TOPICS:
1. PRIVITY OF CONTRACT
2. CONTRACTUAL TERMS
3. TYPES OF TERMS
4. EXEMPTION CLAUSES

TEACHERS: MR A HOWELLS (Head of Law)
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Only a person privy, or party, to a contract can sue on it – *Dunlop v Selfridge (1915)*.

This means that a third party who benefits from a contract cannot sue. It would be unfair to allow them to gain under a bargain when they have provided nothing in return for the benefit gained from the arrangement.

It also means that a third party who has not played a part in the agreement cannot have action taken against him: Steyn L.J: “…A burden should not be imposed on a third party without his consent.”

**Price v Easton (1833)**
Easton agreed with a third party that if the third party did work for him then he would pay £19 to Price. The work was done but Easton failed to pay Price, so Price sued. **HELD: Price’s claim failed as he had given no consideration for the contract.**

**Dunlop v Selfridge (1915)**
Dunlop made tyres and sold them to Dew with the condition they could not be sold below a certain price. Dew sold them on to Selfridge with the same condition. However, Selfridge sold the tyres below that price. Dunlop sued Selfridge. **HELD: Only Dew could sue as he had made the contract with Selfridge – but he did not wish to.**

**Tweddle v Atkinson (1861)**
Two fathers agreed to pay money to their children upon marriage. One father paid (then later died) and the other did not. The son sued the father who had not paid. **HELD: The son was not entitled to sue as he had not provided consideration. However, the Contracts (Rights of Third Parties) Act 1999 has now made changes to this area. Since 1999 the son would now be able to sue providing it is very clear that the benefit was intended for that particular person.**

Therefore, in order to enforce a contract, the party must:

1. **BE PRIVY TO THE CONTRACT**
2. **PROVIDE CONSIDERATION**
Scruttons Ltd v Midland Silicones Ltd
A drum of chemicals was shipped from New York to London. It was sent to Midland Silicones Ltd and it was a term of the contract that the carriers of the goods would not be liable for loss exceeding £179 per package. Scruttons Ltd were a firm of Stevedores employed by the carriers. Due to Scruttons’ negligence £593 worth of damage to the goods was caused.

Midland sued Scruttons for the damage.

HELD: Scruttons had to pay in full. The exemption clause formed part of a contract between Midland Ltd and the carriers to which Scruttons were not party. However Lord Denning disagreed, and gave a dissenting judgment on the basis that Midland Ltd had voluntarily assumed the risk by agreeing to limit their liability.

ESTABLISHED EXCEPTIONS TO PRIVITY

1. Statutory Exceptions
   
The Married Women’s Property Act 1882
   Where a man makes a contract for life assurance, this Act allows a spouse or child to benefit from the contract even though they were not party to it.

   The Law of Property Act 1925
   A party can be given rights over a property without being named.

   The Road Traffic Act 1988
   A contract is made between the insurance company and the driver. The policy covers the driver but also others not named but who are entitled to claim following an accident.

2. Collateral Contracts
The courts find the existence of a collateral contract to avoid the doctrine of privity. These are not actually exceptions to privity, but can be a method of avoidance.

**Shanklin Pier v Detel Products (1951)**
Ps, the owners of Shanklin Pier, made a contract with painters, to paint the pier. P instructed the painters to use paint made by Ds, Detel Products. The contract to buy the paint was made between the painters and D. However, D had given P a warranty that the paint would last between 7-10 years. The paint only lasted 3 months. P sued D. **HELD: Detel had given a guarantee to the pier owners, but it was the painters who had made the contract to buy the paint. It was decided the pier owners could sue the manufacturers on a collateral contract.**

AO2

This is an artificial method of avoidance, and is felt to be a sensible outcome. It protected the pier owners. It does therefore give a 3rd party the benefit of a contract that they are not party to.

3. **Restrictive covenants which run with the land**
These are promises put onto land. They ‘run with the land’ – a promise is attached to the land and moves onto to whoever the land is sold to. Covenants are therefore enforced against people who may not originally have been party to the initial agreement.

**Smith & Snipes Hall Farm v River Douglas Catchment Board (1949)**
Properties backing onto a river had a covenant attached to them that the owners would maintain the river banks. **HELD: The promise was passed on with the land and applied to future owners whether they knew of this duty or not.**

**Tulk v Moxhay(1848)**
Garden area was sold by Tulk to Elms with the covenant that the garden could not be built on. Elms later sold the land to Moxhay who knew of the covenant but nevertheless intended to build on the garden. When Tulk found out he took Moxhay to court to stop this, even though they had not contracted with each other. **HELD: Tulk was granted an injunction to prevent Moxhay from building on the garden, based on the idea that Moxhay was aware of the covenant.**

AN INJUNCTION IS…
An equitable remedy which requires a person to do/refrain from doing something

\[\text{AO2}\]
the grounds for the decision was based on the defendants notice of the covenant at the
time of the purchase.
Parties would now be very aware of covenants due to electronic conveyancing

\[\text{ATTEMPTS TO AVOID PRIVITY}\]

1. Applying Land Law to Chattels
This is where there is an attempt to apply a covenant (usually only attached to land) to chattels. CHATTLES ARE…

Taddy v Sterious (1904)
P, tobacco manufacturers, sold tobacco to wholesalers with a term in the contract that it could not be sold below a specified price. The wholesalers sold the tobacco with the same term to D, retailers. D sold the tobacco at a lower price. P sued D, claiming the term ran with the tobacco, as a covenant to land does. **HELD:** The court would not allow this, stating that the original seller had no claim against the final retailer.

Lord Strathcona Steamship v Dominion Coal (1926)
The owners of a ship had a contract with Dominion Coal, hiring the ship to them. The owners of the ship then sold it to Lord Strathcona Shipping, who knew of the contract of hire but refused to honour it. Even though they had no contract between them, Dominion sued Lord Strachcona Shipping, claiming the contract ran with the ship. **HELD:** Tulk v Moxhay was applied and Dominion were granted an injunction against the new owner, despite not having a contract with them. This was to prevent Lord Strathcona acting inconsistently with the contract between Dominion and the original owners.

\[\text{Analysis:}\]
The decision in **Lord Strathcona Shipping** has been criticised as a bad decision. In **Port Line Ltd v Ben Line Steamers** Diplock went so far as to say the decision was wrong.
“The Strathcona case has now descended into the limbo of lost causes” – Davies.

The decision in Strathcona should be confined to those particular facts – Court of Appeal.

2. The Trust Concept
This is where one party to a contract holds rights on trust for a third party. The claimant must show that the parties intended for him to receive a benefit. A TRUST IS…

Les Afreteurs Reunis SA v Walford (1919)
W was a broker and he arranged for a ship to be hired, with a term stating he was entitled to 3% commission. The contract for the ship was between the owner and the hirer. HELD: W successfully claimed the money was held on trust for him by the owner, because he was named as receiving a benefit under the agreement.

