

Formation of a Contract – Offer

Parties to a contract	Offeror	The person who makes the offer		
	Offeree	The person who the offer is made to (remember a counter offer can result in the offeree becoming the offeror and vice versa)		
Offer	Offer or invitation to treat	Offer	A proposal (or promise) showing a willingness to contract on firm and definite terms. Words such as 'might' or 'may be able to' are not definite enough to be an offer	Gibson v Manchester City Council (1979)
		Advertisement	Adverts are generally not an offer unless the advert creates a bilateral contract	Partridge v Crittenden (1968)
			Bilateral Contract – this requires both offeror and offeree to do something. Both parties have obligations	Carlill v Carbolic Smoke Ball Co (1898)
			Unilateral Contract – an agreement to pay in exchange for performance, if the potential performer chooses to act. There is no obligation to perform the act.	
		Goods in a shop window	Goods in a shop window or on a shelf are generally an invitation to treat. When the customer presents the goods at the checkout or the self-scanner s/he makes an offer that the shop is free to accept or reject.	Fisher v Bell (1961) Pharmaceutical Society of Great Britain v Boots Cash Chemists (1953)
		Lots at an auction	The bidder makes the offer that the auctioneer can either accept or reject	British Car Auctions v Wright (1972)
		A request for information	A request for an information and a reply to that request is not an offer. A request for information is not a counter offer that would revoke the original offer	Harvey v Facey (1893)
	Making and ending an offer	Who can make an offer	Anyone! Including an individual, a partnership, a limited company or other organisation. Employees or agents can make offers on behalf of the businesses/ their employer. Offers can also be made via a notice on a machine.	Thornton v Shoe Lane Parking (1971)
		To whom can an offer be made	Offers can be made to named individuals, to a group of people or to the world at large. Remember the Hoover flight offer.	Gibson v Manchester City Council (1979) Carlill v Carbolic Smoke Ball Co (1893)
		How long does an offer last	Offers can only be accepted whilst they are still open. Once an offer is closed it can no longer be accepted. An offer comes into existence when it is communicated to the offeree. Communication requires the offeree to be aware of the existence of the offer. Timing is critical (in an exam question create a timeline of events)	Taylor v Laird (1856) Stevenson v McLean (1880)
		How can an offer end	Revocation – an offer can be revoked (withdrawn) at any time before acceptance. The offeror must communicate the revocation to the offeree before acceptance takes place. If the offer is to the whole world revocation can take place on one of three ways; <ul style="list-style-type: none"> By setting a time limit on the offer By the expiry of a reasonable time By publishing revocation of the offer in the same way as the original offer was made However if a separate contract is made to keep the offer open or to only sell to one person with the agreed time and the offeror refuses to sell the offeree can seek to have the offer enforced. The offeror does not have to directly communicate the revocation provided the revocation is reliable that is enough. The courts will look to see how revocation was communicated to decide if it was reliable.	Routledge v Grant (1828) Dickinson v Dodds (1876)
			Rejection – Once an offer is rejected it can't be accepted. The rejection must be communicated for it to end the offer. The easiest way is the offeree saying NO! A counter offer is also a rejection. However, enquires are generally seen as a request for information and not a counter offer.	Hyde v Wrench (1840)
			Lapse of time – clear when this a fixed period of time. When this ends so does the offer. Problems arise when no time is set, in this situation the time is a reasonable time. What is a reasonable time depends on the nature of the offer, you would expect an offer to a buy a metal tank to be open longer than an offer to buy a cake.	Ramsgate Victoria Hotel v Montefiore (1866)
			Death – This depends of which party died and the nature of the type of contract involved. Offeree dies – offer ends and those dealing with the estate can accept on his/her part. However, the executors/ administrators of the estate can make a new offer. Offeror dies – acceptance can still take place until the offeree learns of the offeror's death. However, if the offer is to perform a personal service the offer ends on death.	
			Acceptance - Once an offer has been accepted there is an agreement, and assuming that the other essential features of a contract have been fulfilled, there is a legally binding contract.	

Acceptance

Acceptance	A final and unconditional agreement to all the terms in the offer. It must be acceptance of the whole offer and must be positive and unqualified.	
How do you accept an offer?	Generally can be in any form, unless the offer states a specific method. Does not have to be in the same format as the way the offer was made. However, acceptance cannot be by silence, there must be some positive act. The offeror can require a specific method of communication of acceptance.	Felthouse v Bindley (1863) Yates v Pulleyn (1975)
When does acceptance take place?	General rule is that acceptance takes place when it is communicated to the offeror.	
	Acceptance by conduct – where the offeree behaves in a specific way which deems the contract to be accepted	Reveille Independent LLC v Anotech International (UK) Ltd (2016)
	Acceptance by post – the postal rules – developed in the 19 th century. The rule only applies to letters of acceptance and not offers and counter offers. The rules are 1) The rules only apply if post is the usual or accepted means of communication 2) The letter must be properly addressed and stamped 3) The offeree must be able to prove the letter was posted If the rules apply, acceptance takes place at the moment the letter is properly posted. The rules were set out in Adams v Lindsell (1818)	Adams v Lindsell (1818)
	Electronic methods of communication – the principle (apart from the postal rules) that the offer is accepted when the offeror becomes aware of the acceptance (Entores v Miles Far East (1955)) Out of hours messages are effective when the office has re-opened (Brinkibon Ltd v Stahag Stahl (1983)) Consumer Protection Distance Selling Act (2000) and Consumer Rights Act 2015 give consumers a number of rights. If key information is not given to the consumer then no contract is formed. The regulations apply to telephone, fax, internet shopping, mail order, email and television shopping. Art 11 of the Electronic Commerce (EC Directive) Regulations 2002 states that where a buyer is required to give his/her consent through technical means (e.g. clicking on an icon) the contract is made when the buyer has received an electronic acknowledgement of receipt. Bernuth Lines Ltd v High Seas Shipping Ltd (2006) – raised a lot of questions regarding acceptance by email. This issue was also addressed in Thomas and Gander v BPE Solicitors (2010) – in this case 6pm was seen as normal working hours and the courts said the email could have been read on a portable device. The courts said each case must be looked at on the facts and the general business practises of the sector.	Entores v Miles Far East (1955) Brinkibon Ltd v Stahag Stahl (1983) Bernuth Lines Ltd v High Seas Shipping Ltd (2006) Thomas and Gander v BPE Solicitors (2010)

