

Edinburgh Law Seminars
Contract (Formation and Remedies) (Scotland) Act 2026
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Introduction

- Act has received Royal Assent, but is not yet in force
- Seminar in two parts to reflect the nature of the Act: Formation and Remedies
- Seminar draws on preparatory work by the Scottish Law Commission, and also on Lorna's involvement in the drafting of the Act
- Formation is largely a restatement of the existing law (with exceptions), whereas there is greater change in Remedies

Part 1 – Formation

1.1 General Themes

- Designed to restate **existing Scots law** on formation of contract (the only major change being the abolition of the postal rule). Useful clarification where the principles are unclear.
- **Default rules**, in other words the contracting parties have the freedom to vary these rules
- **Major issues only** are considered here – we don't intend to repeat the entire Act (!)

1.2 What is a contract and how is it formed?

- Contract is formed where there is **agreement**, but there clearly **does not have to be agreement on all terms** (section 2(2)).
- Agreement may be determined from **statements and conduct** (section 2(4)).
- Parties must **intend the agreement to have legal effect** (section 2(1)(a)); it must have the **essential characteristics** of a contract of the kind in question (section 2(1)(b)(i)) and it must have **sufficient content** (section 2(1)(b)(ii)).
- An acceptance with terms **which differ** from the offer continues to 'kill' the offer and act as a counter-offer (see references to 'unqualified assent' to an offer in section 7 and sections 8(1) and 8(2)).
- Even where the essentials are agreed, a party can specify that there is a **particular matter** which must be agreed **before** there is a binding contract (section 2(3)).

1.3 When does a communication take effect under the new Act?

- **Postal rule** is abolished (section 14). This creates difference between Scots and English law, although parties often contract out of it anyway.
- Section 13 covers communication. It makes provision for when **notification** (of an offer, acceptance, counter-offer, withdrawal, revocation, rejection or declaration) **takes effect**.
- Notification takes effect **when it reaches** the party to whom it is addressed (section 13(1)).
- **‘Reaches’?** It reaches a person when it is made available to her in such circumstances as make it **reasonable to expect** the person to be able to obtain access to it **without undue delay** (section 13(3)).
- **Examples of reaching?** - section 13(4)): when it is delivered to that person, that person’s place of business, or where a person does not have a place of business or the notification does not relate to a business matter, to the person’s habitual residence. Where notification is transmitted by **electronic means**, it reaches that person when it becomes **available to be accessed** by that person.
- **Conclusions/observations**

1.4 Can one accept an offer by conduct? Where a contract is formed through acceptance by unnotified conduct, when is that contract formed?

- **Yes**, an offer can be accepted by conduct (just as is the case under the existing law (section 2(4)). Exception to general rule that acceptance must reach offeror.
- Pre-existing law was unclear on **when** a contract is formed where acceptance occurs through **unnotified acts** of the offeree – *Carlill v The Carbolic Smokeball Company* [1893] 1 QB 256. Is acceptance the point when the conduct begins, or when performance concludes? (*Daulia Ltd v Four Millbank Nominees Ltd and Anor* [1978] Ch 231 at 239 per Goff LJ).
- Now see section 3(2) – the contract is formed when the offeree **begins to perform** the act(s) in question.
- **Conclusions/observations**

1.5 Can an offer lapse on fundamental change of circumstance?

- **Yes**, reflecting existing law in *Macrae v Edinburgh & District Tramways* (1885) 13R 265 per LP Inglis at 269. Section 6 covers the situation where an offer has been issued, but before

formation something happens to **either the offeror or offeree** (one party dies, becomes incompetent or enters insolvency).

- **Section 6** – an offer **lapses** on a **fundamental change of circumstance** such that it can no longer be accepted. Note, this applies to **offers only**, and not contracts or other obligations, which will continue to bind an estate when someone dies.
- Fundamental change of circumstance includes (under section 6(2)) **death or one of the parties becoming incapable of making any decision** as to whether to form the contract (as ‘incapable’ is defined in s1(6) of the Adults with Incapacity (Scotland) Act 2000).
- Under section 6(4), the offer **does not lapse** when either the offeror or the offeree enters **insolvency** (sequestration, trust deed granted, voluntary arrangement or debt payment programme approved, winding up, receiver appointed or administration).
- **Conclusions/observations**

1.6 Final thoughts on Formation....

- The Act does not tackle ‘**battle of the forms**’ situations. SLC indicated that the existing law is unclear, but any reform would also be unclear. Are we any clearer on when contracts are actually formed in that type of situation? Do we use the **first shot** or the **last shot** approach? What about the use of **overriding clauses**?
Caledonia Water Alliance v Electrosteel Castings (UK) Ltd [2025] CSIH 21
Go Radio Ltd v Endrick Escape Ltd [2025] SC AIR 37
Jaevee Homes Ltd v Fincham (t/a Fincham Demolition) [2025] EWHC 942 (TCC)
- The Act contains no reference to certain Scottish **agency law principles** which are arguably relevant. *Pollok v Paterson* 10 Dec 1811 FC contains **two exceptions** to the general rule that the **death of a principal terminates the agency relationship**. An agent can complete partially performed transactions, and can perform a transaction where the agent was unaware of the principal’s death. Other (European) legal systems contain similar provisions, and they are found in international soft law initiatives. Could these exceptions keep offers ‘alive’ where an agent is used? Perhaps these agency rules are repealed by the Act, but this should have been expressly confirmed. For analysis, see LJ Macgregor, *The Law of Agency in Scotland*, (2013) para 11-09, and application to partnership law, para 11-11.