Re Schebsman (1943)
S entered a contract where he would be paid money, or if he died, the money would be paid to his family. He died and the money was not paid. HELD: The family were not successful as it was never the intention of the parties to create a trust.

Beswick v Beswick (1968)
B entered a contract with his nephew whereby in return for selling his business to the nephew, B would receive money each week until his death, after his wife would receive it. The wife only received one payment so sued the nephew. She tried to sue in three ways:
  1) on the basis of a trust
  2) under the Law of Property Act
  3) in her capacity as the administrator of her husband’s estate.

Her argument of implying a trust was rejected as she was not privy to the contract, and the claim under the LPA also failed. However, she was able to sue because she was the administrator of the estate and could claim on behalf of the estate.

Beswick v Beswick is a notable case, and is seen as the House of Lords reaffirming the Rule of Privity. Denning had disagreed with this in the Court of Appeal but the speeches in the House of Lords clarify that a contract can only be enforced by a those who are party to it.
This law clarifies and creates some certainty in the law.
3. The Law of Tort
There may be a remedy available here where one does not exist because of privity. TORT MEANS…
This is to redress a wrong done to a person. This is a civil wrong not a criminal wrong

4. Actions on behalf of another

The rule of privity can be very harsh. Therefore, the courts have tried to follow a more sensible approach to provide justice in certain cases.

**Jackson v Horizon Holidays (1975)**
Mr. Jackson booked a holiday for himself and his family. However, the holiday was a complete disaster and did not match the description and Mr. Jackson sued for damages for himself and his family.

**HELD:** Under the strict law of privity, Mr Jackson could only sue for himself as he had made the contract, but the CA allowed him to sue on behalf of the whole family as this was fairer. This method of avoidance is generally only limited to “holiday contracts”.

The House of Lords then dealt with the following case, taking the opportunity to clarify the law.

**Woodar Investment v Wimpey (1980)**
The contract concerned the sale of land for £850,000 with a third party being paid £150,000 upon completion of the sale. The party buying the land unlawfully ended the contract. The House of Lords had to decide whether the third party was entitled to compensation.

**HELD:** The third party was not entitled to sue, as the decision in Jackson was confined to contracts for families only, where it was intended the benefit would be shared between the family.

**Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd [1993]**
A building contractor was engaged by an employer to develop a site. The site was later transferred to a third party, who discovered asbestos in the building and suffered financial loss.

The contractor argued that the third party had suffered no loss and was not entitled to recover damages.
HELD: The third party was entitled to recover damages as it was in the contemplation of the original parties that the site may be assigned to a third party. The original owner is treated as entering into the contract for the benefit of subsequent purchasers and can recover damages on their behalf.

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Jackson is limited to contracts of this type. Woodar illustrates that courts are unwilling to extend this to businesses. Legal commentators have described this as a “legal black hole”

It is doubtful that 19th Century cases that this rule is based on, have any relevance to modern contracting parties, and the legitimate expectations of the third party. It could now be seen as commercially inconvenient. The exceptions and circumventions are complicated, particularly if someone doesn’t have sophisticated legal advice. They have also led to the law being artificial and uncertain.

5. The rule in Dunlop v Lambert
This common law rule states that a remedy can be granted “where no other would be available to a person sustaining loss which under a rational legal system ought to be compensated by the person who caused it.”

The council wanted a new recreation centre. It hired MG who in turn hired the builders WN. A collateral contract provided for MG to pay WN and for the council to reimburse MG and for MG to assign all their rights against WN to the council. £2 million worth of defects were found with the building and the council wished to sue WN. MG would be unable to recover in tort as they had no proprietary interest in the building. The council would normally be prevented from suing because of its lack of privity in the building contract, but Lord Diplock applied the rule in Dunlop v Lambert and allowed the action. This case can also be seen as an extension of the principle in Linden Gardens Trust v Lenesta.

There is also a proviso that the rule will not be applied where the parties to the original contract had contemplated that there would be a separate contract to regulate liability between them and the third party – this can be seen in:

Alfred McAlpine v Panatown (1998)
McA was employed by P to build a multi-storey car park. When the contract was formed, McA entered into a duty of care deed with UIPL who were the owners of the site. P sued McA, claiming the building was so defective that it would have to be rebuilt. McA countered that P had never been the owner of the site and it was UIPL that had suffered the loss, not P – so P
could only claim nominal damages and UIPL couldn’t claim anything as they were not parties to the contract. **HELD:** CA accepted that the deed with UIPL meant that contractual rights had been given to the third party, but since all accounts had to be settled between P and McA then P must have the right to sue. The HOL disagreed and stated that the “duty of care deed” with UIPL prevented P from suing. The deed meant UIPL had been given a specific remedy by the contract even though this remedy was limited.

6. **The Contracts (Rights of 3rd Parties) Act 1999**

**PROBLEMS THE DOCTRINE OF PRIVITY CAUSED**

- The doctrine of privity fails to give effect to the expressed intentions of the parties – **Tweddle v Atkinson** – so this has been rectified by the 1999 Act.
- The numerous exceptions make the law unnecessarily complex.
- Some of the ways to avoid the doctrine are artificial, e.g. collateral contracts.
- The doctrine of privity is commercially inconvenient – certain commercial transactions have had to rely on statutory intervention, e.g. The Road Traffic Act.
- The application of the doctrine can sometimes lead to unjust results – **Tweddle v Atkinson**.

The **1999 Act** provides the following protection to persons not privy to a contract but who are owed a benefit:

**S 1(1): A person who is not party to a contract may enforce a term of the contract if:**

<table>
<thead>
<tr>
<th>S 1(1)(a):</th>
<th>The contract <strong>expressly</strong> states this</th>
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<tr>
<td>S 1(1)(b):</td>
<td>The term declares a benefit on him</td>
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<tr>
<td>S 1(2):</td>
<td>Subsection (1)(b) does not apply if on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party.</td>
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<tr>
<td>S 1(3):</td>
<td>The 3rd party is expressly identified in the contract by name/class/description, but need not exist at the time of the contract E.G.</td>
</tr>
<tr>
<td>S 1(2):</td>
<td>The parties must intend the term to be enforced by a 3rd party, otherwise it will not be enforceable.</td>
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Nisshin Shipping Co Ltd v Cleaves and Company Ltd [2003]
A third party can sue under S 1(1)(b) of the Act where the contract is neutral on the matter. To prevent this the contract must make it clear that the parties intend to prevent this.

THE SITUATION NOW

- Injustice should be prevented.
- There should no longer be a need to use artificial means of avoiding privity.
- Brings English law into line with other European countries.
When two parties are entering a contract, there will generally be negotiations of some sort prior to or at the time of the contract. What was mentioned must be identified as either a term or a representation.

- A **term** is a statement that the parties intend to be bound by - if the contract does not comply, there will be a **breach** of contract.

