DISCHARGE OF THE CONTRACT.

There are four ways in which a contract may be discharged.

- Agreement.
- Performance.
- Frustration.
- Breach.

1. DISCHARGE BY AGREEMENT.

A contract can be discharged in precisely the same way it was formed. Notice that there must be consideration from both sides.

2. DISCHARGE BY PERFORMANCE.

Complete and proper performance will discharge both parties.

The original rule was that performance must be precise and exact.
Re Moore & Co Ltd and Landauer & Co [1921] 2 KB 519.
A contract was drawn up for the sale of tinned fruit stating that the tins were to be packed 30 tins to a case. When the goods arrived, although the correct number of tins was delivered, they were packed in cases of only 24 tins.

This could lead to unjust results.
Cutter v Powell (1795) 6 Term Rep 320.
The defendant agreed to pay Cutter 30 guineas provided he executed his duties as second mate on a voyage from Kingston, Jamaica to Liverpool. Cutter began the voyage but died when the ship was 19 days short of Liverpool. Cutter's widow claimed a portion of the wages.

The courts have established a number of equitable principles with the aim of achieving justice between the parties.

(a) Substantial Performance.
If the contract has been substantially performed the innocent party cannot treat himself as discharged but may be able to counter-claim his loss sustained by reason of the incomplete performance. What amounts to substantial performance is a question of degree – a question of fact dependent upon the circumstances.

Dakin v Lee [1916] 1 KB 566.
Dakin contracted to carry out certain repairs toLee's house for £1500. When Dakin requested payment on completion, the defendant refused to pay on three grounds. The underpinning of a wall was 2ft thick instead of 4ft, four inch solid columns had been used instead of 5 inch hollow ones and the joists over the bay window were not bolted as stipulated. The cost of remedying these "defects" was £80.

Hoenig v Isaacs [1952] 2 ALL ER 176.
An interior decorator contracted to refurbish a flat for £750. The defendant had paid £400 in advance, but then refused to pay the outstanding £350 arguing that the design and workmanship were defective. The court agreed that there were problems but that these would cost £56 to remedy.

Bolton v Mahadeva [1972] 1 WLR 1009.
A contractor agreed to install a central heating system for £560. When the work was done, it was found that it was unable to heat the house properly and emitted fumes. The cost of repair was £174. The claimant sued for the contract price less this cost of repair.

(b) Partial Performance.
The usual rule is that if one party only partially performs the contract, he is not entitled to recover anything. However, he may be entitled to remuneration if the innocent party accepts partial performance. This doctrine of partial performance however applies only if the innocent party has a genuine choice either to accept or reject partial performance.

Sumpter v Hedges [1898] 1 QB 673.
Sumpter agreed to erect certain buildings on the defendant's land for £65. He did part of the work and then abandoned the contract. The defendant completed the buildings himself using materials left on the site by the claimant. Sumpter sued to recover the value of the word done and of the building materials used.

Prevention of Performance:
If an innocent party is prevented from completing his contractual obligations by the default of the other party, he can either recover damages for breach or seek reasonable remuneration on a *quantum meruit* basis for the work already done.

(c) Severable Contracts.
Many of the difficulties which may arise with partial or substantial performance, may be avoided if the court decides that the contract consists of a number of divisible or separate obligations.

For example, take a contract for the delivery of 120 tons of wheat for £12,000 to be delivered 10 tons per month from January to December. If the contract gives no specification with regard to the time of payment, it could be divided, or severed, into 12 contracts, each for the delivery of 10 tons of wheat at £1,000.

(d) Time.
If the time of performance is of the essence then non-performance gives the innocent party the right to terminate.

Time is of the essence where:

- The parties so stipulate.
- The nature of the subject matter or surrounding circumstances requires it.
- A party subject to unreasonable delay gives notice making it so.

3. DISCHARGE BY FRUSTRATION.

After the conclusion of the contract, but before performance, the circumstances so change that there is no longer a workable agreement. The parties are released from their contractual obligations.

(a) Destruction of the contract's subject matter.
Taylor v Caldwell (1863) 3 B&S 826.
The defendant agreed to hire a music hall for the purpose of entertainment. Before the day of the performance, the hall was destroyed by fire. The claimant sued for breach of contract.

(b) The death of either party in a contract which requires personal performance.

(c) The non-availability of one of the parties.
Condor v Barron Knights Ltd [1966] 1 WLR 87 .
A drummer was contracted to play for the Barron Knights, but he had a nervous breakdown. The doctor advised that continuing to perform was likely to cause a major breakdown.

