ANSWERS

Chapter 1 (pp.81–2)

1 Statute law, judicial precedent, custom, institutional writers, European Union law, Canon law, Feudal law.

2 Common law can consist of customs and practice, for example recognised rights of way or customs in trades, businesses and professions and previously decided case law.

3 An Act of Parliament is part of the written law of the country. It starts off life as a Bill (a draft law) and it has to pass through either the Westminster Parliament or the Scottish Parliament before receiving the Royal Assent before becoming law. Examples include the Consumer Credit Act 1974, the Sale of Good Act 1979, the Employment Rights Act 1996, the Courts Reform (Scotland) Act 2014, the Consumer Rights Act 2015 and the Criminal Justice (Scotland) Act 2016.

4 A Bill must pass through the House of Commons and the House of Lords before receiving the Royal Assent which means that it becomes law. The main stages in the House of Commons are the First Reading, the Second Reading, the Committee Stage, the Report Stage and the Third Reading. A very similar procedure is followed in the House of Lords.

5 A Government Bill is a draft law introduced into parliament by a government minister. It will apply to the public generally. A Private Member's Bill is sponsored by an individual Member of Parliament. It will not necessarily have the backing of the government and therefore is less likely to succeed. It also applies generally to the public.

6 There are currently 28 judges who sit in the Court of Justice of the European Union each appointed from one of the member states. They are assisted by 11 Advocates General. The Court sits in Luxembourg. A President of the Court is elected from amongst the 28 judges. The President is assisted by a Vice-President. The Court has a Registrar who is responsible for running its various departments and is responsible to the President. The Court can sit as a court of 28 judges or in a Grand Chamber of 15 judges or in Chambers numbering 3 to 5 judges.

7 In early 2016, the General Court had a membership of 28 judges each appointed by agreement of the EU member states for a renewable term of six years. From 1 September 2016, however, 19 additional judges joined the Court bringing its membership to 47 and there were plans to appoint a further 9 judges by 2019. Since 8 June 2017, the number of judges has fallen to 45. The General Court is organised into nine chambers consisting of five judges each. A president of the Court is elected from amongst the judges to serve for a renewable term of three years. A Registrar has also been appointed to serve for a renewable term of six years. There are no permanent Advocates-General appointed to assist the Court and, traditionally, the judges of the Court will assume this role. Article 256 of the Treaty on the Functioning of the European Union permits the jurisdiction of the General Court to be altered. The General Court may sit as a Full Court; Grand Chamber; Chambers of three to five judges; and sitting with a single judge.

8 The European Council, the Council of Ministers, the European Parliament, the European Commission and the Court of Justice.

9 Primary legislation or law was contained in the original three Treaties – Paris 1951, Rome 1957 and Euratom 1957. These Treaties laid down broad goals that the member states attempted to achieve. These goals could often be sketchy where details were concerned. However, it is possible to use Treaty Articles to enforce a variety of rights if the Article in question is sufficiently clear and precise. Other Treaties such as the Treaty on European Union 1992, the Treaty of Amsterdam 1997, the Treaty of Nice 2000 and the Treaty of Lisbon 2007 have also added to the primary law of the European Union. The two most important European Treaties are now the Treaty on the Functioning of the European Union (TFEU) and the Treaty on European Union (TEU).

Article 288 of the Treaty on the Functioning of the European Union lists the five sources of European law which are known as secondary legislation. The Treaties list broad aims or objectives, but they often do not provide the details. Secondary legislation is, therefore, necessary to flesh out the Treaties of the European Union. Secondary legislation includes:

- Regulations
- Directives
- Decisions
- Recommendations
- Opinions

10 As soon as Regulations are published in the Official Journal of the European Union, they are legally binding. They do not need to be implemented by the Westminster Parliament or the Scottish

Parliament. They can be enforced in all the national courts. In this way, Regulations are said to be directly applicable and have direct effect.

In order to have legal force, the Westminster Parliament must pass legislation to make Directives effective. The UK Agency Workers' Regulations began life as the European Directive 2008/104/EC on temporary agency work. It was only when the corresponding UK Regulations were passed into law on 1 October 2011 that the Directive became effective. Failure to implement Directives into national law by an EU member state could result in legal action being taken against its Government by the European Commission.

Decisions include judgements of the Court of Justice of the European Union and the courts of the member states will have to obey these and follow them. The Council and the Commission can also issue Decisions but these are usually addressed to particular member states, individuals or bodies who will have to abide by them.

Recommendations and Opinions are generally held to have no binding force, but in **Grimaldi *v* Fonds des Maladies Professionelles (1990)** it was held that they may have some indirect legal effect. The European Court of Justice stated that domestic courts are bound to take Recommendations into consideration in order to decide disputes submitted to them, in particular where they are capable of clarifying the interpretation of other provisions of national or Community law.

11 Parliament was first known as the Assembly, but since 1962, it has been referred to as the European Parliament. Currently, the Parliament has 751 members (interestingly, the 1997 Treaty of Amsterdam set a limit of 700 members, but this has not been implemented). The members are elected to serve a five-year term of office. The name parliament can be very misleading – it in no way resembles the Westminster parliament and it is often restricted in all sorts of ways. Additionally, it cannot pass laws in its own right, but a failure to consult Parliament might lead to any subsequent legislation being declared null and void. The European Parliament sits in Strasbourg, France.

12 The European Commission is effectively the civil service of the European Union. The Commission employs a staff of over 30,000. The Commission has no formal power to make laws. It can propose new laws, but the Council and Parliament may have other ideas. The Commission's main task is to ensure that member states, business organisations and individuals follow the laws of the European Union. The Commission will not be slow in taking parties to a court if it considers that laws have been broken or ignored.

13 The Council of Ministers is by far and away the most powerful institution as it represents the interests of the member states directly. Representatives of each of the EU member state governments, for example the Foreign Minister or Finance Minister of each member state sit on the Council. When the Heads of the EU Governments meet together at least four times a year, this body is known as the European Council. It will make some of the most important EU policy decisions. The European Council is now headed by a President (who, in 2017, is the former Polish Prime Minister, Donald Tusk).

14 The three main Scottish Civil Courts are the Sheriff Court, the Court of Session and the Supreme Court of the United Kingdom.

15 The Sheriff Court is the most junior court in Scotland, the Court of Session is the next court and the Supreme Court of the United Kingdom is the highest civil court in Scotland.

16 There are six sheriffdoms – Glasgow and Strathkelvin, North Strathclyde, South Strathclyde, Dumfries and Galloway, Tayside, Central and Fife, Lothian and Borders and Grampian, Highland and Islands

17 Jurisdiction concerns the power of a court to hear and decide the outcome of a case.

18 The simple procedure (which was established in November 2016) deals with cases which have a value of less than £5,000. It is supposedly an informal and streamlined judicial procedure which should encourage people to take cases to court. Litigants are expected to represent themselves and expenses are confined to a maximum of £300. The right of appeal is limited to points of law and appeals will be heard in the Sheriff Civil Appeal Court in Edinburgh.

19 The Sheriff Court is organised under various procedures – Simple Procedure which deals with cases valued under £5,000; Summary Procedure which deals with certain types of cases valued between £3,000 and £5,000, for example Personal injury claims and claims for recovery of heritable property; and Ordinary Procedure which deals with cases valued at over £5,000. Geographically, the Sheriff Court is organised into six sheriffdoms and 39 Sheriff Court districts.

20 The Court of Session is divided into an Outer House and an Inner House. The Outer House is primarily a trial court where one judge will sit to hear cases. The Inner House deals mostly with appeals and is subdivided into a First and Second Division with five members each although three

will sit at any one time. There is also now an extra division which takes pressure off the other two. The Court is headed by the Lord President who is assisted by the Lord Justice Clerk.

21 A judge will arrive at his decision based on weighing up the balance of probabilities.

22 A civil court seeks to resolve disputes between private individuals and provide compensation for victims.

23 Pursuer and defender.

24 Litigants.

25 Sheriff Court – Sheriffs. Court of Session – Senators of the College of Justice. The Supreme Court of the United Kingdom – Justices of the Supreme Court.

26 Sheriff Court – Solicitor. Court of Session – advocate and solicitor-advocates. The Supreme Court of the United Kingdom – advocate and solicitor-advocates. Technically, advocates and solicitor-advocates can appear in all courts.

27 The Scottish Court Service runs the Sheriff Court system on a day to day responsibility, but ultimately the First Minister and the Scottish Government ensure the smooth administration of the Sheriff Court system.

28 Divorce – Sheriff Court or Court of Session. As a result of the Courts Reform (Scotland) Act 2014, cases involving the tenor of a lost document can now be heard in either the Sheriff Court or the Court of Session. An appeal from a simple procedure action would proceed to the Sheriff Civil Appeal Court in Edinburgh on a point of law.

29 The Courts Reform (Scotland) Act 2014 has now removed the right of a pursuer or claimant to choose whether a claim can be heard in either the Sheriff Court or the Outer House of the Court of Session. Cases with a value below £100,000 must be heard in the Sheriff Court. If the value of the claim is above £100,000, the pursuer must take the claim to the Outer House.