- A **representation** is a statement made either before or at the time of the contract, but is not part of the contract but may be part of the negotiations - if this is not accurate, there has been a **misrepresentation**.

**REPRESENTATIONS**

There are three types of representations:

1. Trade puffs
2. Mere opinions
3. Mere representations

**TRADE PUFFS**

- These are boasts that are not intended to be taken seriously. They are usually found in adverts, e.g.

- However, the closer a boast comes to being factual, the more likely it is to be taken as a term of a contract, e.g. *Carlill v Carbolic Smoke Ball*.

**MERE OPINIONS**

- An opinion is not part of a contract as it tends to lack any significance.

**Bisset v Wilkinson (1927)**

The person selling land in New Zealand was asked how many sheep the land could hold. It had never been used for such a purpose before, and the buyer was aware of this. When the sellers estimate was significantly below the actual amount, the buyer sued for misrepresentation.

**HELD:** Because of the sellers inexperience it was an honest opinion. No action could be taken.
However, where one party is an expert in a particular area and gives a false opinion, then the other party can sue.

**Esso v Marden (1976)**
Marden was buying land to open a petrol station under a franchise from Esso who provided an estimate of how much petrol would be sold each year. When this was significantly below their estimation, Marden sued.

**HELD:** Marden was allowed to sue due to Esso’s extensive expertise in this area. He could rely on the estimate as if it was a factual statement.

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**MERE REPRESENTATIONS**

- This is where a statement has been made to encourage the other party to contract.
- The representation is not part of the contract, but the other party may sue if it is found to be false.
- If false, such statements are known as misrepresentations.

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**HOW DO THE COURTS DECIDE IF IT IS A TERM OR A MERE REPRESENTATION?**

Whether a statement is included as a term or classed as a mere representation will depend on the following:

1. The **importance** a party might place on a statement
2. The **special knowledge/skill** one party might have
3. Whether the statement needs **verified/confirmed**
4. The **time** between the statement and the contract being made
1) IMPORTANCE OF THE STATEMENT

- If a statement is so important to one party, that they would have not have entered the contract without it, the statement will generally be taken to be a term of the contract.

**Couchman v Hill (1947)**
When a heifer was put up for sale without warranty, the buyer asked whether it was in calf. As it was not, the he bought the heifer, which later died when it had a miscarriage. The buyer sued. **HELD: The representation was so crucial to the buyer that it was incorporated as a term, so could sue.**

**Birch v Paramount Estates (1956)**
A couple buying a brand new house bought it on the condition it would be as good as the show home. When it was not, they sued. **HELD: CA said this was so central to the agreement that it had been incorporated as a term, as the couple would not have made the contract otherwise. Could sue.**

**Bannerman v White (1861)**
The buyer specifically asked if the hops he was about to buy had been treated with sulphur, otherwise he was not interested. He was assured they had not. When he found it the hops had been treated he tried to end the contract. **HELD: The discussions amounted to a condition of the contract. The condition had been breached, so repudiation was justifiable. Repudiation means...**

2) SPECIAL KNOWLEDGE / SKILL

- If a person with special knowledge/skill makes a statement, this is generally taken to be a term of the contract due to their expertise in that area.
Dick Bentley Productions v Harold Smith Motors (1965)
A customer asked the car dealers to find him a Bentley in good condition. They sold him one they claimed had done 20,000 miles when in fact it had done 100,000 miles. The customer sued. **HELD: Allowed to sue, as claimant had relied on the specialist expertise of the car dealer.**

Oscar Chess v Williams (1957)
D sold his car to P, car dealers, stating it was a 1948 model. When P discovered it was actually a 1939 model, they realised they had paid too much for the car and sued D. **D honestly believed car to be 1948 model as the registration documents stated this. It was an innocent misrepresentation, as the seller had no expertise or specialist skill.**

3) VERIFICATION REQUIRED

- If the one party makes a statement but tells the other party to have it verified, it is unlikely to be a term of the contract.

- This is because he is making a statement but suggests an expert opinion is sought.

Ecay v Godfrey (1947)
The seller of a boat stated it was sound but advised the buyer to get it surveyed. **The statement was a mere representation and not a term because of his advice.**
Schawel v Reade (1913)
The seller of a horse told the buyer that for stud purposes the horse was sound and if there was anything wrong with it, he would tell him. Relying upon this, he bought the horse. In fact the horse was unfit for stud purposes and the buyer sued. The statement was a term of the contract, so buyer could sue.

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4) TIME BETWEEN THE STATEMENT & THE CONTRACT

- Generally, the longer the time between the statement and the contract, the less likely it will be part of the contract.

Routledge v McKay (1954)
A 1939 motorcycle was wrongly described as 1941 in its registration documents, owner was unaware of this. In 1949 the owner decided to sell and made a stated the age of a motor bike to a prospective buyer. A week later the prospective buyer actually bought the motorcycle, in a written contract that did not mention the age. He discovered the true age and tried to sue. HELD: The statement was held not to be a term of the contract, due to the time lapse. Also as it did not feature in the written contract, it was not important enough to be a term.

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SOURCES OF TERMS – HOW DO THEY BECOME PART OF THE CONTRACT?

Terms of a contract can be either:

- **Express terms** are those which are agreed by the parties when the contract is made.
- **Implied terms** are those which do not appear in the contract but exist because of statute, the courts, or custom.

EXPRESS TERMS – THESE ARE AGREED BY THE PARTIES AT THE OUTSET

- Express terms can be agreed by the parties in writing or orally.

EXPRESS TERMS IN WRITTEN CONTRACTS

- The general rule is that when the parties write down the terms of their contract, they are bound by all of it.
- They cannot add to it or change it.

1. **The Parole Evidence Rule**
   This rule comes from the case of *Goss v Lord Nugent* (1833) and states that oral or other evidence will not be allowed to alter or contradict what is contained in the written contract.

2. **The Rule In L’Estrange**
   This rule comes from the case of *L’Estrange v Graucob* (1934) and states that a person is bound by a document he signs whether he reads it or not.
EXPRESS TERMS IN ORAL CONTRACTS

- Problems arise when written terms are included in oral contracts.
- To be effectively included, the courts have to consider the following:

IS THERE SUFFICIENT NOTICE OF THE TERM?
The courts will examine the following:

1) The document
2) The attention of the party
3) At the time of the contract

1. The document:

Parker v South Eastern Railway (1877)
The receipt for left luggage had the terms of the contract on the back and had to be kept in order to have the luggage returned. **HELD:** P had notice of the term as it was the type of receipt that would be kept and was likely to be read – even though she had not read it.

Chapelton v Barry UDC (1940)
The terms for hiring a deck chair were on the back of the ticket. **HELD:** the words on the back were not of contractual importance, so not classed as terms.
2. The attention of the party:

Thompson v LMS Railway (1930)
An exemption clause was contained in a timetable; however, P could not read. **HELD:** She was contractually bound by the exclusion clause, as reasonable notice of it had been brought to her attention.

