gymnastics seen in *Edgington* v *Fitzmaurice* (1885) and *Smith* v *Land and House Property Co* (1884) unnecessary.

Use of the tort remedy for inaccurate company securities advertisements

As regards actions against directors and experts in respect of statements in an advertisement for the sale of securities or in a prospectus, there is as we have seen a statutory claim under the Financial Services and Markets Act 2000 and under *Hedley Byrne* at common law. The claim against directors under *Hedley Byrne* is specifically preserved by the Financial Services and Markets Act 2000 in s 87(9). A claim under the Misrepresentation Act 1967 is against 'the other party to the contract', i.e. the company or issuing house, and not against directors or agents.

It will be recalled that in *Esso Petroleum Co Ltd* v *Mardon* (1976) (see above) the court held that it was too restrictive to limit the duty in *Hedley Byrne* to persons who carried on or who held themselves out as carrying on the *business* of giving information or advice. The acceptance of these views means that the duty can apply more widely and brings in company directors in terms that they could be liable on a personal basis for negligence.

In any case, it is a requirement as part of admission of the shares to a full Stock Exchange listing or AIM (Alternative Investment Market) listing that the advertisement or prospectus shall state that the directors have taken reasonable care to ensure that the facts stated in it are true and accurate, that there are no misleading omissions and that, accordingly, all the directors take responsibility for the prospectus.

In view of this statement, it is likely that a duty of care is owed only by the individuals involved in the making of the statements and not by the company as such. If this is so, no claim can be made against the company. This would accord with the general principle of capital maintenance inherent in the prospectus remedies, i.e. it is difficult to get one's money back from the company and easier to get compensation from directors or experts, leaving capital contributed with the company.

In view of this it would seem that an action for rescission of the contract (see below) against the company will not in the company law context be a likely remedy. In any case it is very quickly lost as we shall see.

Remedy of rescission

As we have seen, this remedy is available to a party misled by innocent, negligent or fraudulent misrepresentation. It restores the status quo, i.e. it puts the parties back to the position they were in before the contract was made. However, the remedy may be lost:

(a) By affirmation. If the injured party affirms the contract he cannot rescind. He will affirm if with full knowledge of the misrepresentation he expressly affirms the contract by stating that he intends to go on with it or if he does some act from which an implied intention may properly be deduced. In the company situation this could, for example, be attending a company meeting to complain about an inaccurate prospectus.

(b) By lapse of time. This is a form of implied affirmation and applies as follows:

(i) In innocent and negligent misrepresentation the position is governed by equity and the passage of a reasonable time, even without knowledge of the misrepresentation, may prevent the court from granting rescission: *Leaf* v *International Galleries* (1950) – see Chapter 12.

(ii) In fraudulent misrepresentation the position is governed by s 32 of the Limitation Act 1980 and lapse of time has no effect on rescission where fraud is alleged as long as the action is brought within six years of the time when the fraud was, or with reasonable diligence could have been, discovered.

(c) Where status quo cannot be restored. Rescission is impossible if the parties cannot be restored to their original positions as where goods sold under a contract of sale have been consumed.

(d) Where a third party has acquired rights in the subject matter of the contract. Thus if X obtains goods from Y by misrepresentation and pawns them with Z, Y cannot rescind the contract on learning of the misrepresentation in order to recover the goods from Z. Nor can he sue Z in conversion (*Lewis* v *Averay* (1971) – see Chapter 12).

It should be noted that the third party must have supplied consideration, as in *Lewis*. If the third party has received the property as a gift, it can be recovered from him.

Long v *Lloyd*, 1958 – Application of the affirmation rule (**143**)
Clarke v *Dickson*, 1858 – Inability to restore status quo (**144**)

Rescission and contractual debt

The fact that a party to a contract rescinds it because, e.g., of non-performance by the other party does not mean that the party rescinding has thereby abandoned an action for debts owed under the contract. Thus in *Stocznia Gdanska SA* v *Latvian Shipping* [1998] 1 All ER 883 S rescinded a contract with L to build two ships because of L's failure to pay the first instalment of the price when due. The House of Lords later decided that a claim by S for the unpaid instalment which represented the cost of the design and laying of the keel of a ship was recoverable.

