Unit B

Contract law

Version: 1.2

Registered charity number 279057
VAT number 726 0202 76
Company limited by guarantee
Registered number 1436945 England

Registered office: Citizens Advice 3rd Floor North 200 Aldersgate Street London EC1A 4HD

Introduction

Consumers make contracts on a daily basis, e.g. every time something is bought. When something goes wrong, e.g. the new car breaks down after a week, the law of contract, which is concerned with legally binding promises, comes into play by:

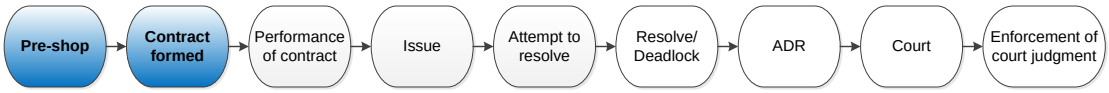
- regulating the rights and obligations of the parties to the contract
- providing remedies for certain losses or damage suffered
- providing extra protection for consumers when they deal with traders

Basic contractual principles are found in the common law but most of the provisions that protect consumers are based in statute. Liability under a contract is strict.
Most contracts are bilateral, where both parties make a promise, e.g. A offers to buy B's car at a price with which B is happy. B has promised to sell the car to A, who has promised to pay the agreed price to B. However, unilateral contracts also exist, where only one party makes a promise and the other performs an act in return for the promise, e.g. A advertises a £50 reward for the return of his lost dog. A is promising to pay the £50. B is entitled to the money if he returns the dog, but no promise to search for the dog has to be made by B for a contract to be formed. Simply going to look for the dog is enough to make the contract.

The test as to whether or not it is a unilateral contract is what a reasonable person would think. Is doing the act sufficient, or would a promise to do it be necessary, thereby making it a bilateral contract?

Regardless of whether a contract is unilateral or bilateral, the most important aspect of a contract is the ability to show agreement between the parties, a meeting of minds, sometimes referred to as the *consensus ad idem*.

The stages of the consumer's journey addressed in this unit are as indicated below:



The areas for discussion in this unit are:

B1 The elements that make up a contract

B2 Terms and conditions

B3 Remedies for breach of contract

B4 Miscellaneous important rules about contracts

B5 Liability to third parties

B1 The elements that make up a contract

It is important to establish whether a contract exists to determine whether the parties have legal obligations to each other. The following five elements must be present to constitute a contract:

- ✓ an offer
- ✓ an acceptance
- ✓ some consideration (not always necessary in Scotland for a contract to be formed)
- ✓ an intention to create legal relations
- ✓ the capacity to contract

B1.1 Offer

One party to the contract will usually propose terms while the other party accepts them. So an offer must contain some sort of promise. It does not necessarily come from the person making the first move, who may only be inviting offers, known as 'an invitation to treat' (ITT). The “offeror” is the person making the offer and the “offeree” is the person to whom it is made.

There are times when Cs may not know **who the offeree was**, or may be mistaken about this. In these instances, refer to Quick Reference Tool for Financial Capability.

B1.1.1 Examples of invitations to treat

B1.1.1.1 Self-service stores

The display of goods in a self-service store is an ITT and C makes the offer to buy at the checkout. This allows C to have a change of mind before reaching the checkout and put the goods back on the shelf *(Pharmaceutical Society of Great Britain v Boots).*

B1.1.1.2 Shop window

Similarly, goods displayed in a shop window will not constitute an offer but an ITT *(Fisher v Bell).*

B1.1.1.3 Website

There is no case law, but based on the principles above, an item shown on T’s website with a price indication, is likely to be an ITT. C visits the site, chooses the goods that they want to purchase, sends them to their virtual shopping trolley and makes the purchase; this is likely to be an offer to buy.

B1.1.1.4 Auctions

An auctioneer invites potential bidders to make offers to buy goods but, in theory, bids can be withdrawn before the hammer falls. There is no promise to sell to the highest bidder unless the sale is advertised as being 'without reserve'. Advertising that particular goods will be sold at an auction is merely a declaration of an intent to sell, not a promise to do so *(Harris v Nickerson).*

If the auction is an online auction, the web page operator is not actually an auctioneer under UK law. The operator is actually operating a complex message board system, supplying a service that includes the ability

for sellers to place details of their goods on the website and to receive bids from potential buyers and pass details of these to the sellers.

B1.1.1.5 Magazine advertisements

Information given in magazines about items for sale may amount to an offer depending upon the wording *(Carlill v Carbolic Smoke Ball Co. Ltd).* "The first 50 people to turn up at the store on Monday morning can buy an X brand television for £50" - is likely to be an offer. However, a picture of an item accompanied by just a price indication and some descriptive words about it is likely to be an ITT.

B1.1.1.6 Letters

Similarly, the wording used in a letter will also be important. In *Gibson v Manchester City Council*, a letter from the council to Mr Gibson said that, 'The Corporation may be prepared to sell the house to you at ...if you would like to make a formal application to buy ...'. The court had to decide whether this was an offer to sell at the price indicated or an invitation for Mr Gibson to offer to buy.

B1.1.2 Terminating offers

An offer to enter into a bilateral contract may end in the following circumstances:

✓ it is withdrawn before it is accepted and this is communicated to the offeree *(Byrne v Van Tienhoven)*

✓ a reasonable period of time passes

✓ a counter offer is made (*Hyde v Wrench)*

If the offer is one which would lead to a unilateral contract, then it cannot generally be withdrawn once the offeree has begun performance; however, it may be possible to withdraw it before performance if notice is given in the same format as the original offer. Some online auction sites do not allow potential buyers to retract their bids once placed.

What is a reasonable period of time for an offer to lapse will depend on the nature of the subject matter of the contract and the facts of each case.

A counter offer will destroy an original offer and become an offer in its own right, requiring acceptance for there to be a contract. This will be particularly important where the parties negotiate before coming to some agreement. For example, if A offers to sell her car to B for £4,000 and B responds by saying, no that's too expensive, I'll give you £3,500, then B has made a counter offer. If A rejects this and B says, well then I will give you the £4,000 you originally suggested, this is an offer and it would be necessary to establish whether A accepted this or not in order to determine whether a contract is in existence.

B1.2 Acceptance

Generally, when an offer is accepted, this is the point at which the contract is made, so it is important to know when acceptance has taken place.

B1.2.1 Communication of acceptance

Acceptance of a unilateral offer is by performance *(Carlill v Carbolic Smoke Ball Company)*. In a bilateral contract, a presumption is made that communication of an acceptance is required and the offeror can prescribe the mode of acceptance, e.g. in writing.

B1.2.2 The Postal Rule

Adams v Lindsell, established this rule, which states that a contract is made when a letter of acceptance is posted, even though it may never arrive. This is really for convenience as there is more precision and chance of proof than if it was based on delivery. The offeror could always exclude the rule, and state that acceptance must be actually received to be effective. If the offer has to be accepted by a certain date the acceptance is effective so long as it is posted by that date.

B1.2.3 Instantaneous communications

There are various methods of instant communication, such as speaking face-to-face or over the telephone and online. It is likely that acceptance will take place when and where it is received since it is more the norm to receive immediate acknowledgement and if none is received, to communicate again. However, 'No universal rule can cover all such cases; they must be resolved by reference to the intentions of the parties, by sound business practice and in some cases by a judgment about where the risks should lie' (Lord Wilberforce in *Brinkibon Ltd v Stahag Stahl*). This will be relevant for Cs shopping by telephone and online, when they will be communicating verbally and by email. Exactly when acceptance takes place when C has ordered online, may depend on the wording of any email sent in response to C's order and any terms which clarify this point. Any contract made electronically must comply with additional legal requirements, some of which are discussed in more detail in units C and D.

