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

James Devenney

14. Mixed Topic Questions

James Devenney, Head of School and Professor of Transnational Commercial Law, School of Law, University of Reading, UK and Visiting Full Professor, UCD Sutherland School of Law, University College Dublin, Ireland

https://doi.org/10.1093/he/9780192865625.003.0014

Published in print: 13 October 2022

Published online: October 2022

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 introduces students to examination questions which contain overlapping topics. Clearly, if students identify all the relevant areas then they will have established a firm base from which a good answer can be developed. The chapter aims to illustrate how different topics may be contained within one question; the suggested answers offer an explanation of how such questions may be approached in a written answer.

Keywords: contract law, exam questions, exam techniques, sample questions, mixed questions, answer plans

Introduction

This chapter introduces you to examination questions with mixed topics. Key purposes of such questions include testing your ability to identify different topics contained within one question and your ability to manage responses to the different issues within the question. For example, a contract question might include aspects of mistake, undue influence, and misrepresentation or may contain all aspects of formation of contract; that is offer and acceptance, intention to create legal relations, and consideration. Clearly, if students identify all the relevant areas, then they will have established a firm base from which a good answer can be developed.

In answering mixed questions, it is important to identify and address the issues raised by the question. It may be that you will not have time to look at all of the issues in great depth and the explanation of relevant law may have to be brief. Where the weight of your answer should lie is for you to judge, in the light of the question asked.

Questions of this type are less common but entirely possible in first-year contract examinations. However, guidance may be gained from the seminar programme delivered and past examination papers from your university. As always, if in doubt consult your tutors.

Question 1

For the past five years Fastbuild Ltd, a company that specializes in the building of housing estates, has entered into one-year contracts with Bricklast Ltd for the supply of house bricks. Each of these contracts has been preceded by protracted negotiations in which new terms and conditions have been agreed between the parties. In the most recent set of negotiations, for a proposed contract in 2018, the parties had agreed on the type and quantity of bricks to be supplied, with the specified quantity easily exceeding Bricklast's expectations bearing in mind previous contracts. Fastbuild thereupon sends Bricklast a letter of intent which includes the following statement: ↵ 'As per negotiations we intend to contract with you, purchasing 2.5 million bricks (type agreed) for the year 2018 at a price to be confirmed.' Bricklast purchases additional machinery in order to manufacture the increased quantity of bricks and goes into immediate production.