Contracts *uberrimae fidei* (utmost good faith)

Silence does not normally amount to misrepresentation. However, an important exception to the rule occurs in the case of certain contracts where from the circumstances of the case one party alone possesses full knowledge of all the material facts and in which therefore the law requires him to show utmost good faith. He must make full disclosure of all the material facts known to him, otherwise the contract may be rescinded. The contracts concerned are as follows.

At common law

Contracts of insurance provide the only true example of a contract *uberrimae fidei*. There is a duty on the person taking up the insurance to disclose to the insurance company all facts of which he is aware which might affect the premium or acceptance of the risk. Failure to do so renders the contract voidable at the option of the insurance company. This could happen, for example, where a person seeking insurance did not disclose that he had been refused insurance by another company. Where there is a failure to disclose, the insurance company is not required by law to meet the claim but must return the premiums. In other words, the contract is rescinded. A leading decision that this is so is *Banque Keyser Ullmann SA* v *Skandia (UK) Insurance Co* [1989] 3 WLR 25.

In addition, most proposals for insurance may require the proposer to sign a declaration in which he warrants that the statements he has made are true and agrees that they be incorporated into the contract as terms. Where this is so any false statement which the proposer makes will be a ground for avoidance of the contract by the insurance company, even though the statement was not material in terms of the premium.

Dawsons Ltd v *Bonnin*, 1922 – The contract may widen the duty of disclosure (**145**) 

By statute

As regards contracts to take shares in a company with a listing or quotation on the Stock Exchange, there is a duty on the directors or its promoters, under the Financial Services and Markets Act 2000, to disclose various matters essential to an informed assessment as to whether an investor should purchase the securities. These provisions, and those in earlier statutes which preceded them, had to be put into law by Parliament because the judiciary had always refused to regard the sale of securities by a company as a contract *uberrimae fidei*. They did not, therefore, require the advertisement or prospectus under which the shares were issued necessarily to disclose all the material facts.

In equity – fiduciary relationships

In contracts between members of a family, partners, principal and agent, solicitor and client, guardian and ward, and trustee and beneficiary, the relationship of the parties requires that the most ample disclosure should be made. The duties of disclosure arising from the above fiduciary relations recognised by equity are not situations of *uberrimae fidei*. In contracts *uberrimae fidei* it is the nature of the contract, i.e. insurance, which requires disclosure regardless of the relationship of the parties. In the fiduciary situation it is the relationship of the parties and not the particular contract which gives rise to the need to disclose.

Gordon v *Gordon*, 1819 – Disclosure in a family situation (**146**) 

Duress

Duress will affect all contracts and gifts procured by its use. Duress, which is a common-law concept, means actual violence or threats of violence to the person of the contracting party or those near and dear to him. The threats must be calculated to produce fear of loss of life or bodily harm.

Threats of violence

A contract will seldom be procured by actual violence but threats of violence are more probable. The threat must be illegal in that it must be a threat to commit a crime or tort. Thus to threaten an imprisonment, which would be unlawful if enforced, constitutes duress, but not, it is said, if the imprisonment would be lawful. However, the courts are unlikely to look with favour on a contract obtained by threatening to prosecute a criminal. A contract procured by a threat to sue for an act which was not a crime, e.g. trespass, would not be affected by duress.

Welch v *Cheesman*, 1973 – Duress by threats of violence (**147**)

Threats to property

In *Skeate* v *Beale* (1840) 11 Ad & El 983 a tenant owed £19 10s in old money and agreed to pay £3 7s 6d immediately and the remaining £16 2s 6d within a month if his landlord would withdraw a writ of distress under which he was threatening to sell the tenant's goods. The tenant later disputed what he owed and the landlord tried to set up the agreement and sued for the remaining £16 2s 6d. It was held that the landlord was entitled to £16 2s 6d under the agreement which was not affected by duress since the threat was to sell the tenant's goods. However, more recently the courts have been moving away from the view that threats to property cannot invalidate contracts. In *The Siboen and The Sibotre* [1976] Lloyd's Rep 293 it was said that duress could be a defence if a person was forced to make a contract by the threat of having a valuable picture slashed or his house burnt down.