B1.2.3.1 Compliance with the Electronic Commerce (EC Directive) Regulations 2002 (ECRs)

Where C places an order using technological means, e.g. by text, email or interactive television, T must provide an electronic acknowledgement of it, without undue delay [r11(1)(a)]. Some Ts make it clear, when they send an email to do this, that acceptance of C's offer to buy, does not take place until they send an e-mail saying that goods have been dispatched and this is confirmed by the wording in the terms and conditions (T&C). Other Ts may word their acknowledgement emails in such a way that they amount to acceptance of C's offer, either deliberately or inadvertently. Other requirements under the ECRs depend on whether T is simply advertising or actually trading online. More details are provided in table B2 when remedies for non-compliance are discussed. Those relevant to the making of a contract include:

- ✓ online Ts must provide certain information to buyers (overlaps with detail in unit C) [r6 &r9]
- ✓ appropriate methods of correcting input errors should be provided [r11(1)(b)] and technical information about them [r9(1)(c)]
- ✓ the steps to conclude a contract should be clear [r9(1)(a)]
- ✓ any terms and conditions (T&C) provided, should be made available in a way that allows storage and reproduction of them [r9(3)]

B1.2.3.1 Compliance with the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (CCRs) [r14]
For contracts to be concluded by electronic means and at a distance (not face-to-face), T must ensure that:

- ✓ C is aware of certain information (clarity and prominence required) directly before C places the order (items 1, 6, 7, 8, 15 & 16) in Appendix D2 of unit D)
- ✓ C has explicitly acknowledged the obligation to pay when placing any order
- ✓ where placing an order requires the activation of a button, or some similar function, that this is clearly labelled "order with obligation to pay" or some comparable unambiguous wording, e.g., "pay now"
- ✓ any trading website through which the contract is concluded, indicates whether there are any delivery restrictions and which means of payment are accepted; this must be done clearly and legibly and at the beginning of the ordering process by the latest

B1.2.4 Practical application of offer and acceptance

Contracts are made in different ways depending on various factors such as location and method of communication and whether there is any negotiation beforehand. It is essential to check what happened in an individual case if there is any uncertainty about whether a contract has actually been concluded. Table B1 illustrates some common examples but matters may proceed in a different way or order.

The performance of a contract, e.g., payment and delivery, can take place after the contract has been made.

Table B1: Practical examples of how contracts are made

Type/place of contract	Common offer example	Common acceptance example	Comments
In a store	C offers to buy at the till	T puts the items through the till by way of acceptance	C can put most items back on the shelf if they change their mind before going to the till. T can refuse to sell C, e.g. if they have mispriced an item, have no stock or think that C is underage
Online shopping	C offers to buy by ordering online after putting items in a virtual shopping basket and checking out	T accepts C's offer by sending an email indicating acceptance - the 1st email C receives may only be acknowledging the order, acceptance may be delayed until T sends one saying the goods have been dispatched	The wording used by Ts in these emails will be important in determining when acceptance takes place This is likely to be a distance contract, which may provide C with cancellation rights
Face to face	T offers to sell a particular car on the garage forecourt at £200 less than the indicated price	C accepts by nodding, shaking hands with T or simply by saying yes	There could be a period of negotiation before a sale is agreed so it is important to consider who said what, when and in response to what to establish whether a contract was actually made

Type/place of contract	Common offer example	Common acceptance example	Comments
Telesale	T rings C on a landline and offers a broadband contract to C	C accepts by verbally agreeing to the supply of the broadband service during the call	The wording used could be important here. Sometimes C does not realise he/she has agreed to buy something This is likely to be a distance contract, which may provide C with cancellation rights
House call	T calls round at C's house and persuades him/her to sign an order form for a mobility scooter. This could be an offer to buy by C or an offer to sell by T, depending on who signs first	If T signs first, C's signature will be an acceptance If C signs first, then T's signature will be an acceptance	This is likely to be an off-premises contract, which may provide C with cancellation rights If T behaves in an unfair manner while persuading C to sign, this may provide grounds to unwind the contract under the CPRs
Hiring a cab	C stands in the road and raises his/her arm to hail a cab	The cab driver stops for C to get into the cab	The contract may be formed in such a scenario before either party has said anything
Public auction	C raises his/her hand at a car auction to indicate a wish to bid for a particular car	The auctioneer, acting on behalf of the seller, brings down the gavel to signify acceptance of C's offer	In theory C could withdraw the offer to buy before the auctioneer brings the gavel down, but in practice this might be quite difficult to achieve
Online auction	C bids for an item on an online auction	T accepts C's offer as it is the highest bid and meets the reserve price	Some online auctions do not allow buyers to withdraw bids. Private sellers also use online auctions to sell items as well as Ts (unit J) This is likely to be a distance contract, which may provide C with cancellation rights
Mail order	C sends off a completed order form or rings a dedicated order line to place an order	C may be informed by telephone, text, letter or email that the offer has been accepted and the goods will be dispatched	This is likely to be a distance contract, which may provide C with cancellation rights
Vending machine	The machine containing the item is an offer to sell	C accepts the offer by inserting money into the machine	This is a distance contract but for practical reasons is exempt from the requirement to provide a cancellation right

B1.3 Consideration

An offer to contract is asking for something in return. Accepting the offer is promising to do, or actually doing, that something. The promise or the act is called the consideration and is another necessary element of a legally binding contract. Both parties must provide consideration. A promise by one party only is viewed as a gift and is legally unenforceable.

Consideration does not have to be provided in Scotland for a contract to be binding. But this does not automatically mean that just because there was no consideration there is a legally binding contract.

In a straightforward consumer sale, the consideration provided by T is the item or service being sold, and the consideration being provided by C is paying the price. It could alternatively be an exchange, e.g. a motorbike for a car.

There are times when Cs may not know **what the amount of consideration was** ie. not know how much the item or service was. In these instances, refer to the Quick Reference Tool for Financial Capability.

Consideration must be sufficient, but not necessarily adequate, and must not be in the past:

B1.3.1 Sufficiency

There are some things which the law regards as incapable of amounting to consideration, namely promising:

- not to do something which there is no right to do in the first place, e.g. trespass on someone's land
- to perform a duty already imposed, such as agreeing to pay someone to attend court as a witness when they have already been ordered by the court to do so *(Collins v Godefroy).*

B1.3.2 Adequacy

The law is not concerned with whether someone has made a good deal, only that the consideration has some value, however, low. So an agreement to pay £1 for something worth £20 could be a valid contract. If duress had been used to force the contract, however, then the law would intervene.

B1.3.3 Past

A promise to pay for something which has already been provided is not enforceable unless it is an ordinary commercial service. The majority of consumer contracts will fall into this category and so even though a price has not been agreed beforehand, e.g. when the plumber is called out to deal with a burst pipe, there is a requirement to pay a reasonable price.

There are times when Cs may not know **what the consideration was** ie. how the item/service was paid for. In these instances, refer to the Quick Reference Tool for Financial Capability.

B1.4 Intention to create legal relations

In some domestic or social situations it is clear that even though the parties exchanged promises and provided consideration, they never intended their agreement to have any basis in law, e.g. 'The band practice can be at my house next week if it can be at your house the week after.'

It is unlikely that Cs consciously intend their transactions to have legal consequences. The test of whether or not there is an intention to create legal relations is an objective one. There is no precise rule about how to determine this and the facts and circumstances surrounding each situation would need to be examined.

B1.5 The Capacity to Contract

Contract law requires people to be capable of understanding the nature and consequences of the transaction they enter into. Generally speaking, Cs can make any legal contract they choose and there are some circumstances when people considered to be in a vulnerable position may be able to escape the contracts they make if they so wish. However, if the contract is for what the law calls necessaries, there will be an obligation to pay a reasonable price.

Where it is considered that a person does not possess the ability to take on board all the necessary information and process it properly to make an adequately informed decision, the law may protect them from their actions. There are two categories where this may occur, namely contracts with minors and contracts with persons of unsound mind.

B1.5.1 Minors

A person under the age of 18 is a minor and will not generally have the capacity to enter into contracts until they reach the age of majority, i.e. 18. However, this does not mean that they cannot make any contracts at all. The law is designed to protect minors by discouraging others from entering into contracts with them. Typically, contracts with minors are voidable by the minor but binding on the other party, so the minor can back out of the contract if they wish to, but the other party cannot. There are however, some exceptions to this general rule and minors are likely to be bound by contracts which, amongst others, are for necessaries or employment which is beneficial.

B1.5.1.1 Necessaries

If a minor purchases goods which are necessaries then they are under an obligation to pay a reasonable price for them [s3(2) SGA]. Necessaries are defined as goods which are “suitable to the condition in life” of such a minor, and to their “actual requirements at the time of the sale” [s3(3) SGA].
In other words, it requires some assessment of what goods a particular minor is likely to require and also importantly, what their specific, individual needs are at the time. This is a two stage test:

- are the goods in question of the type you would expect this minor to have?
- is it reasonable that the minor actually needs them, or are they already adequately provided for?

If the answer to both questions is yes then the goods are necessaries and the minor is obliged to pay for them, however, only payment of a reasonable sum is required, not the contract price. It is up to T to show that goods are necessaries, e.g., it may be considered that teenage children these days have mobile phones, they could therefore be thought of as necessaries. To determine whether a child was bound to pay for a mobile phone that they had agreed to buy, would depend on their actual needs at the time of the

agreement. If they already had a perfectly good phone then T could well find that they are unable to enforce the contract.

