**Contents of a contract - Terms**

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| The contents of a **contract** are known as **terms** or clauses. An agreement will generally consist of various **terms.** Even the simplest forms of contract will have **terms**. The main **terms** generally being the price paid and the subject matter of the contract, eg. the goods or services provided. It is common for businesses to have standard form **written terms** which can be quite lengthy. It is not a requirement that terms are written in simple contracts, although writing is required in certain types of contract eg. contracts for the sale of land, mortgages and consumer credit agreements. **Contract terms** may be **express or implied** and they may be classed as either [conditions, warranties or innominate terms](http://www.e-lawresources.co.uk/Conditions%2C-warranties-and-innominate-terms.php). Where a contract is formed orally it may be difficult to establish which statements made in negotiating the contract amount to **terms** and which statements are merely **representations.**    **Terms may be either:**  **Express terms -** those agreed between the parties themselves  or **Implied terms -** terms which are put into the contract by the [courts](http://www.e-lawresources.co.uk/Terms-implied-by-common-law.php) or by [statute](http://www.e-lawresources.co.uk/Statutory-implied-terms.php)  **Statements made during the course of negotiations**  Statements made during the course of negotiations can be classified as either:  **1. An express term -** if not fulfilled the innocent party may bring an action for breach of contract.   **2. A representation -** if not fulfilled the innocent party may bring an action for misrepresentation.  **3. As part of a collateral contract -** the innocent party may sue on the collateral contract. The main contract remains intact:  [*Esso Petroleum v Mardon*](http://www.bailii.org/ew/cases/EWCA/Civ/1976/4.html)[1976] QB 801   ([Case summary](http://e-lawresources.co.uk/forum/viewtopic.php?f=37&t=9))  **4. A sales puff -** not intended to be binding. Has no legal effect. eg Red Ball gives you wings.  **Express term or representation**  In deciding whether a statement amounts to a term or representation the courts look at four factors:  Statements made during the course of negotiations could amount to a **contractual term** or a **representation**. It is important to know whether a particular statement is a **contractual term** or if it is a **representation** as this will determine the appropriate cause of action and remedy available. If the statement amounts to a term of the contract which is not fulfilled, the innocent party may sue for breach of contract. If the statement is merely a **representation** which turns out to be untrue, the innocent party may bring an action for [misrepresentation](http://www.e-lawresources.co.uk/Misrepresentation.php).  In deciding whether a statement amounts to a term or representation the courts look at four factors:     1. The parole evidence rule 2. Relative expertise of the parties 3. Importance of the statement 4. Time   **1. The parole evidence rule:**    Where the contract has been put into writing only the terms included in the written document are terms any verbal statements will be representations.  **2. Relative expertise:**      If the representor has the greater knowledge, it is more likely to be a contractual term. Conversely if the representee has the greater knowledge it is more likely to be a representation:  [*Oscar Chess v Williams*](http://www.bailii.org/ew/cases/EWCA/Civ/1956/5.html)[1957] 1 WLR 370   ([Case summary](http://e-lawresources.co.uk/forum/viewtopic.php?f=37&t=121))  [*Dick Bentley v Harold Smith Motors*](http://www.bailii.org/ew/cases/EWCA/Civ/1965/2.html) [1965] 1 WLR 623                                                               ([Case summary](http://e-lawresources.co.uk/forum/viewtopic.php?f=37&t=122))  **3. The importance of the statement and reliance:**    Where the representee indicates to the representor the importance of the statement, this is likely to be held to be a term:   *Bannerman v White* (1861) 10 CBNS 844.  ([Case summary](http://e-lawresources.co.uk/forum/viewtopic.php?f=37&t=123))  **4. Timing**    The longer the time lapse between making the statement and entering the contract the more likely it will be a representation: [*Routledge v Mackay* [1954] 1 WLR 615](http://www.bailii.org/ew/cases/EWCA/Civ/1954/8.html)        ([Case summary](http://e-lawresources.co.uk/forum/viewtopic.php?f=37&t=124))    **Contractual term or Representation**  Statements made during the course of negotiations could amount to a **contractual term** or a **representation**. It is important to know whether a particular statement is a **contractual term** or if it is a **representation** as this will determine the appropriate cause of action and remedy available. If the statement amounts to a term of the contract which is not fulfilled, the innocent party may sue for breach of contract. If the statement is merely a **representation** which turns out to be untrue, the innocent party may bring an action for [misrepresentation](http://www.e-lawresources.co.uk/Misrepresentation.php).    In deciding whether a statement amounts to a term or representation the courts look at four factors:   1. The parole evidence rule 2. Relative expertise of the parties 3. Importance of the statement 4. Time   **1. The parole evidence rule:**   Where the contract has been put into writing only the terms included in the written document are terms any verbal statements will be representations.    **2. Relative expertise:**    If the representor has the greater knowledge, it is more likely to be a contractual term. Conversely if the representee has the greater knowledge it is more likely to be a representation:  [*Oscar Chess v Williams*](http://www.bailii.org/ew/cases/EWCA/Civ/1956/5.html)[1957] 1 WLR 370   ([Case summary](http://e-lawresources.co.uk/forum/viewtopic.php?f=37&t=121))  [*Dick Bentley v Harold Smith Motors*](http://www.bailii.org/ew/cases/EWCA/Civ/1965/2.html) [1965] 1 WLR 623                                                               ([Case summary](http://e-lawresources.co.uk/forum/viewtopic.php?f=37&t=122))  **3. The importance of the statement and reliance:**    Where the representee indicates to the representor the importance of the statement, this is likely to be held to be a term:   *Bannerman v White* (1861) 10 CBNS 844.  ([Case summary](http://e-lawresources.co.uk/forum/viewtopic.php?f=37&t=123))  **4. Timing**  The longer the time lapse between making the statement and entering the contract the more likely it will be a representation:  Routledge v Mackay (1954) 1WLR 615  **Conditions, warranties &**  **innominate terms**    Contractual terms can either be **conditions, warranties or innominate terms**. Traditionally, contractual terms were classified as either **conditions** or **warranties**. The category of **innominate terms** was created in *Hong Kong Fir Shipping*. It is important for parties to correctly identify which terms are to be conditions and which are to be warranties. Where there has been a breach of contract, it is important to determine which type of term has been breached in order to establish the remedy available.  **Conditions**    A condition is a major term of the contract which goes to the root of the contract. If a condition is breached the innocent party is entitled to repudiate (end) the contract and claim damages:  *Poussard v Spiers* (1876) 1 QBD 410    [(Case summary)](http://e-lawresources.co.uk/forum/viewtopic.php?f=37&t=184)    **Warranties**  Warranties are minor terms of a contract which are not central to the existence of the contract. If a warranty is breached the innocent party may claim damages but can not end the contract: *Bettini v Gye* 1876 QBD 183        [(Case summary)](http://e-lawresources.co.uk/forum/viewtopic.php?f=37&t=185)  Even where the parties have themselves classified the term as a condition the courts can hold that it was in fact only a minor term and therefore a breach of that term would not give rise to the right to repudiate the contract.   Compare the cases:  [*Schuler v Wickman Tools* [1974] AC 235](http://www.bailii.org/uk/cases/UKHL/1973/2.html)       [(Case summary)](http://e-lawresources.co.uk/forum/viewtopic.php?f=37&t=186)  [*Lombard North Central v Butterworth* [1987] QB 527](http://www.bailii.org/ew/cases/EWCA/Civ/1986/5.html)  [(Case summary)](http://e-lawresources.co.uk/forum/viewtopic.php?f=37&t=187)    **Innominate terms**  The innominate term approach was established in the case of *Hong Kong Fir Shipping.* Rather than classifying the terms themselves as conditions or warranties, the innominate term approach looks to the effect of the breach and questions whether the innocent party to the breach was deprived of substantially the whole benefit of the contract. Only where the innocent party was substantially deprived of the whole benefit, will they be able to treat the contract as at an end:  [*Hong Kong Fir Shipping v Kawasaki Kisen Kaisha*](http://www.bailii.org/ew/cases/EWCA/Civ/1961/7.html) [1962] 2 QB 26                                                         [(Case summary)](http://e-lawresources.co.uk/forum/viewtopic.php?f=37&t=183)   This approach has been criticised for sacrificing certainty. Also the innocent party may well be liable for wrongful repudiation if they treat the contract as at an end where it is found that the breach did not deprive them of substantially the whole benefit of the contract.    