Duress probably renders a contract voidable

This, at least, is the view expressed in Cheshire & Fifoot's *Law of Contract* (a leading text on contract law), though other writers have argued that the effect of duress is to render a contract void. However, the judgments of the Privy Council in *Barton* v *Armstrong* [1975] 2 All ER 465 and *Pao On* v *Lau Yiu Long* [1979] 3 All ER 65 suggest that duress has the same effect as fraud, i.e. it renders a contract voidable. The issue is an important one for third parties, since if B procures goods from A by duress and sells the goods to C, who has no knowledge of the duress, A will be able to recover the goods from C if the contract is void, but will not be able to do so if it is voidable. On the authorities to date, therefore, A would have no claim against C.

Undue influence and associated equitable pleas

The doctrine of undue influence was developed by equity. The concept of undue influence is designed to deal with contracts *or gifts* obtained without free consent by the influence of one mind over another.

If there is no special relationship between the parties undue influence may exist, but must be proved by the person seeking to avoid the contract.

Where a confidential or fiduciary relationship exists between the parties, there is a presumption of undue influence and the party in whom the confidence was reposed must show that undue influence was not used, i.e. that the contract was the act of a free and independent mind. It is desirable, though not essential, that independent advice should have been given.

There are several confidential relationships which are well established in the law, namely parent and child, solicitor and client, trustee and beneficiary, guardian and ward, and religious adviser and disciple. In these cases there is a presumption of undue influence by the parent, the solicitor, the trustee and so on. There is no presumption of such a relationship between husband and wife, nor, according to the Court of Appeal in *Mathew* v *Bobbins* (1980) 256 EG 603, between employer and employee. This was affirmed by Millett, LJ in *Credit Bank Nederland* v *Burch* (1996) *The Independent*, 27 June. He did, however, state that the relationship

could develop into one of trust and confidence on the facts of a particular case but it was not a relationship where undue influence would necessarily be presumed. The facts must show it to exist. The Court of Appeal held that undue influence did exist between an employer and employee on the facts of the case. The employee B agreed to mortgage her flat to the bank as security for the debts to the bank of a travel company by which she was employed. She had no independent advice. When the company went into liquidation the bank tried to enforce the mortgage by a sale of her flat. The Court of Appeal set the mortgage aside because B had entered into it by reason of her employer's undue influence and the bank should have been put on enquiry because of the relationship of employer and employee of which they were aware and where undue influence might come to exist. However, a presumption of undue influence may be made between husband and wife where there are special circumstances such as the lack of sufficient mental capacity in either party to resist the influence of the other leading to gifts of property which are quite out of character with the donor's normal inquiring disposition when disposing of property (*Simpson* v *Simpson* (1988) *The Times*, 11 June). The fiduciary relationship between parent and child ends usually, but not necessarily, on reaching 18 or on getting married.

Lancashire Loans Ltd v *Black*, 1934 – Undue influence: parent and child (**148**)
Allcard v *Skinner*, 1887 – Undue influence: religious adviser and disciple (**149**)

However, there may be a presumption of undue influence even though the relationship between the parties is not in the established categories outlined above. In *Re Craig (Deceased)* [1970] 2 All ER 390 Ungoed-Thomas, J ruled that presumption of undue influence arose on proof:

(*a*) of a gift so substantial or of such a nature that it could not on the face of it be accounted for on the grounds of the ordinary motives on which ordinary men acted, and
(*b*) of a relationship of trust and confidence such that the recipient of the gift was in a position to exercise undue influence over the person making it.

Hodgson v *Marks*, 1970 – Undue influence: outside the special categories (**150**)

Effect of undue influence on third parties

A contract between A and B procured by undue influence cannot be avoided by rescission against third parties who acquire rights for value without notice of the facts. Where this has happened the party suffering the undue influence, say, A, will have to rely on tracing the proceeds of sale into the original purchaser's, i.e. B's, assets. The contract may be avoided and the property recovered from third parties for value with notice of the facts and also against volunteers (i.e. persons who have given no consideration) even though they were unaware of the facts.

Effect of undue influence on the parties to the contract

Undue influence renders the contract voidable so that it may be rescinded. However, since rescission is an equitable remedy, there must be no delay in claiming relief after the influence has ceased to have effect. Delay in claiming relief in these circumstances may bar the claim since delay is evidence of affirmation. This is illustrated by the case of *Allcard* v *Skinner* above.