The courts have on occasion also decided that some service contracts are for necessaries and have treated them in the same way as goods, e.g. contracts for legal services. However, the law in this area is by no means clear.

The position regarding a contract for a mobile phone service has not been examined by the courts and it is not clear whether it would be considered as falling into the category of:

- a continuing obligation - binding unless ended by the minor
- a service for necessaries - minor obliged to pay a reasonable price
- neither of the above - not enforceable by the service provider

Most mobile phone service providers and internet service providers will require C to sign to say that they are 18 or over and if someone makes a false claim about their age, this may nullify any claim they may have had with regard to their incapacity as a minor, and they may also be committing a criminal offence.

B1.5.1.2 Employment

Contracts of employment, or similar, are binding on minors providing that overall they are beneficial. This would require an examination of all the terms and conditions relating to the contract but could cover examples such as an agreement to do a paper round or play football for a Premier League Club.

B1.5.1.3 Remedies

If the minor has not already paid, then the other contracting party will not be able to enforce the contract, i.e. demand payment. If the minor has already paid then whether he/she can repudiate the contact (end it) will depend on whether it is for necessaries or one of the other types of contract which may be binding on a minor. A court can require a minor to return items to a supplier, if it is just and equitable to do so [s.3 Minors' Contracts Act 1987] as well as awarding a refund of money already paid.

B1.5.2 Persons of Unsound Mind

The rules about capacity are to ensure that someone who is entering into a contract understands the nature and consequences of what they are doing, therefore, if someone is not of sound mind it is unlikely that they are capable of such understanding and should not be bound by their actions. A person may be of unsound mind because they are either intoxicated or mentally incompetent.

B1.5.2.1 Intoxication

If someone is so intoxicated, through drink or drugs, so as to be incapable of giving consent, any contract they enter into may be voidable, although this argument has been used less successfully in modern times as the degree of intoxication required before capacity is lost, is likely to be substantial. If the contract is for necessaries (see above) there would be an obligation to pay a reasonable price [s3 SGA]. Where non-necessaries are concerned, for the intoxicated person to avoid the contract their lack of capacity must have been obvious to the other person AND they must be so affected by the drink/drugs, that they do not understand the nature of the transaction.

B1.5.2.2 Mental incompetence

The same principles apply for someone who is mentally incompetent. Contracts they make for non-necessaries will be voidable if they do not understand the nature of the transaction AND the lack of capacity

should be obvious to the other person. Contracts for necessaries will be binding and a reasonable price will have to be paid. In addition it is possible, under the Mental Capacity Act 2005, for a court to take control of someone's affairs if they are not capable of doing so. Such incapacity can be permanent or temporary and is decided on a balance of probabilities. The test is based on whether a person can make a decision for themselves or not, due to an impairment or disturbance of the brain. This includes understanding, retaining, using or weighing information or communicating the decision in any way.

The law concerning capacity is a complex area. The discussions above are a simplification of the most relevant points to consider.

The capacity of children and young persons to enter into contracts is governed by the Age of Legal Capacity (Scotland) Act 1991. The general principle is that someone below the age of 16 has no capacity to enter into legal transactions [s1(1)(a)]. Any apparent contract would be null and would therefore need to be made on the child's behalf by the child's legal representative, usually a parent.

There are exceptions to this general rule, the most important being that someone under the age of 16 can enter into a legal contract providing the transaction satisfies both criteria below:

i) it is of a kind commonly entered into by people of the child's age and circumstances, and

ii) the terms are not unreasonable

So, for example, a child of 7 buying some sweets will make a valid contract, providing the price is reasonable.

Between the ages of 16 and 18 there are special provisions in place which allow an application to a court to have certain contracts set aside if they are prejudicial [s3(1)]. This can be done up to the age of 21 and any party can apply to the court for ratification to remove the uncertainty. Prejudicial is defined in s3(2) and requires the prejudice to be substantial and consideration of whether a reasonably prudent adult would have made such a contract if in the same circumstances that the young person was in at the time. If a young person lies about their age or affirms the contract when they reach 18, they can no longer apply to have it set aside.

Certain contracts cannot be set aside as prejudicial, including any made in the course of a trade, business or profession [s3(3)(f)], e.g. a 17 year old buying a van to deliver flowers when they set themselves up as a florist.

Summary

- Consumers make contracts on a daily basis without even realising it and the **law of contract** is there to assist in determining what the **terms of the contract** are, when they have been breached and **what remedies are available**.
- There are **five elements** which make up a contract and they must all be present for a contract to be legally binding; they are: an **offer, acceptance, consideration, an intention to create legal relations and the capacity** to form a contract.
- Most contracts are **bilateral** where **both parties make a promise**, however, it is possible for contracts to be **unilateral, where only one party makes a promise** to do something and the other responds by performing an act, such as looking for a lost item for the promise of a reward.
- **Offers must be distinguished from invitations to treat**; items displayed or advertised simply with a price indication, e.g. in a shop window, on a supermarket shelf, in a magazine or on a web site, are likely to be ITT not offers to sell as the seller is simply inviting the potential customer to offer to buy, although sometimes the seller does make a direct offer to sell.
- **Offers can be withdrawn before they are accepted**, although sometimes this is difficult to do in practice, e.g. at an auction; offers can also be terminated after a reasonable period of time or by the introduction of a counter offer.
- The point of **acceptance of an offer is when the contract becomes binding** on both parties and so it is important to know when this happens; an acceptance **must be communicated and unconditional** and the mode of acceptance can be **determined by the person making the offer** (offeror); the **postal rule**, if applicable, states that, for convenience, a letter of acceptance is effective as soon as it is posted.
- There are specific requirements under the **ECRs, for T to comply with when C orders using technological means**, some of which depend on whether T is advertising or actually trading, including: an immediate acknowledgement of the order, regardless of whether this amounts to acceptance or not; the provision of information; details of how to correct input errors; clear steps showing how to conclude a contract and some means for the reproduction and storage of any T&C provided.
- For **contracts being concluded by electronic means and at a distance, the CCRs require T to ensure that**: C is aware of certain information directly before placing an order; C has explicitly acknowledged the obligation to pay when ordering; that any button, or similar, is clearly labelled “pay now” or something comparable and any trading website, indicates any delivery and means of payment restrictions clearly and legibly.
- The **consideration is the exchange of promises by the parties** and must be provided by both parties for the contract to be enforceable; it need not be adequate but must not be in the past and must be sufficient in the eyes of the law.
- An **intention to be legally bound is presumed if it is a normal commercial transaction**, it is only certain social interactions where it could be assumed that no such intention exists.
- Generally speaking entering into a contract is a voluntary action and **people can make contracts with whoever they like**, however, there are **some restrictions** to this concept and minors (under 18s) and those who are not aware of what they are doing through drink, drugs or because they are mentally

unsound, may only be bound to continue with certain classes of contracts, e.g. necessaries, for which they will have to pay a reasonable price.

- **Necessaries** are those things that are both suitable for someone's position in life and also appropriate for their actual personal requirements.

- A lack of understanding of whom the contract was made with, how much for, or what method was used to provide consideration are all **indicators of poor financial capability**.

B2 Terms and conditions

In order for a contract to be enforced the parties must know the terms they have agreed. This simply means that they should know which statements made during their negotiations became part of the contract (terms) and which did not (representations). There can be many terms in a contract and the following issues need to be considered:

- whether they are express or implied
- what status each term has
- how they are incorporated into the contract

B2.1 Types of contract terms

A contract is usually made up of two different types of terms. These are:

B2.1.1 Express terms

These are terms which form part of the contract because the parties have agreed them by stating them verbally or by writing them down. They do not necessarily need to have been negotiated and Cs are often presented with a standard set of written terms when entering certain contracts, e.g. car hire, holidays, energy supplies, mobile phones and broadband services. Often such terms try to limit or exclude T's liability to C and there are rules concerning the validity of such terms. They may also cover matters such as:

- what law governs the contract, UK law or that of another country
- what rights and obligations the parties have
- when acceptance of C's offer to buy takes place
- what exactly is being purchased and the price

B2.1.2 Implied terms

These are terms which form part of the contract because the law states that they will do so, e.g., the Consumer Rights Act 2015 (CRA) implies various terms into a consumer contract, stating, amongst other things, that goods should be of satisfactory quality if are bought from a T (unit C). Implied terms (ITs) will exist whether or not the parties specifically agree to them and whether or not they are even aware of them.

