

COM6655 Professional Issues

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Contract Law (part 1)

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Aims of this lecture

- To review the principles of contract law
- To explain key aspects of contracts for software
- To show how software and other digital content are accommodated in the law relating to supply of goods and services
- To discuss breach of contract and limitation/exclusion of liability for a breach

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Contract law

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Contracts

- A contract is an agreement between two or more persons (the **parties** to the contract) that can be enforced in a court of law.
- Contract law is largely based on common law.
- Essential components:
 - All parties must **intend** to make a contract
 - All parties must be **competent** to make a contract (e.g. old enough, and of sound mind)
 - There must be an **exchange of consideration**, i.e. each party must be receiving something and providing something

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Overview of contract law

- A contract is a **legally enforceable** agreement.
 - Enforceable since there is legal action available (you can **sue**) in case one party should fail to comply with their promise under the agreement.
- Liability cannot be unfairly limited, and liability for death or personal injury cannot be limited.
- The usual remedy is money compensation, known as **damages**.
- When a party does not comply with terms of a contract, a **breach of contract** is said to have occurred.
- An important doctrine of English Law is **privity of contract**:
 - Third parties are unable to sue on a contract that does not concern them.

Software contracts

Example

- A company is expanding and needs some software to calculate wages and print pay slips. The company has quite an old computer system, for which there is no existing software to do the task. Therefore, the company decides to contract a software house to develop some bespoke code. Currently, the company has about 200 employees but this is likely to increase in the next year or so.
- **What will the software house want in the contract?**
- **What will the company want in the contract?**
- **What problems might arise?**

Software contracts

- When a contract is entered into for the licensing or custom development of software:
 - **Both parties** should know precisely what is expected in terms of performance and the standards required.
 - A comprehensive **specification** must be drawn up.
 - The contract should provide a fair means of identifying **responsibilities** and resolving **disputes**.
 - **Liability** for any injury to persons or property as a result of errors in the software should be considered.

Licence agreements

- A **software contract** is a contract for the supply of software (either bespoke or off-the-shelf).
- Many such contracts are not sale contracts: they are **licence agreements** that allow a customer to use software in return for a licence fee.
- The licence may be for a fixed period of time.
- **Q. Do you recall the link between a licence and copyright law?**

Implications

- The nature of software and the fact that it is normally acquired via a licence has some legal implications:
 - The **Sale and Supply of Goods Act 1994** (which amended the earlier Sale of Goods Act 1979) does not apply to computer software.
 - Software is exempted from much of the **Supply of Goods and Services Act 1982** (for contracts entered into before 1st October 2015).
- These acts **imply terms into a contract** for sale/supply of goods/services which give rights to the consumer and cannot be modified or excluded.
- Specific provision for digital content in **Consumer Rights Act 2015** and **Consumer Contracts Regulations 2013**.

Legislation concerning supply of goods and services

SSGA: Sale and Supply of Goods Act 1994

- The SSGA implies terms in contracts of sale such as
 - The goods must match their description in the contract.
 - The goods must be of 'satisfactory' quality.
 - The goods must be fit for their intended purpose.
 - The seller has the right to sell the goods.
- But 'goods' are defined as '*all personal chattels other than things in action and money*'.
 - Copyright is a 'thing in action' (other examples are shares or money orders). Software is therefore excluded from the definition of 'goods'.
 - However, computer hardware or computer media (magnetic/optical disks) are treated as goods
- In any case, a licence agreement is not a contract of sale.

SGSA: Supply of Goods and Services Act 1982

- The SGSA implies terms into contracts in which the ownership of goods changes hands in contracts for the hire of goods and contracts for services.
 - Once again software is excluded from the 'supply of goods' part of the SGSA.
 - The SGSA is relevant if a programmer is contracted to write a computer program, since this is a 'service'.
 - The supply of an expert (or knowledge-based) system could also be deemed to be providing a service.

SGSA implied terms

- The supplier, if acting in the course of business, must carry out the service with reasonable care and skill.
- In the absence of an agreed time for completion, the supplier will carry out the service in reasonable time.
- Unless the contract fixes the payment, the supplier will be paid a reasonable amount.
- **Q. What constitutes 'reasonable care and skill' in software development?**

SSGA and Expert Systems

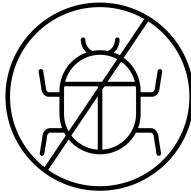
- In AI, an **expert system** is a computer system emulating the decision-making ability of a human expert.
- The SGSA may cover the supply of expert systems, since the giving of advice by the system could be interpreted as the supply of a service.
 - If an expert system is supplied by a dealer, who is the supplier of the service?
 - The dealer?
 - The software company that made the expert system?
 - The domain expert?
- **Q. Why is this question important?**

Consumer Rights Act (2015)

- [Consumer Rights Act](#) introduced on 1st October 2015.
- Defines digital content as *data which are produced and supplied in digital form*.
- Consumers now have rights in relation to anything downloaded or streamed, including apps, e-books, films, games or music.
- Digital content must be:
 - Of satisfactory quality
 - Fit for a particular purpose
 - As described by the seller
 - Free of minor defects (but see next slide)
- If it does not meet these criteria, consumers have the right to have the digital product repaired or replaced.