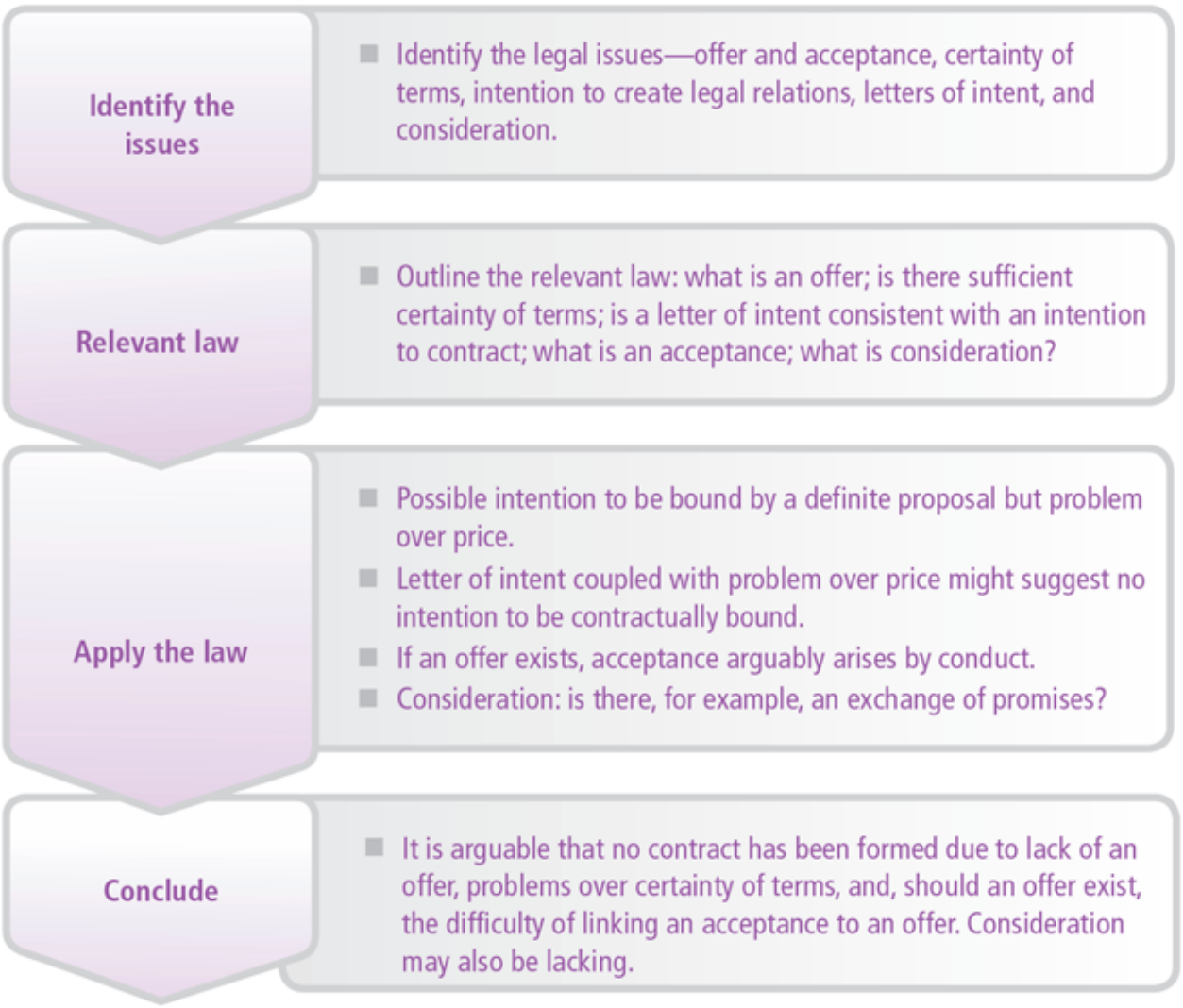
p. 216

Consider the legal position of the parties if negotiations between them break down and Fastbuild Ltd refuses to purchase any bricks from Bricklast Ltd.

Caution!

■ The question raises a number of issues, and you must ensure that you deal with all of them. It is a question of judgement how long you spend on each issue.

Diagram answer plan



p. 217

Suggested answer

This question deals with the formation of a contract and involves a discussion of offer and acceptance, certainty of terms, letters of intent, and consideration.[1]

[1] The question is generally about formation of contract and raises a number of specific issues. Each issue will be subsequently dealt with in turn.

First, does the letter of intent constitute an offer?[2] An offer has to be certain, be specific, and demonstrate an intention to be bound. Leaving aside the particular problems associated with letters of intent, Fastbuild Ltd's communication does contain specific terms (quantity and period of delivery), but two problems remain: use of the word 'intend' and omission of an agreed price. The word 'intend' imports some degree of reticence and might be referring merely to *future* intentions.[3] For example, in ***Clifton v Palumbo* [1944] 2 All ER 497** the claimant's statement that he was 'prepared to offer' was held to constitute a mere invitation to treat (see also ***Gibson v Manchester City Council* [1979] 1 All ER 972**). Equally, omission of an agreed price would detract from the letter's certainty although use of the word 'confirmed' might suggest possibly that the parties have already reached a definite agreement elsewhere.[4] Contrast the cases of ***Hillas & Co. Ltd v Arcos Ltd* (1932) 147 LT 503** and ***Scammell (G) and Nephew Ltd v Ouston* [1941] AC 251**, the first case showing that the omission of a price might not affect contractual validity if viewed in the light of the parties' previous course of dealing. It may be that ***Hillas & Co. Ltd v Arcos Ltd*** may be distinguished as in the present scenario the terms are negotiated each year and, if the terms do not establish a course of dealing which may be used to resolve uncertainties in the current agreement, then this may be fatal to the enforceability of the agreement. If the words used mean that no price has been agreed and are to be interpreted as an agreement to agree on a price in the future, then the courts may consider the 'agreement' to be too uncertain to be enforced, as in ***May and Butcher v R* [1934] 2 KB 17.** Note the general policy that courts will usually seek to implement rather than defeat the reasonable expectations of the parties, particularly where the parties have acted on an agreement (see ***Foley v Classique Coaches Ltd* [1934] 2 KB 1**). However, acting on an agreement by itself may not be enough to convince a court of the existence of a contract should the parties have failed to agree or disagree or left too many issues open; see, for example, ***British Steel Corp. v Cleveland Bridge and Engineering Co. Ltd* [1984] 1 All ER 504**. It might also be relevant to consider the impact of ***Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council* [1990] 1 WLR 1195** in that the clear intentions of the parties might override ↵ the technical requirements of offer and acceptance. Finally, lack of certainty[5] might be argued with reference to ***Walford v Miles* [1992] 2 AC 128**—even if the letter implies an undertaking not to contract with anyone else, this does not establish an enforceable, positive contract to negotiate in good faith as it is too uncertain.