Economic duress

Apart from the old concepts of duress and undue influence, the courts are developing in modern times wider rules to protect persons against improper pressure and inequality of bargaining power as it affects contracts. This development was perhaps best described by Lord Denning in *Lloyds Bank* v *Bundy* [1974] 3 All ER 757 where he said, having discussed duress and various forms of undue pressure in contract:

> Gathering all together, I would suggest that through all these instances there runs a single thread. They rest on 'inequality of bargaining power'. By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract on terms which are very unfair or transfers property for consideration which is grossly inadequate, where his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity coupled with undue influence or pressures brought to bear on him by or for the benefit of the other.

Economic duress is within this concept. Suppose A agrees to build a tanker for B by an agreed date at an agreed price and B enters into a contract with C under which the tanker is to be chartered to C from the agreed completion date or shortly afterwards. If A then threatens not to complete the contract by the agreed date unless B pays more and B makes an extra payment because he does not want to be liable in breach of contract to C, then the agreement to pay more is affected by economic duress. (See the judgment of Mocatta, J in *North Ocean Shipping Co Ltd* v *Hyundai Construction Co Ltd*, *The Atlantic Baron* [1978] 3 All ER 1170.)

The decision of the House of Lords in *Universe Tankships Inc of Monrovia* v *International Transport Workers' Federation* [1982] 2 All ER 67 is instructive in that it affirms the existence of the doctrine of economic duress. In that case a ship called the *Universe Sentinel*, which was owned by Universe Tankships, was 'blacked' by the respondent trade union, the ITF, which regarded the ship as sailing under a flag of convenience. ITF was against flag-of-convenience ships and refused to make tugs available when the ship arrived at Milford Haven to discharge her cargo. The blacking was lifted after Universe Tankships had made an agreement with ITF regarding improvements in pay and conditions of the crew and had paid money to ITF which included a contribution of $6,480 to an ITF fund known as The Seafarers' International Welfare Protection and Assistance Fund. Universe Tankships sued for the return of the $6,480 on the basis of economic duress, and the House of Lords held that they were entitled to recover it. It appears from the judgments that the effect of economic duress is to make the contract voidable and to provide a ground for recovery of money paid as money had and received to the claimant's use – a form of quasi-contractual claim.

The decision in *Universe Tankships* was applied by the Court of Appeal in *B & S Contracts & Design* v *Victor Green Publications* [1984] IGR 419 where A agreed to erect stands for B who was doing a presentation at Olympia. A's employees threatened to strike unless they received extra money which they had demanded and to which they were not entitled. A said that the contract could not proceed unless these extra sums were paid by B as an increase in the contract price. B paid the extra sums to get the work done and then recovered them in this action. The money was paid under economic duress.

It should also be noted that where extra contractual payments have been arranged under circumstances of economic duress they cannot be recovered in a claim before a court. Thus in *Atlas Express* v *Kafco* [1989] 1 All ER 641 Atlas, a national road carrier, made a contract to deliver cartons of basketware to Woolworths stores for Kafco who were a small company importing and distributing the basketware. A price of £1.10 per carton was agreed but the first load had fewer cartons than had been anticipated and Atlas told Kafco that they would not

carry any more without a minimum payment per trip regardless of the number of cartons carried. Kafco could not find another carrier quickly and, being worried about their contract with Woolworths if the latter did not get their supplies, Kafco agreed to the new terms but later refused to pay the new rate, only the per carton rate. The High Court held that the claim of Atlas for the minimum rate must be dismissed. The circumstances amounted to economic duress and there was no proper consent by Kafco.

Unconscionable bargains

The court will, in what it regards as an appropriate case, set aside a contract which is affected by improper pressure by one party or where there is inequality of bargaining power. However, mere inequality is not in itself enough: the court will look at all the circumstances of the case.

Lloyds Bank v *Bundy*, 1974 – Unconscionable bargains illustrated (**151**)

Further examples of inequality of bargaining power may be found in *Clifford Davis Management* v *WEA Records* [1975] 1 All ER 237 where A, an experienced manager, obtained a contract with a pop star, B, who had little or no business experience, under which B gave A the copyright in all his compositions for a period of years. It was held that B could avoid the contract because A had exploited his superior bargaining power.