(d) The non-occurrence of a particular event which forms the basis of the contract.
Krell v Henry [1903] 2 KB 740.
The defendant contracted to hire a flat for 26th and 27th June 1902 (Kings Coronation). The contract made no reference to the coronation but it was due to take place and the procession was to pass the flat. The procession was cancelled because of the King's illness. The claimant sued for unpaid rent.

Herne-Bay Steamboat Co v Hutton [1903] 2 KB 146.
The defendant chartered a ship to see the coronation naval review and to tour the fleet. The review was cancelled but the fleet was still in port.

(f) Supervening Illegality**.**
This will arise where, between the completion of the contract and the performance of it, it becomes illegal to perform it.

Avery v Bowden [1855] 5 E&B 714.
A contract for the loading of a cargo in Odessa became illegal because of the outbreak of the Crimean war.

Fibrosa Spalka Akeyjna v Fairnbairn Lawson Combe Barbour Ltd [1943] AC 32.
In July 1939 an English company agreed to supply machinery to a Polish company, delivering it to Gdansk. War broke out between Germany and Britain on 3rd September 1939 and Gdansk was occupied by the Germans on 23rd September.

(g) A contract will not be frustrated simply because it has become more onerous or expensive to perform than originally envisaged.

Davis Contractors v Fareham UDC [1956] 3 WLR 37.
The claimant contracted to build 78 houses over eight months and at a cost of £94,000. The work however took twenty-two months and cost £115,000. Despite the delay the defendants were willing to pay the contract price but this did not cover the claimant's costs. The claimants argued that the contract was frustrated alleging that labour shortages made performance fundamentally different.

Limits to Frustration.
The doctrine will not apply if the risk is provided for by the contract – a *force majeure* clause is such an express provision.

"A party shall not be liable in the event of non-fulfilment of any obligations arising under this contract by reason of Act of God, disease, strikes, lock-outs, fire and any accident or incident of any nature beyond the control of the relevant party."

Self-induced frustration.
Maritime National Fish Ltd v Ocean Trawlers Ltd [193 5] AC 524.
The defendant chartered a trawler from the plaintiff, intending to operate it with an otter trawl. Both parties knew that an otter trawl could not be used without a licence. The defendants applied for five licences but got only three. They used these for other trawlers they operated and argued that the charterparty with the plaintiffs was frustrated.

J Lauritzen AS v Wijsmuller BV [1990] 1 Lloyd's Rep 1.
Super Servant 1 and 2 were barges designed to transport oil rigs. The defendants agreed to transport the claimant's oil rig using either 1 or 2. Before performance the defendants allocated 2 to the contract with the claimant and 1 to other concluded contracts. 2 then sank. He contract was performed by a more expensive mode of transport. The claimant sued for breach because the defendant had failed to transport the rig in the agreed manner.

The Effects of the Doctrine of Frustration.
At common law, the contract was terminated automatically and immediately and both parties were then released from their future obligations. The parties were however obliged to fulfil any obligations that arose prior to the frustrating event, the view being that the "loss lay where it fell".

Appleby v Myers (1867) LR 2 CP 651.
The plaintiff contracted to erect machinery on the defendant's premises, the price to be paid upon completion of the whole. After some portions of the work had been finished the premises, with all the materials thereon, were destroyed by an accidental fire.

Chandler v Webster [1904] 1 KB 493.
The defendant agreed to let a room, for the purpose of viewing the coronation procession, for £141. Under the contract the full price was payable before the date the procession became impossible. In fact the hirer had paid £100.

The Fibrosa [1942] 2 All ER 122.
An English company agreed to make machinery for a Polish company. The price was £4800 of which £1600 was to be paid in advance. After £1000 of this had been paid the contract was frustrated by the German occupation of Gydynia after the outbreak of war.