Even where the parties have themselves classified the term as a condition the courts can hold that it was in fact only a minor term and therefore a breach of that term would not give rise to the right to repudiate the contract.    Compare the cases:  [*Schuler v Wickman Tools* [1974] AC 235](http://www.bailii.org/uk/cases/UKHL/1973/2.html)       [(Case summary)](http://e-lawresources.co.uk/forum/viewtopic.php?f=37&t=186)    [*Lombard North Central v Butterworth* [1987] QB 527](http://www.bailii.org/ew/cases/EWCA/Civ/1986/5.html)  [(Case summary)](http://e-lawresources.co.uk/forum/viewtopic.php?f=37&t=187)    **Terms implied by common law**    The courts are reluctant to **imply terms** in to a contract at common law. It is the parties' role to agree the terms of their particular agreement. It is generally not considered to be the role of the courts to rewrite a contract for the parties. Freedom of contract prevails. There are limited circumstances where the courts will **imply a term** into a contract at common law:   1. Terms implied through custom 2. Terms implied in fact 3. Terms implied at law   **Terms implied through custom**    Where a particular term is prevalent in a trade the courts may imply a term in a contract of the same type in that trade:  [*Hutton v Warren*](http://www.bailii.org/ew/cases/EWHC/Exch/1836/J61.html) [1836] EWHC Exch J61      ([Case summary](http://e-lawresources.co.uk/forum/viewtopic.php?f=37&t=125))  **Terms implied in fact**  Terms implied as fact are based on the imputed intention of the parties. Two tests have developed:  1. The business efficacy test:  This asks whether the term was necessary to give the contract business efficacy ie would the contract make business sense without it? - The courts will only imply a term where it is necessary to do so.    *The Moorcock* (1889) 14 PD 64              ([Case summary](http://e-lawresources.co.uk/forum/viewtopic.php?f=37&t=126))  2. The officious bystander test:  Had an officious bystander been present at the time the contract was made and had suggested that such a term should be included, it must be obvious that both parties would have agreed to it.    *Shirlaw v Southern Foundries* [1939] 2 KB 206    ([Case summary](http://e-lawresources.co.uk/forum/viewtopic.php?f=37&t=127))  **Terms implied in law**  The courts may imply a term in law in contracts of a defined type eg Landlord/tenant, retailer/customer where the law generally offers some protection to the weaker party:  *[Liverpool City Council v Irwin](http://www.bailii.org/uk/cases/UKHL/1976/1.html)* [[1977] AC 239](http://www.bailii.org/uk/cases/UKHL/1976/1.html)  [(Case summary)](http://e-lawresources.co.uk/forum/viewtopic.php?f=37&t=181)    In addition to being a contract of a defined type, the term must be a reasonable one to include:  *Wilson v Best Travel* [1993] 1 All ER 353       [(Case summary)](http://e-lawresources.co.uk/forum/viewtopic.php?f=37&t=182)    **Statutory implied terms - The Sale of Goods Act 1979 and the Supply of Goods and Services Act 1982**    **Intro**   In contracts for the **sale of goods** and **supply of services** certain basic provisions are implied by statute in order to provide protection to purchasers. The main provisions derive from the **Sale of Goods Act 1979** and the **Supply of Goods and Services Act 1982.** The **Sale of Goods Act** protects purchasers where the seller does not have the right to sell the goods **(s.12).** Where the goods are sold by description there is an implied term that the goods will correspond to that description **(s.13).** Businesses must ensure that the goods they sell are of satisfactory quality and fit for their purpose **(s.14)**. Where the goods are sold by sample there is an implied term that the goods will correspond to the sample in quality **(s.15).** Where the goods are supplied along with a service then the **Supply of Goods and Services Act 1982** applies. This implies the identical provisions as the **Sale of Goods Act** in relation to the goods supplied. In addition there are implied terms that the service must be carried out with reasonable care and skill **(s.13),** that the service will be carried out within a reasonable time **(s.14)** and where no price is agreed a reasonable price will be paid **(s.15).