No general rule that all contracts must be fair

There is no rule of law which states that a fair price must be paid in *all* transactions and some unfair contracts will be held binding provided the parties were of equal bargaining strength. In *Burmah Oil Ltd* v *The Governor of the Bank of England* (1981) *The Times*, 4 July, Burmah was in financial difficulties and sold a large holding of shares which it had in British Petroleum to the government at a price below the Stock Exchange price. Burmah then brought an action to set the contract aside. The court refused to do so. Although there was authority to set aside a transaction where one party had acted without independent advice, or where the bargaining strength of one party was grievously impaired, neither of those situations existed in this case. The relationship was purely commercial and the contract for the sale of shares must stand.

Cases such as *Burmah Oil* indicate that the broad principle of 'inequality of bargaining power' can be misleading. A further example is provided by *Alec Lobb* (*Garages*) *Ltd* v *Total Oil GB Ltd* (1985) where directors of a company which was desperate to raise money negotiated a disadvantageous mortgage over its property which was nevertheless upheld as valid. Lawful business pressure seems to be justified no matter how much inequality of bargaining power may exist particularly where, as in this case, the loan was given in extremely risky circumstances to rescue Lobb which was in danger of collapse. The more recent case of *Leyland Daf Ltd* v *Automotive Products plc* (1993) *The Times*, 9 April, is also of interest. The Court of Appeal decided that Automotive was entitled to withhold supplies of brake and clutch systems to Leyland, which owed Automotive £758,955, until this was paid. Leyland was in administrative receivership and the receivers urgently needed the supplies to carry on the company's trade in the hope of finding a buyer for it. The court also decided that Automotive was not in breach of Art 86 of the Treaty of Rome (abuse of a dominant position) (see further Chapter 16).

14

CONTRACTUAL TERMS

We shall now consider the contents of the contract by explaining the types of terms express or implied which may be found in a contract.

Inducements and terms generally

Even where it is clear that a valid contract has been made it is still necessary to decide precisely what it is the parties have undertaken to do in order to be able to say whether each has performed or not performed his part of the agreement.

In order to decide upon the terms of the contract it is necessary to find out what was said or written by the parties. Furthermore, having ascertained what the parties said or wrote, it is necessary to decide whether the statements were mere inducements (or representations) or terms of the contract, i.e. part of its actual contents. The distinction in diagrammatic form together with an indication of remedies appears in Figure 14.1 at p 331.

The distinction is less important than it was since the passing of the Misrepresentation Act 1967. Before the Act became law there was often no remedy for a misrepresentation which was not fraudulent, and in such a case the claimant's only hope of obtaining a remedy was to convince the court that the defendant's statement was not a mere inducement but a term of the contract of which the defendant was in breach and for which damages might be obtained. As we have seen, under the Misrepresentation Act 1967 the new form of negligent misrepresentation which did not exist before will now give rise in many cases to an action for damages even in respect of a mere misrepresentation or inducement.

Written contracts and outside evidence

It is a general rule of the common law that outside (or extrinsic) evidence cannot be brought to vary a written contract (*Goss* v *Nugent* (1833) 5 B & Ad 58). This is known as the parol (oral) evidence rule. However, the courts have been prepared to admit outside evidence if it can be shown that the written contract was not intended to express the whole agreement of the parties. Thus in *Walker Property Investments (Brighton) Ltd* v *Walker* (1947) 177 LT 204 a prospective tenant under a written tenancy agreement was allowed to add an oral agreement to the tenancy under which, as he satisfied the court, he was entitled to the use of two basement rooms and the garden. Reference to this right had been omitted from the tenancy agreement.