Consideration

Definition	Dunlop v Selfridge Ltd (1915) <i>"An act of forbearance of one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable"</i>		
Types of consideration	Executed consideration	An act in return for a promise	
	Executory consideration	A promise for a promise	
Rules of consideration	Consideration need not be adequate but must be sufficient	The law is concerned with bargains not gifts. But it is up to the parties to agree what is sufficient value	Thomas v Thomas (1842) Chappell v Nestle Co. Ltd (1960)
		Sufficiency – consideration must be real and must have some real value. It must be definite and have a value even if it is a nominal amount.	White v Bluett (1853) Ward v Bytham (1956)
	Past consideration is not good consideration	Consideration has no value if it has already been done at the time the agreement takes place. Unless there is an understanding that the work must be paid for. For the exception to apply the following must be present: <ul style="list-style-type: none"> An express or implied request by the promisor to the promisee to perform a task An implied promise inherent in the request that the promisor will pay the promisee a reasonable sum for performance of the task The performance of the task The payment of money by the promisor to the promisees for that performance While this is said to be an exception the consideration actually takes place after the implied promise has been made.	Re McArdle (1951) Re Casey's Patent (1892) Lampleigh v Braithwait (1615)
	Consideration must move from the promisee	A person cannot be sued under a contract unless s/he provided consideration.	Tweedle v Atkinson (1861)
	Performing an existing duty cannot be consideration for a new contract	A pre-existing duty is something that you are legally required to do. This can occur in three ways.	
		<ul style="list-style-type: none"> A duty imposed under a public duty to act, such as the police doing what they are required to do under their public duty However, if there is an extra element this may require new payment as in <u>Glasbrook Bros v Glamorgan CC (1925)</u>	Collins v Godefroy (1831) Glasbrook Bros v Glamorgan CC (1925)
		<ul style="list-style-type: none"> A duty imposed under an existing contract with the promisor, such as in a contract of employment, merely doing one's job However, if there is an extra element this may require new payment as in <u>Harley v Ponsonby (1857)</u> and in <u>Williams v Roffey Bros and Nicholls Contractors Ltd (1990)</u> where the defendant builder made the offer of extra payment.	Stilk v Myrick (1809) <u>Harley v Ponsonby (1857)</u> Williams v Roffey Bros and Nicholls Contractors Ltd (1990)
		<ul style="list-style-type: none"> A promise to make payment of an already existing debt, such as repaying a loan 	
	A promise to accept part payment of a pre-existing debt in place of the whole debt is not consideration	Even if a lesser sum is paid and taken on the day a debt is due the creditor will still be able to claim the full amount at a later date.	Pinnel's Case (1602) Foakes v Beer (1884)
		Exceptions to the rule in Pinnel's case	
		1) Accord and Satisfaction. Where there is an agreement to end the old contract and replace it with a new one. This must be done at the request of the creditor not the debtor. 2) Promissory Estoppel – where one party agrees to vary the contract and the other relies on it.	Central London Property Trust Ltd v High Trees House Ltd (1947) Re Selectmove Ltd (1995) D and C Builders v Rees (1965)

Privity of Contract

Principle of Privity of Contract	Only those who are party to a contract are bound by it and can benefit from it. This is seen in <u>Dunlop Pneumatic Tyre Co. Ltd (1915)</u> where there was contract between Dunlop and Selfridge so Dunlop could not sue in the agreement made with Dew not to sell below a stated price.		
The relationship between privity and consideration	Based on the idea that consideration must move from the promisee as in <u>Tweedle v Atkinson (1861)</u>		Tweedle v Atkinson (1861)
	In some situations privity can be seen as causing injustice, the courts have tried to find ways of avoiding the rule as in <u>Jackson v Horizon Holidays Ltd (1975)</u>		
	General exceptions	Agency – where one person (the agent) is authorised to make the contract on behalf of another (the principal). In this situation the Principal will be bound by the terms of the contract even if they did not make it.	
		Collateral Contracts – this involves finding a second contract alongside the main agreement.	Shanklin Pier Ltd v Detel Products (1951)
Contracts (Rights of Third Parties) Act 1999	Under s.1 Contracts (Rights of Third Parties) Act 1999 states that someone who is not a party to a contract (a third party) may enforce the contract against either or both of the actual parties to the contract if:		
	The third party is expressly identified by name, or as a member of a class or as answering a particular description; and		This would have met that Mrs Beswick would have been able to rely on the contract in Beswick v Beswick (1967)
	The contract expressly provides that the third party may enforce the contract, or		
	The contract term is an attempt to confer the benefit of the term on the third party		
	However, under s.3 of the act the parties to the contract do have the right to exclude the rights of third parties. Most commercial contracts will not exclude this right.		