**    [**Sale of Goods Act 1979**](http://www.statutelaw.gov.uk/legResults.aspx?LegType=All+Legislation&title=Sale+of+Goods+Act&Year=1979&searchEnacted=0&extentMatchOnly=0&confersPower=0&blanketAmendment=0&TYPE=QS&NavFrom=0&activeTextDocId=1837068&PageNumber=1&SortAlpha=0)    **Summary**  The Sale of Goods Act 1979 provides four main protections for buyers:  1. The seller must have the right to sell the goods ( S.12)  2. Goods sold by description must correspond to the description (S.13)  3. Goods must be of satisfactory quality (s.14)  4. Goods sold by sample, the goods must correspond to the sample in quality (s.15)  The Sale of Goods Act applies to all contracts for the sale of goods, however, s.14 is more limited in its scope in that it only applies where goods are sold in the course of a business. Also where the goods are sold in the course of a business the provisions of the Sale of Goods Act are reinforced with the protection offered by the Unfair Contract Terms Act 1977 which prohibits their exclusion. See further [here.](http://www.e-lawresources.co.uk/Unfair-Terms---Regulation-by-statute.php)  These protections are in the form of statutory implied terms. This means that the Sale of Goods Act will put these terms into all contracts for the sale of goods no matter what the parties themselves have agreed in the terms and conditions of sale. A contract is for the sale of goods provided it is a contract to transfer ownership of goods (as opposed to a hire agreement) and the goods are exchanged for money. This excludes contracts of barter unless money is also given.  **The main provisions**  **1. S. 12 implied terms as to title**  S. 12 applies to all contracts for sale of goods so it will cover private sales in addition to where goods have been purchased from a shop or other business.  **S.12(1)** implies a term that the seller has the right to sell the goods. This covers situations where the seller is selling stolen goods (whether the actual thief or a subsequent sale in the chain). This term is a **condition** in all sales.  A buyer who treats the contract as repudiated is entitled to return of the full purchase price even if they have enjoyed use of the goods for some time.  *Rowland v Divall* [1923] 2 KB 500       [(Case summary)](http://e-lawresources.co.uk/forum/viewtopic.php?f=63&t=190)  In addition to applying to stolen goods s.12(1) also applies where the seller does not have the right to sell the goods where to do so would be breach of trademark, patent or copyright:  *Niblett v Confectioners' Material*[1921] 3 KB 387  [(Case summary)](http://e-lawresources.co.uk/forum/viewtopic.php?f=63&t=191)  **s.12(2) (a)** implies a term that the goods are free from any undisclosed charge or encumbrance. This applies where for example goods which are still subject to hp terms have been sold without telling the purchaser of the hp agreement or where any other debt has been secured on the goods. This term is only a **warranty** so whilst the purchaser can claim for any loss caused by the charge or encumbrance they cannot end the contract.  **S.12 (2)(b)** implies a term that the purchaser will enjoy quiet possession of the goods. This acts as an ongoing assurance that no one will interfere with the buyer’s right to possess or use the goods. This term is a **warranty.**  *Microbeads v Vinehurst Road Markings*[1975] 1 WLR  [(Case summary)](http://e-lawresources.co.uk/forum/viewtopic.php?f=63&t=192)  **2. S.13 sale by description**  s.13(1) provides that where there is a contract for the sale of goods by description, there is an implied term that the goods will correspond with the description.  This section applies where the sale is solely by description. If the buyer sees the actual goods before the sale then s.13 can not be relied upon:  *Harlington & Leinster v Christopher Hull Fine Art* [1991] 1 QB 564  [(Case summary)](http://e-lawresources.co.uk/forum/viewtopic.php?f=63&t=193)  S.13 is simply concerned with description and not quality as was made clear in:  *Arcos v Ranaason* [1933] AC 470                 [(Case summary)](http://e-lawresources.co.uk/forum/viewtopic.php?f=63&t=194) *Re Moore &* *Landauer* [1921] 2 KB 519         [(Case summary)](http://e-lawresources.co.uk/forum/viewtopic.php?f=63&t=195)  The term implied by s.13 is a **condition** in relation to consumer sales but an **innominate term** in relation to non-consumer sales.  **3. S. 14 Implied term as to quality**  **S.14** only applies where the seller sells goods in the course of a business. It therefore does not apply to private sales although there may be an action for breach of an express term or misrepresentation in some circumstances.   