**SUMMARY QUESTIONS**

**ESSAY QUESTIONS**

1. Assess the development of the rules in establishing an actionable misrepresentation. Focus on the parties’ obligations to provide information and how this is interpreted in light of the general rule that silence cannot amount to a misrepresentation.

**Indicative content outline answer:**

* An action under misrepresentation is available if the untrue representation is considered ‘actionable.’ This means that there is a legal remedy available where a false statement of fact (not opinion) is made that induces the other party to enter the contract.
* To determine misrepresentation there must be:

1) A statement of material fact (not opinion) that induces the other party into the contract;

2) A representation that was false;

3) The innocent party believed the statement to be true; and

4) The representation induced the party into the contract.

***A Statement of Material Fact***

* Statements of fact are sometimes difficult to separate and distinguish from opinions. If the statement can be determined, objectively, as being true or false, this may assist in identifying whether it is a fact or opinion.
* Opinions cannot, by their nature, be objectively tested as true or false, whereas facts can be tested in this manner. In *Bisset v Wilkinson*, a vendor’s assurances of the suitability of land for sheep farming, when the purchaser was aware the vendor had no knowledge or experience of this type of farming, was held to be an opinion rather than a fact.

***Silence as Misrepresentation***

* The general rule of contract is that silence cannot amount to a misrepresentation, even if the disclosure of such information would in all probability dissuade the other party from contracting. Naturally, there are exceptions to this rule, and if there is a material change in the circumstances; if remaining silent would make a statement misleading; if the parties had a fiduciary relationship; and in cases where the contract is one of good faith, then an actionable misrepresentation is possible.

***Material Change in Circumstances***

* There exists an obligation to provide (volunteer) information to the other party if the facts materially change between the issuing of the statement and the acceptance of it (*With v O’Flanagan*).

***Duty to Answer Questions Truthfully***

* If a person is asked a question during the negotiations, and an answer is offered (although there is no legal duty to answer questions here), there is an obligation that the answer is truthful. This places an obligation on the person issuing the statement to provide a full and complete answer, which does not mislead the other party. Further, a true statement, but one that misleads the other party, can amount to a misrepresentation (*Nottingham Patent Brick & Tile Co. Ltd v Butler*).

***Evidence of a Fiduciary Relationship***

* A fiduciary relationship is one involving trust and can typically be seen in relationships of partners of an undertaking, solicitor and client, doctor and patient and so on. In these situations, it is presumed that any material fact must be revealed to the other party and if this is not volunteered, then the silence can be held to be a misrepresentation.

***Contracts of Good Faith***

* In certain contracts, especially those involving contracts of insurance that require *uberrimae fidei* ‘utmost good faith,’ there must be a full disclosure of relevant factors that would influence a decision to enter an agreement or not. This includes volunteering information even if a question regarding the fact is not asked (*Hood v West End Motor Car Parking*).

2. ‘It is much better, when possible, to claim for a breach of a contractual term than to argue a misrepresentation has occurred.’

Critically assess this statement.

**Indicative content outline answer:**

* The remedies available for breach of contract and misrepresentation should be the focus of this answer.
* You should identify and assess the statements made before the contract – was it based on a representation, or an obligation / promise to be completed?
* The remedies available in breach of contract should be considered – damages at common law and the equitable remedies e.g. specific performance, injunctions etc.
* This should outline the extent and availability of these remedies and what they intend to do – reliance and expectation damages.
* You may also wish to discuss the effect of the equitable remedies and use cases such as *Mountford v Scott* to demonstrate their power.
* There are different remedies available in cases of misrepresentation depending upon the type of misrepresentation involved (fraudulent, negligent, or innocent).
1. Rescission: The remedy of rescission is an equitable remedy where the party has the option to set the contract aside and the parties are returned to their pre-contractual position. The court, through s. 2(2) of the Misrepresentation Act 1967, has discretion as to whether to provide a remedy of rescission, and in practice this is often impossible. The remedy of rescission is available for all types of misrepresentation, and as in situations of misrepresentation the contract is said to be voidable, the innocent party is able to rescind (avoid) the contract but this right must be exercised within a reasonable time. The right to rescind the contract has to be communicated to the other party to be effective, and once this is chosen, the contract cannot be revived.
2. In situations that involve fraudulent misrepresentation, it may be more difficult to communicate the intention to rescind. This is usually because by the time the fraud has been discovered, the rogue has disappeared. There is still a possibility of communicating rescission in this example through conduct such as seizing the goods that the rogue had sold; or by performing some act which is consistent with communication (for example, informing the police).
3. Damages: A simpler method of remedying the loss sustained due to a misrepresentation is through an award of damages. Here an amount of money is awarded to the innocent party to compensate him/her for any losses sustained. In the case of fraudulent misrepresentation, the damages are intended to place the party in the position he/she would have been if the fraud had not been committed (reliance damages). Damages can be awarded in contract and tort (such as fraud - *Derry v Peek* (1888), and of course through statute.
* Hence, where an actionable misrepresentation has taken place, the remedies awarded are intended to place the party back to the position before they were had there been no misrepresentation. The contract is also voidable at the innocent party’s discretion.
* The remedies for misrepresentation have also been extend following enactment of the Misrepresentation Act 1967.
* For those who have been subject to an innocent misrepresentation, the courts have the discretion to award damages under s. 2(2) of the Misrepresentation Act 1967 in place of rescission. To be able to succeed in a claim for damages under this section:

1. the misrepresentation must have been such as to allow the innocent party to rescind the contract; and

2. the claimant must prove that the contract has been (or ought to have been) rescinded; and

3. the court must consider the award of damages, rather than awarding rescission, to be equitable.