The Law Reform (Frustrated Contracts) Act 1943.
s 1(2) All sums paid or payable to any party in pursuance of the contract before the time when the parties were... discharged... shall, in the case of sums so paid, be recoverable from him as money received by him for the use of the party by whom the sums are paid, and, in the case of sums so payable, cease to be so payable

Provided that if the party to whom the sums were so paid or payable incurred expenses before the time of discharge in, or for the purpose of, the performance of the contract, the court may, if it considers it just to do so having regard to all the circumstances of the case, allow him to retain or , as the case may be. recover the whole of any part of the sums so paid or payable, not being an amount in excess of the expenses so incurred.

s 1(3) Where any party to the contract has, by reason of anything done by any other party thereto in, or for the purpose of , the performance of the contract, obtained a valuable benefit (other than the payment of money) before the time of discharge, there shall be recoverable fro him by the other party such sum (if any), not exceeding the value of the said benefit to the party obtaining it, as the court considers just having regard to all the circumstances of the case and in particular to:

the amount of any expenses incurred before the time of discharge by the benefited party in, or for the purpose of, the performance of the contract, including any sums paid or payable by him to any other party in pursuance of the contract and retained or recoverable by that party under s 1(2), and

the effect, in relation to the said benefit, of the circumstances giving rise to the frustration of the contract.

BP Exploration Co (Libya) Ltd v Hunt (no 2) [1982] 1 All ER 125.
In December 1957 the Libyan Government granted the defendant a concession to explore for and extract oil from a specified area of Libya. The defendant agreed with the plaintiff that in return for a half share of the concession the plaintiff would explore, develop and operate the concession entirely from its own resources. If oil were discovered the plaintiff's expenditure would be repaid out of the defendant's share of the oil. Oil was discovered and came "on stream" in 1967.
The Libyan Government expropriated the plaintiff's share in 1971 and the defendant's in 1973. The contract was frustrated when BP had received only part of its expenses. The plaintiff brought an action seeking sums under s 1(3).

4. DISCHARGE BY BREACH.

Actual breach: one party fails to perform a contractual obligation.
Anticipatory breach: one party shows an intention not to perform.

Where there is an anticipatory breach the innocent party can accept the breach and immediately sue for breach of contract or they may refuse to accept it and wait until the due date of performance. If the latter, they keep the contract alive not only for their own benefit but also for the benefit of the other party.

Avery v Bowden [1855] 5 E&B 714.
A cargo was to be loaded in Odessa within 45 days. When the innocent party became aware that this was not going to happen, he decided to wait. Before the 45 days expired, the Crimean War started and that frustrated the contract.

What if the innocent party can refuse to accept the breach, does so and performs their obligations under the contract?

White & Carter v McGregor [1962] AC 413.
White & Carter were advertising agents. They supplied local authorities with litter bins to which they attached advertising plates. McGregor contracted with them for his garage to be advertised in this way for three years. Later the same day he cancelled the agreement. White & Carter refused to accept the cancellation. They prepared the advertising plates and displayed them for three years. They then sued for the contract price.

5. REMEDIES FOR BREACH OF CONTRACT.

The innocent party will always have the right to sue for damages for breach of contract. Depending upon the nature of the breach i.e. the seriousness of it, they may also be able to repudiate the contract.

If a **condition** is broken then the remedies available are damages and/or repudiation.
If a **warranty** is broken then the only remedy available is damages.
If an **innominate term** is broken the courts consider the seriousness of the breach. If the consequence of the breach is fundamental then the injured party may repudiate and claim damages. Otherwise the remedy is damages.

REPUDIATION.

A breach of condition or a serious breach of an innominate term allows the innocent party to repudiate. The innocent party has a choice. They may elect to affirm the contract.

If the innocent party repudiates:

- they are no longer bound to accept further performance
- they are released from their obligations under the contract.
- The party in breach is released from future obligations and is liable to pay damages.

If the innocent party affirms:

- the contract remains in force and each party is bound to continue with the performance of their obligations.

THE REMEDY OF DAMAGES.

"Unliquidated" - assessed by the courts.
"Liquidated" - determined by the parties in a contractual term.

The sum stated as liquidated damages must be a genuine pre-estimate of the actual loss likely to be suffered in the event of a breach. If it is not it will be invalid and known as a penalty clause because it is seen as a deterrent to the breach.

Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd [1915] AC 79.
The plaintiff supplied tyres to the defendant. The contract provided that the defendant would not re-sell them for less than the list price. If they breached this term then had to pay £5 for each tyre sold at less than the list price.

Cine v United International Pictures [2003] EWCA Civ 1669.
A clause in a licensing agreement Made provision for various payments to be made by the licensee to the licensor on termination of the agreement but did not give any credit to the licensee for the benefits the licensor obtained.

The assessment of unliquidated damages.

The fundamental principle is to place the innocent party in the position they would have been in had the contract been performed. *Robinson v Harman* (1848) 1 Ex 855. The innocent party thus recovers for his loss of bargain. These damages are often said to represent "expectation loss".

An alternative principle is to put the plaintiff into the position he would have been in if the contract had never been made, by compensating him for expenses incurred (or other loss incurred) in reliance on the contract."