p. 218

[2] The first issue concerns the existence of an offer and the related issues of certainty and the effect of a letter of intent.

[3] The focus of the inquiry into the existence of an offer initially must be on the words used in the communication.

[4] Having considered intention, the proposed terms and the question of certainty need to be explored.

[5] Many of the issues concerning the certainty of an offer would be equally applicable to the certainty of the final contract, assuming an offer and acceptance had actually taken place, eg ***Foley v Classique Coaches Ltd*** **[1934] 2 KB 1**.

As Fastbuild have characterized their communication as a 'letter of intent', what is the impact of the use of such words? Letters of intent,[6] as do letters of comfort, raise questions of contractual intention. The decision in ***Kleinwort Benson Ltd v Malaysia Mining Corp. Bhd*** **[1989] 1 WLR 379** shows that the courts have no preconceived notion as to the enforceability of letters of comfort. Rather, the enforceability of such letters will depend upon the precise wording used. In ***Kleinwort***, the words 'it is our policy' were not considered to be promissory in nature and not contractual. On the present facts, the word 'intend' might be considered to import an unacceptable degree of uncertainty, although contrast this with the decision in ***Wilson Smithett & Cape (Sugar) Ltd v Bangladesh Sugar and Food Industries Corp.*** **[1986] 1 Lloyd's Rep 378**, where the court construed a letter of intent as an acceptance of an offer made by the claimant. The effect of a letter of intent is part a matter of construction of the document and part legal analysis. If a communication is labelled as a 'letter of intent' a court may find it to have the attributes of an offer or an acceptance or indeed of neither. In the final analysis are the words used, and any conduct, consistent with an intention to be bound or do the words negative an intention to contract? The absence of a clear intention to be bound coupled with the uncertainty over price suggest a lack of contractual intention.

[6] This paragraph deals with the impact of the words 'letter of intent'. Does the use of these words negative any intention to contract?

Secondly, if an offer has been made, has there been an acceptance? Acceptance can take many forms: written, spoken, or through conduct. Although there is no suggestion that Bricklast has responded formally to Fastbuild's letter, there is clear evidence of reliance. At first glance, ***Brogden v Metropolitan Railway Co.*** **(1877) 2 App Cas 666** seems applicable but in that case *both* parties acted on the strength of the new agreement (see also ***Wettern Electric Ltd v Welsh Development Agency*** **[1983] QB 796**). This is important as, in general, acceptance is ineffective until it has been communicated[7] (see ***Powell v Lee*** **(1908) 99 LT 284**). Thus, no contract will have come into existence unless Bricklast can argue that starting work constitutes acceptance of an offer and thus creates a contract.[8] In ***RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH*** **[2010] UKSC 14** the Supreme Court held that even though the

p. 219

parties had not, as anticipated, executed a formal contract, they had agreed terms which were essential to being legally bound and, when coupled with significant performance, there was a contract. However, in ***British Steel***, which concerned the twin impact of an existing letter of intent and reliance by the recipient that a contract would be finalized, the court refused to find the existence of a contract as the action of commencing work could not be seen as acceptance of the claimant's offer, as the defendant had made plain that the claimant's terms were unacceptable. An alternative approach would be to consider cases where courts have been prepared to adapt, if not modify, the orthodox rules of offer and acceptance (eg ***Blackpool*** and ***Kleinwort***, mentioned earlier; and ***Evans (J) & Son (Portsmouth) Ltd v Andrea Merzario*** **[1976] 1 WLR 1078**). Naturally, it would help if the parties during their negotiations had set up independent machinery (eg arbitration) to determine the meaning of uncertain terms (see ***Sudbrook Trading Estate Ltd v Eggleton*** **[1983] 1 AC 444**).