Intention to Create Legal Relations

General principle	When the offer and acceptance have taken place in order for there to be a contract the law will recognise there needs to be the intention to create legal relations. Generally in business relations there is a presumption that there is an agreement to create legal relations. This can be rebutted based on evidence. In social relationships there is a presumption that is not an intention to create legal relations. However, based on evidence the courts can decide there is an intention to create legal relations.		Jones v Vernons Pools (1938)
Types of agreements	Business Arrangements	General presumption is that there is an intention to create legal relations. <u>Edwards v Lawson (2000)</u> said that each case will be decided on its facts.	Jones v Vernons Pools (1938) Edwards v Skyways Ltd (1969) Edwards v Lawson (2000) Esso Petroleum Co. Ltd v Commissioners of Custom and Excise (1976) McGowan v Radio Buxton (2001) Kleinwort Benson Ltd v Malaysian Mining Corporation (1989)
	Business or domestic arrangements	<u>Sadler v Reynolds</u> suggested that some situations will fall into a halfway house between business and domestic relationships.	Sadler v Reynolds (2005)
	Social and domestic arrangements	The general principle is that there is no intention to create legal relations. However, this presumption can be rebutted. The biggest distinction can be seen when comparing Balfour v Balfour (1919) with Merritt v Merritt (1970), the difference in these cases were the couple in Merritt were already separated when the agreement was made.	Balfour v Balfour (1919) Merritt v Merritt (1970) Jones v Padavatton (1969) Simpkins v Pays (1955) Wilson v Burnett (2007) Parker v Clarke (1960)

Specific Terms Implied by Statute in Relation to Consumer Contracts

Key Terms	<p>Consumer Described in the Consumer Rights Act 2015 as an 'individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession.' Note that a company cannot be a 'consumer' as it is not an individual. It is up to the trader to prove whether or not the Claimant is a consumer.</p> <p>Trader Described in the Consumer Rights Act 2015 as 'a person acting for purposes relating that person's trade, business, craft or profession, whether acting personally or through another person acting in the trader's name or on the trader's behalf.' Note that a trader can be sole trader or a company or business partnership or any other form of business organisation.</p>		
The Consumer Rights Act 2015 Brings together all rights and remedies in relation to consumers into one place	Rights	<p>Applies to the contracts of</p> <ul style="list-style-type: none"> • Sale • Hire • Hire Purchase • Other contracts for the transfer of good 	
		<p>Section 9 - The right of satisfactory quality This means the goods meet what the reasonable person (not the trader/consumer) would see as satisfactory quality, taking account of</p> <ul style="list-style-type: none"> • Any description of the goods • The price and other consideration for the goods (if relevant) • All the other relevant circumstances <p>The quality of goods includes their state and condition and take into account</p> <ul style="list-style-type: none"> • Fitness for purpose of the goods usually supplied and durability • Appearance and finish of the goods • Freedom from minor defects of the goods • The safety of the goods <p>However, this will not apply</p> <ul style="list-style-type: none"> • If the defects are drawn to the consumer's attention before purchase • The consumer examines the goods and the examination would have revealed the defect • Where goods have been sold after inspection of a sample and the defect would have been apparent on a reasonable examination of the sample 	<p>Rogers v Parish (Scarborough) Ltd (1987)</p>
		<p>Section 10 - The right for fitness for a particular purpose Applies when the consumer makes the trader aware they want to use the goods for a particular purpose. In this circumstance there is an implied term that the goods are fit for purpose. E.g. If I am buying a car and ask for a family car with a large boot and the sales man sells me a Nissan Micra this would not be fit for purpose. Where the goods are being used for their normal use there is no need to state the use – i.e. there is no need to tell the cashier you will wear a rain coat in the rain. However, if the C has a particular sensitivity that is not known to the C, then the test is whether the goods are fit for the reasonable person – i.e the seller does not have to guard against a rare allergy they are not aware of</p>	<p>Baldry v Marshall (1925) Grant v Australian Knitting Mills Ltd (1936) Griffiths v Peter Conway Ltd (1939)</p>
		<p>Section 11 - The right relating to the description The goods must match the description. The description can be implied – i.e. when the goods are on display. Statutory information should be included under the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013. If the goods are sold by inspection of a model then the goods supplied must match the model. The can even refer to the way goods are packaged</p>	<p>Re Moore and Co. Ltd and Landauer and Co.'s Arbitration (1921) Beale v Taylor (1967)</p>
	Remedies	<p>Section 20 - The short term right to reject goods Must be exercised within 30 days of delivery (shorter where goods are perishable) This must be made clear to the trader and the consumer is able to get a full refund. The trader must bear any reasonable costs of returning the goods A refund (once the trader accepts the right) must be given within days and must be paid in the same way as the original payment unless otherwise agreed.</p>	
		<p>Section 23 - The right to repair or replacement If the goods were unique and could not be replaced the C could have a right to repair. Whether repair or replacement would put a disproportionate cost on the seller is taken into consideration. Repairs must take place within a reasonable time and the trader must bear any additional costs. The consumer cannot require the trader to repair or replace goods if the cost to the trader would be disproportionate in relation to other remedies. This takes into account the nature of the goods and the purpose. The fault complained about must have been present at the time of delivery.</p>	
		<p>Section 24 - Right to price reduction or final right to reject If s.23 does not bring satisfaction the consumer has this right. The trader can only have one attempt at repair or replacement for the C to use this right. Any refund is subject to a deduction for use. During the first 6 months any deduction for use is currently only allowed for motor vehicles.</p>	
		<p>Who has to show non-conformity? If a fault appears within the first 6 months it is said to be there at the time of delivery (unless the trader can prove otherwise. (does not impact short time right to reject) If the fault develops after the first 6 months the burden lies with the consumer to prove the fault was there at the time of delivery.</p>	
The Consumer Rights Act – Supply of Services	Rights	<p>Section 49 - Reasonable Care and Skill Implied term that the trader must exercise reasonable care and skill. The standard expected is similar to that in negligence and dealt with on a case by case basis</p>	<p>Thake v Maurice (1986) Wilson v Best Travel (1993)</p>
		<p>Section 52 - Performance within a reasonable time Where the contract does not expressly fix a time the services must be performed in a reasonable time. What is reasonable depends on the circumstances.</p>	
		<p>Rights of the trader S.49 and S.52 states that the trader has a right to reasonable payment if none is stated.</p>	
	Remedies	<p>Section 55 - The right to require repeat performance This means if a job is not done properly the consumer can request that it is done again, the trader must provide it in a reasonable time and without significant inconvenience to the consumer. The trader must bear any necessary costs (e.g. material and labour)</p>	
		<p>Section 56 - The right to a price reduction An appropriate price reduction for the trader's failure to perform the contract. This may result in the trader giving a refund up to the full contract price. This remedy is only available in two situations</p> <ul style="list-style-type: none"> • Where completion by repeat performance is impossible; or • If the consumer has asked for repeat performance but the trader is in breach of the requirement to do it within a reasonable time and without significant interference to the consumer 	