Before the provisions of the Courts Reform (Scotland) Act 2014 were introduced in November 2016, a pursuer or claimant who was pursuing an ordinary claim (i.e. claims valued at over £5,000) had the choice of having the claim heard either before the Outer House or the Sheriff Court. Now, since the introduction of the Courts Reform (Scotland) Act 2014, only those claims with a high value – over £100,000 – will be heard in the Court of Session.

Generally speaking, litigants will prefer to use the Sheriff Court because in many cases it is their local court and, if the dispute can be determined in a local court, it may be a less expensive experience in the longer term. Obviously, if the litigants have to use the Sheriff Personal Injury Court in Edinburgh and have to travel quite a distance to get there, the costs of the case could begin to rise quite markedly.

30 **a)** John Willis – the case must be heard in the Sheriff Court under ordinary procedure. The Courts Reform (Scotland) Act 2014 now means that the previous option of having such a case heard in the Outer House of the Court of Session is no longer available to John Willis. If dissatisfied with the Sheriff's decision, John Willis could appeal on a point of law to the Sheriff Civil Appeal Court in Edinburgh. There may be the possibility of further appeals to the Inner House of the Court of Session and, even possibly, the UK Supreme Court at Guildhall, London if the case raises a very significant point of law.

b) Agnes Pratt will have to raise her action in the Sheriff Court for damages under the simple procedure. There is the possibility of an appeal to the Sheriff Civil Appeal Court in Edinburgh on a point of law. There may be further appeals if the case raises really important issues to the Inner House of the Court of Session and the UK Supreme Court.

c) Dougie Fisher will have to raise his action in the Outer House of the Court of Session for breach of contract under the ordinary procedure. The claim is in excess of £100,000 and must be heard in the Outer House as per the new civil procedure rules introduced in November 2016 as a result of the Courts Reform (Scotland) Act 2014. There is the possibility of an appeal to the Inner House of the Court of Session in Edinburgh on a point of law. There may be further appeals if the case raises really important issues to the UK Supreme Court.

d) Frank will have to raise his action in the Sheriff Court for damages under the simple procedure. There is the possibility of an appeal to the Sheriff Civil Appeal Court in Edinburgh on a point of law. There may be further appeals if the case raises really important issues to the Inner House of the Court of Session and the UK Supreme Court.

e) The Outer House of the Court of Session in Edinburgh will deal with the winding up of Fly-by-Night plc because the issued share capital of the company (£5 million) is well in excess of £120,000. The Court of Session has exclusive jurisdiction to deal with this type of winding up when the share capital of the company exceeds £120,000.

31 Justice of the Peace Court (formerly the District Court), Sheriff Court, High Court of Justiciary and the UK Supreme Court.

32 A crime is behaviour which the state regards as threatening the security of the community at large and people who indulge in criminal activities should be punished by imprisonment or fine.

33 The prosecution must prove that the accused is guilty beyond a reasonable doubt.

34 Summary – judge sits alone and decides the question of the accused's guilt or innocence and if the accused is found to be guilty the judge will decide the sentence. Solemn – the judge sits with a jury of 15. The jury will decide whether the accused is guilty or not. The judge will impose the appropriate punishment where the accused has been found guilty.

35 Justice of the Peace Court – Justice of the Peace and a Stipendiary Magistrate. Sheriff Court – Sheriff. High Court of Justiciary – Lords/Ladies and Commissioners of Justiciary. The UK Supreme Court – Justices of the UK Supreme Court.

36 The Courts Reform (Scotland) Act 2014 has introduced some important changes to Scotland's criminal appeals system:

Appeals from a decision of a Justice of the Peace Court would be lodged with the Sheriff Criminal Appeal Court in Edinburgh. There may be a further right of appeal to the High Court of Justiciary sitting as the Criminal Appeal Court in Edinburgh. If the case involves matters of human rights or raises a devolution issue, there may even be a further right of appeal to the UK Supreme Court sitting in Guildhall, London.

Appeals from a decision of the Sheriff Court (whether under Summary or Solemn Procedure) would be lodged with the Sheriff Criminal Appeal Court in Edinburgh. There may be a further right of appeal to the High Court of Justiciary sitting as the Criminal Appeal Court in Edinburgh. If the case involves matters of human rights or raises a devolution issue, there may even be a further right of appeal to the UK Supreme Court sitting in Guildhall, London.

Appeals from a decision of the High Court of Justiciary sitting as a trial court would be lodged with the High Court's own Criminal Appeal Court in Edinburgh. If the case involves matters of human rights or raises a devolution issue, there may even be a further right of appeal to the UK Supreme Court sitting in Guildhall, London.

37 Justice of the Peace – £2500 fine and/or 60 days imprisonment.

38 Sheriff – £10,000 fine and/or one year's imprisonment.

39 Unlimited powers of fine and imprisonment.

40 Procurator Fiscal – Justice of the Peace Court and Sheriff Court. Advocate Depute – Sheriff Solemn Court and High Court of Justiciary.

41 The Crown Office.

42 Guilty, not guilty and not proven.

43 The Lord Advocate, Solicitor General and Advocate General.

44 A judge may be of the opinion that imposing a fine or a period of imprisonment is not the most appropriate or effective way in which to punish an offender and it may be better to consider some alternatives.

What alternatives does the judge have at his or her disposal?

- Probation orders
- Community Service
- Caution
- Reparation
- Restriction of liberty orders
- The Fiscal can also impose fines in certain situations.

45 a) Arrest and detention

Arrest: Arrest can be defined as the forcible detention of the suspect – possibly by police officers physically restraining the suspect – and is an extremely serious development in the investigation of a criminal offence. In situations where the police have decided to arrest the suspect, they do not have to worry about detaining the suspect for more than six hours.

Detention: Section 14 of the Criminal Procedure (Scotland) Act 1995 gives the police the right to detain an individual whom they believe, at this stage of their enquiries, may have committed the offence currently under investigation. The euphemism often used at this stage of the investigation is that an individual is helping the police with their enquiries. Alternatively, the police can always question an individual who is suspected of committing the offence and then simply let them go without the need for detention. Whatever course of action the police decide to exercise in such situations, all answers obtained from the suspect must be acquired fairly in order to permit such information to be used in later legal proceedings.

The police are also entitled to detain a suspect under **Section 13 of the Criminal Procedure**

(Scotland) Act 1995. This power, however, is a more limited right of detention and is primarily geared towards helping the police to identify a suspect or a potential witness to a crime. Any individual detained under Section 13 (whether as a suspect or a witness) is obliged to provide to a police officer the details of their name and address. If the officer is detaining a suspect, s/he must have reasonable grounds for suspecting that an individual is in the process of committing or has committed a crime. When detaining the suspect, the officer may simply be seeking an explanation which could actually allay any suspicions previously aroused.

Traditionally, it was often said of those individuals who were suspected of committing a crime that the reason that they had been detained was to help the Police with their enquiries.

b) Lynn – detention

Section 14 of the Criminal Procedure (Scotland) Act 1995 states that a police officer can detain a suspect in situations where s/he has 'reasonable grounds for suspecting that a person has committed or is committing an offence punishable by imprisonment'.

The police officer exercising the power of detention must inform the suspect of the nature of his/her suspicion, the general nature of the offence committed and the reason(s) for the detention. After the officer has decided to detain a suspect, s/he must escort the detainee to a police station as soon as this is reasonably practicable. The suspect or detainee need not be taken to the nearest police station.

There are strict time limits regulating the period of detention and, in normal circumstances, a suspect can be held by the police for a maximum of six hours. In theory, this period should give the police enough time to decide what they intend to do with the detainee, i.e. arrest the suspect, detain the suspect under some other criminal legislation or even release the suspect.

Under the Prevention of Terrorism legislation, a suspect could be detained for questioning for a maximum period of 28 days, but this relates to exceptional circumstances.

46 **The intermediate diet:** This sitting of the court will normally take place two weeks prior to the trial diet. The purpose of the intermediate diet is to check that both defence and prosecution are ready to proceed to trial. The parties are obliged to state at the intermediate diet that their witnesses and evidence are in a state of readiness for the trial. It will be necessary, for example, to find out how many witnesses are going to appear at the trial. Both parties will be asked at this stage whether they are ready to proceed to trial as originally planned. If they both answer positively, then the trial diet will take place within the next 14 days. If, however, one or both of the parties cannot give a firm undertaking that they are ready for the trial, a further intermediate diet will have to be set down meaning that the trial diet will be postponed. A new trial diet will therefore be arranged and, 14 days prior to this, a second intermediate diet will take place. At the second intermediate diet, the parties will again be quizzed about the stage of their preparations and, hopefully, they will both be ready to proceed to trial.