* Damages are rarely awarded under this section, and when they are, the assessment is based on the contractual remedy of damages that seeks to place the parties in the position they would have been had the representation not been untrue.

**PROBLEM QUESTIONS**

1. Eric is searching for a residential property to rent. He views a flat being offered for rent by Fabulous Flats and Furnished Properties (FFFP) Ltd, a very commercially aggressive firm which attempts to sign residents to contracts as soon as possible. Following his viewing of this first flat, FFFP ask Eric to sign a tenancy contract that includes the following clauses:

1. FFFP is not responsible for any damage or loss to individuals or their belongings as a result of any act of negligence by the company or its staff.

2. It is a condition of this contract that the tenant is responsible for the safety of all visitors to the premises and to ensure the flat is maintained in a good condition (i.e. it is at a minimum kept clean).

Eric, despite having not read the contract, signs it despite the fact that he smells strongly of alcohol and appears quite confused.

Sometime later, FFFP visits the property rented by Eric to ensure that all is well. Discovering that there are no fire extinguishers in the property, and having another person who has already expressed an interest in renting the premises, FFFP invoke clause 2 and seek to terminate Eric’s contract for breach of the condition.

Advise the parties of their legal rights in this situation.

**Indicative content outline answer:**

* Given that Eric is signing a contract with an exclusion clause and he is searching for a residential flat to rent it appears he is acting as a consumer. This means that the assessment of the exclusion clause should fall under the Consumer Rights Act 2015. Were he acting as a business, the Unfair Contract Terms Act would be applicable. The main distinguishing features between the two Acts with regards to the assessment of the exclusion clause is that whilst UCTA assesses the term in relation to reasonableness, the CRA considers this based on fairness.
* Also, remember that UCTA only covered exclusion clauses on standard forms (even though this appears to be the case in the scenario). The CRA applies to both standard forms (non-negotiated) and to negotiated contracts.
* As Eric smells of alcohol, you may wish to consider whether he has the capacity to contract and whether this impaired his judgment / knowledge of what he was signing. Further, were / should FFFP have known of the intoxication and if so, was it so severe to provide Eric with an excuse of not having a suitable awareness of what he was doing – hence trying to have the contract set aside.
* The use of the word ‘condition’ is important – although of course it is only indicative, not conclusive. The distinction between conditions and warranties – especially in relation to the remedy of repudiating the contract – should be considered with appropriate case law evidence – e.g. *Poussard v Spiers*.
* *Hongkong Fir v Kawasaki* should be raised as a ‘breach-based’ approach to the identification of a term as a condition or warranty.
* You may also wish to assess whether the Clause two points regarding the tenant’s responsibility to manage health and safety, particularly in relation to providing fire extinguishers, is reasonable and enforceable. It would seem these would fail the test of fairness

2. Mohammed runs a spa and healthcentre under the name Leisure, Endurance Gym in Oxford Street Ltd (LEGOs). Membership of LEGOs is available to members of the public following the completion of an application form and agreeing to a minimum 12-month contract. Membership costs £600 per year.

As part of its advertising campaign, Mohammed produces a leaflet to be distributed in the local area. The leaflet describes the features of the spa as including an extensive free weights area and a swimming pool of Olympic standard.

Siobhan reads one of the leaflets and visits LEGOs the following day where she signs the contract and pays £600 for membership. When she arrives at the spa later in the week she visits the free weights area to discover that this consists of no more than a rack of ten dumbbells. Disappointed, she decides to go to the swimming pool as Siobhan is a keen diver and intended to use the facility to work on her technique. However, the pool was only 7ft in depth and not suitable for diving.

Advise Siobhan on any misrepresentation claim she may have against LEGOs.

**Indicative content outline answer:**

* The question should raise the issue of misrepresentation and the inducement of this to result in Siobhan entering the contract.
* The various forms of misrepresentation should be identified and the remedies for each.
* It is not likely that this will be a case of innocent misrepresentation. Mohammed will certainly know about the equipment available at the spa and there is clearly a difference between a swimming pool with a maximum depth of 7ft compared with an Olympic standard pool (which typically has a depth closer to 10ft).
* It is most likely that the form of misrepresentation applicable here is fraudulent misrepresentation and Siobhan would therefore have the burden of proof imposed on her. Successfully establishing fraudulent behaviour may be a difficult task therefore Siobhan may choose to argue that the claim in the advertisement was made recklessly. Hence, an action of negligent misrepresentation which, through s. 2(1) of the Misrepresentation Act 1967, reverses the burden of proof may be preferable.
* The burden would then transfer to Mohammed to prove that he held reasonable grounds to believe the contents of the advert to be true.
* If Mohammed is unlikely to be able to satisfy this test, Siobhan will succeed in recovering damages and ending the contract.