Vitiating Factors – Misrepresentation

Nature of a Misrepresentation	A misrepresentation only occurs during the formation of a contract. The effect of a misrepresentation is that the contract voidable. This means the contract remains valid until the party who has suffered the misrepresentation seeks to end the contract. This is called rescission and is a discretionary remedy available the courts. Rescission treats the contract as if it never existed.		
False Statement	A statement is usually written/ verbal but does not have to be as in <i>Spice Girls Ltd</i> . Silence cannot be a misrepresentation. To be a misrepresentation the statement must be false. There is no obligation to make a statement but what is said must be true. However there are exceptions to the rule where the D might be obliged to make a statement.		<i>Spice Girls Ltd v Aprilla World Service BV</i> (2000) <i>Fletcher v Krell</i> (1873)
	Exceptions to the rule regarding silence	Change of circumstances – if a statement is true but becomes false because of a change in circumstances it can become a misrepresentation.	<i>With v O’Flanagan</i> (1936)
		The making of a half truth – what is not said is a misrepresentation as the person making the offer has a responsibility to tell the full situation	<i>Dimmock v Hallett</i> (1866)
		Confidential relationship – where a relationship is based on trust there may be a requirement to disclose all information.	<i>Tate v Williamson</i> (1866) <i>Lambert v Co-operative Insurance Society</i> (1975)
Of material fact	The misrepresentation must be of material fact – it must lead the person to enter into the contract		
	Statement of opinion	A statement of opinion is not generally dishonest if the maker of the statement believes it to be true. If the opinion proves to be false it will not support a claim of misrepresentation. If the person who makes the statement knows it to be untrue then this a statement of fact not opinion as in Smith v Land and House Property Corp (1884)	<i>Bisset v Wilkinson</i> (1927) <i>Edgington v Fitzmaurice</i> (1885) <i>Smith v Land and House Property Corp</i> (1884)
	Statement of intention	A statement of intention/ to something in the future is not a statement of fact unless there is evidence that the D had no intention to carry out the statement/ knew it would not happen.	<i>Edgington v Fitzmaurice</i> (1885)
Made by a party to the contract	A person is not liable for the statements of others unless the third party is his/her agent. A newspaper review of an item cannot be a misrepresentation.		
That induces the other party to enter the contract	The statement must be a critical part of the decision making. The statement must have been relied on and they must not have sought information elsewhere		<i>Attwood v Small</i> (1838)
	It doesn’t matter if the C could have easily found the information elsewhere. The fact the statement is untrue and D relied on it.		<i>Redgrave v Hurd</i> (1881) <i>Museprime Properties Ltd v Adhill Properties Ltd</i> (1990)
Misrepresentations – omissions in a consumer contract	S.12 Consumer Right Act 2015 includes information that must be included in a contract to supply goods	It is considered misleading if a trader <ul style="list-style-type: none">• Omits material information that the average consumer needs, according to the context, to make an informed transaction decision• Hides or provides material information in an unclear, unintelligible, ambiguous or untimely manner• Fails to identify the commercial intent of the commercial practice if not already apparent from the context	
Different Types of Misrepresentation			
Innocent Misrepresentation	Misrepresentation Act 1967 defines innocent misrepresentation as a false statement made honestly. The person making the statement needs to believe it to be true and there needs to be no evidence of negligence		
Negligent Misrepresentation	Common law of negligence	Established in <i>Hedley Byrne v Heller</i> (1964) – refer to your notes on negligent misstatement	
	Misrepresentation Act 1967	S.2(1) creates a statutory liability for negligent misrepresentation. There does not need to be a special relationship between the parties. All that is needed is for there to be a contract and for C to suffer loss. Once the C has proved there was a misrepresentation it is up to D to prove the belief was reasonably held. <i>Howard Marine v Ogden and Sons</i> (1978)	
Fraudulent Misrepresentation	Origins in the Tort of Deceit, this covers situations where the person making the statement knows it to be untrue or is reckless as to whether or not it is untrue. To avoid being found liable for fraudulent misrepresentation the person making the statement must believe it to be true. An over optimistic statement can also be a fraudulent misrepresentation.		<i>Derry v Peak</i> (1889) <i>Cherrilow Ltd v Butler Creagh</i> (2011) <i>Greenridge Luton One Ltd v Kempton Investments Ltd</i> (2016)
Remedies	Innocent Misrepresentation	Rescission or Damages – not both Rescission will not apply when	
		Restitution to the original pre-contract position is not possible	
		The contract is affirmed – where the innocent person decides to carry on with the contract even though they are aware of the misrepresentation	
		Delay	
		A third party has gained rights over the property	
	Negligent Misrepresentation	Rescission and/or damages	
	Fraudulent Misrepresentation	Rescission and damages in the Tort of Deceit. The aim of damages is to put the C in the position they would have been in before the misrepresentation took place.	
Damages and Misrepresentation	Although the normal remedy is rescission damages can be awarded in some circumstances	Misrepresentation Act 1967 – s.2(1) gives a right to damages for negligent misrepresentation	
		Misrepresentation Act 1967 – s.2(2) gives a court the discretion to make an award for damages in lieu of rescission for a negligent or innocent misrepresentation. This could be in addition to damages under s.291)	<i>Sindall v Cambridgeshire County Council</i> 1993
		The damages must be for losses specifically related to the misrepresentation	
Damages in the Tort of Deceit where there is fraudulent misrepresentation.			