The trial diet: If the accused has decided to enter a plea of not guilty, it will be necessary to hold a trial. As the prosecution has decided to pursue charges against the accused, the fiscal will open proceedings. The fiscal has to prove the charges against the accused. The fiscal will rely on the evidence gathered to persuade the judge to convict the accused. The defence solicitor, in turn, will attempt to undermine the evidence of the fiscal and, in turn, can bring in evidence which demonstrates the innocence of the accused. Both lawyers can cross-examine each other's witnesses and, at the end of proceedings, they will address the judge in an attempt to persuade him or her of the strength of their respective cases. The fiscal will argue for a conviction whereas the defence solicitor will obviously argue for an acquittal. The judge must be satisfied that the fiscal has proved the guilt of the accused beyond reasonable doubt in order to convict.

Chapter 2 (pp.170–4)

1 A contract is undoubtedly an agreement, but, crucially, it is an agreement that the courts will enforce. In other words, should one of the parties fail to keep his side of the bargain, the innocent party can go to court and seek a remedy for breach of contract. The courts will not enforce other types of agreements such as agreements binding in honour only, domestic agreements and social agreements. These types of agreements are not contracts see, for example, **Spellman *v* Spellman (1961), X *v* Mid Sussex Citizens Advice Bureau (CAB) and Others [2012]** and **Rose & Frank Co *v* JR Crompton & Bros Ltd [1924]**. The courts will not enforce agreements that are not contracts because they are considered to be unworthy of judicial time.

2 The advertisement by Crossan & Wylie Beauty Products should probably be viewed as an invitation to treat and not as an offer. The advertisement in this example is not as specific as the one in **Carlill *v* Carbolic Smokeball Co (1893)**. Admittedly, the advertisers do make some pretty strong claims but these may be regarded as trade puffs or advertising hype. It will be up to customers to go into a store that supplies the product and make an offer to purchase it – an offer which may or may not be accepted by the store. For the difference between an offer and an invitation to treat see **Harvey *v* Facey (1893)** and **Pharmaceutical Society of Great Britain *v* Boots Cash Chemists (1953)**.

3 **a)** *Consensus in idem* quite literally means a meeting of minds. In order for the parties to form a contract, the offer must mirror the acceptance. In other words, the parties must reach agreement on all the important aspects of the contract. If there are still areas of disagreement between the parties, they continue to be in a state of negotiation and no contract exists. For examples of failures to achieve agreement see **Harvey *v* Facey (1893)** and **Mathieson Gee (Ayrshire) Ltd *v* Quigley (1952)**.

b) Sandeep and Balinder have failed to achieve *consensus in idem* (i.e. agreement) and, therefore, no contract exists. Their situation is very similar to **Mathieson Gee (Ayrshire) Ltd *v* Quigley (1952)** where the parties were at cross-purposes and had totally misunderstood one another. In this case, the court decided that no contract existed and it is likely that a court would arrive at a similar decision where Sandeep and Balinder are concerned.

4 Generally speaking, a valid acceptance must reach the offeror otherwise it cannot be said that a contract has been formed by the parties. It does not take a great stretch of the imagination to realise that a message containing an acceptance by the offeree can be misdirected or even rendered unreadable when received by the offeror – especially if they are sent via fax or email. Furthermore, telephones, especially mobiles, can be cut off and messages left on answering machines can be accidentally deleted. The responsibility will very often be on the offeree's shoulders to ensure that the acceptance was received and actually understood by the offeror (see **Entores Ltd *v* Miles Far Eastern Corpn (1955)** and **Brinkibon *v* Stahag Stahl (1982)**). It is not enough for the offeree to say that he has sent the message. The one exception to the rule that an acceptance must physically reach the offeror arises when the acceptance is sent via the Royal Mail in response to a postal offer (see **Adams *v* Lindsell (1818),** and **Jacobsen *v* Underwood (1894)**). Even if the acceptance is lost in the post, a valid contract is formed between the parties as soon as the acceptance is posted (see **Household Fire Insurance Co *v* Grant (1879)**). Acceptance must be communicated by a person generally authorised to do this. In **Powell *v* Lee (1908)**, a person who had no authority to communicate an acceptance sent an acceptance to the offeror, but the court concluded that there had not been a valid acceptance. Acceptance must also be a positive act – the offeree's silence cannot be regarded as acceptance (see **Felthouse *v* Bindley (1862)**).

5 Unfortunately, Suhail may be bound into contract with McCannell Ltd and he will have to pay for the shares. Suhail's offer was accepted by McCannell Ltd as soon as it posted the letter of acceptance on 20 June and theoretically it makes absolutely no difference that Suhail failed to receive this letter. According to the postal rule, an acceptance is valid as soon as it is posted (see **Adams *v* Lindsell (1818), Jacobsen *v* Underwood (1894)** and **Household Fire Insurance Co *v* Grant (1879)**). However, that said, Scots law has never addressed such a situation as definitively as the English courts did in **Household Fire Insurance Co *v* Grant** (above), so a degree of doubt exists on this point of law in this country.

6 The problem with instantaneous communications is that an acceptance sent by fax or email may not actually reach the offeror or it may reach the offeror in a totally different form from that intended by the offeree. These types of communications can be garbled or parts of the message can be lost in transmission. The responsibility is on Asma's shoulders to ensure that the acceptance was received and actually understood by Creative Designs (see **Entores Ltd *v* Miles Far Eastern Corpn (1955)** and **Brinkibon *v* Stahag Stahl (1982)**). Merely because Asma faxed her acceptance does not mean that she sent a valid acceptance. In this situation, Asma has failed to form a contract with Creative Designs Ltd. The offeree should double-check that the message was received by the offeror and in the form intended.

7 What is a reasonable time for acceptance of an offer by the offeree depends on the situation at hand. Sometimes, the offeree will have weeks or even months to make up his mind whether or not to accept an offer. Often, the offeree will have to make up his mind rather more quickly, for example, in minutes, hours or even a matter of days. What is a reasonable time for acceptance of an offer will really be determined by the subject matter of the contract. If the subject matter of the proposed

contract is subject to regular price fluctuations (i.e. commodities such as oil, precious metals, coffee) or the subject matter is of a perishable nature (for example agricultural products), it is likely that the offeree will have to make up his mind very quickly whether or not to accept the offer. Delay will often mean that the offeree loses an opportunity to accept the offer. However, to avoid disputes arising, a sensible offeror will often impose a time limit for acceptance of the offer. For examples of the approach taken by the courts to the question of what is a reasonable time see **Wylie and Lochhead v McElroy and Sons (1873)** and **Glasgow Steam Shipping Company *v* Watson (1873)**.

8 McCracken undoubtedly made Anne-Louise an offer, but she has responded by making him a completely new offer. The effect of this new offer or counteroffer from Anne-Louise means that she has rejected McCracken's original offer and he is absolutely entitled to go elsewhere and look for work. McCracken cannot be forced to work for Anne-Louise even if she is now willing to pay the original price of £15,000. McCracken and Anne-Louise never achieved agreement or *consensus in idem*, so there is no contract between them. For examples of counteroffers see **Wolf & Wolf *v* Forfar Potato Co Ltd (1984)**, and **Hyde *v* Wrench (1840)**.

9 **a)** In Scotland, a person who makes a promise can have it enforced against him by the beneficiary of that promise (see **Morton's Trustee *v* Aged Christian Friend Society of Scotland (1899)**, **Petrie *v* Earl of Airlie (1834)**, **Littlejohn *v* Hawden (1882)** and **Paterson (A & G) *v* Highland Railway Co (1927)**). In other words, the phrase 'my word is my bond' is particularly appropriate to describe this type of obligation. The beneficiary can sue the promisor in order to have the promise enforced. However, it is not possible for the promisor to sue the beneficiary in an attempt to force him to accept the benefits of the promise. Examples of unilateral promises include offers of rewards, promises of gifts or donations and a promise to keep an offer open for a specified period of time. Generally speaking, unilateral promises should be in writing according to the rules laid down by the Requirements of Writing (Scotland) Act 1995 so that the beneficiary can enforce it against the promisor. However, unilateral promises made in the course of business do not need to be in written form in order to be enforceable. It is still possible to enforce an unwritten promise against the promisor if the beneficiary can prove that he has relied on the promise, the promisor knew of this and if the promise is not enforced the beneficiary will suffer real harm as a result. In England, unilateral promises are not enforceable unless the promisor draws up a formal deed. In any case, English law emphasises the importance of consideration whereby to receive a benefit a party must contribute something of value to the other party.

b) The dealings between Katy and Craig may have taken place in the course of business and, therefore, the promise to keep the offer open for ten days does not need to be in writing. However, if these were private dealings, the promise should have been in written form in order to be enforceable (Requirements of Writing (Scotland) Act 1995). An unwritten promise will not be fatal to Katy's claim if she can show that Craig knew that she was relying on the promise and that she would suffer real harm if he refused to stand by it. In either situation, Katy could sue Craig for any losses that she has suffered as a result of his breach of promise, i.e. if she had had to buy a similar car at a more expensive price she could sue Craig for the difference between what he offered to sell his car and the car that she actually ended up buying. It should be noted that there isn't and never was a contract between Katy and Craig and, therefore, she is not entitled to get the car from him.