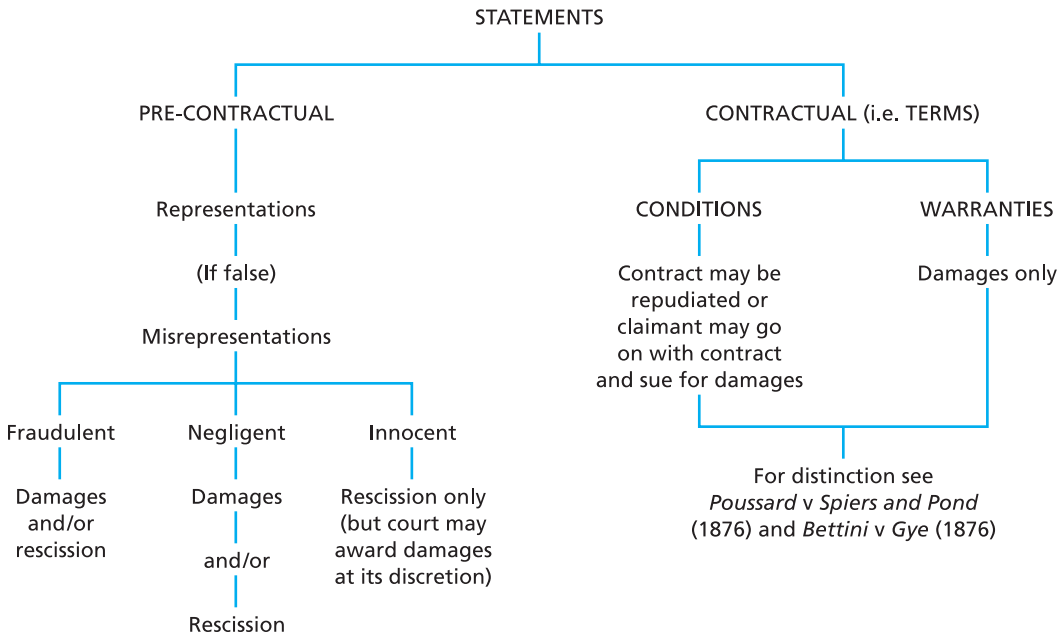

Figure 14.1 Distinction between pre-contractual and contractual statements

Inducements and terms distinguished

Nevertheless, it is still necessary to consider the main tests applied by the courts in order to distinguish between a mere misrepresentation and a term of the contract, bearing in mind always that the question whether a statement is an inducement or a term and, if a term, whether a condition or warranty *is a matter of fact for the judge*. Fact decisions of this sort vary widely according to the circumstances of each case, so that it is virtually impossible to predict with absolute accuracy what the outcome of a particular case will be. However, by way of illustration the following headings contain the major guidelines which are applied.

The statements and intentions of the parties

The court will always be concerned to implement the intentions of the parties as they appear from statements made by them. Thus in *Gill & Duffus SA* v *Société pour l'Exportation des Sucres SA* [1985] 1 Lloyd's Rep 621 the defendants agreed to sell sugar to Gill. A term of the contract (not specified as a condition or warranty) said that the defendants were to name a port at which the sugar was to be loaded by 14 November 'at latest'. The defendants did not nominate a port by that time and so Gill refused to take any sugar from the defendants and regarded the contract as cancelled. The defendants then tried to make a nomination of a port but Gill refused to accept it saying that they had repudiated the contract because of the defendants' breach of condition (or repudiatory breach). Following a decision unfavourable to them at arbitration, Gill appealed. Leggatt, J said that there were no words in the English language by which a deadline could be appointed more concisely, more precisely, or with more finality than 'at latest'. They meant what they said and the judge had no doubt that the intention of the parties as gathered from the contract itself would be best carried out by treating the promise not as a mere warranty but as a condition precedent by the failure to perform which the other party was relieved of liability. Gill's contention was accepted. There was a

repudiatory breach of condition. Where in a contract the parties have indicated that a particular undertaking is to be a term of the contract, the courts will in general abide by the wishes of the parties. However, the court will not slavishly follow the parties' statements and where, for example, the parties appear to have regarded a trivial matter as a vital term of the agreement, the court may still take the view that it is not.

Thus, so far as a written contract is concerned, the court may disregard a statement by the parties that a particular undertaking is a condition and say instead that it is a warranty. So far as wholly oral contracts are concerned, the court may ignore the statements of the parties and decide that a particular undertaking is a condition, a warranty, or a mere inducement.