Anglia Television Ltd v Reed [1972] 3 ALL ER 690.

A television company had planned to make a film, and had signed up Reed, an actor, to star in it. At a fairly late stage he pulled out and as a result the film was not made. Clearly the potential profits on a project such as a film are extremely difficult to predict; it could be a huge success or sink without a trace. Consequently, Anglia sought instead to claim back the money they had spent on making the film. The amount they had spent after contract with Reed was clearly recoverable, since it had been spent in reliance on his performing as agreed, but the film company also wished to claim money spent in the preparatory stages, before Reed was signed. It could not be said that this was spent in reliance on Reed, but the court said that there was nevertheless, no reason why such expenditure should not be recovered so long as it satisfied the rules on remoteness; if Reed could have been expected to realize that such losses were likely to result from his breach, he was liable for them. "Anglia Television do not claim their profit. They cannot say what their profit would have been on this contract if Mr Reed had come here and performed it. So, instead… they claim for the wasted expenditure… Anglia Television say that all that money was wasted because Mr Reed did not perform his contract…[A plaintiff] can claim also the expenditure incurred before the contract provided that it was such as would reasonably be in the contemplation of the parties as likely to be wasted if the contract was broken."(per Lord Denning)

C & P Haulage v Middleton [1983] 3 All ER 94.

The plaintiff rented business premises from the defendant. The agreement provided that any fixtures out in by the plaintiff were to be left on the premises and would not be paid for by the defendant. The plaintiff installed fixtures to run his car repair business. He was wrongfully evicted by the defendant. The local authority gave him permission to use his own garage as business premises. As a result he lost no profit and so claimed for the loss of his fixtures. Held: His claim was refused because if allowed he would have been in a better position than if the contract had been performed properly.

The innocent party cannot recover losses that are "too remote".
The innocent part must mitigate their loss.

Remoteness.

Hadley v Baxendale (1849) 9 Ex 341.
The plaintiff's mill came to a standstill when a crankshaft broke. A new one had to be ordered from the makers and this required that the original be used by them as a pattern. The defendant carrier agreed to deliver the broken shaft to the makers. In breach of contract the shaft was not delivered on time, so the mill remained idle for longer than it would have done otherwise. The plaintiff sought damages for the loss of profit caused by the delay.

"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered

either arising naturally, i.e. according to the usual course of things, from such breach of contract itself,

or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."

Was the loss reasonably foreseeable as liable to result from the breach? This depends upon the state of the defendant's knowledge. Every defendant has imputed to him knowledge of what happens in the ordinary course of things. They may also have actual knowledge of special circumstances.

Victoria Laundry (Windsor) Ltd v Newman Industries Ltd [949] 2 KB 528.
The plaintiffs were launderers and dyers, who needed to buy a large boiler in order to expand their existing business, and take on a very well paid govemment contract. They contracted to buy such a boiler, second hand, from the defendants, making it clear that it was needed for immediate use. As the defendants dismantled the boiler in preparation for delivery, it was damaged, and so the delivery was considerably later than agreed. As a result, the launderers claimed loss of profits under two heads; £16 per week for the loss of 'normal' profits, which represented the extra amount of ordinary work they could have taken on with the extra boiler; and £262 per week for the loss of the lucrative dyeing contract with the government.

The Heron II (1969) 1 AC 350.
The plaintiff chartered a ship, the Heron II, to carry sugar to Basrah, where the cargo was to be sold. The journey was to take 20 days, but the ship owner strayed from the normal route and took 29 days. During the period between the agreed delivery date and the actual delivery date the market price of sugar at Basrah fell significantly. The late delivery was a breach of contract, and the plaintiff claimed the difference between the price he would have got had the delivery been made on time, and the price when the delivery was actually made. The ship owner had not been told that the plaintiff intended to sell the sugar as soon as it arrived in Basrah, but he did know that there was a market for sugar at Basrah.

The HL rejected the view that the test of remoteness in contract was "reasonable foreseeability" if that meant the very low degree of foreseeability required to satisfy the test of remoteness in tort. Various expressions were used to describe the degree of foreseeability required: "very substantial"; "serious possibility"; "real danger"; "liable to result".