10 There is no contract between Gavin and the store because the display in the window was an invitation to treat and not an example of the store making an offer (see **Fisher *v* Bell (1961)**). Gavin has made an offer to the store to purchase the television for £200 which has been rejected (see **Pharmaceutical Society of Great Britain *v* Boots Cash Chemists (1953)**). Gavin could make a complaint in terms of a misleading price indication being made by the store under Part 3 of the Consumer Protection Act 1987. A misleading price indication is a criminal offence, but Gavin will still not get the television set for £200 – he will have to pay the £2,000 that the shop is asking for.

11 Before the Gambling Act 2005 came into force across the United Kingdom on 1 September 2007, gambling agreements were not enforced by the Scottish and English courts. Nowadays, contracts which are associated with gambling can be legally enforced. In any case, agreements to share winnings between members of a gambling syndicate could be enforced by a court prior to the introduction of the Gambling Act 2005 (see **Robertson *v* Anderson (2002)**). So, despite the fairly recent changes to the law which affect gambling agreements thus now making them enforceable in a court of law, a Scottish judge, following the decision in **Robertson *v* Anderson**

(2002), would continue to take the view that Netta and Annie had intended to create a legal relationship and that they had freely entered a contract. Netta will, therefore, have to give Annie the remaining £59,000 that she originally agreed to pay out.

12 **a)** Many people believe that it is a legal requirement that all contracts must be in writing and witnessed. Under Scots law, many contracts do not require formalities, i.e. the need to have written terms and conditions. The majority of contracts will be verbal agreements or their existence can be proved by looking at the parties' behaviour or by implication (see **Carlill *v* Carbolic Smokeball Company (1893)** or **Thornton v Shoe Lane Parking (1971)**). The existence of contracts can be usually proved by any type of evidence (statements from parties' testimony and their witnesses). Some contracts, however do need to be in written form. In modern Scots law, contracts involving land and buildings (heritable property) are covered by the Requirements of Writing (Scotland) Act 1995. A contract for the sale of land has to be in writing and must contain all the terms expressly agreed by the parties and each of those terms must be set out in the written document. The Consumer Credit Act 1974 insists that all the main terms of a regulated credit agreement must be in writing, otherwise the creditor will only be able to enforce the agreement with a court order. Furthermore, the Bills of Exchange Act 1882 insists that all negotiable instruments, for example, a bank cheque or promissory note must be in written form.

b) Lisa and Suzanne have failed to provide a written agreement or document when the Requirements of Writing (Scotland) Act 1995 Act places a duty on them to do so. It might be thought that if the parties have a purely verbal contract involving heritable property, the courts would refuse to enforce it. However, this is not the case. Despite the fact that the 1995 Act states that all contracts involving heritable property should be in writing, there are situations where the courts will enforce unwritten contracts. A contract (and for that matter a unilateral promise) can be enforced where there have been 'significant actings'. Suzanne and Lisa should have put their contract in writing and it may be thought that this is the end of the matter. The contract involves land, should have been in writing but the parties failed to do this. Therefore, the contract is not enforceable. If one party attempted to withdraw from an informal contract involving heritable property on the grounds that there was nothing in writing, they might be in for something of a shock. It will not be possible to use the argument that as there is no written contract then the agreement can be cancelled if:

1. The other party has relied on the contract; and
2. Where the other party knew of their actions and agreed to them; and
3. Where the actions of the party wishing to honour the contract were material (not trivial) so that they would be prejudiced or severely disadvantaged if the other party pulled out.

It is highly likely that Lisa could enforce the contract against Suzanne despite the lack of a written contract.

c) The Contract (Scotland) Act 1997 clarified the law in relation to written contracts. It is now permissible for the parties to rely on additional external sources of information. These sources may consist of verbal statements or documentary evidence which can be used in court to flesh out additional express terms in relation to a written contract. Otherwise, the 1997 Act assumes that a written document will contain all the main terms of the agreement.

13 **a)** A person of full capacity is capable of taking on duties which the law recognises and will force them to comply with. Additionally, the law will recognise any rights that these individuals are entitled to and will enforce these rights on their behalf. Most natural legal persons, i.e. human beings have full capacity. Certain groups, have no capacity or limits are placed on their ability to enter contracts:

- Young people under the age of 18
- Adults with incapacity
- Intoxicated persons
- Enemy aliens
- Young people and children

b) Young persons aged 16 and 17, such as Hugh, are regarded as having full legal capacity in much the same way as an adult would. However, the Age of Legal Capacity (Scotland) Act 1991 does explicitly recognise that this group of young people will perhaps require some protection. It should be remembered that young people will have less experience of life and could be taken advantage of by unscrupulous older people like Simon. The courts will, therefore, cancel a contract that a young person has entered into if it can be shown that the agreement was harmful/prejudicial to the young person's interests. Potentially, Hugh's contract with Simon could made with a young person aged 16 or 17 could be declared voidable by the courts. Hugh would have to prove that no sensible/reasonable adult would have entered into the contract under the same circumstances; and the contract is likely to cause substantial prejudice/harm to the young

person. Only the young person can use the protection that the 1991 Act provides. Other people (usually older persons) cannot use it to get out of the contract. Hugh must use this defence before he reaches the age of 21. Interestingly, Hugh may also lack contractual capacity because he was under the influence of drugs (see **Taylor *v* Provan (1864)** and he may be able to prove that he was in such a state of intoxication that he did not know what he was doing when he agreed to enter the contract with Simon.

c) The Adults with Incapacity (Scotland) Act 2000 allows a guardianship (formerly known as a *curator bonis*) to be declared where someone can act for a person who lacks capacity. The guardian may act for the incapable person in one transaction only, in a series of transactions or in relation to all the incapable person's affairs. The 2000 Act recognises various means by which a guardianship can be established.

14 A void contract means that a contract has never existed – despite what the parties may have said or done and despite what they may have believed. In this situation, neither party can acquire rights or duties because there is no contract. Void contracts arise in a variety of situations such as error in the substantials, contracts with the insane, contracts with children under the age of 16, contracts with enemy aliens and contracts that are illegal. In **Loudon *v* Elder's *Curator Bonis* (1923)**, the contract was void on the grounds of one of the party's insanity.

A voidable contract means that a contract did exist in the first place, but that it suffers from a flaw of some type and this gives one or both of the parties an option to have the agreement cancelled. Such an option to cancel the agreement must be exercised rapidly by one of the parties because any property that has changed hands under the original contract can be further transferred to third parties who acquire ownership rights (see **Lewis *v* Averay (1972)**). If the parties fail to take steps to cancel the contract, despite its flawed nature, a valid agreement continues to exist. Examples of voidable contracts arise where one of the parties has made a misrepresentation; facility and circumvention; where the parties have failed to put a contract in writing when the law requires this; failure to disclose all material facts; less serious examples of error; intoxication and undue influence.

15 **a)** As a general rule, the doctrine of illegality penalises those parties who create particular contracts that are regarded as illegal (sometimes referred to as *pacta illicita*). The greatest sanction that the court has is to refuse to enforce the agreement if its creation breaches the common law or statute. Such an agreement is void from its creation. This means that, in the event of a dispute, the parties will not have any rights or duties under the agreement – the courts will simply not recognise its validity. The general rule regarding illegal contracts is often expressed as *ex turpi causa non oritur actio*, i.e. a party can have no right of action when the dispute involves an immoral or illegal situation. Examples of these types of agreement would be contracts that are either illegal at common law (see **Pearce *v* Brooks (1866)**) or those that have been declared illegal by statute (see **Bigos *v* Bousted (1951)**).

b) Henry cannot enforce his agreement with the contract killer because it is an agreement to commit a crime and is, therefore, illegal at common law. The agreement is completely void and Henry will not be able to get his money back from the contract killer. If he raises an action to recover the money, he risks exposing himself as an accessory to a crime. Examples of contracts being declared illegal and void in terms of common law include **Pearce *v* Brooks (1866)**, **Regazzoni *v* Sethia (1958)**, **Parkinson *v* College of Ambulance (1925)** and **Cantiere San Rocco SA *v* Clyde Shipbuilding and Engineering Co Ltd (1923)**.

16 Substantial error completely undermines any potential agreement. In such situations, the mistaken beliefs of the parties do not centre around trivial matters which can easily be resolved. Error in the substantials concerns one or more of the important aspects of the agreement (the identity of the contracting parties, the subject matter of the contract, the price or the nature of the contract). In situations where an agreement is affected by substantial error there can be no true *consensus in idem* or agreement. In fact, the actual contract is radically different from the one that the parties originally intended to create.