Thus in *L Schuler AG* v *Wickham Machine Tool Sales* [1973] 2 All ER 39 the claimants entered into a contract for four years with the defendants giving them the sole right to sell panel presses in England. A clause of the contract provided that it should be a condition of the agreement that the defendants' representatives should visit six named firms each week to solicit orders. The defendants' representatives failed on a few occasions to do so and the claimants claimed to be entitled to repudiate the agreement on the basis that a single failure was a breach of condition giving them an absolute right to treat the contract as at an end. The House of Lords said that such minor breaches by the defendants did not entitle the claimants to repudiate. The House of Lords construed the clause on the basis that it was so unreasonable that the parties could not have intended it as a condition giving Schuler a right of repudiation, but rather as a warranty. Thus Schuler were themselves in breach of contract leaving Wickham with a claim for damages against Schuler.

This case is also an example of the court trying to give redress in regard to an unconscionable bargain and to correct unscrupulous commercial conduct.

The nature of the statement

A statement is likely to be an inducement rather than a term if the person making the statement asks the other party to check or verify it, e.g. 'The car is sound but I should get an engineer's report on it'.

In addition, a statement is likely to be a term rather than a mere inducement if it is made with the intention of preventing the other party from looking for defects and succeeds in doing this, e.g. 'The car is sound, you need not look it over'.

The importance of the statement

If the statement is such that the claimant would not have made the contract without it, then the statement will be a term of the contract and not a mere inducement.

Bannerman v *White*, 1861 – Representations and terms: a vital undertaking (**152**)

The timing of the statement

A statement made during preliminary negotiations tends to be an inducement. Where the interval between the making of the statement and the making of the contract is distinct then the statement is almost certain to be an inducement. Thus in *Routledge* v *McKay* [1954] 1 All ER 855 the claimant and the defendant were discussing the possible purchase and sale of the defendant's motor cycle. Both parties were private persons. The defendant, taking the information from the registration book, said, on 23 October, that the cycle was a 1942 model. On 30 October a written contract of sale was made. The actual date of the cycle was later found to

be 1930. The buyer's claim for damages for breach of warranty failed in the Court of Appeal. In this case the interval between the negotiations and the contract was well marked and the statement was not a term. However, the interval is not always so well marked and in such cases there is a difficulty in deciding whether the statement is an inducement or a term.

Oral statements later put into writing

If the statement was oral and the contract was afterwards reduced to writing, then the terms of the contract tend to be contained in the written document and all oral statements tend to be pre-contractual inducements. Even so the court may still consider the apparent intentions of the parties and decide that they had made a contract which was part oral and part written (see *Evans* v *Merzario* (1976) in Chapter 15).

Special skill and knowledge or lack of same

Where one of the parties has special knowledge or skill with regard to the subject matter of the contract, then the statements of such a party will normally be regarded as terms of the contract. In addition, it will be difficult for an expert to convince the court that a person with no particular knowledge or skill in regard to the subject matter has made statements which constitute terms of the contract.

Oscar Chess Ltd v *Williams*, 1957 – Effect of special skill and knowledge (**153**)

Conditions and warranties

Having decided that a particular statement is a term of the contract and not a mere inducement, the court must then consider the importance of that statement in the context of the contract as a whole. Not all terms are of equal importance. Failure to perform some may have a more serious effect on the contract than failure to perform others. The law has applied special terminology to contractual terms in order to distinguish the vital or fundamental obligations from the less vital, the expression *condition* being applied to the former and the expression *warranty* to the latter. A condition is a fundamental obligation which goes to the root of the contract. A warranty on the other hand is a subsidiary obligation which is not so vital that a failure to perform it goes to the root of the contract.

This distinction is important in terms of remedies. A breach of condition is called a repudiatory breach and the injured party may elect either to repudiate the contract or claim damages and go on with the contract.

It should be noted that the claimant must go on with the contract and sue for damages if he has affirmed the contract after knowledge of a breach of condition. He may do this expressly as where he uses the goods, or by lapse of time as where he simply fails to take any steps to complain about the breach for what in the court's view is an unreasonable period of time. A breach of warranty is not repudiatory and the claimant must go on with the contract and sue for damages.

Whether a term is a condition or warranty is basically a matter for the court which will be decided on the basis of the commercial importance of the term. As we have seen, the words used by the parties are, of course, relevant, but are not followed slavishly by the court which may still decide differently from the parties on the basis of the commercial importance of the term.