Part 2 – Remedies

The rules are default rules that the parties can contract out of, expressly or impliedly (section 16).

2.1 Mutuality of contract

Section 17 clarifies that where both parties are in breach of contract, the fact of being in breach does not prevent party A from suing B in contract provided that:

- B's breach of contract occurs before the contract is rescinded (terminated) for A's breach
- A is not seeking performance of obligations which fall due following rescission; and
- B can lawfully withhold performance in response to A's breach.

These provisions bring clarity to the effect of mutuality of contract when a party is in breach, where some cases¹ have indicated that a party in breach of contract loses the right to sue on the contract as a result of his breach.

2.2 Restitution (return of benefits received) following rescission

Section 18 provides a new remedy in contract² for the return of **unreciprocated benefits** following rescission of a contract for breach. For example, in terms of obligations under a contract A was to receive X from B and B was to receive Y from A. A provides Y to B (referred to in these sections as the recipient) but before B provides X to A the contract is rescinded such that B is no longer required to provide X to A (future obligations coming to an end on rescission). In that situation A is entitled to the return of Y from B. If B had provided X to A prior to the contract being rescinded restitution would not be available.

- Where the benefit was the payment of money the amount received is to be repaid (eg B to repay £Y to A).
- Where the benefit is not payment of money but it is transferrable by the recipient it must be returned to the other party unless it would be unreasonable or impractical to do so, in which case, the recipient must pay the other party its value (eg B to return Y to A or, if unreasonable / impractical B to pay the value of Y to A).

¹ Such as *Graham & Co v United Turkey Red Co Ltd* 1922 SC 533; and *Forster v Ferguson & Forster, Macfie & Alexander* 2010 SLT 867.

² Although Lord Tyre's *obiter* comments in *Stork Technical Services (RBS) Ltd v Ross's Executor* 2015 SLT 160 suggested there was such a remedy in contract law.

- Where the benefit is not the transfer of money and it is not transferrable by the recipient the benefit is returned by payment to the other party of (i) the value of the benefit; or (ii) if the benefit has been disposed of for an amount exceeding its value, that higher sum (eg B to pay the value of Y to A, or where B has disposed of it for Z (a sum exceeding Y) B to pay Z to A).
- Sections 19 – 21 make provision on how to calculate the value of a benefit, the payment of compensation for any reduction in value of benefit due to a change in its condition brought about by the recipient between receipt of the benefit and its return, payment by the recipient for any use she has made of the benefit between its receipt and return; and a right for the recipient to receive payment for the value of any improvement she made to the benefit between its receipt and return. Section 18(8) provides that returning a benefit includes returning the fruits of that benefit.

➤ **IMPORTANT IMPLICATIONS FOR PRACTICE** – exclusion and limitation of liability clauses generally drafted with damages claims in mind. Need to reconsider these in light of this new remedy.

2.3 Retention / withholding of performance

Sections 22 – 25 clarify and make changes to the law of retention.

- A can withhold performance of her contractual obligations in response to a breach or in anticipation of a material breach of a counterpart obligation by B. Obligations in a contract presumed to be counterparts unless can show parties did not intend obligations to be counterparts (section 22(2)(a)). Obligations can be counterparts of each other although contained in separate contracts where they form part of the same transaction (section 22(2)(b)).
- A cannot withhold her performance where the effect of doing so is clearly disproportionate to the effect of B's breach (section 22(4)) but can partially retain performance (ie some but not all obligations) so that her retention is not clearly disproportionate (section 22(5)). It is for B to show that the effect of A's retention is clearly disproportionate to the effect of his breach (section 24(1)).

- Section 22(6) makes clear that A can retain until B performs his counterpart obligations or pays damages in lieu of such performance, clarifying that retention is available even where a breach has occurred in the past and is unlikely to be repeated.³
- Where A retains in response to an anticipatory breach by B, A must notify B in writing or orally that A is exercising the right to retain and must do so before exercising retention or as soon as reasonably practicable after exercising the right to retain (section 23).
- Provisions on retention are without prejudice to the law of lien, set off, compensation, special retention and any other right to retain or abate arising other than on contractual breach. The court retains a right to refuse to allow retention where its use would be inequitable (section 25).

2.4 **Reduction of damages for breach of contract to take account of fault of the party making the claim – amending Law Reform (Contributory Negligence) Act 1945 (section 26 of the 2026 Act)**

Clarifies that where a party suffers loss partly due to breach of contract by another and partly through her own fault the damages recoverable are reduced to such extent as the court thinks just and equitable taking into account the claimant's share of responsibility for her loss. Before there was doubt about whether the 1945 Act applied where the claim was for breach of contract only, without a concurrent claim in delict.

Here Scots law will differ from English law where it has been held that the provisions of the 1945 Act⁴ are only available to a defendant where the breach of contract consists in negligence on the part of the defendant.⁵

³ Contrary to the position adopted by Lord Drummond Young (with whom Lord Eassie agreed) in *McNeill v Aberdeen City Council* 2014 SC 335, a stance that was difficult to reconcile with the decision of the Supreme Court in *Inveresk plc v Tullis Russell Papermakers Ltd* 2010 SC (UKSC) 106.

⁴ The Act makes separate provision for Scotland – see section 5 of the 1945 Act.

⁵ See the discussion in the Court of Appeal in *Forsikringsaktieselskapet Vesta v Butcher (No 1)* [1989] AC 852 and *Barclays Bank plc v Fairclough Building Ltd* [1995] QB 214.