17 **a)** The price that one party expects to pay and the price that the other party expects to receive will, obviously, be a very important term of the contract. Any confusion surrounding the price will render the contract void. Admittedly, it is possible for the parties not to fix a price and still have a valid contract as long as some mutually agreed system or mechanism exists for determining the price. Here Ruaridh is in total disagreement with Gary about the price (see **Wilson *v* Marquis of Breadalbane (1859)**). The problem centres around the fact that the goods have now been used to make something else and they no longer exist. The court would, therefore, have to determine what was a reasonable price and Gary will have to pay this to Ruaridh.

b) This situation concerns error in relation to the identity of one of the contracting parties (see **Morrisson *v* Robertson (1908)**). The issue of mistaken identity must be fundamental to the formation of a contract. In order to convince a court that mistaken identity should render the agreement void, a person would have to demonstrate that he intended to enter into a contract with a particular person and no other. In this situation, Ruaridh clearly intended to enter into a contract with Campbell. He would, therefore, be entitled to reclaim the sheep from McDonald who would have to pursue O'Donnell in order to get his money back.

c) A mistaken belief as to how the contract will operate may completely undermine matters. Here, we have two different types of mortgages which operate in a fundamentally different way. There is no proper agreement and, therefore, no contract (see **Foster *v* Mackinnon (1869)**).

d) Such a situation is likely to arise where the parties are completely confused and mistaken as to the subject matter of the agreement. One party (the potential buyer) believes that a particular item is being offered for sale whereas the other party (the potential seller) believes that she has made an offer to sell a completely different item. Both parties are completely at cross-purposes. There can be no real agreement between them and, therefore, no contract (see **Raffles *v* Wichelhaus (1864)**).

18 **a)** A misrepresentation occurs when one party, during negotiations leading to the formation of a contract, makes a materially false statement of fact which has the effect of encouraging or inducing the other party to enter the agreement. It is usually after the contract has been formed that the party who relied on the statement will discover that it factually false. The innocent party must be able to prove that, if he had been aware that the statement was in fact false, he would never have entered the contract in the first place. In the course of making a misrepresentation, a party does not have to be aware that the statement was false. A misrepresentation is not necessarily a deceitful or dishonest statement. Since the decision of the House of Lords in **Hedley Byrne & Co Ltd *v* Heller & Partners Ltd (1963)**, three categories of misrepresentation are recognised by the Scottish Courts:

1 Innocent
2 Fraudulent
3 Negligent

With an innocent misrepresentation, the party who made the statement genuinely believes what he is saying to be the truth. There is no intention to deceive, but the statement is still factually incorrect and it may have encouraged another individual to enter the contract Fraudulent misrepresentation, on the other hand, is a deliberate attempt by the party making the statement to deceive another person and, therefore, influence the innocent party to enter the contract. The party who made the fraudulent statement is fully aware of the falseness of his statement. In other words, he is being consciously dishonest when he makes the misrepresentation to the other party. For comparisons between innocent and fraudulent misrepresentation see (see **Derry *v* Peek (1889)** and **Boyd & Forrest *v* Glasgow & South-Western Railway Company (1915)**) A negligent misrepresentation is very different from innocent and fraudulent misrepresentation. Someone who makes a negligent statement does not intend to deceive the other party but, at the same time, he cannot prove that he had reasonable grounds for believing the truth of his statement. In other words, he has made the statement recklessly without verifying its accuracy (see **Hedley Byrne & Co Ltd *v* Heller & Partners Ltd (1963)**).

b) The misrepresentation is clearly fraudulent in nature because it involves a deliberate attempt to deceive. Alasdair was clearly influenced by the false statement. The contract is potentially voidable and Alasdair has a variety of options:

1 Rescission or cancellation of the contract
2 Rescission or cancellation of the contract and an award of damages
3 Retention of the contract and an award of damages

19 **a)** In a small number of situations, the law demands that, during pre-contractual negotiations, a party must act with the utmost good faith (*uberrimae fidei*). The example of insurance contracts are often used to demonstrate how this duty to act with the utmost good faith works in practice. The proposer (the person intending to take out the policy) is under a positive duty to bring all material facts to the insurer at the time of making the contract of insurance. If the proposer is in any doubt about the importance of a fact, for safety's sake and to protect his own position, he should bring it to the attention of the insurer. Failure to do so by the proposer may allow the insurer to treat the contract as voidable and refuse to pay out under the policy as the House of Lords made it quite clear in **Pan Atlantic Insurance *v* Pine Top Insurance (1994)** (see also **The Spathari (1925)**).

b) Fiduciary relationships – a fiduciary relationship is a relationship of confidence that imposes a

special duty of care on one or both of the parties. Examples of such relationships include those of solicitor/client, principal/agent, doctor/patient, parent/child and the partners in a firm. If a party owes a fiduciary duty to someone else this means that he must disclose all material facts to the other person (see **McPherson's Trustees *v* Watt (1877)**).

20 **a)** A restraint of trade clause or a restrictive covenant prevents or limits an employee from seeking employment with a new employer who happens to be a business rival of the employee's previous employer. The use of such agreements is an extensive practice to be found in a wide range of modern business contracts. They are most common in employment contracts, where the employer seeks to restrain the right of the employee to compete or work for a competitor once s/he has left the employer's business. They are commonly applied to managerial, marketing, scientific and professional staff. Such covenants are increasingly being used in franchising, distribution and supply agreements. Restraints of trade are anti-competitive rather than being strictly illegal and the effect of such contractual terms is that they are presumed to be void unless the party wishing to enforce such terms can show that they are, in fact, reasonable. The courts will examine a number of factors in order to determine whether such restraints or restrictions are reasonable:

1 The contract must be reasonable between the parties
2 It must be reasonable in terms of time and geography
3 It must be reasonable in the public interest
4 It must be reasonable in terms of trade practice and custom

If the court finds that the restraint is unreasonable, it will be declared void but, crucially, the court will not replace it with a more reasonable provision. This means that the person who wished to rely on the restraint will not have any protection.

b) Iain will probably not be entitled to take up the offer of new employment with one of his current employer's business rivals. Iain will undoubtedly have had access to all sorts of trade secrets and may have dealt with customers extensively. The restraint is not unreasonable and can probably be justified on the grounds that the employer has legitimate business interests that he needs to protect (see **Scottish Dairy Farmers Company (Glasgow) Ltd *v* McGhee (1933)**, **Home Counties Dairies *v* Skilton (1970)**, **Bluebell Apparel *v* Dickinson (1978)** and **C-MIST *v* Crute (2003)**).

c) An employer can always use an alternative approach to the problem of protecting trade secrets and business connections. Some employers, rather than including a restrictive covenant in the employment contract – which can always be challenged on the grounds that it is unreasonable, will insist that an employee has to give an extended period of notice if he wishes to terminate his employment. Eighteen month notice periods are not unknown in some trades and professions where the employee is in a very senior position within the organisation. This gives the employer time to prepare for the employee's departure by taking precautions to protect trade secrets or business connections. Furthermore, the current employer may actually state that it is not necessary for the employee to turn up for work – he may as well tend his garden (hence the phrase 'garden leave'). The beauty of these contractual notice periods is that the employee cannot work for any other employer who is competing against his current employer. Employees who are affected by these 'garden leave' clauses can challenge them by putting forward the argument that it is important that they are allowed to continue to work in their chosen profession in order to keep vital skills updated and current. In **William Hill Organisation Ltd *v* Tucker (1998)** the English Court of Appeal criticised the growing use by employers of garden leave clauses in employment contracts. The Court was particularly concerned that this was little more than an attempt to get round the strict rules governing the use of restrictive covenants in employment contracts. It was felt that garden leave clauses should be scrutinised carefully and, furthermore, the rules surrounding these types of clauses should be considerably tightened to prevent abuse by employers.

21 Susan has been the victim of undue influence. Undue influence renders the contract voidable so that it may be rescinded or cancelled. However, if rescission is being sought by Susan, there must be no delay in claiming relief after the influence has ceased to have an effect. Delay in claiming relief in these circumstances may bar the claim since delay is evidence of affirmation or agreement (see **Allcard *v* Skinner (1887)** and **Anderson *v* The Beacon Fellowship (1992)**).

22 The notice is certainly prominent enough and is an attempt by the store to exclude its liability. Before the Unfair Contract Terms Act 1977, it was possible for a person to exclude his liability for negligent performance and non-performance of the contract as long as he gave the other party adequate notice of the existence of an exclusion

clause. The law before 1977 meant that it was possible for someone to exclude his liability for death and personal injury caused by his negligence or by failing to perform the contract. Under section 16 of the Unfair Contract Terms Act 1977, any clause where a party attempts to escape or limit his responsibility for having caused death or personal injury to another as a result of his actions will be automatically void. The clause cannot be relied upon and will not be enforced by the courts. Section 31 of the Consumer Rights Act 2015 states that any attempt to exclude or limit the statutory terms of the Consumer Rights Act 2015 in a consumer sale will be automatically void. Such an attempt by traders will be automatically void in terms of Section 31 of the Act. Section 31 actually goes further and also makes void attempts by traders to exclude or limit their liability to consumers in terms of delivery of the goods (under Section 28 of the Act) and the passing of risk (under Section 29 of the Act). In a non-consumer sale, Section 20 of the Unfair Contract Terms Act makes it clear that any attempt by a seller to limit his liability in terms of Section 12 of the Sale of Goods Act, will be automatically void. In a non-consumer sale, a seller may be able to exclude or limit his liability in relation to Sections 13 to 15 of the Sale of Goods Act, but Section 20 of the Unfair Contract Terms Act states that this will only be permitted if this is fair and reasonable.