Sugar v LMS Railway (1941)
The ticket with the terms on the back had been covered by the date stamp **HELD:** As the terms could not be read, they did not form part of the contract.

3. At the time of the contract:

Olley v Marlborough Court Hotel (1949)
P booked in and paid at the reception desk to stay at Ds hotel. When Ps belongings were stolen, D relied upon the sign on the back of the hotel room door which stated the hotel accepted no responsibility for such instances. **HELD:** The contract had been formed at reception, so the terms on the door did not form part of the agreement.

Thornton v Shoe Lane Parking (1971)
When T parked his car, the contract was made at the point where he took the ticket and the barrier was raised. When he crashed his car inside the car park he sued but the owners relied on a sign inside the car park which stated they were not responsible for any damage. **HELD:** The term was not part of the contract as the contract was formed at the entrance. Also, as the exclusion clause was so wide that it should have been brought to Mr. Thornton’s attention in “the most explicit way.”
Interfoto v Stiletto (1988)
D borrowed photos from a library but as he was late returning them, owed £3,700.
HELD: The fine of £5 per slide each day was too onerous. Court reduced the fine to £3.50 per slide per day.

Lord Denning noted that some clauses, as above, that exclude responsibility, need to be printed in red ink with a red hand pointing to it for their to be sufficient notice.

PREVIOUS DEALINGS

Hollier v Rambler Motors (1972)
P left his car at Ds garage, but the car was destroyed in a fire at the garage. P sued D but he tried to rely upon a sign in the garage excluding him from being responsible. P did not go to the garage frequently. HELD: As he was not a regular customer, the garage could not rely on the notice inside. Could sue.

McCutcheon v David MacBrayne Ltd (1964)
Ds ferry sank and P sued as his car was destroyed. Ds argued that they were not responsible because of the exclusion clause in the office which they claimed P was aware of as he used the ferry regularly. However, P did not always go into the office to purchase the ticket. HELD: Defendant was liable, so had to replace the car.
British Crane Hire v Ipswich Plant Hire (1975)
It was usual for those hiring equipment to be responsible for returning it. When the hired crane got stuck in the mud, the hirer was responsible as he was in the same business and was familiar with the usual course of dealings.

IMPLIED TERMS
Some terms will be implied in a contract even though they are not written down in the contract. Terms may be implied if they are:

1. Custom
2. Court order
3. Statute
4. Business Efficacy & Intention

CUSTOM
- If something has happened over a long period of time it becomes customary.
- Therefore, within certain businesses, there will be usual conditions of practice.
- If custom is to be implied into a contract, it must help to support the purpose of the contract and not contradict express terms.
COURT ORDER

- Sometimes the court may have to intervene when there is a dispute, and imply a term into the contract.

Samuels v Davis (1943)
P sued D over false teeth that did not fit and could not be used, claiming the goods were not fit for their purpose using the Sale of Goods Act 1979. D claimed the teeth were not ‘goods’ since fitting teeth was a ‘service’. **HELD:** The customer was entitled to expect that the false teeth handed over at the end would be fit for their purpose under the Sale of Goods Act.

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STATUTE

The following are a selection of implied terms from the **Sale of Goods Act 1979**:

- Section 12 - The seller has the right to sell the goods

Rowland v Divall (1923)
The claimant bought a car that was stolen, so the rightful owner of the car could take it back. The claimant could recover the full price paid for the car from the seller.

- Section 13 – The goods match the description

Re Moore and Landauer (1921)
A contract for tinned fruit was described as being in cartons of 30 tins, but half of the cartons contained only 24 tins, so this breached Section 13.
- Section 14(2) – The goods are of satisfactory quality (implied where the goods are sold in the course of a business)

**Bartlett v Sydney Marcus (1965)**
A car was bought with a defective clutch, the sellers offered to repair the clutch or reduce the price of the car by £25. The buyer accepted the price reduction but had to replace the clutch, costing £45. The buyer claimed that the car was not of merchantable quality, but Lord Denning rejected this.

- Section 14 (3) – The goods are fit for purpose

**Grant v Australian Knitting Mills (1936)**
The buyer contracted a painful skin disease from chemicals in underpants that he had bought. It was implied that the seller should have been aware of the intended purpose of the underpants and the buyer was not required to state the intended purpose to the seller.

- Section 15 – Goods sold by sample should match the sample

**Godley v Perry (1960)**
A boy was injured by a catapult when the elastic broke. The retailer had tested the sample but was able to show that the bulk did not match the quality of the sample.

- The **Unfair Contract Terms Act 1977** also protects the consumer by placing severe restrictions on the ability of sellers to exclude the implied terms above.
BUSINESS EFFICACY & INTENTION

- The courts will imply a term where it is essential to make the contract function and reflect the parties’ intention.

- A term may be implied if it is clear that the parties must have intended to include it.

The Moorcock (1889)
D contracted with P so that he could moor his boat at Ds jetty. The water was too shallow and damaged Ps boat. P sued. **HELD: There was an implication that the ship would not be damaged, so D was liable and P could sue.**

- The courts have developed the ‘officious bystander’ test from the case of Shirlaw v Southern Foundries.

- Where a term has not been expressed in a contract, the court will consider whether an officious bystander, watching the agreement, would be able to make a suggestion about a term being included, and the parties replying “Oh of course”.

Spring v National Amalgamated Stevedores & Dockers Society (1956)
The Bridlington agreement made between various trade unions stated that they must not try to “poach” one another’s members. P joined the defendant union in breach of this rule (they were totally unaware of it) – and the committee demanded this member be expelled. **HELD: The officious bystander test was used here but it was decided that even if P had been told about the agreement by an officious bystander, he would still have no idea what the agreement was about. The term was therefore not implied by the court.**

- Therefore, both parties must know about the term, otherwise the court will not imply it.

- The courts have applied the test very strictly, refusing to imply terms in:
Liverpool CC v Irwin
The council leased flats, though there was no proper tenant agreement there was a list of tenant’s obligations which they signed. When flats became badly damaged the tenants with-held the rent in protest as they claimed it was implied the council should maintain the common areas.
HELD: There was an implied term on the part of the council to take reasonable care to maintain the common areas – but the court did not consider the council had breached this.

Paragon Finance v Nash
Mortgage lenders lent money on variable interest rates which meant they could raise or lower the rates.
HELD: A term should be implied that the rates should not be set arbitrarily or dishonestly. This meant the rates should not be set in a way that no other lender acting in a reasonable way would do. However the court also held the loan agreement was not excessive when the bank chose not to follow the mortgage rate or other lenders, and neither was it unlawful under the Consumer Credit Act 1974 or the Unfair Contract Terms Act 1977. Thus, the implied term had not been breached.