B2.2 Importance of contract terms

Not all terms in a contract will have equal status in a contract, but if one is breached, it is important to know the status of it as this affects any CL remedies that may be available. This has more relevance for breaches of express terms and in particular B2B contracts (unit J) because for consumer contracts where there is a breach of an IT, statutory remedies are available as well as CL ones, and they depend on the actual breach rather than how important the term is.
There are three different categories:

B2.2.1 Conditions

These are the most important terms of the contract. e.g. in a consumer contract for the purchase of a car there is likely to be an express term that C is agreeing to buy a particular make and model of car. This will be a major and important term of the contract as C will expect to receive the goods ordered.

B2.2.2 Warranties

These are the less important terms in a contract. e.g. if as part of a consumer contract to buy a car it is agreed that car mats will be included in the sale. This may be seen as a more minor element of the contract.

B2.2.3 Innominate or intermediate terms

When it is not clear how important a term is, the court can take into account the effect of the breach on a particular occasion and treat the term either as a condition or as a warranty. So an innominate term can be either a condition or a warranty at different times depending on the seriousness of the breach (*Aerial Advertising Co v Batchelors Peas Ltd (Manchester).*

Important terms in Scottish law are called material terms.

The less important or minor terms are known as non-material terms.

B2.3 Incorporation of terms

Since not all contracts are in a single document, or even written at all, it is important to know how to determine what the express terms of a contract are. A person will only be bound by a statement if it forms part of the contract. If a term forms part of the contract, in legal terms the term will be referred to as being 'incorporated' into the contract.

In general terms, the term must have been brought to the attention of the other party to the contract before or at the time that the contract was formed, although it does not matter whether it has been read or not. It will be a question of fact in each case as to whether any particular term has been properly incorporated into the contract. Examples of ways in which terms may be incorporated include:

- ✓ getting C to sign a document in which they are contained
- ✓ requiring a box to be ticked on a website to highlight where they are
- ✓ putting up a prominent notice in premises where the parties make the contract

When it is not clear, the courts use various guidelines to decide whether or not a term has been incorporated. This may depend on who wants to rely on the term. It could be either:

• C who is arguing that something is a term of the contract, e.g. the car they are buying is a 2007 model; or

- T who is arguing that a particular clause is a term of the contract, e.g. a statement which excludes or limits their liability in some way.

If a contract is to be concluded electronically and T is providing T&C, then there is an obligation on T to make them available in a way that allows C to store and reproduce them [ECRs r9], otherwise C can apply to a court for an order to make T comply (ECRs r14].

B2.3.1 Terms and representations

From C's point of view this becomes relevant when deciding whether a statement is a term (in the contract) or a representation (outside the contract) and relevant factors for consideration might be:

- was the statement included in a written contract?
- when was the statement made?
- did the statement maker have any specialist knowledge?
- how important was the statement?

B2.3.2 Terms which exclude liability

From T's point of view, whether they have incorporated terms properly becomes particularly important when they want to rely on one which limits or excludes their liability.

The questions which the courts might ask here are:

- has C signed a document containing the clause?
- was the term in a suitable document?
- was sufficient notice of the term given?
- or was it incorporated by sufficient previous dealings between the parties?

B2.3.3 Choice of law clauses

Another common express term for Ts to include, is one that states which country's law applies if there is a dispute. This is to some extent regulated by Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I).

B2.3.3.1 Where the parties have included a choice of law clause

The general rule is that freedom of choice prevails, providing such a choice is expressly or clearly demonstrated by the terms of the contract or the circumstances of the case, so the contract will ostensibly be governed by the law chosen by the parties. However, this is subject to certain exclusions, restrictions and limitations and for consumer contracts the choice must not have the effect of depriving C of any protection afforded by the law of the country in which C usually lives, if it is a protection that T cannot exclude liability for [a6(2)].

In addition, the CRA specifically applies the provisions covering unfair terms [sections 61 – 76] to contracts where the law of a non EEA State is chosen to govern the contract, if the contract has a close connection with the UK [s74(1)].

B2.3.3.2 Where the parties have not included a choice of law clause

If there is no choice of law clause in the contract, then the general rule concerns a "close connection" test, however; there are specific rules that apply to consumer contracts [a6]

If T pursues or directs commercial or professional activities where C usually lives, then the contract will be governed by the law of the country where C usually lives [a6(1)], e.g. T is based in Germany but has a website, which C can choose to view in the English language with English currency displayed.

If T does not direct or pursue his activities to C's country, but C nevertheless decides to buy something from T, then the applicable law will depend on what type of contract it is [a4]:

- sale of goods (seller's habitual residence); supply of services (service provider's habitual residence); sale of goods by auction (where the auction takes place if determinable)
- other consumer contracts and where there are elements of more than one of the above (the law of the country with which the contract is manifestly most closely connected will apply)

B2.3.3 Terms on websites

Depending on how terms appear on a website, it may be the case that they do not form part of the contract if they have not been incorporated. Well-prepared businesses will clearly make T&C available to their customers; some will require acceptance of these to be acknowledged before the transaction can proceed. On other sites simply finding terms and conditions becomes a challenge in its own right. It can be argued that if these terms have not been accepted by C, they have not been incorporated into the contract.

Summary

- The terms in a contract will be made up of **express terms**, those agreed by the parties because they have been negotiated or properly presented to the other party and **implied terms**, those which the law states will be in certain contracts.
- The terms in a contract that are important are called **conditions** and the less important ones are known as **warranties** and there is a third category called **innominate or intermediate terms**, where the exact nature is not known when the contract is made and the nature of the breach is examined to determine the status.
- The **importance of a term will be relevant** when considering **CL remedies for breaches of the express terms** in a contract; in consumer contracts there are various implied terms which attract statutory remedies and these depend on the actual breach rather than the importance of it.
- The express terms need to be **incorporated** into the contract to be effective, even if they are not read, and this can be done by drawing attention to them in some way, for example, by asking the consumer to sign a printed sheet containing them, by getting them to tick a box on a website before confirming their order or by displaying prominent notices in relevant premises.
- If a **contract is to be concluded electronically and T is providing T&C**, then there is an obligation on T to **make them available in a way that allows C to store and reproduce them**, as required by the ECRs, otherwise C can apply to a court for an order to make T comply.
- **Exclusion clauses in particular, need to be properly incorporated into a contract** by including them in a suitable document, getting C to sign a document containing them, relying on previous dealings between the parties or in some other way ensuring that sufficient notice is given off them.
- **Which country's law applies is regulated by Rome I**, which states that the parties' choice generally prevails but for consumer contracts this must not deprive C of any protection afforded by the law of the country where C usually lives, if T cannot exclude it; if no choice is made and T pursues commercial activities where C usually lives, the contract will be governed by the law of that country but if T does not pursue commercial activities there, then the applicable law will depend on what type of contract it is.

B3 Remedies available for breach of contract

Once a contract has been formed, the parties to it have legal obligations to carry out the promises that they have made to each other under it i.e. to comply with the terms of the contract, whether they are ones which the parties have agreed to include (express terms) or whether the law includes them (implied terms). If a party fails to keep to their part of the deal, it will be open to the innocent party to seek some form of redress. This is known as a 'remedy'.

Any CL remedy that a party is entitled to depends on, amongst other things, the type of breach that has occurred. Better remedies are available under the CL for the innocent party, if there has been a breach of a major term (condition) of the contract, than if there has been a breach of a less important term (warranty). CL remedies will be particularly relevant for breaches of the express terms in a contract.

B3.1 Common law remedies

B3.1.1 Repudiation

If there has been a breach of a condition, this can give the innocent party the right to repudiate the contract and claim damages. The contract is ended and sometimes the effect of this is that C rejects goods and is given a refund. Additional damages may be available for consequential loss if it is appropriate and reasonable.

Breach of an intermediate term, with major consequences, could also give rise to the right to repudiate a contract (*Aerial Advertising Co v Batchelors Peas Ltd (Manchester).*

B3.1.1.1 Affirmation

Once C is aware of a breach of contract that would permit repudiation and decides that this is the preferred course of action, then they should do this without delay, otherwise C will be deemed to have affirmed the contract. This is a CL concept, meaning that C has chosen to continue with the contract, knowing of the breach and the right to choose between ending it and carrying on with it. Once a contract has been affirmed, termination for a repudiatory breach will no longer be available as a remedy under the CL, only damages.

Agreeing to a repair and making payments do not necessarily amount to affirmation but continuing to use goods once a fault is known, is likely to be. Doing nothing for too long once the breach is known is also likely to be seen as affirmation of the contract.