23 Exclusion and limitation clauses are governed by the common law, the Unfair Contract Terms Act 1977, the European Directive on Unfair Terms (Council Directive 93/13/EEC), the Enterprise Act 2002 and the Consumer Rights Act 2015. The law here is very complex. Basically, the common law allows a person to exclude his liability for negligent performance and non-performance of the contract as long as he gives the other party adequate notice of the existence of an exclusion clause. The law before 1977 meant that it was possible for someone to exclude his liability for death and personal injury caused by his negligence or by failing to perform the contract. The Unfair Contract Terms Act 1977 prevents some of the worst abuses that exclusion and limitation clauses encouraged such as excluding or limiting liability for death and personal injuries. The Act makes a clear distinction between consumer and non-consumer contracts (i.e. business agreements) which means that consumers are better protected than business parties. Many (but not all) unfair terms in consumer contracts will automatically be declared void by the 1977 Act. Otherwise, the test of fairness will be applied. The Consumer Rights Act 2015 only applies to consumer contracts and many clauses that are deemed to be unfair will be declared void.

24 In the Scots law of contract, there are four possible remedies available to a party who has suffered a breach of contract. These are:

- Damages
- Specific implement
- Retention and lien
- Rescission

25 **a)** This is a very limited remedy in the sense that it will only be granted to the pursuer if the court thinks that it is appropriate. Basically, the pursuer is asking the court to make an order (a decree) which will force the defender to carry out his contractual obligations. In a small claims action in the Sheriff Court, for example, a pursuer could ask the court to force a builder who has only half-completed a patio to finish the job. A recent example of the remedy of specific implement being granted to a pursuer by the Scottish courts can be seen in **John Anderson *v* Pringle of Scotland (1998)**. The remedy of specific implement will not be appropriate in the following circumstances:

- Where the court is of the opinion that an award of damages is a more than adequate remedy.
- Where the defender owes the pursuer money, the court will not grant specific implement because the appropriate action on the pursuer's part is to sue for damages. On a technical point, a decree of specific implement is a court order and failure to comply with it would mean that the defender was in contempt of court. This means that the defender would face imprisonment, but being sent to prison for a civil debt is no longer available to the courts in Scotland.
- Where the pursuer can obtain goods or services from a variety of alternative sources and there is no great inconvenience caused. If the pursuer had to pay a greater price than the contract price for these goods and services, he could sue the defender in damages for the difference. It is only where the goods or services have some unique value that the courts will grant an order for specific implement.
- Where the grant of an order would cause injustice or harm to someone.
- Where the contract in question involves a high degree of personal contact, for example an employer cannot be compelled by an Employment Tribunal to reinstate or re-engage an employee that has been dismissed. Even if the employee wins his unfair dismissal claim and the Employment Tribunal grants a Reinstatement

Order, the employer cannot be forced to take him back.
- Where the defender is outwith the jurisdiction of the Scottish courts.
- Where the granting of an order would, in effect, be ordering the defender to do something which was impossible to carry out.

b) Chapelhill Housing Association should pursue an action for payment of money in the Sheriff Court under small claims procedure because a decree of specific implement cannot be granted in Scotland in relation to actions for the recovery of debt.

26 **a)** The injured party has a duty to mitigate or to minimise his loss, i.e. he must take all reasonable steps to cut his losses. Thus, a seller whose goods are rejected must attempt to get the best price for them elsewhere and the buyer of the goods which are not delivered must attempt to buy as cheaply as possible elsewhere. Should the parties in both these situations fail to cut their losses, they cannot rely upon the courts to award them full damages in respect of their losses. However, a pursuer only has to show the courts that he has taken reasonable steps to cut his losses. Superhuman efforts on the part of the pursuer are unnecessary (see **Gunter & Co *v* Lauritzen (1894)**).

b) Remoteness of damage means that damages in a contract will not be recovered by the pursuer unless they are proved to be a direct and natural consequence of the defender's breach, i.e. the losses caused to the pursuer occurred because of the defender's actions. If the losses have not occurred directly owing to the defender's fault, then it is likely that the defender, as a reasonable man, did not realise that such an outcome was likely to occur. Damage which does not arise naturally and which is not in the contemplation of a reasonable man can only be recovered if the defender was made aware of it and agreed to accept the risk of the loss (see **Hadley *v* Baxendale (1854)**).

27 **a)** The parties to an agreement may actually be far-sighted enough to insert a remedy into their contract which addresses the issue of the amount of damages payable should one of them break the contract. These damages are known as liquidated damages and sometimes such a clause is known as a penalty clause. The phrase penalty clause can be misleading because the courts will not enforce the provision if it would permit one party to punish the other – even if one of the parties is in breach. For many years, penalty clauses had to be a genuine pre-estimate of the actual losses of the pursuer. If it was merely an attempt to impose punitive damages on the party in breach, judges would refuse to enforce the clause and they would then resort to awarding damages in the usual way, i.e. by applying the tests of remoteness of damage and mitigation of loss. Recently, the UK Supreme Court has re-evaluated the traditional approach to the enforcement of the penalty or liquidated damages clauses. In two conjoined appeals: **Cavendish Square Holding BV *v* Talal El Makdessi** and **ParkingEye Ltd *v* Beavis [2015]**, the Supreme Court has decided that the long established test for penalty clauses that they must be a genuine pre-estimate loss is no longer relevant for more complex situations involving contractual breaches. The new test to be applied is whether the liquidate damages clause is proportionate to the legitimate interests of the victim of the breach of contract. The Court also stated that the test applies to 'secondary obligations' only, i.e. duties that arise from the breach of a primary obligation, for example, the duty to pay a specified sum of compensation upon the event of a contractual breach occurring. This is a significant change of direction from the Supreme Court because the genuine pre-estimate of loss test goes back to the case of **Dunlop Pneumatic Tyre Co Ltd *v* New Garage & Motor Co Ltd [1914]**.

Hugely extravagant sums in penalty clauses will usually invite judicial suspicion and may be not be enforceable. Very often, damages can be accurately assessed and the party hoping to take advantage of the extravagant penalty clause will be left exposed. If the sum provided for in the contract is payable on the occurrence of any one of several events, it is probably a penalty for it is highly unlikely that each event can produce the same level of losses. Penalty clauses will not be enforced by the courts in the pursuer's favour if the breach of contract was the pursuer's fault.

b) The penalty clause is completely excessive and would fail to meet the older test that it is not a genuine pre-estimate of loss (see **Cameron-Head *v* Cameron & Co (1919)** and **Clydebank Engineering & Shipbuilding Co *v* Yzquierdo y Castaneda (1904)**). As we have discussed previously, in **Cavendish Square Holding BV *v* Talal El Makdessi** and **ParkingEye Ltd *v* Beavis [2015]**, the Supreme Court has decided that the long established test for penalty clauses that they must be a genuine pre-estimate loss is no longer relevant for more complex situations involving contractual breaches. The new test to be applied is whether the liquidate damages clause is proportionate to the legitimate interests of the victim of the breach of contract. The courts will award Davinder

damages in the usual way, i.e. by applying the tests of remoteness of damage and mitigation of loss. This means that Tommy will have to pay Davinder £2,000 to £3,000 in damages for breach of contract.

28 General damages are awarded to the pursuer when the loss he has suffered is a reasonably foreseeable and direct result of the defender's breach of contract. The amount of damages will ensure that the pursuer is placed in the position that he would have been had it not been for the defender's actions. General damages, therefore, compensate the pursuer for loss caused in the ordinary way of things. Special damages, on the other hand, are awarded to the pursuer when the defender's breach of contract causes abnormal loss or loss which was not reasonably foreseeable. In these situations, the pursuer will have to take steps to inform the defender that there are special circumstances that would cause him to suffer losses far in excess of what might ordinarily be the case. If the pursuer fails to inform the defender about these special circumstances, there can be no award of special damages (see **Hadley *v* Baxendale (1854)** and **Victoria Laundry *v* Newman Industries (1949)**).

29 A material breach of contract is such a serious breach that it goes to the very roots of the agreement and completely undermines the contract. This remedy will be sought by the pursuer when the defender has committed a material breach of contract. The practical effect of rescission is that the pursuer wishes the court to cancel the contract. Minor breaches of contract will rarely allow the pursuer to cancel the contract and very often the court will grant damages to the pursuer as an alternative. The parties to a contract could state, however, that certain breaches of the agreement will be regarded as material and this will allow the innocent party to apply to the courts for rescission (see **Shaw, Macfarlane & Co *v* Waddell & Sons (1890)** and Sections 21 and 24 of the Consumer Rights Act 2015 for examples of rescission).

30 There various ways in which a contract is discharged or terminated:

1 Performance and payment
2 Acceptilation and discharge
3 Delegation
4 Novation
5 Compensation
6 Confusion
7 Material breach of contract
8 Lapse of time – prescription, impossibility
9 Frustration
10 Illegality

Furthermore, in contracts for personal services, such a contract is discharged by the death of the person who was to perform it. The incapacity of a person who is to perform a contract may discharge it. The purpose of the contract becomes impossible to perform or the purpose of the contract becomes illegal. A contract could also be discharged by breach.