Wilson v Best Travel.
Whilst on holiday in Greece a holiday maker fell through a glass door. Although the glass complied with Greek safety standards, it did not comply with British standards, so the claimant sued.
HELD: Not allowed to sue – the officious bystander test could not apply here as the matter was beyond the tour operators control and would not have been prepared to accept such a term existed.
COLLATERAL CONTRACTS

- A representation for the main contract may help to form the collateral contract.

City & Westminster Properties v Mudd (1959)
The contract was for the lease of a shop. However, the tenant often slept in one of the rooms. When the contract was renewed, it clearly stated the lease was for business purposes only. However, an oral agreement was made for the tenant to continue sleeping in one of the rooms. The representation made orally with the main contract, went on to form a collateral contract.

PAST EXAM QUESTIONS

January 2006
There are occasions when terms are implied into contracts which have not been discussed by the parties. Critically consider the circumstances in which this is likely to occur. [50]

January 2008
“At common law a term will not be implied into a contract simply to make it fair.” Compare the terms that are implied into a contract by the courts with those implied by statute, in the light of the above statement. [50]
January 2010
Sara, who owns a restaurant, has placed a number of orders with local traders. She ordered ten salmon from Tom but was annoyed when ten trout were delivered. Tom said that it was a usual term in the fish trade that if salmon were not available trout could be delivered instead. This was correct but Sara had never heard of that term.

When Sara took delivery of a case of wine from Henri she signed a delivery note. The note included a statement that any complaints about the wine had to be made within five working days. The wine turned out to be undrinkable but Sara did not discover this until two weeks after delivery.

Sara also placed an order with Bella, a baker, for 50 bread rolls to be delivered every day. She was surprised to find that the deliveries were made at 1.30 in the afternoon, too late to be used for lunch, which was when she did most of her business.

Advise whether Sara has a valid claim for breach of contract against Tom, Henri and Bella. [50]

June 2010
‘The courts have little sympathy for a party who claims that they are unaware of the terms on which they have contracted’. Discuss the extent to which it is true that any written statement of terms will be incorporated into a contract, in light of the statement above. [50]
Terms are the contents of a contract and set out what is expected. Some terms will be more important than others and therefore given greater significance.

There are two types of terms in a contract: conditions and warranties. The way in which terms are classified is critical to determining the outcome.

1. **CONDITIONS**  
   - these are the most important terms that are at the root of the contract.

If a condition is breached, the innocent party has a choice whether to:
   a) Repudiate, meaning _____________________
   b) Continue but claim damages

2. **WARRANTIES**  
   - these are the minor / less important terms.

If a warranty is breached, the innocent party can:
   a) Claim damages

**CONDITIONS:**
   o These terms are so important to the contract that if they are not performed, the contract would be classed as meaningless.
   
   o They go to the **ROOT** of the contract.
   
   o If a condition is breached it allows the innocent party to end the contract and be free to find an alternative party to contract with.
   
   o This is because the breach will be so serious.
Poussard v Spiers & Pond (1876)
P was contracted to perform the lead role in an opera. She became ill and missed the final rehearsals and the first 4 performances. As she was replaced, she sued D for breach of contract.

It was held that it was actually P who had breached the contract by failing to turn up on the first night of the performance. Having the lead role meant her performance was crucial and her failure to meet that was a breach of a condition which entitled D to repudiate.

WARRANTIES:
- These are minor terms of the contract.
- They are ancillary / secondary to the main purpose of the contract.
- In general, the contract can still continue despite the breach.
- The innocent party will still be bound by a contract where a warranty is breached.
- They can simply claim damages for the breach.

Bettini v Gye (1876)
P was a singer contracted to perform in an opera. The contract included a term that P must attend rehearsals for 6 days. However, he was ill and only attended the last 3. When he was replaced he sued D for breach of contract.

D's claim, that failure to attend the rehearsal was a breach of a condition, failed. The term regarding the rehearsal was ancillary to the performance. P had simply breached a warranty which only entitled D to claim damages, not replace P.
INNOMINATE TERMS

- These are terms in a contract which, at first, cannot be identified as being a condition or a warranty. This is because the courts primarily wish to consider the consequence of the breach.

- The courts will **first** look at the breach and determine how serious it is.

- The term will **then** be classified, once the seriousness of the breach is established.

- The appropriate remedy will be available (repudiation or damages).

- The term will only be classified as a condition if repudiation would be fair to both sides.

- The idea of innominate terms was a result of *Hong Kong Fir*.

1 - THE HONG KONG FIR APPROACH

*Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd 1962*)

D chartered a ship for 2 years from P, with a term that stated that the ship was ‘in every way fitted for ordinary cargo service’. However, the ship was in a poor state of repair and broke down, remaining out of use for 18 weeks. As the above term could not be met, D repudiated the contract but was sued by P for breach of contract, claiming the term was a warranty.

**Lord Diplock commented that in some situations, it is not as simple as classifying a term as either a condition or a warranty. It depends on the nature of the breach. Having looked at the seriousness of the breach, it was decided that the term was a warranty and P could only claim damages.**

**AO2**

This was a common sense approach to complex contracts, where the effect of the breach was the initial concern to be dealt with before the term was classified.

It is a more flexible way of dealing with contracts that can vary greatly in the seriousness of the breach and the impact of it.

However, it does leave the parties uncertain as to what the term will finally be classed as.
The approach in **Hong Kong Fir** was also used in:

**The Hansa Nord case (1976)**
Part of a cargo was damaged and the buyers tried to repudiate the contract. The approach taken in *Hong Kong Fir* was applied here, allowing the court to look at the seriousness of the breach before classifying the term. On this basis it was decided that the breach was not serious enough to allow the buyers to repudiate. Based on this, it was held that the term regarding the state of the cargo was a warranty.

**Reardon Smith Line v Hansen Tangen (1976)**
A tanker was ordered to be called ‘Osaka 354’. However, when it came back with the name ‘Oshima 004’, the buyers claimed this was a major breach enabling them to repudiate. Applying the *Hong Kong Fir* approach, the court first looked at the seriousness of the breach. As the breach was technical, and did not affect the outcome of the contract, it was not significant. The name on the tanker was classified as a warranty which only enabled a claim for damages, not repudiation.

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**AO2**

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**2 – THE NEED FOR CERTAINTY**

The courts did not follow the *Hong Kong Fir* approach in the following cases, believing the need for certainty in these situations should come first.