B3.1.2 Damages

A breach of warranty only gives the innocent party the right to claim damages, for loss which arises 'directly and naturally from the breach of contract' (*Hadley v Baxendale*). Alternatively, C may choose to carry on with a contract, even with grounds to repudiate, and prefer to seek damages instead.

A claim for damages is a claim for a monetary sum like compensation, to cover the "cost of curing" the breach or it may include a claim for 'loss of bargain', e.g. C may make a claim when T is unable or unwilling to deliver the goods or services that C has ordered as part of their contract. The 'loss of bargain' is the difference between the price that was agreed with T for those goods or services and the market value of the goods and is sometimes referred to as the "difference in value".

T may include 'loss of profit' in a claim for damages. A claim may be made when C does not perform their part of the contract, e.g., they inform T that they no longer want to buy the goods that they have ordered, when there is no statutory right to cancel. T may claim for any losses that they have reasonably incurred.

Consequential loss, claimed alongside repudiation, must still meet the requirement of arising 'directly and naturally from the breach of contract'.

B3.1.2.1 Mitigation of losses

A victim of a breach of contract has a legal duty to mitigate their loss, which means taking steps to reduce it, e.g., by shopping around or reducing damage. This duty to mitigate arises, regardless of whether the victim of the breach is a buyer or a seller, a C or a T (*British Westinghouse Electric and Manufacturing Co v Underground Electric Rlys Co of London*).

B3.2 Other remedies

B3.2.1 Statutory remedies

Various other remedies, such as more practical ones of a repair or a replacement for faulty items, may be available depending on the actual breach. The CRA contains a number of statutory remedies for breaches of the ITs contained in it (unit C). The CCRs and CPRs also contain specific remedies for certain breaches (units D and E). Statutory remedies for breaches of provisions discussed in this unit are included below.

B3.2.1.1 Remedies for breaches of the ECRs [r13-15]

Breaches of the ECRs give rise to a number of remedies; in addition, the ECRs may be enforced by LA TSS, although there is no duty on them to do so. The ECRs are listed for the Enterprise Act 2002 Part 8 and so Ts could be the subject of civil enforcement action if they do not comply with the provisions.

The remedies are:

- ✓ rescission — similar to repudiation as the contract ends but it is discretionary
- ✓ damages — for breach of statutory duty
- ✓ a court order — to require compliance

When each may apply is indicated in table B2. The ECRs do not provide for a remedy if T fails to indicate which codes of conduct are subscribed to or fails to give information about how to consult any such codes electronically, which is a further requirement placed on Ts who make contracts electronically, unless they are to be concluded exclusively by email exchange [r9(2)].

Table B2: remedies for breaches of the ECRs

Breach	Reference	Remedy	Who has to comply
Failure to supply required information when supplying any online service: name; geographical and email addresses; trade register details; supervisory authority; regulated profession details and VAT number Failure to indicate prices clearly and unambiguously or inclusively of tax and delivery (if price information is provided) ***** Failure to do the above in an easily, directly or permanently accessible manner	r6	Damages for breach of statutory duty	Providers of any online service
Failure to clearly identify communications as commercial or as containing promotional offers or competitions Failure to make the conditions for qualification or participation clear, unambiguous or easily accessible Failure to clearly identify the person on whose behalf the commercial communication is made	r7	Damages for breach of statutory duty	Providers of commercial communications** e.g. advertisers
Failure to ensure that unsolicited commercial communications sent by email are clearly and unambiguously identified as such as soon as they are received	r8	Damages for breach of statutory duty	Providers of commercial communications** e.g. advertisers
Failure to provide information about: the steps to make a contract; whether it will be filed; means for identifying and correcting input errors before placing an order and languages offered for concluding contracts	r9(1)	Damages for breach of statutory duty	Ts who make contracts electronically unless they are to be concluded exclusively by email exchange
Failure to acknowledge receipt of an order without undue delay or by electronic means	r11(1)(a)	Damages for breach of statutory duty	Ts taking orders using technological means, e.g. text, email and interactive television, unless the contract is concluded exclusively by email exchange
Failure to make T&C available so that they can be stored and reproduced (if T provides T&C)	r9(3)	Court order requiring compliance	Ts who conclude contracts electronically
Failure to make available appropriate, effective and accessible technical means for C to identify and correct input errors before placing an order	r11(1)(b)	Rescission of the contract (discretionary)	same as for r11(1)(a)

***** price details are required under other legislation (unit C)

****** a commercial communication is one, in any form, designed to promote the goods, services or image of someone pursuing a commercial, industrial or craft activity, or exercising a regulated profession, unless they are simply providing address information rather than advertising, or it has been prepared independently

B3.2.1.1 Remedies for breaches of the CCRs [r13-15]

Most breaches of the CCRs are covered in unit D. A failure by T to comply with r14(3) or (4) will result in C not being bound by the contract or order. So if T concludes distance contracts by electronic means and does not ensure compliance with the following two requirements, then C could escape from the contract. If C decides to continue with the contract then C will have to pay for whatever has been ordered. T should ensure that:

- ✓ when placing an order, C explicitly acknowledges the obligation to pay
- ✓ if placing an order requires C to activate a button or similar function, it is labelled only "order with obligation to pay" or something equally unambiguous, such as "pay now"

B3.2.2 Equitable remedies

The law of Equity also provides for further remedies, e.g. specific performance, use of injunctions and rescission. Although these could apply to consumer contracts, they are often a last consideration after CL and statutory remedies and are therefore considered in more detail in unit J. The basic difference between CL and equitable remedies, is that the latter are discretionary so a court could choose not to award them.

B3.3 Entire and severable obligations

The general rule is that once the parties have made a contract, they should both do exactly whatever has been agreed in the terms of it, otherwise they would not be able to enforce the contract themselves. This can however, lead to unjust results if the contract is an entire obligation and the rule is interpreted strictly and so the courts have developed a number of exceptions to this rule.

B3.3.1 Entire obligations

An entire obligation is one where the whole of each party's obligation under the contract is necessary for the other's performance and any breach will therefore amount to grounds for repudiation (*Cutter v Powell, Vigers v Cook*). Domestic building contracts are often construed as being entire obligations and the effect of this is that, any breach by a supplier will mean that no payment has to be made. The potential harshness of this rule has led to a number of doctrines to counteract its effect.

B3.3.1.1 Substantial performance

The doctrine of substantial performance was developed to allow someone who had provided most of what was required under a contract, to claim payment for that performance, even though it was not the exact and precise delivery of the entire obligation. This may of course include allowance for any omissions or defects in the performance. The courts held that there had not been a substantial performance in the cases of *Sumpter v Hedges and Bolton v Mahadeva*, which were both concerned with building work. There is some similarity here with the division of terms in a contract into conditions and warranties, in relation to what remedies are available.

B3.3.1.2 Acceptance of partial performance

If it can be implied that the partial performance and consequent obligation to pay for what has been done has been accepted by the other party, then payment can be recovered on a *quantum meruit* basis. This means that payment is proportionate to the work done. Such a promise to pay cannot be inferred unless the recipient of the benefit under the contract has the option to either accept or reject the partial performance, e.g. short delivery in a sale of goods contract. C could reject a short delivery or choose to accept on the basis of agreeing to pay for what is delivered at the contract rate [replicated in statute for consumer contracts in s25 CRA, unit C]. This is unlikely to be possible in, for example, a building contract as the work would have been incorporated into C's property leaving C little choice about whether to accept it or not (*Sumpter v Hedges and Bolton v Mahadeva*).

B3.3.1.3 Prevention of complete performance

If someone has performed part of the work required under an entire obligation and is then prevented from carrying on, they will be entitled to be paid for what has been done, e.g. C may have engaged a builder to construct a wall in the garden of his property and when it is designed and the materials have been bought, decides that he no longer wants the wall. The builder would be able to sue C for damages for breach of contract or recover on a *quantum meruit* basis for what has already been done (*Planché v Colburn*).

B3.3.2 Severable obligations

Even in many complex contracts it is possible that a breach of an important term will not destroy the whole point of the contract so if it can be construed as being made up of severable or divisible obligations, rather than one entire obligation, it can be divided into its component parts. A breach of one of these obligations will then entitle the other party to damages, rather than being able to treat the contract as repudiated, or as being able to avoid the performance by themselves that was dependent on the breached obligation.

An example of a contract made up of severable obligations is one for the delivery of goods in instalments, requiring separate payments. If C orders 6 tonnes of stone to lay a path, for delivery in 6 instalments, and delivery on the 3rd occasion turned out to be short weight, this would not entitle C to refuse delivery of tonnes 4, 5 and 6. It is also now more common to provide for stage payments in a building contract, in much the same way as employment contracts provide for weekly or monthly remuneration, which would alleviate the issues experienced in some of the earlier case law mentioned.