Chapter 3 (pp.225–8)

1 **a)** Orla's conduct falls firmly within the Scots law of delict and she has breached her duty of care to users of the swimming pool and in relation to her employer, the council by turning up for work under the influence of alcohol. Orla is being seriously negligent in relation to the discharge of her duties as a lifeguard. A delict can be defined as a situation where the defender voluntarily commits an act or fails to act when the law imposes a duty of care and this failure to implement the legally required standard care causes the pursuer to suffer a personal injury or loss or damage to his property. If, for example, a motorist hits a pedestrian while driving his car the question that would have to be asked is whether the motorist was paying due care and attention when the accident happened. If the road accident occurred as a direct result of the motorist's failure to drive carefully then the victim would have a potential claim in terms of the law of delict against the motorist. The motorist owed a duty of care to pedestrians and other road users but he has failed to meet the necessary standard when he caused the accident. Put simply, the accident can be blamed on the motorist's actions or his failure to act properly – it is the motorist's fault that the victim has been injured. It is worth stressing that the motorist cannot get into his car and decide that he is not going to drive safely today. He has no choice in the matter because the law expects him to show all necessary care when he gets behind the wheel. The motorist may, of course, also have to face criminal charges of dangerous driving, but this aspect of the incident need not concern us. Cases which illustrate the concept of a duty of care include **Donoghue *v* Stevenson (1932)** and **Bourhill *v* Young (1942)**. It is important to remember that a duty of care is not owed to everyone – only those individuals who are likely to be harmed by the defender's actions or failure to act are owed a duty of care.

b) Orla's employer, the council, could also be vicariously liable for her actions if any of the users of the swimming pool were injured while she was on duty. Vicarious liability can arise where there is a contract of service meaning that the employer may

be vicariously liable for the delicts or negligence of an employee. This means that the employee can be liable for harm that he did not directly cause. An employer can only be liable for the negligent acts of an employee not an independent contractor (see **Mersey Docks and Harbour Board *v* Coggins & Griffith (Liverpool) Ltd (1947), Trotman *v* North Yorkshire County Council (1998), Lister *v* Hesley Hall (2001), Viasystems (Tyneside) Ltd *v* Thermal Transfer (Northern) Ltd and others (2005), Majrowski *v* Guy's and St. Thomas' Hospital NHS Trust (2006), Green *v* DB Group Services (UK) Ltd (2006), JGE *v* The Portsmouth Roman Catholic Diocesan Trust [2012]** and **Mr A M Mohamud (in substitution for Mr A Mohamud (deceased)) *v* WM Morrison Supermarkets plc [2016])**. The issue of vicarious liability is discussed fully in Chapter 6 of the book.

c) Negligence is harm caused unintentionally and is, by far and away, the most likely type of delictual action that the Scottish courts will have to deal with. Negligence claims arise because the defender owes what is known as a duty of care to the pursuer and, unfortunately, a breach of this duty occurs and, as a result, the defender suffers loss, injury or damage. The leading case for negligence claims is Donoghue *v* Stevenson (1932). Liability in negligence claims is generally based on proving the defender's fault and if the pursuer cannot establish that the defender was at fault the claim will fail (see **Bolton *v* Stone (1951)** and **Paris *v* Stepney Borough Council (1951)**).

d) The two most common defences that are used by the defender in an action of delict are:

1. Contributory negligence (see **Hanlon *v* Cuthbertson (1981); Helen Trueman *v* Aberdeenshire Council 20 November 2007**; and **McLellan *v* Dundee City Council (2009)**).
2. Volenti non fit injuria (to one who is willing a wrongful act cannot be done) (see **ICI *v* Shatwell (1965); Morris *v* Murray [1991]**; and **Jackson *v* Murray [2015]**).

2 a) Aggie will have to prove that Paul and Harry actually dug the trench in the first place. Assuming that a trench existed, she will then have to prove that Harry and Paul acted in a negligent way by not putting up appropriate warning signs and placing fencing around the trench in order to prevent people falling into it. In other words, Aggie will have to prove that Paul and Harry failed to implement a duty of care that they owed to her and their failure to implement the necessary level of care has caused her to suffer injury (see **Donoghue *v* Stevenson (1932)**, **Bourhill *v* Young (1942)** and **Haley *v* London Electricity Board (1965)**). Clearly, if Paul and Harry did dig the trench, they do not owe a duty of care to all the world, but only to those people who are likely to be harmed by their actions or failure to act.

b) (i) Aggie must prove that Paul and Harry were responsible for digging the alleged trench. If she cannot prove this, her claim must necessarily fail. Aggie is alleging that Paul and Harry have been negligent and in these types of claims, it is for the pursuer (Aggie) to prove that the defenders (Paul and Harry) have not taken the appropriate level of care that the law expects. Liability in negligence claims is generally based on proving the defender's fault and if the pursuer cannot establish that the defender was at fault the claim will fail. However, Paul and Harry may be able to defeat a negligence claim by demonstrating that they both took reasonable care to avoid injury or harm being caused to another person (see **Bolton *v* Stone (1951)** and **Paris *v* Stepney Borough Council (1951)**).

(ii) Assuming that Phil is a credible and honest witness, Aggie's case will be much weaker if the existence of the trench is in doubt.

(iii) Aggie is really in trouble now because her witness has been forced to admit that she only saw Harry carrying out a survey in the garden and that he was not digging a trench. Aggie's argument that the trench existed has been considerably undermined.

(iv) Aggie is quite simply not a credible witness. She cannot change her story now by stating that it was a hole that she fell into rather than a trench. Her testimony completely lacks consistency. She has been unable to establish that a trench was dug by Harry and Paul and, if she can't prove this, her whole case collapses. It is highly unlikely that Aggie will win her case.

3 a) If the pursuer can show that he is owed a duty of care, the defender can escape liability in many situations by demonstrating that he took the appropriate standard of care which the law expects of him in order to reduce the risk of loss or injury being suffered by the pursuer. The standard of care which is expected of the defender is one of reasonable care. Reasonable care is the standard of care expected of the 'hypothetical' reasonable man or woman who is a person of ordinary care and prudence and who is neither over-cautious nor over-confident. This is an objective test and is not

based on the defender's personal characteristics. Very often, a reasonable person will foresee or predict that are particular individuals who are especially vulnerable in some way and this means that they may suffer a greater degree of harm if the defender fails to take reasonable care. For examples of the standard of reasonable care see the following cases: **Bolton *v* Stone (1951)**, **Paris *v* Stepney Borough Council (1951)**, **Bolam *v* Friern Barnet Hospital Management Committee (1957)**, **Bolitho *v* City & Hackney Health Authority (1997)** and **Mullin *v* Richards (1998)**).

b) Following the decision in **Bolton *v* Stone (1951)**, it is unlikely that Lorne will be able to sue the golf club successfully. The club looks as if it has taken reasonable care to minimise the risk of accident to people using the course. Over a million rounds of golf have been played and only one accident has taken place at the spot in question. The accident was by no means serious. The golf club also took the precaution of bringing in a expert to provide advice on a range of safety measures that it might implement. The club has taken its duty of care seriously and it has taken reasonable care to minimise the likelihood of injuries occurring.

4 The situation closely mirrors the case of **Home Office *v* Dorset Yacht Co Ltd (1970)**. The question which must be addressed is whether the chain of events which was set in motion and the end result (the damage to the farmer's property) was entirely foreseeable or predictable. The boys in question were young offenders who were not properly supervised. Admittedly, these boys were not considered to be a danger to the public, but it is highly likely that, if they were left unsupervised, they would misbehave. Should we really be surprised that they decided to take a vehicle and go joyriding? Probably not. Is it likely that they lack the necessary driving skills? This also is probably the case. Should we really be surprised that the failure of the boys to control the vehicle properly has caused damage to someone's property? The staff who accompanied the boys on the holiday failed to implement their duty of care and, as a result of this, harm has been caused. (See also **Hughes *v* Lord Advocate (1963)**.)

5 **a)** It is important to stress that, generally speaking, the courts tend to award damages to a pursuer who has suffered some sort of harm in the shape of personal injuries (whether physical or psychiatric) or for damage to property which has been caused by the defender where the defender has been negligent. We have to be very clear when we talk about damage in terms of delictual liability. Where the pursuer has suffered financial or pure economic loss as a result of the defender's negligent actions, the courts are much more reluctant to grant compensation. For the correct judicial approach, see **Spartan Steel & Alloys Ltd *v* Martin & Co (Contractors) (1972)**. Defects in property will not be regarded as providing a pursuer with an opportunity to sue the defender for damages. The defects in the property must actually cause damage to other property or cause injuries to other people. However, the courts have not always been consistent on this point. In a number of situations, the pursuer has been able to show that he has a special relationship with the defender who made the negligent statement and that he relied upon the information supplied by the defender (see **Hedley Byrne & Co Ltd *v* Heller & Partners Ltd (1963)**). As a result of satisfying these conditions, the courts have awarded damages to the pursuer for pure economic loss caused by the defender's negligent statement.

b) Clearly, McBurney has suffered economic loss as a result of the subcontractor's negligence. The courts are, traditionally, reluctant to award damages to a pursuer who has suffered economic loss (see **Spartan Steel & Alloys Ltd *v* Martin & Co (Contractors) (1972)**). However, McBurney may be able to rely on the case of **Junior Books *v* Veitchi Co (1982)**. **Junior Books** appeared to suggest that a defender could be liable for causing pure economic loss if the pursuer relied on negligent advice supplied by the defender. It has been argued that courts will still continue to refuse to grant compensation where a negligent act committed by the defender causes pure economic loss to the pursuer. If this reasoning is correct, it would make **Junior Books** much more closely related to the line of cases which started with **Hedley Byrne & Co Ltd *v* Heller & Partners Ltd (1963)**.