**Bunge Corp v Tradax Export (1981)**
As part of a shipping contract, 15 days notice was required. However, on this occasion, only 13 days notice was given. The amount of notice required to be given was held to be a condition as the need for certainty was more important than considering the extent of the breach.
A vessel was hired out and a dispute arose over the regularity of payments. The owners claimed that because of this, they were entitled to withdraw the ship. **The HOL held that they were entitled to do so, even though this was harsh - the term had to be interpreted as a condition so the parties knew where they stood.**

Lombard North Central v Butterworth (1987)
When P leased a computer to D, the agreement stated that payment was ‘of the essence’. When D failed to pay on time on the 4th occasion, it had to be decided whether the agreement to pay by instalments was a condition or a warranty. **As the term concerning payment was so important it was held to be a condition, enabling the contract to be repudiated.**

**AO2**

**HOW DO THE COURTS DECIDE IF IT A CONDITION OR A WARRANTY?**

Where it is not clear whether a term is a condition or a warranty, the courts must consider:

1. If it goes to the **root** of the matter E.G. Poussard v Spiers & Pond.
2. What the parties have **labelled** the terms as.
3. The **intention** of the parties.
4. The **status** given to a term in the **statute**, if it is implied from that – E.G. consumer contracts.
5. Previous **course of dealing** between the parties.
P gave D sole rights to sell their machinery. One condition was that D ‘visits the six largest UK car manufacturers every week’ to gain orders. Over a 4 year period this would amount to 1,400 visits. D failed to make 1 visit and P sought to repudiate the contract due to breach of a condition. The court had to decide whether the term was a condition or a warranty.
The House of Lords felt it was inevitable that at some point in the contract at least 1 visit might not be possible. To allow the term to be a condition would entitle P to terminate the contract at any point in the 4 years should 1 out of a possible 1,400 visits not be made. As this would be an unreasonable burden, the term could not be a condition, even though the parties had labelled it as such. The term was simply a breach of a warranty, only entitling a claim for damages.

The Mihalis Angelos case (1970)
There was an agreement that a ship would be ready to leave Vietnam to go to Hamburg. On that date, it was not ready. There had been a breach of the agreement, but the court had to decide whether the deadline it should have met was a condition or a warranty.
The need for certainty and predictability in the commercial sector was vital. Therefore, failing to be ready on time was breach of a condition.

The above shows that the decision as to whether a term is a condition or a warranty is not an easy one. Ultimately, the courts must aim to represent the aims of the parties.

British Crane Hire v Ipswich
The normal trade practice for a hirer of this type of equipment was to be responsible for returning it. When a crane became stuck in the mud, the terms regarding the return of the crane were disputed, and it was held that on this occasion that the courts could refer to normal trade practice which the parties must have encountered in their previous work.
SPECIMEN PAPER
Discuss whether the increased use of the innominate term means that it is no longer important to differentiate between conditions and warranties. [50]

JUNE 2006
“The different approaches to classifying terms lead to uncertainty.” Discuss the accuracy of this statement. [50]

JANUARY 2011
Press Up are a company who make biscuit tins. They hire some large machines from Rentamac for use in their factory, the contract requiring them to pay rent on the first day of each month. This month they were five days late in paying the rent. Rentamac are threatening to end the contract and reclaim the machines.

Two months ago Quki, a biscuit baking company, ordered 5,000 biscuit tins from Press Up, saying they needed them as soon as possible. Press Up have not yet delivered the tins and Quki are threatening to end the contract.

Press Up have recently delivered a large quantity of tins to Snakit, another biscuit baking company. Several of the tins cracked when Snakit started to pack biscuits into them and Snakit are unable to use the tins.

Advise whether Rentamac, Quki and Snakit may terminate their contracts with Press Up. [50]

JUNE 2011
‘The most important aim of contract law is certainty for the parties, innominate terms fail to achieve this aim and leave the outcome to the opinion of the judge.’

Discuss the extent to which contracting parties can assess the likely consequences of a breach of contract in the light of the above statement. (50)
There are two types of exemption clause:

1. **EXCLUSION CLAUSES** = where a party tries to avoid any liability at all in a contract

2. **LIMITATION CLAUSES** = where a party limits liability in a contract

Therefore, it is a term in a contract that seeks to exclude or limit liability.

Previously, contracts worked on the principle of *caveat emptor* – let the buyer beware – which led to an inequality in bargaining power.

The courts therefore developed, through common law, rules to protect customers more.

The notion of consumer protection however has since been developed in legislation and EU law.

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**RELYING ON AN EXEMPTION CLAUSE**

To rely on an exemption clause, certain criteria must be met:

1. **INCORPORATION** - The clause is a term of the contract.

2. **CONSTRUCTION** - Can the damage which has occurred be interpreted as falling within the boundaries of the exemption clause?

3. **LEGISLATION** - Is the term allowed within current statute law
1. THE CLAUSE IS A TERM OF THE CONTRACT - INCORPORATION

1) IF YOU SIGN, YOU’RE BOUND

L’Estrange v Graucob (1934)
The claimant bought a vending machine from D on a written contract which in small print contained the following clause, “any express or implied condition, statement or warranty, statutory or otherwise not stated herein is hereby excluded.” The court held that she was bound by the exclusion clause regardless of the fact that she had not read it, because Section 55 of the Sale of Goods Act 1893 allowed sellers to exclude implied terms.

The rule in L’Estrange applies to all exemption clauses – if you sign a document and do not read it, you are still bound by the terms.

AO2

2) TERMS MUST BE KNOWN AT TIME OF CONTRACT

The offeree must be aware of the term at the time of the contract –

Olley v Marlborough Court Hotel (1949)
Mr and Mrs Olley booked into a hotel, and at this point the contract was formed. When they later went out they left the key with reception, as required by the rules of the hotel. When they returned they discovered a third party had entered their room and stolen Mrs Olley’s fur coat.

The exemption clause on the back of the bedroom door came too late to be incorporated, and the CA was not prepared to allow the hotel to rely on a clause that was not part of the contract.
**Thornton v Shoe Lane Parking (1971)**

The claimant was injured in a car park owned by the defendants. At the entrance there was a notice that identified the charges for parking and stated that parking was at the owner’s risk. On entering the car park the motorist was required to stop at a barrier and take a ticket from a machine, then the barrier automatically lifted. On the ticket it stated “this ticket is issued subject to the conditions of issue as displayed on the premises.” Notices inside the car park then listed the conditions of the contract and these included a clause excluding liability to property and personal injury. **When the claimant sued for his injuries the defendants argued that he was bound by the exclusion clause, but the court rejected this as there was insufficient attempt to draw the claimant’s attention to the existence of the clause for the defendant to be able to rely on it to avoid liability.**

**Dillon v Baltic Shipping (The Mikhail Lermontov) (1991)**

A woman booked a cruise for herself and her daughter. The booking form stated that carriage was “subject to conditions and regulations printed on the tickets.” **When the cruise ship sank the claimant compensation for her injuries, but the defendants sought to rely on the exclusion clause. However, the tickets did not reach P until much later so the exemption clause contained on the tickets came too late to be incorporated. The court stated that there was insufficient notice given in the booking form to actually draw the claimant’s attention to the existence of the exclusion clause and it could not be relied on to avoid liability for negligence.**

3) **PREVIOUS DEALINGS MUST BE CONSISTENT**

To incorporate an exemption clause where there have been previous dealings, there must be consistency – **McCutcheon v David MacBrayne**: although P used the ferry often, it was not consistent enough to expect him to be aware of the exemption clause and include it in the contract.