The question of whether goods were sold in the course of a business was considered in:  [*Stevenson v Rogers*](http://www.bailii.org/ew/cases/EWCA/Civ/1998/1931.html) [1999] 1 All ER 613          [(Case summary)](http://e-lawresources.co.uk/forum/viewtopic.php?f=63&t=196)  Liability under s.14 is strict and not dependant of proof of fault on the part of the seller.    The relevant parts of s.14 are as follows:  (2) Where the seller sells goods in the course of a business, there is an implied term that the goods supplied under the contract are of satisfactory quality.    (2A) For the purposes of this Act, goods are of satisfactory quality if they meet the **standard that a reasonable person** **would regard as satisfactory**, taking account of any description of the goods, the price (if relevant) and all the other relevant circumstances.  (2B) For the purposes of this Act, the quality of goods includes their state and condition and the following (among others) are in appropriate cases aspects of the quality of goods—  (a) fitness for all the purposes for which goods of the kind in question are commonly supplied,  (b) appearance and finish,  (c) freedom from minor defects,  (d) safety, and  (e) durability.  Applying this section a judge would thus consider whether a reasonable person would regard the goods as of satisfactory quality looking at the stated aspects in addition to all other relevant circumstances. Looking at fitness for purpose, the judge, will consider whether the goods are fit for the purpose the goods are commonly supplied so for example if you purchase a hairdryer and use it to dry your clothes, the judge is unlikely to conclude there has been a breach as the goods were not used for their common purpose. Conversely if you purchase a pair of shoes which fall apart after a few days wear, the seller cannot simply state they were fashion shoes and not intended for wearing full time.  In addition to the statutory guidance a court applies the acceptability and usability tests to help determine if the goods in question are of satisfactory quality.  **The Acceptability Test – Applies to consumer transactions**  The acceptability test looks at whether a reasonable purchaser would have accepted the goods at the same price had they known of the defect:  *Shine v General Guarantee Corp*[1988] 1 All ER 911   [(Case summary)](http://e-lawresources.co.uk/forum/viewtopic.php?f=63&t=197)  **The Usability Test – Applies to business to business transactions**  The usability test is less generous than the acceptability test. This test requires the court to consider if a reasonable purchaser could have used the goods for purposes for which the goods were commonly supplied:  *Aswan Engineering v Lupdine* [1987] 1 All ER 135             [(Case summary)](http://e-lawresources.co.uk/forum/viewtopic.php?f=63&t=198)  S.14 (2C) provides certain limitations to the application of s.14(2) as follows:    (2C) The term implied by subsection (2) above does not extend to any matter making the quality of goods unsatisfactory—  (a) which is specifically drawn to the buyer's attention before the contract is made:    *Bartlett v Sidney Marcus ltd* [1965] 1 WLR 1013 [(Case summary)](http://e-lawresources.co.uk/forum/viewtopic.php?f=63&t=199)  (b) where the buyer examines the goods before the contract is made, which that examination ought to reveal, or   (c) in the case of a contract for sale by sample, which would have been apparent on a reasonable examination of the sample.  S14 is a **condition** in a consumer sale and an **innominate term** in a non-consumer sale    **4. S.15 Sale by Sample**    S.15 applies to all sales by sample irrespective of whether it is a private sale, consumer sale or business to business sale.  S.15 (2) provides that in a contract for sale by sample there is an implied term-    (a) that the bulk will correspond with the sample in quality;   (b) that the goods will be free from any defect, making their quality unsatisfactory, which would not be apparent on reasonable examination of the sample.  Note that s.15 only relates to quality and not to other matters such as colour. S.15 is a condition in a consumer sale and an innominate term in non- consumer sales.  **Additional remedies for consumer sales**    Consumers are afforded additional remedies under part **5A SGA 1979** where the goods do not conform to the contract of sale at the time of delivery or for up to 6 months after delivery.  **S.61** Sale of Goods Act states that the meaning of consumer for the purposes of part 5A is taken from the definition given in **s.12(1) UCTA**. Thus a person deals as a consumer if they do not make the contract in the course of a business where the other person does. A Business can also be treated as a consumer if it is purchasing goods which are ordinarily supplied for private use or consumption.  **1. S.48B (1) Repair or replacement**   **S.48B** provides that the buyer can require the seller to repair or replace the goods at the seller's expense. The seller is required to do so within a reasonable time. If the buyer makes this request they lose the right to reject the goods unless the seller does not comply within a reasonable time. The seller need not repair or replace the goods where this would be impossible or disproportionate to do so.  **2. S48C(1) Reduction of price**  The seller may be required to reduce the purchase price under s.48 C (1) where the seller has not complied with a request from the buyer to repair or replace because it would be disproportionate to do so. This is a secondary remedy and can not be requested without the buyer first making a request for repair or replacement which has not been fulfilled.  **3. S. 48C (2) Rescission of the contract**  This is another secondary remedy available only where a request for repair or replace has not been complied with. Rescission is putting the parties back in their pre –contractual position ie the buyer gives back the goods and the seller gives back the purchase price. However, the seller can deduct from the purchase price any value for the use the buyer may have had of the goods.  [**Supply of Goods and Services Act 1982**](http://www.statutelaw.gov.uk/legResults.aspx?LegType=All+Legislation&title=Supply+of+Goods+and+Services+Act+1982&searchEnacted=0&extentMatchOnly=0&confersPower=0&blanketAmendment=0&TYPE=QS&NavFrom=0&activeTextDocId=241600&PageNumber=1&SortAlpha=0)    Where goods are supplied in addition to services, eg the installing of a new boiler, or the fitting of new engine parts in a car, the goods are covered by the **Supply of Goods and Services Act** **1982) (SGSA)** rather than the **Sale of goods Act**. The **SGSA** is divided into two parts **Part 1** covers the supply of goods and **part 2** covers the supply of services. **Part 1** covers contracts which transfer property in goods and hire contracts. Part 1B provides additional remedies for consumers.    **Part 1 Supply of goods**  **S.1** Defines contracts which transfer property in goods and excludes the following type of contracts: (a) contracts for the Sale of goods: (Covered by Sale of Goods Act) (b) contracts for hire purchase; (c) contracts involving trading stamps (d) contracts made by deed where there is no consideration (e) a contract intended to operate by way of mortgage, pledge or charge  Sections **2-5** replicate the provisions in the Sale of Goods Act sections **12-15** in relation to **title, description, satisfactory quality and sample.**    **S. 5A** provides that in non-consumer sales the terms implied by sections 2-5 are innominate terms  **S. 6** defines a contract for the hire of goods and excludes contracts of hire purchase and contracts using trading stamps.  **Sections 7-10** again replicate sections 12-15 of the Sale of Goods Act in relation to title description, satisfactory quality and sample.    **Part 1B**  **Part 1b S.11** provides additional remedies for consumers which replicate those in s 48 of the Sale of Goods Act in relation to repair or replace, reduction in price and rescission.  **Part 2 Supply of services S.12 SGSA** defines contracts for the supply of services. It excludes contracts of apprenticeships, but includes any agreement for the supply of services irrespective of whether goods are also supplied. There is no requirement for money consideration.  **S. 13 SGSA** implies a term where the supplier **acts in the course of a business**, that the services will be carried out with reasonable care and skill.  **s.14 SGSA** implies a term where the service is carried out **in the course of a business** and no time is specified, that the service will be carried out within a reasonable time. What is considered a reasonable time is a question of fact and will depend on the circumstances.  **S.15 SGSA** where a service is carried out and no price has been agreed there is an implied term that a reasonable charge is payable. This is not limited to services supplied in the course of a business. What is a reasonable charge is a question of fact to be determined in the circumstances.    Further reading:   Law Commission Consultation Paper 188 [*Consumer Remedies for Faulty Goods*](http://www.lawcom.gov.uk/docs/cp188.pdf) Nov 2008  Office of Fair Trading response to consultation, [*Consumer Remedies for Faulty Goods*](http://www.oft.gov.uk/shared_oft/reports/oft_response_to_consultations/oft1052.pdf)*,* February 2009 |