It may be possible to argue however, that the cumulative effect of a series of breaches of severable obligations can give rise to the right to repudiate the whole contract over a period of time if it is possible to infer that a builder, for example, would continue to perform using a lack of reasonable care and skill in the future, based on their performance so far.

Summary

- **Various remedies are available** for breaches of contract and amongst other things, they are dependent upon the status and type of the term breached, so different remedies are available for ITs and express terms and for the case latter, whether a major or minor terms has been breached will also be relevant.
- **Repudiation**, which involves ending the contract, is only available if there has been a major breach or breach of a condition and the contract has **not been affirmed**.
- **Damages**, a monetary award, may be available to take account of various factors such as loss of bargain, difference in value, cost of cure or loss of profit, but will **need to be mitigated** and can only be awarded for loss which arises directly and naturally from the breach; it can accompany repudiation if there is consequential loss; they may also be available for **breach of statutory duty under the ECRs**.
- **More practical remedies**, may be available as **statutory remedies**, depending on the type of contract and other factors, e.g. repair or replacement of faulty items under the CRA; a court order under the ECRs if T&C are not available correctly and not being bound by the contract if the electronic payment provisions in the CCRs are not complied with.
- **Equitable remedies** are also a possibility but are less relevant for consumer contract breaches; they include specific performance, injunctions and rescission.
- The construction of a contract as being one for either an **entire obligation or severable obligations**, may affect the remedy available if there is a breach of contract; the rules relating to entire obligations can operate harshly and over time the courts have developed a number of doctrines to counteract this, such as substantial performance and acceptance of partial performance; in addition, the practices in some industries have changed to accommodate severable obligations instead of entire ones.

B4 Other important rules about contracts

Having considered whether a contract has been formed, what types of term will be found in it and what remedies may be available, it is necessary to briefly examine a few other relevant considerations:

B4.1 Formalities

Most everyday contracts can be entered into verbally (e.g. when shopping in the high street); there are some types of contracts, however, which must be in writing, e.g. those relating to the sale of property or land, and those regulated by the Consumer Credit Act 1974 (CCA). For some consumer contracts there are additional legal provisions requiring the production of certain information in writing or other durable format, at certain times, depending on how and where the contract is made and what the contract is for, e.g., to comply with the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2014 (CCRs).

B4.2 Use of credit

Often C will pay for goods and services using some form of credit, e.g. a bank loan, credit card or hire-purchase agreement. This can sometimes have an effect on the contract. It may mean that actually C's contract is with a finance company not the original T. Sometimes it also provides C with an alternative person to pursue if there is a breach of contract.

There are times when Cs may not know the **type of finance involved**, or **the identity of the finance company**. In these instances, refer to the Quick Reference Tool for Financial Capability.

B4.3 Factors affecting the contract

Certain other factors may affect the validity of a contract and these are discussed further below.

In practical terms, these factors may enable a person to 'escape' from the contract. A brief overview of these issues is given below but these can be very complex areas of law. Some render the contract void, namely mistake, illegality and frustration, which means that the contract ends automatically, whereas, others would render it voidable, so the innocent party can choose whether to end the contract or not.

The following factors will be discussed briefly:

✓ mistake
✓ frustration
✓ illegality
✓ duress
✓ undue influence
✓ misrepresentation
✓ unfair trade practices

The factors which can affect the validity of a contract are sometimes referred to using different phrases in Scottish law, however, for the purposes of these notes they operate in virtually the same way. The different words which you may come across are:

mistake	error
duress	extortion or force and fear
undue influence	abuse of good faith
illegality	pacta illicit

B4.3.1 Mistake

A party to a contract may be able to escape from the contract where a mistake has been made. There are several types of mistake that may occur that could in theory enable one of the parties to escape from the contract if they challenged it. However, this is a complex area and the courts appear to be quite reluctant to

enable people to escape from contracts on the basis of some types of mistake. One type that may arise in relation to a consumer contract, is a unilateral mistake.

B4.3.1.1 Unilateral mistake

This is where one of the parties to the contract has made a mistake and the other party entering into it is aware of that mistake or it is so obvious that they should have been aware of it. This is particularly relevant if T claims to have mis-priced an item. If acceptance has occurred then a T who has entered into a contract at too low a price, may try and argue the doctrine of unilateral mistake. This means that they have made a mistake about the terms of the contract and the purchaser was, or should have been, aware of this. If this argument is successful, the contract will not be binding, i.e. it will be void, which means it is treated as if it had never been entered into. This is not an easy route to take and T's mistake may not be apparent; the offer may simply look like a good bargain in which case T will be bound by it.

The law on error applies here in Scottish law and operates in the same way as the doctrine of unilateral mistake.

B4.3.2 Frustration

A contract is most likely to be frustrated if after it has been made, something happens that makes further performance impossible, illegal or something radically different from that contemplated by the parties when they formed the contract.

B4.3.3 Illegality

If a contract has been made for an illegal purpose, or the way that the contract must be carried out would be illegal, then the courts will not enforce it.

B4.3.4 Duress

A person may be able to escape from the contract if they can show that it was entered into under duress. This would mean that the contract was entered into as a result of force or threats.

B4.3.5 Undue influence

A contract may be challenged on the basis that it was entered into as a result of undue influence. This will occur where the circumstances do not amount to duress, but improper pressure has been applied to persuade a person to enter into the contract. It is unlikely that even the most enthusiastic sales techniques that are commonly used would be sufficient. In the past, cases have often involved the exploitation of a personal or confidential relationship between the parties.

B4.3.6 Misrepresentation

If a false statement of fact induces someone to enter into a contract, this may give grounds to avoid the contract on the basis of misrepresentation. Some statements made before the contract, become actual terms of the contract and then the remedy would be for breach of contract. The courts have some guidelines that they use to determine whether a statement made has become a term or whether it is to be treated as a representation (unit J).

B4.3.7 Unfair trade practices

Unfair trade practices are regulated to some extent by legislation. The Consumer Protection from Unfair Trading Regulations 2008 allow Cs to unwind many contracts in some circumstances when Ts have mislead them or behaved aggressively when persuading them to enter into the contracts (unit E).

Summary

- Most contracts can be made in any format, although there are **some which have to be written**, for example, those involving property and those regulated under the Consumer Credit Act 1974; for others, written details may be required at some point, e.g. to comply with the CCRs.
- If there is an element of **credit** involved in the contract, this may affect how the contract operates and the rights and obligations of the parties.
- Some contracts will be **void**, i.e. automatically at an end, in certain circumstances, for example, when there is a **unilateral mistake, frustrating event or illegality**.
- Other occurrences may lead to the contract being **voidable**, which gives the innocent victim the choice of ending it if the criteria are met, namely, **duress, undue influence, misrepresentation and unfair trade practices**.

B5 Liability to third parties

The person who finds themselves as the victim, or the one who is suffering some loss or damage, is not necessarily a party to a relevant contract. There are some contractual rules which may assist them and also some other areas of law which may help them achieve a remedy. The following will be considered:

- privity of contract
- the law of negligence
- product liability

  There is also the possibility that C incurs liability even when they appear not to be involved in an incident themselves, e.g. The Protection of Freedoms Act 2012 [s56 & Schedule 4] makes the registered keeper of a vehicle liable for the payment of valid parking charges if the name and address of the actual driver of the vehicle are not known (unit H) (This legislation does not apply in Scotland).

B5.1 Privity of contract

Generally, only the parties to the contract can pursue each other for breach of contract. Someone who is not party to a contract cannot enforce it, or have obligations imposed upon them by it. This is the case even if the contract was for their benefit and they have provided the consideration. This is known as 'privity of contract'.

There are some situations where, the law works in a different way:

✓ agency relationships

✓ assignment of rights

✓ the Contracts (Rights of Third Parties) Act 1999 (England and Wales)

B5.1.1 Agency relationships

There are various types of agency with different legal consequences but essentially this is where one person acts for another. Agency is a very complex area of law but the most important point is that an authorised agent makes a binding contract on behalf of the person they are acting for, the principal. The contract will be between the third party and the principal and so the principal needs to be able to show that they provided the consideration. Some examples of agency relationships are:

✓ credit card companies using third parties to sign up retail stores to use their credit cards
✓ travel agents acting as agents for tour operators to make contracts with Cs (although sometimes it has been successfully argued that a travel agent can be an agent for C)
✓ certain dealers being agents of creditors under the Consumer Credit Act 1974
✓ energy companies using independent third parties to persuade people to switch suppliers

B5.1.2 Assignment of rights

It is possible for the rights under a contract to be assigned or given to someone else, e.g. debt collection agencies buy bad debts from businesses. They were not a party to the original contract but can act as if they were. Not all contracts can be assigned in this way, i.e. without the consent of the other party,

sometimes the terms of the contract state that consent is required. In addition, rights under a contract of a personal nature or one involving a relationship of confidence cannot be assigned.