H Parsons Ltd v Uttley Ingham & Co Ltd [1978] QB 791.
The CA further considered the interrelationship of the contractual and tortious tests for remoteness - though rather unsatisfactorily.
Pig farmers bought a hopper for storing pig nuts. A term relating to the quality of the goods was broken by the sellers failing to open a ventilator in the hopper. This led to the nuts becoming mouldy which in turn caused the death of a large number of pigs from a rare intestinal disease that was not even known at the time. The defendant offered £18 – the cost of replacing the nuts in the hopper. The plaintiff claimed £36,000 – the value of the dead pigs, the cost of controlling the disease and the loss of profit on future sales.

Denning MR thought that *Hadley v Baxendale*, *Victoria Laundry* and *The Heron* established a principle that could be applied only to economic loss. Where there was physical harm the tortious test should apply.
Scarman LJ and Orr LJ said there was no difference in the test to be applied whether the loss was economic or physical and that the test was reasonable contemplation. However, they stated that the parties need not contemplate the precise nature of the loss, it was enough that the loss was of a type that could reasonably be supposed to have been within the contemplation of the parties as a serious possibility.

Non-pecuniary loss.

Damages usually aim to compensate for financial loss. However there are a few cases that indicate that it is possible to claim for injury to feelings or mental distress. These cases have been limited to those contracts that are for recreation or enjoyment.

Jarvis v Swan Tours Ltd [1973] 1 All ER 71.

The plaintiff had booked a two-week winter sports holiday, which was described as a 'house party' and promised, among other things, a welcome party, afternoon tea and a yodelling evening. In the event, there was no welcoming party, the afternoon teas consisted largely of crisps and the yodeller turned out to be a local man who arrived in his working clothes, sang a couple of songs and left. The 'house party' also left something to be desired, consisting of 13 holidaymakers in the first week, but only the plaintiff in the second.

Farley v Skinner [2001] UKHL 49.

A surveyor was specifically asked to comment upon whether a country residence near Gatwick would suffer from aircraft noise. He stated that noise was unlikely to be a problem though some planes would cross the area. The claimant bought the house but, after spending £100.000 on improvements to it, he discovered that aircraft noise was a problem.

Hamilton Jones v David and Snape [20 03] EWHC 3147.

The claimant sought damages because the defendant's breach of contract had allowed her husband to abduct her sons to Tunisia.

Mitigation.
The innocent party must take any reasonable steps that are available to mitigate the extent of the damage caused by the breach.

Payzu v Saunders [1919] 2 KB 581.
The contract was to deliver goods by instalments, payment to be made within one month of delivery. The plaintiff failed to make prompt payment after the first delivery. The defendant, in breach of contract, refused to deliver any more unless the plaintiff paid cash on delivery. The plaintiff refused to do so and claimed as damages the difference between the contract price and the market price.

Brace v Calder [1895] 2 QB 253.
The claimant was employed for a term of 2 years by a partnership. Five months later the partnership was dissolved by the retirement of two members. Technically the claimant was wrongfully dismissed i.e. in breach of his contract of employment. Two partners continued and offered the claimant employment, which he refused and he then tried to claim the wages he would have earned had he not been wrongfully dismissed.

Pilkington v Wood [1953] 2 All ER 810.
A house was conveyed with a defective title. The buyer's solicitor admitted negligence but he argued that the buyer should have mitigated his loss by taking proceedings against the seller. Held: The buyer was under no duty to take such proceedings. This would have been difficult and complicated without certainty of success.

British Westinghouse v Underground Electric Railways [1912] AC 673.
British Westinghouse supplied turbines to the railway company. They were deficient in power and uneconomic. The railway company replaced the turbines with a different make. The efficiency of the new turbines was so much greater that even if the British Westinghouse turbines had complied with the contract it would still have been advantageous to replace them with the new ones.

Mitigation and anticipatory breach.
There is no duty to mitigate loss until there is an actual breach.

OTHER REMEDIES FOR BREACH OF CONTRACT.

(a) Restitution.
Where money has been paid under a contract, or purported contract, and performance has not been received in return, or has not been adequate, the payer may want to claim the money back, rather than claiming damages (if for example, no additional loss has resulted from the failure to perform). In general this will only be possible if there has been what is called a total failure of consideration so that restitution will prevent unjust enrichment. This means that the party paying the money has not received any of what was paid for."

(b) Equitable Remedies.
Whilst damages are the most common form of award consideration should be given to equitable remedies. At common law damages were the only form of remedy available and it was in situations where damages did not provide an effective remedy that equity developed an alternative.

Specific performance: an order of the court directing the defendant to fulfil their obligations. It is an exceptional remedy, usually used in property transaction to enforce the sale. It can only be offered where damages are inadequate and where it is equitable to do so. If the claimant can purchase replacement goods or performance, specific performance will not be offered.