7 The problem of acceptance is explored, highlighting the absence of communication.

8 The problems in seeking to argue that acceptance has occurred are considered.

Finally, even if a court is prepared to find an offer that has been accepted, is there consideration for this agreement?[9] To make a promise binding, the law requires that an act, forbearance, or promise be given in exchange. Without consideration a promise will not be enforceable. Briefly, if there has been no exchange of promises, a court would find great difficulty in identifying valid consideration (see ***Combe v Combe*** **[1951] 2 KB 215**). In conclusion,[10] it would seem that it is difficult to argue for the existence of an offer given the language used by Fastbuild. Moreover, the lack of a price creates uncertainty if interpreted as requiring further agreement by the parties. The presence of the words 'letter of intent' may not be fatal to an enforceable agreement if they do not negative an intention to contract. But, once again, an argument must be made for the existence of an offer; that is, on the facts, is there is an intention to be bound by a definite set of certain terms? Should an offer exist, then it has to be established that there has been an acceptance. Generally, communication of acceptance is required but, should the offer be one of a unilateral nature, then conduct of itself may constitute acceptance. While there is commencement of brick manufacture it is unclear whether this may be linked to an offer. Finally, has consideration been given by Bricklast for any promise of Fastbuild's? An exchange of promises may be required, as usually reliance, in itself, would not be sufficient to make a promise binding.

9 Consideration is based on an exchange.

[10] The answer ends with a general conclusion on the issues raised by the question.

Looking for extra marks?

■ The interplay between the law relating to offer and acceptance, certainty of terms, and contractual intention could be emphasized, explaining the overlap in the operation of these rules. Further, the relationship between an intention to contract and an intention to create legal relations could be explored, see ***Baird Textile Holdings Ltd v Marks & Spencer*** **[2001] EWCA CIV 274**.

p. 220

Question 2

Financial Systems Ltd (FSL) is experiencing intermittent interruptions to its gas supplies and therefore requests a quote from Solheat & Co. (S) for the installation of a new solar-powered heating system that will avoid reliance on outside energy suppliers. The sales representative of S delivers the quote to FSL and adds the following comments: 'This system is a world-beater. It achieves the highest "Ecology Rating", based on research by government environmental agencies. Moreover, I guarantee that you will recover the initial installation costs within five years.' FSL is impressed by these comments.

Two days later FSL signs a contract with S regarding the installation of the new heating system. The contract does not incorporate any guarantee of cost recoupment, nor any reference to the system's ecology rating.

The solar-powered heating system is installed into FSL's offices, with the parties agreeing that the system conforms to the specifications contained within the contract. Two months later FSL discovers that the new heating system had lost its government-approved 'ecology rating' because of superior products coming on to the market, while a recently published report confirms previous research that the start-up costs of solar-powered heating systems can never be recovered by purchasers. FSL demands the removal of the new heating system, a full refund of the original contract price, and the repair of all office walls and partitions caused by the original installation of the new heating system. S refuses to comply with any of these requests.

Advise FSL.

