Question 2

> **"There are…many contractual undertakings of a more complex character which cannot be categorised as being conditions or warranties."**

(Diplock LJ in Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha [1962])

Following the recognition of the category of innominate terms or intermediate terms in the Hong Kong Fir case, would it not be better to place all contractual terms within this category and thus give the courts greater flexibility in dealing with breaches of contract?

Remedies available for breach of a contractual term are broadly either damages and or rescission of the contract. The issue of categorising terms is primarily concerned with the decision as to whether rescission is available. The legal reasoning behind this issue stems from Lord Mansfield in Boone v. Eyre (1777), where he says that it is "only necessary to aver as a condition precedent [for which rescission is available] a condition in which went to the whole consideration of both sides"[1]. The Sale of Goods Act 1893[2] categorised terms for who's breach rescission is available as "conditions" and where only damages are available as "warranties", thus simplifying disputes for wrongful repudiation.

Since then, in accusations of wrongful repudiation, the primary question has been whether the breached term was a condition or a warranty. In the case of Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha (1962) the charterers of a ship, rescinded the charterparty after prolonged delays caused by engineering problems resulting from the owner's inadequate provision of engineering staff. Clause 3 of the charterparty stated that the owners agreed to

[1] Boone v Eyre [1779] 1 H B1 273n
[2] Sale of Goods Act 1893 s.11

"maintain her in a thoroughly efficient state in hull and machinery during service"[3] such that "seaworthiness" was a term. However, it was held that "seaworthiness was not a condition"[4], though neither could it be merely a warranty as had the breach been sufficiently serious, the charterers would have been unable to use the ship for the contract's intended purpose. The obligation to provide a seaworthy ship was therefore called an "intermediate term" because "the term could have been broken in a trivial manner"[5], such that damages were adequate, or in a way that undermined the purpose for the contract, such that repudiation would be. Lord Diplock said that in the case of these more complex undertakings the deciding factor is whether the breach will "deprive the party not in default of substantially the whole benefit which it was intended that he should obtain from the contract"[6]. This gave rise to a third category of term called "intermediate" or "innominate" terms, where the right to repudiate was contingent on the seriousness of the breach.

The Law Commission have said that, "A case can be made for abolishing the categories of 'condition' and 'warranty'…and for treating all such implied terms as innominate obligations"[7], however this may not be desirable. Innominate terms, though necessary, are not without their disadvantages. The two main difficulties are the difficulty in distinguishing whether the term is innominate, and knowing how serious the consequences of the breach must be to allow repudiation.

In Cehave v Bremer Handelsgesellschaft (1975) both difficulties present when a customer buying citrus pulp pellets rejected a shipment as a substantial part was damaged. At the first

[3] Hongkong Fir Shipping Co. Ltd. v Kawasaki Kisen Kaisha Ltd. [1962] 2 Q.B. 26
[4] Hongkong Fir Shipping Co. Ltd. v Kawasaki Kisen Kaisha Ltd. [1962] 2 Q.B. 27
[5] McKendrick, E., Contract Law: Text, Cases and Materials 2nd Edition (UK, Oxford University Press, 2005) at pp. 965
[6] Hongkong Fir Shipping Co. Ltd. v Kawasaki Kisen Kaisha Ltd. [1962] 2 Q.B. 69
[7] Law of Contract: Implied terms in contracts for the supply of goods, (The Law Commission, Working Paper No. 71, 1977) at [15]

trial, the buyers were held to be entitled to reject the goods as the contract contained a provision that "the shipment to be made in good condition"[8], which they held to be a condition, but on appeal this was overturned as it was held that the obligation was an innominate term and the breach was not sufficient to warrant repudiation. This achieved justice, as the buyers shortly after rejecting the goods, bought them at a vastly discounted price and used them for the original purpose intended, however the complete reversal of decision illustrates the unpredictability involved in reasoning about intermediate terms. This unpredictability is inherent to the definition of an intermediate term, though is undesirable as the norm as "One of the important elements of the law is predictability"[9].

In Bunge Corp v Tradax Export SA (1981)[10] the ruling goes the other way, where the term in dispute is an obligation as to time of performance. The appellants argued that under the circumstances the lateness of notice would not have deprived the innocent party of "substantially the whole benefit of the contract"[11] and so only damages were allowable. Lord Wilberforce distinguished this from the Hongkong Fir case, by pointing out that in that case seaworthiness could be trivial or serious, and so it was "impossible to ascribe to the obligation, in advance, the character of a condition" [12]; whereas with time of performance, it can either be late, or not. For this reason it was held to have been a condition, and the appeal was dismissed. Here again we see the difficulty in the predictability of these intermediate terms. This causes particular difficulties in giving legal advice. One unfortunate consequence

[8] Cehave N. v. v Bremer Handelsgesellschaft M.B.H. (The Hansa Nord) [1976] Q.B. 44
[9] Maredelanto Compania Naviera S.A. v Bergbau-Handel G.M.B.H (The Mihalis Angelos) [1971] 1 Q.B. 205
[10] Bunge Corp v Tradax Export SA [1981] 1 W.L.R. 711
[11] Hongkong Fir Shipping Co. Ltd. v Kawasaki Kisen Kaisha Ltd. [1962] 2 Q.B. 69
[12] Bunge Corp v Tradax Export SA [1981] 1 W.L.R. 715

of this is it "may operate to inhibit the use of termination as a remedy"[13], as legal advisors may be forced to err on the side of caution.

To conclude, the author feels that it would not be beneficial to class all contractual undertakings as innominate terms, although neither is it possible to concretely class all terms as conditions or warranties. The flexibility of the intermediate term is needed for justice in some situations because "human prescience being limited"[14] one is unable to foresee every possible breach of a given term. However, flexibility in law is not broadly desirable and the uniformity provided by the other two predictable classes gives a simple *prima facie* rule[15], and significantly simplifies much of the relevant legislature.

[13] McKendrick, E., Contract Law: Text, Cases and Materials 2nd Edition (UK, Oxford University Press, 2005) at pp. 966
[14] Hongkong Fir Shipping Co. Ltd. v Kawasaki Kisen Kaisha Ltd. [1962] 2 Q.B. 26
[15] Treitel, G.H., The Law of Contract 11th Edition (UK, Sweet & Maxwell, 2003) pp. 797