Cohen v Roche [1927] 1 KB 169.
An auctioneer failed to deliver a set of Hepplewhite chairs sold to the buyer. The buyer was successful in claiming that there was a breach of contract, but the court refused to order specific performance. "The goods in question were ordinary articles of commerce and of no special value or interest… The judgement should be limited to damages for breach of contract." (per McCardie J)

Behnke v Bede Shipping Co [1927] 1 KB 649.
This case concerned the sale of a ship. The court made an order of specific performance against the vendor. "The ship was of peculiar and practically unique value to the plaintiff… Her engines and boilers were practically new and such as to satisfy the German regulations, and hence the plaintiff could, as German ship owner, have her at once put on the German register. A very experienced ship valuer had said that he knew of only one other comparable ship but that may now have been sold. The plaintiff wants the ship for immediate use and I do not think damages would be an adequate compensation." (per Wright J.)
Specific performance is not granted for contracts for personal services and contracts which require constant supervision.

Injunctions. An injunction is an order, normally against the defendant, not to do a particular thing. An injunction cannot be used to get round the unavailability of specific performance where personal services are involved.

Page One Records v Britton [1968] 1 WLR 157.
The plaintiff sought an injunction to restrain a pop group from engaging anyone else as their management. The injunction was refused by the High Court. "It was said in this case that if an injunction is granted the Troggs could, without employing any other manage continue as a group on their own or seek other employment of a different nature. The Troggs are simple persons, of no business experience, and could not survive without the services of a manager. As a practical matter on the evidence before me, I entertain no doubt that they would be compelled, if the injunction were granted, on the terms that the plaintiff seeks, to continue to employ the plaintiff as their manager."

6. EXCLUDING LIABILITY FOR BREACH OF CONTRACT.

Exclusion/limitation clauses are a particular kind of term, which seek to exclude or limit liability for breach of contract or for damages arising in some other way (perhaps out of a negligent act). Consideration needs to be given to the legal validity of these clauses under both common law and relevant statutory provisions.

IS THE CLAUSE BINDING AT COMMON LAW?

(a) Incorporation.

The first issue is to establish whether the clause has been incorporated into the contract. If it has not, it is not valid (note it is only the exclusion clause which is invalid not the whole contract – the contract is read as if the exclusion clause were not part of it). There are three ways in which a clause can be incorporated into the contract;

By signature.

L'Estrange v Groucob [1934] 2 KB 3 94.
A woman signed a written contract for the purchase of a cigarette vending machine without reading it. It included an exclusion clause in the small print.

What if the person signs the contract because of fraud or misrepresentation?
Curtis v Chemical Cleaning & Dying Co [1951] 1 KB 805.
The claimant took a wedding dress trimmed with beads and sequins to be cleaned. When given a document to sign, she asked what it was and was told that it exempted the company from liability for damage to the beads and sequins. She signed. The dress was returned stained. The exclusion clause actually covered "any damage howsoever caused".

By notice – This means that the presence of the clause is brought to the attention of the other party.

Parker v South Eastern Railway Co (1877) 2 CPD 416.

Reasonable notice of the existence of the clause must be given by the party seeking to rely upon it before or at the time the contract is made. Only the existence of the clause needs to be notified – not necessarily the details of it content.

Whether reasonable notice had been given depends upon the facts of each case.

Thompson v LMS Railway Co [1930] 1 KB 41.

A train ticket said on the front "See Back". On the back it said that the ticket was issued subject to conditions found in the timetable. One of these conditions excluded liability for personal injuries. The claimant who was illiterate and had not read the timetable was injured by the company's negligence.

Chapelton v Barry UDC [1940] 1 KB 532.

The claimant hired a deck chair. The attendant gave him a ticket as proof of payment but put this in his pocket without reading it. The chair collapsed and he was injured. When he claimed damages, the Council tried to rely on an exclusion clause that was printed on the ticket.

Thornton v Shoe Lane Parking [1971] 2 QB 16.

The plaintiff drove his car into the defendant's car park on the outside of which was a notice stating the charges and that all cars were parked at the owner's risk. The plaintiff took his ticket from a machine at the entrance. The ticket had some small print stating that it was issued subject to conditions displayed on the premises. Within the car park was a notice displaying the conditions, one of which was that the garage would not be liable for any injury to the customer. The plaintiff was injured in an accident.

Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd. [1989] QB 433.
The defendants had not previously dealt with the claimants. They ordered photographic transparencies from them and were sent 47 plus a delivery note that contained conditions including one that stated that a fee of £5 per day was payable for every day the transparencies were kept in excess of 14 days. The defendants returned the transparencies after one month and were sent an invoice for £3,783.50. They refused to pay.

The clause must be communicated before or at the time the contract is made. A clause cannot be unilaterally inserted into a contract after it had been made.

Olley v Marlborough Court Ltd [1949] 1 KB 532.

The Olleys entered a hotel and booked a room at the reception. They later went our, having left Mrs Olley's fur coat and some valuables in their locked room. They left the key at reception. A thief stole the key and subsequently the coat and valuables. When Mrs Olley claimed compensation, the hotel tried to rely on an exclusion clause found in the room.

By a course of dealings – past contracts between parties which contain particular exclusion clause may be enough to imply the same exclusion clause into subsequent contracts of the same nature which do not contain the clause.
Kendall v Lillico [1969] 2 AC 31.
A seller had in approximately 100 previous contracts over three years with the buyer followed the oral contract with the handing over the next day of a 'sold note' which had on the back an exclusion clause. This same procedure was followed on the occasion in question.

McCutcheon v David MacBrayne [1964] 1 WLR 125.
A ferry service from the Scottish mainland to the islands sank with the claimant's care on board as a result of the defendant's negligence. The defendant tried to rely on exclusions clauses, which were found on a risk note that customers usually signed. On this occasion, this had not happened. The clauses were also on notices both inside and outsider the defendant's offices at the pier. These contained 4000 words in 27 paragraphs of small print.

(b) Construction.

Establishing that the clause has been incorporated into the contract is the first step. It is then necessary to show that the clause covers the breach in question. The courts have to determine its proper construction.

The principles of interpretation of contracts are set out in *Investors Compensation Scheme v West Bromich Building Soc [1998] 1WLR 896, 912.*

Interpretation is ascertaining the meaning the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation which they were at the time of the contract.

The background includes anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

The law excludes from the background the previous negotiations of the parties and their declarations of subjective intent.

The background may enable the reasonable man to choose between the possible meanings of words which are ambiguous.

The rule that words should be given their "natural and ordinary meaning" reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents.

However, a very strict approach is taken to ambiguous exclusion clauses. A valid clause must be clear and unequivocal. Any ambiguity will be interpreted against the person wishing to rely on it. This is referred to as the **contra proferentum rule**.

Houghton v Trafalgar Insurance [1954] 1 QB 247 .

A motor insurance policy said the insurers would not be liable for any damage caused "whilst the car is carrying any load in excess of that for which it was constructed". An accident occurred whilst six people were in the car designed to carry five. The insurers refused to pay, relying on the clause.

IS THE CLAUSE VALID UNDER STATUTE?
The principal relevant statutes are the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999

THE UNFAIR CONTRACT TERMS ACT 1977.
An incorporated exclusion clause which appears to cover the issue at hand may be declared void or subject to the test of reasonableness. The Act primarily focuses on contracts made between consumers and a business and on occasions between two businesses. It does not apply to non-business contracts. Also it applies specifically to exclusion clauses rather than 'unfair' terms generally.

s.2(1) A person cannot by reference to any contract term or to a notice given to persons generally r to particular persons exclude or restrict his liability for death or personal injury resulting from negligence.

(2) In the case of other loss or damage, a person cannot so exclude or restrict his liability for negligence except in so far as the term or notice satisfies the requirement of reasonableness.

(3) Where a contract term or notice purports to exclude or restrict liability for negligence a person's agreement to or awareness of it is not of itself to be taken as indicating his voluntary acceptance of any risk..

s.3. (1) This section applies as between contracting parties where one of them deals as consumer or on the other's written standard terms of business.

(2) As against that party, the other cannot by reference to any contract term-
(a) when himself in breach of contract, exclude or restrict any liability of his in respect of the breach; or
(b) claim to be entitled –
    (i) to render a contractual performance substantially different from that which was reasonably expected of him, or
    (ii) in respect of the whole or any part of his contractual obligation, to render no performance at all,

except in so far as (in any of the cases mentioned in this subsection) the contract term satisfies the requirement of reasonableness.

s.6 (1) Liability for breach of the obligations arising from section 12 of the Sale of Goods Act 1979 (title) cannot be excluded or restricted by reference to any contract term.