The person to whom the rights are assigned, the assignee, cannot recover more from the debtor than the assignor, so any valid defences can still be put forward.

B5.1.3 Contracts (Rights of Third Parties) Act 1999

This Act is not specifically aimed at protecting Cs but may do so in very specific circumstances. It provides two alternative grounds on which a third party may enforce a contract:

✓ where the contract expressly provides for such an event, or

✓ where a term purports to confer a benefit on a third party

'The third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into' [s1(3)].

Where an item has been bought as a gift for someone else, any T&C should be checked to see whether third parties are able to enforce the contract. If this is the case then the Act will not apply and the buyer, rather than the recipient of the gift, would have to pursue the matter directly with the seller.

The Contracts (Rights of Third Parties) Act 1999 does not apply in Scotland, however, two people can give rights to a third party who is not a party to a contract. This is known as Jus QuaesitumTertio. It usually occurs where A and B agree to do something for C and allows C to sue if the thing is not done, even though C was never a party to the contract. It gives effect to the intention of the contracting parties. If upon interpretation of the contract it appears that the parties intended to confer rights upon a third party, then, subject to certain further requirements, the law will give effect to that intention. This is unusual, rather than the norm, and is unlikely to affect consumer contracts.

B5.2 Negligence

Negligence is a tort and in legal terms, a tort is a civil wrong; there are a number of different civil wrongs including false imprisonment and trespass, e.g. parking on private land not clearly identified as a car park (unit H).

In a more general context, the tort of negligence is often used by those claiming damages as a result of road traffic accidents or medical malpractice, or from the local council because they have been involved in an accident which may have occurred as a result of a lack of maintenance, e.g. tripping over uneven flagstones, or driving over a pothole in the road. Negligence is based on one person owing a duty of care to another.

The word “tort” is not used in Scottish law, negligence comes under the law of “delict”.

B5.2.1 Contract law and the tort of negligence

Where there is no contract between the person suffering the loss or damage and the person responsible for it, the law of negligence may enable the person suffering the loss to make a claim. It is possible that a person could have a claim in both contract and the tort of negligence, and if this is the case they would usually be advised to pursue the other party under the law of contract as liability is strict whereas the law of negligence is fault based.

B5.2.2 Essential Elements for a claim in negligence

For negligence to be established the following elements must be present:

✓ a duty of care

✓ a breach of that duty

✓ loss or damage resulting from the breach

B5.2.2.1 Duty of care

Whether a duty of care is owed is a legal consideration and the courts have established that a duty is owed in many situations, some of which include:

✓ drivers - to all other road users

✓ medical staff - to patients

✓ employers - to employees

A person owes a duty of care to their 'neighbour'. In general terms, this is anyone who it can reasonably be foreseen may be injured by a person's acts or omissions. In the case of *Donoghue v Stevenson*, the court stated that a duty of care is owed by a manufacturer of products to the ultimate consumer.

This can be best explained by considering the facts of the case, which are that a lady visited a cafe with her friend. She purchased her friend a bottle of ginger beer. The cafe stored the ginger beer in the opaque glass bottles in which they were delivered and gave the customer the bottle and a glass. After drinking some of the ginger beer and pouring some more from the bottle into the glass, the friend noticed the remains of a decomposing snail in the bottle of beer and she became ill. Since the person who was suffering had not purchased the ginger beer, the retailer had no contractual liability to her. The court held the manufacturer of the ginger beer liable to the friend in the law of negligence, and she was able to claim damages as a result.

A further example is the case of *Grant v Australian Knitting Mills Ltd.*

B5.2.2.2 Breach of duty

The law of negligence is fault based, as opposed to being strict liability, and the victim has the burden of proving the lack of care. A breach of the duty occurs if there is a failure to reach the required standard of care which the law requires, which is reasonable care. The standard of care will differ from case to case, so the standard of a plumber will be that of the reasonable plumber in the particular circumstances. This does not require looking back with hindsight and deciding what should have happened, rather it requires looking at the circumstances at the time and considering what would have been reasonable at that point. This is assessed objectively not subjectively (*Bolam v Friern Hospital Management Committee*). It is not open to a defendant to argue that they did their best which happened to be inadequate. If a person holds themselves out as having specialist skill or knowledge, they will be judged to that higher standard.

B5.2.2.3 Loss or damage resulting from the breach

There are two issues to consider here:

- ✓ the loss or damages must have been caused by the breach of duty, and
- ✓ the loss or damage must not be too remote.

Firstly, there is the issue of causation in that the claimant must prove that the loss or damage he is suffering was caused by the negligent act or omission of the defendant and not by some other person or intervening event *(Wilsher v Essex Area Health Authority, Kay's Tutor v Ayrshire and Arran Health Board).*

Secondly, there is an issue of remoteness. Damages are the main remedy in negligence and they can be claimed for loss which is 'reasonably foreseeable'. If the loss is not reasonably foreseeable then the damages will be considered to be too remote and cannot be awarded.

Also, there is a general principle that claims cannot be made for financial loss that is not accompanied by other damage to property or personal injury unless it is a claim for negligent misstatement (see below). In other words, if the loss results from an act, rather than a statement, the 'economic loss' can only be claimed if it accompanies other damage.

The CRA 2015 prevents the exclusion of liability for death or personal injury caused by negligence [s65(1)]; however, clauses in contracts or statements in consumer notices, which limit or exclude liability for other loss, such as property damage or financial loss, may be effective, if they pass the fairness test [s62].

B5.2.3 Negligent Misstatement

Giving advice negligently can also give rise to liability. It was established in the case of *Hedley Byrne & Co. Ltd v Heller & Partners Ltd* that a duty of care may be owed by someone giving advice to someone else, depending on the circumstances. This is particularly helpful where there is no contract between the person giving the advice and the person receiving it. The following need to be established for liability to arise:

✓ there was a special relationship between the parties
✓ the statement was relied upon
✓ it was reasonable to rely upon the statement

In the Hedley Byrne case there were two banks, both with clients, client A asked its bank (bank A) to ask bank B about the financial standing of its client (client B) as client A was thinking of investing in client B. Relying on the information given, client A made the investment and subsequently lost over £17,000 when client B went into liquidation. The court expressed the opinion that the makers of such statements owed a duty of care to those whom they may expect to rely on their statements.

NB: Client A did not actually succeed against bank B as liability was effectively excluded, but it is generally accepted that this case established the principle of owing a duty of care for negligent misstatements.

Other cases in which these principles have been argued include: *Chaudhry v Prabhakar, Yianni v Edwin Evans, Smith v Bush, Shankie-Williams v Heavey.*

B5.2.3.1 Liability of Citizens Advice advisers

The law in relation to negligent misstatement could apply to advice given by Citizens Advice. There is a special relationship between the adviser and the client. The client will be relying on the advice given by the advisor and it will be reasonable for them to rely on that advice.

In general terms, an employer may be legally responsible for torts committed by their employees under the principle of vicarious liability, providing these take place whilst carrying out the employer's business,. Liability for any claim may be joint and several with the employer. In the event that an employer has to pay damages in relation to any claim for negligent advice, they may be able to seek reimbursement of the damages from the employee under the Civil Liability (Contributions) Act 1978.

B5.2.4 Contributory negligence

Sometimes, the damage that has occurred may be attributable to more than one person. The victim may be partly responsible for the damage that they have suffered. The courts can take this into account and can reduce the amount of damages that would otherwise be awarded, to reflect the extent to which it is considered that a person contributed to their own injuries or damage.

In road traffic accidents, victims claiming against negligent drivers may have their damages reduced if they failed to wear a seatbelt, and wearing that seatbelt would have reduced the extent of the injuries that occurred.

In consumer cases, failing to follow instructions for use or ignoring warnings could amount to contributory negligence in certain circumstances. Damages can also be apportioned between different parties, as seen in *Lambert v Lewis.*

B5.2.5 Commonly encountered complaints potentially involving negligence

- ✓ T has been carrying out work on C's property and has caused damage to the neighbouring property.
- ✓ C is given an item as a gift and suffers damage as a result of the item being faulty.
- ✓ C is injured after eating food that contains a foreign body.