Vitiating Factors - Economic Loss

Key Terms	Undue Influence	There is a relationship between the parties which has been exploited by one party to gain an unfair advantage.	Allcard v Skinner (1882)
	Duress	When someone enters into a contract as a result of threats of violence to the person which would amount to crimes or torts if those threats were carried out.	Barton v Armstrong (1976)
	Economic Duress	When someone results into a contract as a result of financial threats	Universe Tankships Inc of Monrovia v International Transport Workers Federation (The Universe Sentinel) (1983)
Economic Duress	Economic distress does not normally cover threats towards property	Economic distress does not normally cover a threat to property unless in extreme circumstances.	Skeate v Beale (1840) The Siboen and The Sibotre (1976) Atlas Express v Kafco (1989)
	Economic duress (1) – compulsion or lack of practical choice for the victim	A practical effect must be that there is a compulsion or a lack of practical choice for the victim	Universe Tankships Inc of Monrovia v International Transport Workers Federation (The Universe Sentinel) (1983)
	Economic Duress involves (2) illegitimate pressure	Commercial pressure is not enough to amount to economic duress. There are a number of factors to consider	Pao on v Lau yiu Long (1979)
	Economic Duress involves actions that are not lawful	'illegitimate pressure' can be constituted by conduct which is not in itself unlawful, although it will be an usual case where that is so	Progress Bulk Carriers Ltd v Tube City (2012)
	Effecting of finding economic duress	The contract is voidable, this means that it remains a valid contract until avoided by the innocent party	
	Remedies	Does not result in a claim for damages. The courts can make an order of restitution. This is an equitable remedy and therefore discretionary. The idea is that the parties are in the position they would have been in had the improper action not taken place.	