(2) As against a person dealing as a consumer liability for breach of the obligations arising from section 13, 14, or 15 of the Sale of Goods Act 1979 (conformity with description or sample, satisfactory quality and fitness for purpose) cannot be excluded by reference to any contract term.

(3) As against a person dealing otherwise than as a consumer, the liability specified in subs (2) above can be excluded or restricted by reference to a contract term but only so far as the term satisfies the requirement of reasonableness.

S 11(1) In relation to a contract term, the requirement of reasonableness is that the term shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made.

Schedule 2 lists a number of factors which will be taken into account when assessing the requirement of reasonableness. The include: the relative bargaining position of the parties; whether the customer knew (or should have known) of the existence of the clause and the extent of its application; whether the customer received an inducement to agree to the term and whether any goods were manufactured, processed or adapted to the special order of the customer. It is for the person seeking to rely on the clause to prove that it satisfied the requirement of reasonableness.

Geo Mitchell v Finney Lock Seeds Ltd [1983] 2 AC 577.
The respondents, farmers in East Lothian, bought 30lb of Dutch winter white cabbage seed from the appellants for £201. They planted 63 acres but the crop proved to be worthless and had to be ploughed in. The seeds were a very inferior quality of autumn cabbage. The farmers claimed £60,000 lost profit. The seed merchants relied on their exclusion clause: "In the event of any seeds sold by us not complying with the express terms of the contract or proving defective we will, at our option, replace the defective seeds or will refund all payments made to us by the buyer and this shall be the limit of our obligation."

Phillips Products Ltd v Hyland [1987] 2 All ER 620.
The defendants hired a JCB excavator and driver to the claimants. One term of the contract stated that the driver was to be regarded as the employee of the claimants and that the claimants alone should be responsible for all claims arising in connection with the driver's operation of the excavator. Owing to the driver's negligence the excavator crashed into the claimant's factory wall.

Schenkers Ltd v Overland Shoes Ltd [1998] 1 Lloyd's Rep 434.
In this case the clause had not in practice been relied upon. The plaintiffs were the English members of a world-wide network of companies with a German Parent company. They were members of the British International Freight Association and their standard trading conditions provided: the customer shall pay to the Company in cash all sums immediately when due, without reduction or deferment on account of any claim, counterclaim or set-off." The defendants were substantial operators in the shoe trade, importing shoes from the Far East. The plaintiffs had acted as their freight forwarders for several years and all contracts were on the BIFA standard terms. The plaintiffs claim was in respect of charges on relation to goods imported from China via Portugal. Duty had to be paid on entry to Portugal and that duty was recoverable on the onward transmission to the UK. The defendants argued that the plaintiffs were to reclaim the duty and repay it to them. They alleged they had failed to do this and so the sum due could be set off against the charges for freight.

St Albans City Council v International Computers Ltd [1996] 4 All ER 481.
The defendants had installed a computer database for the plaintiff's community charge register. An error in the software significantly overstated the population in the area and as a result the plaintiffs lost £1,314,846. The contract contained a clause limiting the defendant's loss to £100,000.

THE UNFAIR TERMS IN CONSUMER CONTRACTS REGULATIONS 1999.

These Regulations prohibit the use of unfair terms in consumer contracts that have not been individually negotiated.
They prevent consumers from being bound by contractual terms which have not been individually negotiated and which are also unfair. They are narrower than UCTA 1977 (they apply only between a seller or supplier of goods and services and a consumer) but also broader in that they potentially apply to all types of contractual terms, not just exclusion clauses.

There is considerable overlap between these regulations and the Unfair Contract Terms Act 1977, although the fundamental differences may be stated thus;-

- The 1999 Regulations apply to all clauses – the 1977 Act only applies to exclusion and limitation clauses

- The 1999 Regulations apply to contracts involving individual consumers only – the 1977 Act can apply to companies and partnerships.

- The 1999 Regulations apply only to non-individually negotiated clauses – the 1977 Act can apply to all clauses, negotiated or otherwise.

Reg 5 A term shall be regarded as unfair if it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

Director General of Fair Trading v First National Bank [2001] UKHL 52.
This case was decided under the predecessor of these regulations.
Lord Bingham stated that substantive unfairness was complimented by the requirement of good faith, which was evidenced by fair and open dealing. Openness requires that terms should be expressed fully, clearly and legibly, containing no pitfalls or traps, with prominence being given to terms which might operate disadvantageously to the consumer. Fair dealing required that the supplier should not, whether deliberately or unconsciously, take advantage of the consumer's necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract or weak bargaining position.