

Contract Exam 2006
Question 2 – 85%

The first issue is whether the clause does operate to contract Derek out of liability. Neither the TPA nor the FTA apply as Derek is not incorporated, and most crucially, the boat is not a type of good ordinarily acquired for domestic or personal household use or consumption. Nevertheless the *Sale of Goods Act* does apply, as this is a contract for the sale of goods. Pursuant to s 14(1) of the SGA, goods must be fit for the purpose they are supplied for (which was made clear to Derek), so this is an implied term, although the SGA can be contracted out of (*L'estrange v Graucob*). It is consequently necessary to establish whether George does have a claim against Derek in spite of the clause's operation.

Prima facie, it seems the clause is incorporated as a term of the contract, as it was signed by George, notwithstanding the fact he didn't read it, and signature is conclusive of incorporation (*L'estrange*), however this is not presumed where there is fraud or misrepresentation (*Curtis v Chemical Cleaning & Dyeing Co*). Should George establish misrepresentation, he would not only be entitled to remedies for that, but also potentially be able to argue that there was a breach of contract. He can clearly establish that there was a misstatement of fact, as the engine was not two years old as Derek represented. He would also need to adduce evidence that this statement induced him to sign. This is not difficult as where the statement precedes the conclusion of the contract, it is presumed that it was at least one inducing factor (*Edgington v Fitzmaurice*). Furthermore, he was under no obligation to check Derek's representations, as parties should be able to take representors' words as honest (*Redgrave v Hurd*). He has a strong claim for misrepresentation, and pursuant to s 7(1) of the *Misrepresentation Act*, would be entitled to rescind. However Derek could put up a strong defence of s 7(2): that he had reasonable grounds for believing the statement to be true. He may argue that he was simply going on the information supplied to him by the original owner. It is surely arguable however that as a dealer, he ought to have superior knowledge about the goods (*Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd*).

George may argue that Derek engaged in misleading or deceptive conduct in trade or commerce, under s 56 of the FTA. This would be a much more effective argument as s 96 provides that liability cannot be contracted out of with regard to misleading or deceptive conduct. This statute is applicable as Derek, as a dealer, is in trade or commerce, and his state of mind is irrelevant. That is, the fact that the representations were innocently made is no defence. George may argue that both pre-contractual statements (that the motor was 150 h/p and only two years old) were misleading (*Clark Equipment Australia Ltd v Covcat Pty Ltd*), which would, pursuant to s 84, give him the right to recover damages (although only for the loss incurred, not expectation loss (*Marks v GIO Australia Holdings Ltd*). Furthermore s 85 invests the Court with the power to exercise discretion to make further orders such as rescission (although this may be barred as the engine is dead and the boat cannot be returned to its original state) and compensation. Arguably the latter is the better remedy as Derek would be entitled to his \$14K forgone to put him in the position as if the contract had not been made (*McDonald v Dennys Leascelles Pty Ltd*).

Alternatively, George may try to argue that Denny's misrepresentations were incorporated as terms of the contract, the breach of which would give rise to a greater

amount of damages. However, as this is a written contract it is presumed by the parole evidence rule that everything that was meant to be included in the contract was included (*Goss v Nugent*), although it must first be established that the contract was intended to be complete (*State Rail Authority of NSW v Heath Outdoor Pty Ltd*). He cannot negate this by arguing that the statements formed a collateral contract, as where the extrinsic statement is merely representational, and not promissory, a collateral contract is not recognised (*J J Savage & Sons v Blackrey*). Thus he would be unable to argue breach of contract as the statutorily implied terms have been contracted out of effectively, and the representations were not incorporated as terms.

He is thus restricted to the remedies found in the FTA for misleading and deceptive conduct, and would at least recover his \$14K, unless he can prove unconscionability, also under the FTA (s 57). Again, this applies as Derek is in trade or commerce, and thus prohibited from engaging in unconscionable conduct. George may argue that the conduct breached s 57(a) in so far as Derek had a superior bargaining power as a dealer (*Dick Bentley*), as he was an inexperienced buyer, dealing with a more knowledgeable dealer. He could also argue that s 57(e) is relevant in so far as he could have acquired a five year old boat with a 100 h/p engine from another supplier for less. Should the breach of these two sections lead to a finding of unconscionability (and the two may be insufficient to find the whole of s 57 is breached), he would be entitled to damages under s 84 and discriminatory remedies under s 85, depending on how the Court views it.