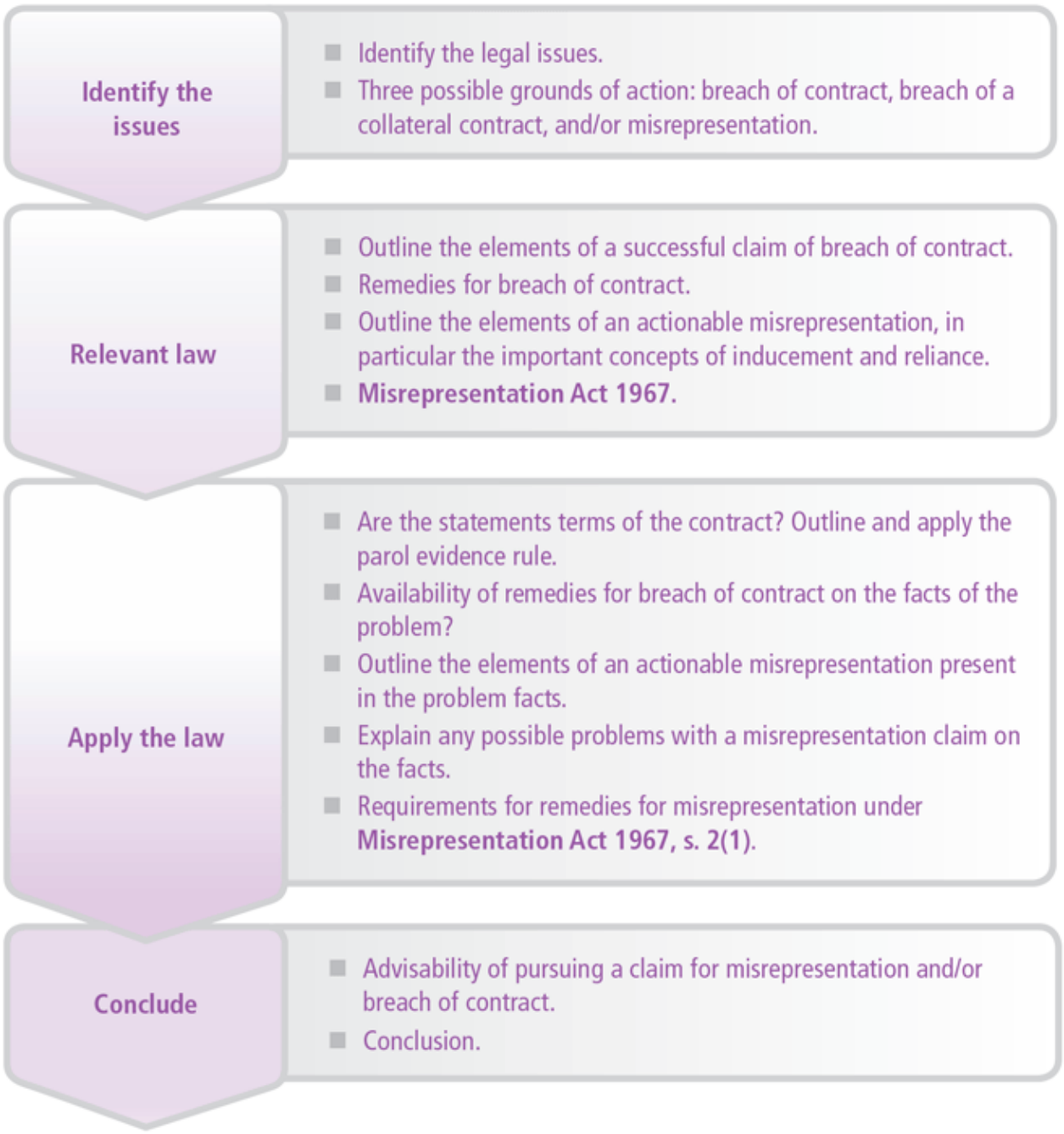
Caution!

■ You have to think carefully about this type of ‘mixed’ question and how much depth is required in answering each part.

■ The problem broadly relates to contractual terms and representations, and you will see that the suggested answer refers to terms, parol evidence, classification of terms, assessment of damages, misrepresentation, and remedies for misrepresentation.

p. 221

Diagram answer plan



Suggested answer

FSL may consider pursuing an action for breach of contract and/or misrepresentation.[1]

[1] Identify the areas of law raised by the question. Here you see that it covers different areas, each of which should be addressed in your answer.

Breach of Contract

Here FSL must prove that any relevant pre-contractual statements made by S's sales representative were terms of the contract as opposed to merely representations.[2] This requires ascertaining the parties' objective intention, helped by considering certain questions (***Heilbut, Symons & Co. v Buckleton* [1913] AC 30**). First, is there a substantial lapse of time between the oral statement and the writing? ↵ If the period is short—two days here—the court is more likely to consider the oral statement to be a term (eg ***Routledge v McKay* [1954] 1 WLR 615** in which a period of seven days was crucial); however, other relevant factors, such as the nature of the goods sold, and the surrounding factual matrix, mean that this is not definitive. Secondly, if the sales representative possesses expert knowledge, more weight will attach to his/her statements (see ***Harling v Eddy* [1951] 2 KB 739**). This should not be too difficult to establish on these facts.[3] Thirdly, does FSL rely on the relevant statements? ***Schawel v Reade* [1913] 2 IR 81** demonstrates that a statement may have contractual effect if it was clearly of importance to the other party and was a dominating factor in the contract's formation. The facts suggest this to be the case. Finally, if there is evidence that FSL was asked to verify the statement, this would seriously undermine the statement being a term (see ***Ecay v Godfrey* (1974) 80 Ll LR 286**; ***Leaf v International Galleries* [1950] 2 KB 86**).

p. 222

[2] The first question to consider is whether FSL has a remedy in breach of contract. Set out the relevant rule(s) in your answer.