Exclusion and Limitation Clauses

Definition	Limitation clauses – a term in a contract that sets an upper limit on liability for breach of contract.		
	Exclusion clauses are a term in a contract that exclude or limit liability for a breach of the contract		
Exclusion Clauses	Is the term incorporated into the contract (1)	Where a party has signed a written agreement s/he is bound by that agreement	L'Estrange v Graucob (1934)
	Is the term incorporated in the contract (2)	Whether exclusion clauses are only incorporated into a contract requires the party subject to the clause to know of the clause at the time the contract was made	Olley v Marlborough Court Hotel (1949)
	Is the term incorporated into the contract – the ticket cases	The combination of notices, tickets and other documents may make it difficult for someone trying to rely on an exclusion clause to prove that it was brought to the attention of the other party	Chapelton v Barry UDC (1940) Thompson v LMS Railway (1930) Thornton v Shoe Lane Parking Ltd (1971)
	Is the term incorporated into the contract (3)	Is the term incorporated as a result of previous dealings of the parties?	McCutcheon v David MacBrayne Ltd (1964)
	The contra proferentem rule	Definition – where there is doubt about the meaning of a term in a contract, the words will be construed against the person who put them in the contract. The contra proferentem principle is an approach to be used only where the term is both one sided and ambiguous	Transocean Drilling UK Ltd v Providence Resources plc (2016) Persimmon Homes Ltd v Ove Arup and Partners Ltd (2017) Oliver Nobahar-Cookson v The Hut Group (2016)
Statutory Control of Exclusion Clauses	Unfair Terms Contract Act 1977	S.2(1) a person cannot exclude liability for death or personal injury caused by negligence	
		S.6(1) the implied condition as to title (Sale of Goods Act 1979 and s.7 of the Supply of Goods and Services Act 1982) cannot be excluded	
		S.3 imposes a reasonable test to contracts where one party is subject to the other's standard written terms of business. Guidelines as to what is reasonable is contained on s.11 and schedule 2 of the Act. These are guidelines and it is ultimately up to the judge to decide what is reasonable. s.11(5) requires the person who inserts the clause to show that it is reasonable in all circumstances.	Warren v Truprint Ltd (1986)
		There are three tests for reasonableness	Smith v Eric S Bush (1990)
			Watford Electronics Ltd v Sanderson CFL Ltd (2001)
		S.11 (4) specifically equates to limitation clauses. There are two set criteria: <ul style="list-style-type: none"> The resources which the D could expect to be available for meeting his or her liability How far it was open to the D to cover him – or herself by insurance against any successful claim 	George Mitchell Ltd v Finney Lock Seeds Ltd (1983)
	Consumer Rights Act 2015	S.31 – Prohibits a term excluding or limiting liability, for the supply of services under the following sections of the Act with respect to the sale of goods: s.9 – Goods to be of satisfactory quality s.10 – goods to be fit for purpose s.11 Goods to be as described s.14 Goods to match the model seen or examined s.15 installation as part of conformity of the goods with the contract	
		S.57 Prohibits a term excluding or limiting liability for the supply of services under the following sections of the act s.49 – Service to be performed with reasonable skill and care s.59 – Information about the or service to be binding s.51 – reasonable price s.52 – reasonable time	
		S.65 – prohibits exclusion or restriction of liability for death or personal injury resulting from negligence	
		General fairness of terms s.62 – requirement for all consumer contracts and notices to be fair The act defines unfair as those which put the consumer at a disadvantage by limiting the consumer's rights disproportionately increasing his/her obligations as compared to the trader's rights and obligations. The courts should take into account the circumstances existing when the term was agreed, other terms of the contract and nature of the subject matter of the contract. The fairness test is also supplements by a 'grey list' of terms, this is a non-exhaustive list of terms that may be unfair. In particular, terms relating to the main subject matter of the contract or term that set the price are not subject to the fairness test if they are both. <ul style="list-style-type: none"> Transparent – in plain and intelligible language and, if in writing legible and Prominent – brought to the consumer's attention in such as a way that the average consumer would be aware of the term Written terms in consumer notices must also be transparent. So this could be in any communication or announcement, as long as it is reasonable to assume it can be seen by the consumer.	

