in fact' (2016) 132 LQR 531.

Explores recent developments in this area including ***Marks & Spencer plc v BNP Paribas Services Trust Co. (Jersey) Ltd*** **[2015] UKSC 72**.

■ Phang, A., 'Implied Terms in English Law—Some Recent Developments' [1993] JBL 242.

Reviews the distinction between implied terms in fact and in law in the light of recent case law, including ***Scally v Southern Health and Social Services Board*** **[1992] 1 AC 294**.

■ Phang, A., 'Implied Terms, Business Efficacy and the Officious Bystander—A Modern History' [1998] JBL 1.

Examines the development of the tests, the business efficacy test and officious bystander test, for implying terms in fact.

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