[3] Remember to apply the law to the specific question throughout your answer.

This analysis would suggest that statements made by S's sales representative should be treated as terms of the contract. If so, the parol evidence rule, and the type of remedy available for any breach must be addressed. The parol evidence rule states that extrinsic evidence may not be adduced to add to, vary, or contradict writing. There is a strong presumption that if the parties have committed their agreement to an all-embracing written contract, it must represent their finalized intent. Here there does not seem to be any evidence that the parties were intending to contract on terms that were partly written and partly oral (see ***Allen v Pink* (1838) 4 M & W 140**), so S might be able to rely on the parol evidence rule to avoid any oral statements being incorporated into the contract.[4]

[4] For extra marks you could suggest that FSL may then try to establish a collateral contract.

If the statements made by the sales representative were terms of the contract, FSL is potentially entitled to repudiate the contract and claim damages. However, it may be that a court would not permit FSL to repudiate the contract when the new heating system has already been installed for a period of time and the old one has been removed (and possibly disposed of). Consequently, if the award of damages was the most likely outcome, the standard common law rules of measure, remoteness, and mitigation should be applied.

Misrepresentation

FSL's alternative possible cause of action is misrepresentation. Broadly, a misrepresentation is a false statement of fact/law made by the representor, which is intended to induce and, in fact, does induce the representee to enter into the contract.[5] S's representative made several statements, each of which must be analysed.

[5] Define the elements constituting the doctrine of misrepresentation.

p. 223 ↵ S could argue that the first statement (it is a 'world-beater') was too vague a statement or should be classed as an opinion (see ***Dimmock v Hallett* (1866) 2 Ch App 21**—the words 'fertile' and 'improvable' were considered too vague to constitute 'facts'). However, FSL could argue that any reasonable person would have assumed that the opinions of a specialist salesperson were based on some clear supporting evidence (see ***Smith v Land & House Property Corp.* (1884) 28 Ch D 7** where use of the word 'desirable' to describe a tenant who was habitually late in paying rent was considered to be a false statement of fact). ***Brown v Raphael* [1958] Ch 636** established that an opinion may be actionable as a misrepresentation where the representor is in a much stronger position to ascertain the facts than the representee, which is clearly relevant here.

The comment regarding the ecology rating appears to be an unequivocal, false statement of fact as the relevant government agency has withdrawn its top ecology rating for S's product. However, FSL must establish that it was a false statement of *existing* fact (ie that the ecology rating was withdrawn *before* FSL entered the contract). If the statement was correct when made, but incorrect at the time the contract was formed, S may have an obligation to inform FSL of this change of circumstances (eg ***With v O'Flanagan* [1936] Ch 575**), although if this information was only disclosed post-contractually no liability would arise.

The final statement (recoupment of costs) appears to be a definite misrepresentation: the language used, and intention conveyed seem obvious, a clear fact is mentioned, and S is in a superior position to know the truth (again, as in ***Smith v Land & House Property***). The timing of the research report, referred to in the facts, is immaterial as the statement remains false, irrespective of when publication took place (ie before or after the contract was made), although the date of its publication might be relevant to the type of misrepresentation made (eg innocent or fraudulent).

Assuming a false statement of fact has been identified, FSL must prove that it relied on that statement and was thereby induced to enter the contract. There is no evidence that FSL was given the opportunity to check the truth of the statements before a contract came into existence (eg ***Attwood v Small* (1838) 6 Cl & F 232**), nor would it be sufficient for S to argue that FSL could/ought to have known about previous research on cost recoupment, particularly as ***Redgrave v Hurd* (1881) 20 Ch D 1** established that the *opportunity* to discover untruths is irrelevant as constructive knowledge is insufficient to disprove reliance. So FSL only needs to prove that the comments of S's sales representative (particularly as to cost ↵ recoupment) were a factor in persuading FSL to enter the contract (see ***Edgington v Fitzmaurice* (1885) 29 Ch D 459**). This seems likely on the facts, as economy and ecology issues would likely be material to the purchaser of a solar heating system, meaning that FSL could claim misrepresentation.[6]

p. 224

[6] Continue to address each element of misrepresentation, applying the law to the facts in each case.