**AO2**
4) **THE DOCUMENT MUST BE OF A CONTRACTUAL NATURE**

The exemption clause must be contained in a document that would be perceived as being contractual for it to be incorporated –

**Parker v SER (1877)**
The receipt for left luggage had the terms of the contract on the back and had to be kept in order to have the luggage returned.

**HELD:** *P had notice of the term as it was the type of receipt that would be kept and was likely to be read – even though she had not read it.*

However, if the document is not seen as being of a contractual nature then the exemption clause on the back of it will not be incorporated.

**Chapelton v Barry UDC (1940)**
The claimant hired deckchairs on the beach and was given two tickets from the attendant when he paid. On the back of the tickets it stated “The council will not be liable for any accident or damage arising from the hire of the chair.” The claimant did not read it, believing it to be a receipt, and the deckchair collapsed due to being defective. The claimant sued for his injuries and the council tried to rely on the exemption clause. **The court would not accept the clause was legitimate because its existence was not effectively brought to the attention of the claimant. The court held it was unreasonable to assume the ticket was a contractual document, so the council was liable.**
2. CAN THE DAMAGE WHICH HAS OCCURRED BE INTERPRETED AS FALLING WITHIN THE BOUNDARIES OF THE EXEMPTION CLAUSE (CONSTRUCTION)

- Construction means interpretation
- Can the exemption clause be interpreted to cover the damage which has arisen?
- Two rules are used to help answer the question:

i) THE MAIN PURPOSE RULE:

- An exemption clause cannot defeat the purpose of the contract

**Glynn v Margetson (1893)**
A clause allowed a ship to stop anywhere in Europe or North Africa. Whilst under a contract to carry oranges from Malaga to Liverpool, the captain relied on this clause to give him the freedom to go into the Mediterranean to pick up extra cargo. The oranges deteriorated and was therefore not in good condition as the contract required. **Held: the clause was not allowed to stand as it defeated the purpose of the contract.**

ii) THE CONTRA PROFERENTEM RULE

- Where there is doubt about an exemption clause, the courts will interpret it against the person that is trying to rely on it.

**Andrews Bros v Singer & Co (1934)**
The contract was for the sale and purchase of “new Singer cars.” The contract contained a clause excluding “all conditions, warranties and liabilities implied by statute, common law or otherwise.” One car delivered was technically a used car as it had already been used by a prospective purchaser. The dealer was sued for damages and tried to rely on the clause in order to defend the claim. CA held that the supply of “new Singer cars” was an express term of the contract. **Since the exclusion clause applied to “implied terms” the contra proferentum rule would prevent it being used in relation to express terms. The clause could not be relied upon and the defence failed.**
OTHER COMMON LAW PRINCIPLES TO HELP WITH CONSTRUCTION:

- It has been established that an oral statement can over-rule an exemption clause.

**Mendelssohn v Normand (1970)**
A garage attendant advised a customer to leave his car unlocked, and items were later stolen from the car. An exclusion clause disclaimed liability for stolen goods. **Held: the exclusion could not be relied upon, it was ineffective because of the oral statement of the attendant.**

- An oral statement will over-rule the exclusion clause even where it is found to be untrue and contradictory:

**Curtis v Chemical Cleaning & Dyeing Co (1951)**
The plaintiff took a wedding dress to be cleaned and was asked to sign a document. When she enquired she was told that the cleaners would not be liable for damage to sequins and beads. However, the document contained a clause exempting liability ‘for any damage howsoever arising’. The dress was stained by the dry cleaners and they tried to rely on the exemption clause. **Held: the misrepresentation had overridden the exemption clause and therefore the cleaners could not rely on the clause and had to pay for the damage.**
3. IS THE TERM ALLOWED WITHIN CURRENT STATUTE LAW (LEGISLATION)

- Legislation may determine the effectiveness of an exemption clause.
- Relevant legislation is the UCTA 1977 and the Unfair Terms in Consumer Contract Regulations 1999.
- Legislation has given a lot of protection to the consumer.

THE UNFAIR CONTRACT TERMS ACT 1977

- This was a significant law, ensuring fairness for consumers.
- It has created certainty in exemption clauses.
- It is no longer necessary to refer cases to the courts.
- The 1977 Act applies to consumers who are defined as:

  **S.12:**
  a person who does not make the contract in the course of business but the other party does, and the goods are ordinarily for private use

- A business can be treated as a consumer

**R&B Customs Brokers v Utd Dominions Trust (1988)**
P bought a car for business and personal use. As he did not regularly buy cars as part of his business, he was treated as a consumer.

**Feldarol v Hermes Leasing (2004)**
A company bought a Lamborghini for its managing director (a sports car enthusiast). As the car was mainly for personal use, this was held to be a consumer contract.

**AO2**
THE UNFAIR CONTRACT TERMS ACT STATES:

• Liability for death / personal injury cannot be excluded resulting from negligence - S2 (1)

• Other liability arising from negligence can only be excluded if it is reasonable to do so - S2 (2)

• A term cannot restrict liability for a failure to perform or performance which is substantially different from what was agreed unless it is reasonable - S3

WHAT IS REASONABLE?

• Reasonable means fair given the circumstances. It takes into account:
  • the resources available to cover the liability
  • whether there is insurance (Stewart Gill v Horatio Myer Ltd 1992)
  • the bargaining powers of the parties
  • any inducement to agree to the term
  • custom
  • previous dealings
  • the difficulty of the task
  • whether the goods are adapted to the order of the customer
The following cases look at when a clause is **HELD TO BE REASONABLE**…

**O’Brien v Mirror Group (2001)**
A reader of a newspaper found a winning number on a scratch card. However, due to a printing error, a large number of other people also had the same winning number. The claimant had not read the terms and conditions in a different day’s edition of the paper that stated if this happened the winnings would be shared amongst everyone rather than being paid in full to each reader. **Although the claimant had not seen this term, it was held to be reasonable as it had been brought to readers’ attention, and it was not reasonable to expect such winnings. The court also took into account the fact that the claimant did not have to do much to “earn” the winnings.**

**Woodman v Photo Trade Processing (1981)**
A clause limited liability to a replacement film. This notice was stated in small print on the film packet. **Held: This was unreasonable but could be reasonable if the customer was also told there was a more expensive service available but without the limitation clause.**

**Watford Electronics v Sanderson (2001)**
There was a clause limiting the supplier’s responsibility when a computer could not perform the tasks it was bought for. **Held: This was reasonable given the two parties were businesses and would be fully aware of the clause.**

**Granville Oil & Chemicals v Davies Turner (2003)**
A clause limited the time for reporting problems with goods in transit. **Held: This was reasonable given the two parties were businesses and would be fully aware of this.**

AO2
WHAT IS UNREASONABLE?
The following cases illustrate clauses that were HELD TO BE UNREASONABLE.