What is satisfactory quality for software?

- It is the norm to encounter some bugs in a complex piece of software on release.
- A reasonable person might not expect that type of digital content to be free from minor defects.
- Consequently, the application of 'freedom from minor defects' to digital content will depend on reasonable expectations as to quality.



Software is like lettuce; testing reveals the presence of bugs, not their absence

CRA (2015): Repair and replacement

- The retailer has one opportunity to repair or replace any goods or digital content that are of unsatisfactory quality, unfit for purpose or not as described, before buyer can claim a refund.
- Entitled to full/partial refund instead of repair or replacement if:
 - The cost of the repair or replacement is disproportionate to the value of the digital content
 - Repair or replacement is impossible
 - Repair or replacement would be significantly inconvenient
 - Repair would take unreasonably long
 - Repair has been unsuccessful

Consumer Contracts Regulations (2013)

- **Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013** give a right to cancel an order:
 - Starts from the moment you place the order
 - Ends 14 days from the day you receive the goods
- **Q. What about digital downloads?**

CCR (2013) and digital downloads

- Digital downloads are given their own unique category under the CCR (2013) and are therefore **not services or goods**.
- Retailers mustn't supply digital content, (e.g. software download), within the 14 day cancellation period, unless the consumer has given their express consent to this happening.
- The consumer must also acknowledge that once the download starts they will lose their right to cancel.
- If a consumer doesn't give their consent, they must wait until the cancellation period has ended before they can download the content.

Breach of contract

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Breach of contract

- If a party to a contract breaches its terms, the remedy depends on the type of terms that have been broken.
- There are two types of terms in contracts; **warranties** and **conditions**.
 - A breach of **warranty** allows the aggrieved party to claim only damages — the contract remains in force and must be completed by both parties
 - A breach of **condition** gives the aggrieved party the right to cancel the contract and claim damages.

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Example: breach of warranty

- A supplier agrees to deliver a computer system with monitors that are a particular colour, but delivers monitors with different colour.
 - This is a breach of warranty unless there is a special reason why a particular colour was specified.
 - The buyer will be entitled to damages only, and will still have to pay the agreed price of the computer.

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Example: breach of condition

- Failure to deliver a product by an agreed date is a breach of condition. The buyer can:
 - Cancel the contract;
 - Claim damages which would be equivalent to the difference in cost of buying a similar product elsewhere;
 - Claim other expenses and losses incurred as a direct result of the breach.

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Salvage Association v CAP Financial Services (1995)

- SA wanted to computerise its accounting system – awarded contract to software house CAP Financial Services Ltd
 - Software was developed in ORACLE but many errors evident at user training (CAP team not sufficiently experienced in use of ORACLE)
 - A revised completion date was agreed but not met by CAP
 - SA rejected software, sued for return of money paid + damages for wasted time
 - In its defence CAP cited **exclusion clause** limiting its liability
- **Verdict**
 - The judge ruled that SA were justified – costs and damages awarded
- Ruling based on Supply of Good and Services Act, and exclusion clause held to be unreasonable under Unfair Contract terms Act (1977)

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Exemption clauses

- An exemption clause excludes or restricts the liability of a party who is in breach of contract. There are two types:
 - **Exclusion clauses** – give total exemption, e.g. a supplier may exclude their liability for late delivery if this is caused by circumstances beyond their control.
 - **Limitation clauses** – limits liability to a specified amount, e.g. software supplier may limit their liability for faulty software to the licence fee they have been paid

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Unfair Contract Terms Act 1977

- The UCTA limits the extent to which liability can be excluded or limited for breach of contract or negligence.
- **Business liability for death and personal injury caused by negligence cannot be excluded or limited in any way.**
- e.g. company supplies software to control a light railway link, and a defect leads to an accident in which people are killed/injured.
- Cannot enforce clause in contract that claims to restrict liability if claims are made for deaths and injuries.

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St Albans City and District Council v International Computers Ltd (1996)

- Council ordered a computer system from ICL to administer local 'poll tax'.
 - ICL used standard terms and conditions, which stated its liability *will not exceed the price or charge payable for the item of equipment, program or service in respect of which liability arises or £100,000 (whichever is the lesser)*.
 - Errors in the software meant the population of the area was overestimated, residents were undercharged, and the council lost £1.3 million
- **Verdict**
 - Software was not fit for purpose and ICL's project manager had been negligent, ICL was in breach of contract.
 - Clause limiting liability to £100,000 was not reasonable (UCTA 1977)
 - ICL's appeal was allowed in part – damages set at £685,000

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Summary

- Software is unique in the way it is traded, and this has many implications for software contracts.
- Software is not 'goods'; as a result, much legislation prior to 2015 that protects the interests of customers does not apply.
- Recent legislation treats digital downloads as a new kind of tradeable thing (not a service or goods)
- Breach of contract may involve a warranty or condition
- Exclusion of liability for breach is limited by the UCTA (1977).