Discharge of Contract

Performance	The strict rule is the performance must be complete and exact. This rule as however led to unfairness as in Cutter (window could not recover any of her husband's wages when he died at sea) Re Moore – tins delivered in different amounts to those stated in the contract.		Cutter v Powell (1795) Re Moore and Co. Ltd and Landauer and Co.'s Arbitration (1921)
However, the courts have tempered the harshness of the rule	Divisible Contracts	Where the contract can be seen in separate parts. I.e. X is contracted by Y to paint 10 for paintings for £3,000 and it was stated this equates to £300 per painting. He becomes ill after painting 5 and cannot continue. As the contract is divisible. X can recover £1500 for the paintings but Y may be able to recover damages for breach of contract.	Ritchie v Atkinson (1808)
	Substantial Performance	Is substantial performance applies there must be a payment of an amount that relates to what has been done. This does not apply to contracts that cannot be broken down. It generally applies to little contracts where little things are not done and the monetary amount to correct them is small in relation to the whole contract. What is substantial is decided by the circumstances of each case. The courts will use their discretion to reach a just and fair decision.	Dakin and Co. v Lee (1916) Hoenig v Isaacs (1952) Bolton v Mahadeva (1972) Young v Thames Properties Ltd (1999)
	Prevention of Performance	If one party prevents the other from performing his obligations under the contract, then the innocent party can claim to be paid on a quantum meruit (what its worth basis)	Planche v Colburn (1831)
	Acceptance of Part Performance	If one party agrees that the other party need not complete the contract then payment can be paid on a quantum meruit basis. However, the consent must be in the form of a specific acknowledgement that the defaulting party is entitled to be paid for what they have done and the agreement was made without undue pressure. If the innocent party has no other option then to take benefit of the partly done work done, this is not considered consent to part performance.	Sumpter v Hedges (1898)
The effect of a term as to time for performance of a contract	<p>Issues arise when considering how exactly a term to time must be performed. If it is a condition the injured party can repudiate the contract for breach of condition.</p> <p>The court will regard time as a condition if:</p> <ul style="list-style-type: none"> The parties have expressly stated in the contract that time is of the essence In the circumstances time for completion of the contract is critical, or One party has failed to complete on time and the other has insisted on a new date for completion of the contract (making time of the essence) <p>If none of the above apply the then time is a warranty and V can seek damages rather than repudiation. Most contracts for sale of land/ property, if time being of the essence is waived it is important that it is reinstated if it is to be relied on.</p>		Charles Rickards Ltd v Oppenheim (1950) Union Eagle Ltd v Golden Achievement Ltd (1997) Hakimzay Ltd v Swailes (2015)
Time and the Consumer Rights Act	<p>S.52 – If the contract does not state a time for completion then s.52 states that it must be done in a reasonable time.</p> <p>S.54 – if not done in a reasonable time the consumer has the right to end the contract because of the breach</p> <p>S.56 – Gives a right to an appropriate price reduction linked to the time of the delay</p>		
Discharge by Breach	Actual Breach	<p>Where a party fails to perform his obligation under the contract. Terminating the contract depends on the type of term that was breached. Only a breach of condition will give rise to repudiation.</p> <p>Breach of condition can be a failure to perform (e.g. not deliver goods) or it could be part performance</p> <p>The three sets of circumstances giving rise to a breach of contract are</p> <ul style="list-style-type: none"> Renunciation by a party of his or her obligations under a contract – e.g. not paying a bill on time. Impossibility created by his/her own act – e.g. a hairdresser closing business during a time when they had appointments Total or partial failure of performance, e.g. delivering defective goods <p>A Repudiatory Breach can only occur when there is;</p> <p>A breach of condition</p> <p>A refusal to perform the contract</p> <p>A sufficiently serious breach of an innominate term, so the breach is considered a breach of condition.</p> <p>If a repudiatory breach is established the party who is not in breach may terminate the contract and claim damages or continue and claim damages.</p> <p>A contract can contain a provision where the contract can be terminated in the event of a breach of any term in the contract.</p>	Stoczna Gdynia SA v Gearbulk Holdings (2009)
	Anticipatory Breach	<p>Where one party to a contract gives advance notice to the other that they will not be performing the contract. The innocent party can</p> <ol style="list-style-type: none"> Sue at the time for breach of condition Wait until the contract should have been performed and sue if performance does not take place <p>The victim can also repudiate the contract under an anticipatory breach.</p> <p>Remember for a breach of warranty the victim can only claim damages.</p>	Hochster v de la Tour (1853) Geden Operations Ltd v Drybulk Handy Holdings Inc (Bulk Uruguay) (2014)
Frustration	Historic position	A party to contract was bound to perform his/her obligations whatever happened. Even is this seemed to be unfair. E.g. paying rent for a house you can no longer live in as a battle is taking place on the land.	
	Development of Doctrine of frustration	In the 19 th century the doctrine of frustration was developed and means that if a party is prevented from performing a promise because of an unforeseeable, intervening event he would not be liable for the breach.	Taylor v Caldwell (1963) Davis Contractors Ltd v Fareham UDC (1956) National Carriers Ltd v Panalpina (Northern) Ltd (1980)
	Impossibility of Performance	Subject matter is destroyed or becomes unattainable through no fault of either party. This includes a party being unable to perform the contract because of an unexpected illness.	Taylor v Caldwell (1963) Jackson v Union Marine Insurance Co. Ltd (1874)

[illegible]