Green v Cade (1978)
A clause stated any complaints about the seed potatoes had to be made within 3 days of delivery.
Held: This was unreasonable as it was not known they had a virus until they were grown.

Seed merchants supplied farmers with 30lb Dutch winter cabbage seeds for £192. A limitation clause limited liability to either replacement seeds or the cost of the seeds. The farmers calculated that the crop would be worth £63,000 when grown, but the seed was the wrong type and there was no crop. The farmers sued for £63,000, and won at first instance. On appeal the CA decided the clause was not sufficiently clear or unambiguous to allow the sellers to rely on it. The HOL disagreed with the CA and stated that the clause did cover the breach, but using the Unfair Contract Terms Act it was unreasonable and could not be relied upon.

Smith v Bush (1990) & Harris v Wrye Forest (1990)
In both cases, the clauses excluded surveyors of properties from being negligent.
Held: This was unreasonable as the properties were of a standard type and the surveyors were expected to carry out valuations professionally.

THE UNFAIR TERMS IN CONSUMER CONTRACTS REGULATIONS 1999

These Regulations cover a much wider scope than the Unfair Contract Terms Act, and include terms that:

- Exclude liability for death or personal injury (as before)
- Terms that bind the consumer where they had no chance of finding out what the terms were before the contract
- Terms that allow a seller to change a contract without valid reason
- Terms that unreasonably exclude a consumer’s legal rights
The Regulations define a consumer as “any natural person who is acting for purposes which are outside his trade, business or profession”.

The Regulations allow for unfair terms to be referred to the courts by other bodies such as:

**WHAT IS UNFAIR?**

<table>
<thead>
<tr>
<th>Regulation 5(1)</th>
</tr>
</thead>
<tbody>
<tr>
<td>“Any term, which contrary to the requirement of good faith, causes a significant imbalance in the parties”</td>
</tr>
</tbody>
</table>

When considering ‘good faith’ the courts will take account of:

- The bargaining power of the parties
- Any inducement to enter the contract
- Special requirements of the consumer
- Whether the seller has acted equitably

The courts will not interfere where the central terms are in plain, understandable language, even if they do not seem fair.

This is because consideration only needs to be sufficient and not adequate.

**THE EFFECT OF THE LEGISLATION:**

- Unfair terms will not be binding.
- Consumers are very well protected.
- Businesses on the other hand, are assumed to know what they are doing. However, this assumption may be harsh.
- The Securicor Cases resulted in businesses being unable to claim for their losses due to the limitation clauses. In both cases it was held that the parties must have made a reasonable assessment of their likely losses.
Photo Production v Securicor (1980)
Securicor had contracted to provide a night patrol service at a factory. A clause in Securicor’s terms stated that “Under no circumstances shall the company be responsible for any injurious act or default by any employee of the company unless such act or default could have been foreseen and avoided by the exercise of due diligence on the part of the Company as his employer.” The security officer on patrol started a fire that got out of control and burnt down a large part of the factory. It was not disputed that he was suitable for the work, and nor were Securicor considered negligent in employing him. **The HOL stated that the clause applied, because since it was clear and unambiguous there was nothing to prevent its use, and it therefore protected Securicor from liability from its employee’s actions.**

Ailsa Craig Fishing v Malvern Fishing & Securicor (1983)
Securicor were contracted to provide a security service in a harbor where boats were moored. Following negligence by the security guard, one vessel fouled another vessel and they both sank and became trapped under the quay. Securicor sought to rely on a term limiting liability for any “loss or damage of whatever nature arising out of or connected with the provision of or failure in provision of, the services covered by this contract…to a sum… not exceeding £1,000 in respect of one claim…and…not exceeding a maximum of £10,000 for the consequences of any incident involving fire, theft, or any other cause of liability.” **This clause was held by the HOL to have been drafted in a sufficiently clear and unambiguous way to protect Securicor in this case.**

- The effect of the legislation in general is to restrict the use of unfair terms, and particularly unfair exemption clauses in consumer contract.
- According to Richard Stone (academic on contract law) the effect of the legislation is to cut ‘a deep furrow right across the doctrine of freedom of contract’.
- This echoes the appraisal of Lord Denning in **George Mitchell v Finney Lock Seeds**, where he said of the reform by statute:

  “So the ‘idol of freedom of contract was shattered…it heralds a revolution in our approach to exemption clauses."
JUNE 2003
Alison visits Bestever Theme Park and, wishing to spend some time on rides, leaves her coat at a cloakroom where she pays a fee and is handed a receipt. While Alison is queuing for a ride, a park attendant, Callum, driving a small vehicle collides with her, causing injury to her shoulder and leg. Callum apologises on behalf of the Park, but points to a sign at the entrance which states, ‘Bestever Theme Park takes no responsibility for injury to visitors however caused’.

Alison decides to leave the Park, but when she returns to collect her coat she finds that it has been given to the wrong person. The assistant, Dana, points out a statement on her receipt which reads, ‘All items are left at owner's risk. Bestever Theme Park takes no responsibility for loss or theft of items, however this may arise’.

Advise Alison whether she should make a claim against Bestever Theme Park concerning her injury and the loss of her coat.

JANUARY 2006
Nolan visits his local gym for a fitness session. He leaves his briefcase with Peter the receptionist who gives Nolan a receipt and promises to take good care of the briefcase.

Nolan completes his fitness routine and takes a shower. On leaving the shower area, Nolan trips on an uneven patch of flooring, and sprains his ankle. He is unable to work for a week following this injury.

When Nolan leaves the gym he hands over his receipt to collect his briefcase but is told by Peter that it is missing. Peter points out a notice near to the reception counter which states:

‘The management of this gym do not take any responsibility whatsoever for injury to clients, however caused. Equally, the management will not be held responsible for loss of, or damage to, clients’ possessions.’

Advise Nolan whether he may claim compensation from the gym managers for the injury that he sustains and for the loss of his briefcase. [50]
Rosie, a builder, contracts with Erin to build an extension to her house. On 1st February they agree a price and a start date of 8th March. On 1st March Rosie sends Erin a full set of written terms, these include:

(1) Rosie does not accept any liability for any loss or damage, however caused, and;  
(2) Rosie has the right to start the work at any time.

Rosie eventually starts the work on 8th April. Shortly after starting the job Rosie drills through a water pipe and causes flooding to the downstairs of the house. She also leaves an electric cable exposed, which gives Erin an electric shock. Erin asks for compensation from Rosie for the damage, the electric shock and the late start but Rosie says she has no liability for any of these things.

Advise Rosie whether she can rely on the exclusion clause in relation to any of these claims.