On this basis, what type of misrepresentation has occurred?[7] It is unlikely that FSL could establish a fraudulent misrepresentation unless there was proof that the sales representative intentionally misled FSL (see ***Le Lievre v Gould* (1893) 1 QB 491**; ***Derry v Peek* (1889) 14 App Cas 337**). In addition, as FSL could rely on the liability imposed by **s. 2(1) of the Misrepresentation Act 1967**, it would seem unnecessary for FSL to bring an action in deceit and/or for negligence at common law, under the principles of ***Hedley Byrne & Co. Ltd v Heller and Partners Ltd* [1964] AC 465**. In effect, **s. 2(1)** imposes liability for negligent misrepresentations and reverses the normal burden of proof: once the representee proves that there has been a misrepresentation, the burden shifts to the representor to show that he had 'reasonable grounds to believe and did believe up to the time the contract was made that the facts represented were true'. It is clear from ***Howard Marine and Dredging Co. Ltd v A Ogden & Sons (Excavations) Ltd* [1978] QB 574** that it is extremely difficult to discharge this burden: honest belief is insufficient as the representor must positively establish the reasonableness of his belief. Consequently, the question is whether S's representative *ought* to have known about the research on cost recoupment and/or the lost ecology rating, with the safest conclusion being that, if the information was publicly available before the contract was formed, it is unlikely that S will be able to discharge the burden under **s. 2(1)**.

[7] This is directly relevant to the remedies which might be available.

As FSL wishes to return the system and obtain a refund of the price, it would be seeking rescission of the contract. This seems unlikely on the facts.[8] FSL may not have affirmed the contract by continuing with its use for two months (compare ***Long v Lloyd* [1958] 1 WLR 753** with ***Leeds City Council v Barclays Bank Plc* [2021] EWHC 363 (Comm)** at **[165]**) but, more importantly, it seems impossible to restore the parties to their original position as it would arguably require FSL's old heating system to be reinstalled and connected, whilst the new system would have significantly depreciated in value through use.[9]

[8] This is a clear and concise explanation and application of the law.

[9] Although see ***Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1996] 4 All ER 769** and its explanation of the direct consequence test.

As regards damages, FSL will presumably pursue its claim under **s. 2(1)** of the 1967 Act (see earlier), so damages will be assessed in the tort of deceit. FSL will be entitled to reclaim all those damages
p. 225 ↵ which *directly* flow from its reliance upon the misrepresentation, such as the failure to recoup its losses within the stipulated time. Following ***East v Maurer* [1991] 2 QB 297**, damages may encompass lost opportunity costs, so this could cover the benefits that FSL would have obtained if it had purchased an alternative system capable of meeting the standards originally specified by FSL.

Looking for extra marks?

■ When considering whether FSL has a remedy in breach of contract, additional marks would be available for also reflecting on the prospects of FSL establishing a collateral contract.

■ On assessing the likely award of damages, the lost ecology rating (assuming it occurred pre-contractually), and the inability to recoup installation costs within five years are primary 'losses' suffered by FSL. Using the standard expectation measure (***Robinson v Harman* (1848) 1 Exch 850**), with the normal rules of remoteness (see ***Hadley v Baxendale* (1854) 9 Exch 341**), the court would need to identify the objective value attributable to the ecology rating, and the pecuniary loss sustained by failing to recoup initial installation costs within the prescribed period. Note also ***Transfield Shipping Inc. v Mercator Shipping Inc., The Achilleas* [2008] UKHL 48, [2008] 4 All ER 159.**

Related Books

View the Essential Cases in contract law

Related Links

Test yourself: Multiple choice questions with instant feedback *<https://learninglink.oup.com/access/content/poole-devenney-shaw-mellors-concentrate5e-student-resources/poole-devenney-shaw-mellors-concentrate5e-diagnostic-test>*

Find This Title

In the OUP print catalogue *<https://global.oup.com/academic/product/9780192865625>*