B5.3 Product liability

In addition to the law of contract and the law of negligence, both having their origins in the common law, there is also some statutory protection, in the form of Part I of the Consumer Protection Act 1987 (CPA), which implements the European Directive concerning Liability For Defective Products [85/374/EEC as amended by 1999/34/EC] and makes producers liable for damage caused by their unsafe (defective) products. The aim is to place the liability with the person most likely to be responsible for the defect.

Part I of the Consumer Protection Act 1987 applies in Scotland.

The areas for discussion are as follows:

✓ Who is liable

✓ What counts as a product

✓ What amounts to a defect

✓ What damage can be claimed for

✓ What defences are available

There will also be some consideration of how product liability relates to the laws of contract and negligence.

B5.3.1 Who is liable [s2]

The Act places responsibility on producers and this will usually be someone who has manufactured the product [s1(2)], but liability can extend to a wider group. There are four categories covering people who can be treated as liable:

- Manufacturer - the manufacturer will usually be the one liable provided that they are within the EU
- Own brander - if someone puts their own name on a product they may be holding themselves out to be the producer
- Importer - T who imports into the EU can be liable
- Supplier - any supplier [s46], can be liable if they are unable or unwilling to provide someone suffering damage, with details of their own supplier, within a reasonable time of that person requesting the information.

B5.3.2 Product [s1(2)]

The provisions do not cover services. The definition of product includes:

✓ any goods
✓ electricity
✓ component parts, e.g. the tube in a television set
✓ raw material in a product, e.g. the chicken in a curry

Goods include: “substances, growing crops and things comprised in land by virtue of being attached to it and any ship, aircraft or vehicle”, with substances being further defined as meaning solid, liquid or gas, whether natural or artificial and includes when they are comprised in or mixed with something else; so natural gas will fall within this definition [s45(1)].

In the case of *A v National Blood Authority,* over a hundred people successfully claimed when they were infected with Hepatitis C by blood transfusions from infected donors; the court accepted that blood and plasma were products within the Act.

B5.3.3 Product defects [s3]

'There is a defect in a product ... if the safety of the product is not such as persons generally are entitled to expect.' [s3(1)].

Safety can be assessed in terms of:

✓ the risks of death or personal injury caused by the product
✓ the risks of damage to property caused by the product

✓ the compilation of items in a product

When considering *what people are generally entitled to expect,* all the circumstances shall be taken into account, including [s3(2)]:

✓ marketing and presentation (including instructions and warnings)

✓ reasonable use

✓ time of supply (subsequent modifications are not evidence of earlier defects)

Therefore, in assessing whether or not an item is defective, the legislation requires a balance between the potential risks exposed by the product and the intended use of the product.

Cases: *Abouzaid v Mothercare (UK) Ltd, Worsley v Tambrands Ltd and Richardson v LRC Products Ltd*

B5.3.4 Damage [s5]

There are three categories of damage which can be claimed for:

✓ death

✓ personal injury

✓ damage to property

There are, however, restrictions on claims for property damage:

- only damage to property that is 'ordinarily intended for private use, occupation or consumption and intended mainly for that use by the person suffering the damage', is covered
- claims must be for a minimum of £275
- the cost of the defective item itself cannot be recovered

Liability under part I CPA cannot be excluded [s7].

B5.3.5 Defences [s4]

There are various defences available, and someone sued may claim that:

✓ the defect was attributable to compliance with a legal requirement

✓ they were not the suppliers

✓ the supply was a private not business one

✓ the defect was not present when the product was supplied

✓ the state of scientific and technical knowledge was such that you would not have expected any producer of such a product at that time to have identified such a defect (development risks defence)

✓ the defect was due to the design of an end product of which this is just a component part.

Contributory negligence is also a partial defence so if the damage has been caused by both the defect in the product and the person suffering the damage, liability may be apportioned accordingly, e.g. where C has:

✓ failed to follow instructions

✓ ignored obvious dangers

✓ handled the product carelessly.

Liability under the Act is strict. It is not necessary to prove that the producer is at fault, a person pursuing a claim only need prove that the product is defective (unsafe). However, the producer may use the defences contained in the Act to avoid liability.

B5.3.6 Examples of possible claims

It is likely that a claim will be made under the Act in the following circumstances:

✓ if the injured party did not buy the goods and so has no claim in contract

✓ when it is not possible to pursue the supplier e.g. a limited company that no longer exists, or where the shop has closed down.

B5.3.7 The relationship between contract, negligence and product liability

The laws relating to contracts, negligence and product liability, will overlap in certain instances. Some queries could potentially fall within more than one of these areas. In some situations all options will be available to C. Table B3 summarises the main features of each.

Table B3: Relationship between Contract, Negligence and Product Liability

Application	Contract	Negligence	Product liability
Products covered	Goods, services and digital content	Goods, services and digital content	Goods (not services), electricity, components, raw materials
Extent of Liability	Products should comply with the quality standards in the CRA and the CCRs and also any express terms	Failure to reach required standard of care	Safety
Nature of Liability	Strict	Fault based (negligence)	Strict (but defences available)
Who can claim?	Contracting party only	Anyone owed a legal duty of care	Injured party only
Who can a claim be against?	Person has contract with	Person owing a duty of care	Producer, own-brander, EU importer or supplier
What can be claimed?	Damages arising naturally from the breach Unusual consequential loss if contracting party knew of it	Reasonably foreseeable damages Damages cannot be recovered for 'pure economic loss' unless it is the result of a negligent misstatement.	Death or personal injury Not the defective product itself Property damage if ordinarily intended for private use, occupation or consumption - and minimum of £275

Summary

- **Privity** of contract means that **only those persons who are parties to a contract may sue and be sued**. Someone who is not a party to a contract cannot enforce it even if it was for their benefit and they have provided consideration or have obligations imposed on them by it.
- There are **areas of law that get round the doctrine of privity** and agents can make contracts on behalf of principals, the Contracts Rights of Third Parties Act 1999 may apply, or the rights under a contract may have been properly assigned to someone else.
- The law of negligence is based on the concept of one person owing a **duty of care** to another person and liability results if that **duty is breached** and **loss or damage is suffered** as a result of that breach, because **reasonable care** was not taken.
- The **duty arises in many situations** and in particular a manufacturer owes the ultimate consumer a duty to take reasonable care when producing goods, and those giving advice may be liable if they do so negligently.
- **Causation must be proved,** which can be a problem if there are several possible causes for the claimant's loss or damage and **damages are the main remedy** for negligence with claims being made for loss or damage providing it is **'reasonably foreseeable'**, i.e. not too remote.
- There is a general principle that **claims cannot be made for financial loss** that is not accompanied by other damage to property or personal injury **unless** it is a claim for **negligent misstatement**.
- **Contributory negligence** may be used as a **partial defence** thereby reducing the amount of damages payable by the party in breach of duty.
- **Liability for death or personal injury caused by negligence cannot be excluded**, however, other loss, e.g. property damage or financial loss, can be excluded by a term or a notice, if it is fair to do so.
- Part I of the Consumer Protection Act 1987, covering product liability, may also assist third parties by making producers liable for damage caused by their **defective products**.
- A **producer** will usually be a manufacturer but could also be an own brander, an EU importer or a supplier if the manufacturer cannot be identified and **products** include any goods, electricity, component parts and raw materials in a product but not services.
- A product contains a **defect if it is not as safe as people reasonably expect it to be**, bearing in mind the risks which it imposes and taking account of its presentation, use and when it was supplied.
- Damages can be claimed for **death, personal injury** and loss or damage to **private property**, but not for the product itself and there is a minimum of £275 for damage to property.
- **Various defences** are available and any contributory negligence on the consumer's part can be taken into account.
- Liability under the Part I of the Consumer Protection Act 1987 **cannot be excluded**.

- Consideration is not always necessary for a contract to be binding in Scotland.
- The legal age of capacity in Scotland is 16 and prejudicial contracts made by17 year olds can be set aside by a court providing they were not made in the course of the young person's trade or profession.
- Important terms in a Scottish contract are called material terms and minor terms are called non - material terms.
- One of the factors which may affect which remedy is available in Scotland, is whether the breach of contract is material or non-material.
- Various miscellaneous factors affect Scottish contracts including the law relating to extortion (duress), error (mistake), abuse of good faith, frustration and *pacta illicita*.
- The principle of *jus quaesitum tertio* applies which allows rights to be conferred on a third party if that was the intention of the parties.
- An action for negligence would arise under the law of delict.