Remedies

Types of Remedies	Legal remedies	Are available for a breach of contract as of right, these can be financial compensation or remedies against the goods.	
	Equitable remedies	Are discretionary, you do not have a right to an equitable remedy but the courts may award one if they think legal remedies are not appropriate in the circumstances.	
	Remedies under a specific statute	The ones you need to know about are the Law Reform (Frustrated Contracts) Act 1943 and the Consumer Rights Act 2015	
Compensatory Damages	Meaning	These are available as of a right to anyone who has suffered a breach of contract. Even if there is no loss the courts will award nominal damages. The aim of damages is to put the C in the position they would have been in had the contract been completed. Damages are normally awarded for expectation loss (loss of bargain) reliance loss (wasted expenditure)	
	Types of damages	Nominal Damages	<p>Damages awarded when there is no loss. However, in some cases substantial damages may be awarded when nominal damages may seem more appropriate. This is sometimes called a Wrotham Park award and used when the actual amount of damages would be difficult to work out.</p> <p>Staniforth v Lyall (1830) Experience Hendrix LLC v PPX Enterprise Inc. (2003) Wrotham Park Estate Co. Ltd v Parkside Homes Ltd (1974) Morris-Garner v OneStep Support Ltd (1974)</p>
		Speculative Damages	<p>The courts have been reluctant to award speculative damages as it is an award for a loss of change of the benefit denied to the C. In Addis, the court refused to award damages for humiliation caused by being dismissed and would only award in relation to lost salary. However, in Chaplain damages for loss of chance were awarded to a C who was denied the opportunity of participating in a beauty contest. In Ruxley damages were awarded for loss of pleasurable amenity.</p> <p>Addis v The Gramophone Company (1909) Chaplin v Hicks (1911) Ruxley Electronics and Construction Ltd v Forsyth (1996)</p>
	Causation and remoteness of damage	<p>Losses can only be recovered if they were caused by the breach of contract. C must prove the breach caused the loss. The 'but for' test for contract is not for the breach of contract would the C have suffered loss? If the loss would have occurred regardless there is no causation. Remoteness of damage does not establish how much compensation will be payable (damages) but merely which losses can be the subject of compensation (damage)</p> <p>The test for remoteness was set out in Hadley v Baxendale (1854) – it is a 2 part test</p> <ol style="list-style-type: none"> 1) What loss is a natural consequence of the breach (objective) 2) What specific losses are in the minds of both parties when the contract is formed (subjective) <p>The test has been developed in Victoria Laundry Ltd v Newman Industries Ltd (1949)</p> <ul style="list-style-type: none"> • Recoverable loss should be measured against a test of reasonable foreseeability • Foreseeability of loss is itself dependant on knowledge at the time the contract is made. • Knowledge is of two types: Common knowledge and actual knowledge of the D. <p>Knowledge can be implied on the basis of what the reasonable man may have contemplated in the circumstances (Czarnikow)</p> <p>Once causation and remoteness of damage have been established the courts can then determine how much the C can recover.</p> <p>Hadley v Baxendale (1854) Victoria Laundry Ltd v Newman Industries Ltd (1949) Czarnikow Ltd v Koufos (1969) H Parsons (Livestock) Ltd v Uttley Ingham (1978) Transfield Shipping Inc v Mercador Shipping Inc (The Achilles) (2008) Wellesley Partners LLP v Withers LLP (2015)</p>	
	Categories of Recoverable loss	Loss of Bargain	To place the C in the position they would have been in if the contract had been properly performed. This can be seen in a number of ways.
		·	1) The difference between the goods and services required in the contract and those actually provided.
			2) Where there is a market, damages will be the difference between the contract price and the market price. If C's profit remains there is no loss, if there is no available market the C can recover the full amount.
			3) Loss of profit – not just goods and also in other contracts
			Loss of chance – generally a speculative loss and generally not recoverable in contract. However, Chaplain v Hicks in the exception to this rule.
	Expectation Loss	The normal measure for damages and refers to the innocent party's loss of bargain and can include the profits they would have expected to receive had the contract been performed, taking into account any costs incurred in performing the contract. The aim is to put the innocent party in the position they would have been in had the contract been performed.	
		Reliance Loss	<p>This is the expense incurred by C who relied on the contract being performed.</p> <p>Expenses paid before the breach may also be recoverable.</p> <p>Anglia Television Ltd v Reed (1972) Farley v Skinner (2001)</p>
	Duty to mitigate loss	<p>The injured party must take reasonable steps to minimise their loss.</p> <p>The C is not bound to go to extraordinary lengths to mitigate loss.</p> <p>In anticipatory breach the C is not bound to sue immediately and can wait to see the full effect of the breach.</p> <p>British Westinghouse Electric v Underground Electric Railways (1912) White and Carter v McGregor (1962) Thai Airways v K I Holdings (2015)</p>	
	Liquidated damages	<p>Where the amount of damages are fixed by a term in the contract. The amount should represent a proper and accurate assessment of loss, if it is not it will be seen as a penalty and not enforceable. An extravagant sum will always be seen as a penalty.</p> <p>The party seeking to rely on a contract that predetermines the amount of damages to be paid must show that the clause is there to protect a legitimate interest and is not exorbitant or unconscionable.</p> <p>Dunlop Pneumatic Tyre Co. v New Grange and Motor Co. (1914) Cavendish Square Holding BV v Talal El Makdessi (2015) ParkingEye Ltd v Beavis (2015)</p>	
	Quantum Meruit	Recovery of unqualified sum for services already rendered	
Equitable remedies	Will not be available if damages are more appropriate or if they would be impossible to perform or cannot be supervised.	Specific Performance	A court order compelling someone to do something – typically hand over the property that has been agreed in the contract.
		Injunctions	Where the courts will order a specific behaviour to prevent a breach of contract. You don't need to know about these for AQA!
		Restitution	A simple payment of any money or other benefits passed to the D
		Rescission	The parties are returned to the position they would have been in before the contract was made.
Termination for breach of contract	<p>This can be a repudiatory breach by the guilty party to the contract. At common law breach can result in terminating the contract, if the affected party chooses to do so where</p> <ul style="list-style-type: none"> • There is a breach of condition or of an innominate term construed as a condition • One party refuses to perform his or her obligations under a contract at all or the substantial part of its obligations, including anticipatory breach • One party makes it impossible to perform the contract 		
Rights against the goods	<p>E.g. those given in the Consumer Rights Act 2015 – the short time right to reject.</p> <p>Many contracts include a reservation of title clause, whereby the title (ownership) remains with the seller until the buyer has paid for them all. The Sale of Goods Act 1979 provides three specific rights for an unpaid seller of goods.</p> <p>Lien – a right to retain possession of goods until the debtor has paid</p> <p>In cases of insolvency a right to stop goods in transit and of regaining possession of goods from the carrier</p> <p>A right of resale as limited by the act</p> <p>Consumers have rights and remedies with respect to the goods. These are</p> <p>s.20 – Short term right to reject</p> <p>s.23 – Right to repair or replacement</p> <p>s.24 – the right to a price reduction or the final right to reject</p>		