6 **a)** Where there is an alleged breach of a duty of care, the actual breach must be the *causa causans* (the direct cause) of the harm to the pursuer. This means that the pursuer must be able to show, on the balance of probabilities, that the defender's negligence caused him to suffer loss or injury. The defender will be able to escape liability if he can show that his negligence should be regarded as the *causa sine qua non*. This means that the defender may have behaved negligently, but his actions should not be regarded as the direct cause of the loss or injury suffered by the pursuer. The *causa sine qua non* should be seen as part of the

background and not a primary cause of harm to the pursuer. As the following cases demonstrate, it is not always obvious whether the defender's actions caused the pursuer to suffer loss or injury (see **Barnett *v* Chelsea & Kensington Hospital (1969)**, **McGhee *v* National Coal Board (1972)**, **Kay's Tutor *v* Ayrshire & Arran Health Board (1987)**, **Wilsher *v* Essex Area Health Authority (1988)** and **Mount *v* Barker Austin (1998)**).

b) On certain occasions, the courts will have to consider situations where the defender has breached his duty of care, but after this event some new factor is introduced into the picture which can also cause harm to the pursuer. This new cause of loss or injury will not have been the defender's fault. The introduction of this new factor can have effect of breaking the chain of causation. This means that the defender will only be liable for the harm that he has caused and he will not be liable for any harm caused to the pursuer by the introduction of the new factor to the equation (see **Rouse *v* Squires (1973)**, **Reeves *v* Commissioner of Police for the Metropolis (1999)**, **MacFarlane *v* Tayside Health Board (1999)** and **Sabri-Tabrizi *v* Lothian Health Board (1999)**).

7 **a)** Section 1 of the Animals (Scotland) Act 1987 states that 'if an animal belongs to a species whose members generally are, by virtue of their physical attributes or habits, likely (unless controlled or restrained) to injure severely or kill persons or animals, or damage property to a material extent, the keeper of the animal is (strictly) liable for any injury or damage caused by the animal and directly referable to these physical attributes or habits.' The keeper of the animal is deemed to be the person who:

- Is the owner or;
- Has possession of the animal at the time or;
- Has actual care or control of a child under 16 who is the owner or has possession of the animal.

b) According to Section 1 of the Animals (Scotland) Act 1987 as outlined in **7a)** above, the keeper of the animal would be strictly liable to Jan for the damage caused to the car when the dog hit it. It will be no defence for the owner/keeper to say that a 15-year-old boy had responsibility for the dog. For examples of strict liability involving animals see **Burton *v* Moorhead (1881), Behrens *v* Bertram Mills Circus (1957)** and **Welsh *v* Brady [2009]**.

8 For a delictual liability to exist, there must be harm, loss or injury which is caused by fault on the part of the wrongdoer. The pursuer must establish that the wrongdoer was to blame for what happened. The fault is called *culpa* and, generally, there can be no liability without *culpa*. The general rule in Scotland is that there can be no delictual liability without fault. Quite simply, this means that the pursuer must prove, on the balance of probabilities that the defender's actions caused him to suffer loss, injury or damage. If the pursuer cannot prove to the court that the defender was responsible for his loss or injury, then the pursuer's case will collapse. Very often, all the defender has to show is that he has taken reasonable care to prevent the harm from occurring (see **Bolton *v* Stone (1951)** and **Paris *v* Stepney Borough Council (1951)** both discussed above) and if the court is satisfied that all reasonable precautions were taken, the defender will escape liability. Admittedly, there are situations where the pursuer does not have to show that the defender was to blame for the injuries or the losses caused. In certain situations, the defender's liability is said to be strict. In other words, the law automatically presumes that the defender is to blame for the harm caused to the pursuer. This means that the defender will have to bring evidence to show, on the balance of probablities, that he was not responsible for the injuries or losses caused to the pursuer. A defender will be strictly liable for injuries or losses caused to the pursuer for dangerous products (Part 1 of the Consumer Protection Act 1987), and animals that he is responsible for cause loss or injury to the pursuer (Animals (Scotland) Act 1987). Situations of strict liability favour the pursuer as the burden of proof is the defender to show that he is not liable for the harm that occurred.

9 **a)** An owner or occupier of property may well become liable if the derelict state of the property causes injury, loss or damage to another person or his property. The main piece of legislation in this area is the Occupiers' Liability (Scotland) Act 1960 which establishes the rule that the occupier of property must take reasonable care to minimise the risks that any visitors to the property (whether invited or not) might encounter. The term occupier is given a broad definition under the Act of 1960 and means any person or corporate body in actual possession, physical control or occupation of the premises (see **Telfer *v* Glasgow District Council (1974), Murray *v* Edinburgh District Council (1981) and Struthers-Wright *v* Nevis Range Development Co Ltd (2006)**). The occupier of premises is not necessarily the owner of the premises. Premises could be any fixed or moveable structure and could include aircraft or ships.

b) Lynch Demolition Services is the occupier of the site as defined by the Occupiers' Liability (Scotland) Act 1960 because it controls access to the site. It is highly unlikely that Lynch could argue successfully that it took reasonable care to prevent the injuries or harm from occurring. Lynch should have realised that its precautions were totally inadequate to ensure the protection of young children and other vulnerable members of the public (see **Glasgow Corporation *v* Taylor (1922)**, **McGlone *v* British Railways Board (1966)** and **Titchener *v* British Railways Board (1984)**).

10 **a)** The most common defences that are used by the defender in an action of delict are:

- Contributory negligence (see **Hanlon *v* Cuthbertson (1981)**)
- *Volenti non fit injuria* (to one who is willing a wrongful act cannot be done) (see **ICI *v* Shatwell (1965)**)
- Prescription and limitation (see the Prescription and Limitation (Scotland) Act 1973)
- Compliance with statutory authority (see **Lord Advocate *v* North British Railways (1894)**)
- Necessity
- *Damnum fatale* (see **Caledonian Railway Co *v* Greenock Corporation (1917)**)
- Criminality (see **Ashton *v* Turner (1981)** and **Pitts *v* Hunt (1990)**)

b) No, Michael would not be advised to raise an action against the Zoo because it would probably fail. The Zoo would be able to rely on the defence of *volenti non fit injuria* (**see ICI *v* Shatwell (1965)**, **McGlone *v* British Railways Board (1966)** and **Titchener *v* British Railways Board (1984)**). Michael knew that it was dangerous to enter the lions' enclosure, but he voluntarily assumed this risk in order to retrieve his phone. He has no one to blame but himself for his injuries.

11 **a)** *Res ipsa loquitur* means that the facts speak for themselves. There are situations where the only possible explanation for the harm suffered by the pursuer is that the defender's actions or failure to act caused it. There is no other credible explanation – the defender's negligent actions or omissions must have caused harm to the pursuer. The defender is then forced to bring evidence before the court to show why he is not liable to the pursuer. If the defender can show that there is a plausible explanation that demonstrates that he is not to blame, then the pursuer's claim will fail. However, the defender's explanation must be a plausible one and not one which is only theoretically possible. It should be remembered that the principle of the facts speaking for themselves does not remove the burden of proof from the pursuer to show that the defender was at fault. The pursuer must show that the facts are credible and that they do speak for themselves. The pursuer can only make use of this legal rule in the following circumstances:

1. The events which led to the pursuer suffering harm must have been controlled by the defender or his employees.
2. Loss or injury does not usually happen when reasonable care is taken by a responsible person.
3. The defender must not be able to provide an alternative and credible explanation for the harm suffered by the pursuer which effectively gets him off the hook.

Examples of the use of the maxim *res ipsa loquitur* from case law include: **Scott *v* London and St Katherine's Docks (1865)**, **Gee *v* Metropolitan Railway (1873)**, **Cassidy *v* Minister of Health (1951)** and **Radcliffe *v* Plymouth and Torbay Health Authority (1998)**.

b) Brian has a good claim against the supermarket and he would probably be successful in his claim for damages. Undoubtedly, Brian would be able to use the maxim *res ipsa loquitur* to win his case as outlined above in **10a)**.

12 **a)** In **Alcock and Others *v* Chief Constable of the Yorkshire Police (1992)** the House of Lords felt that although the secondary victims had suffered as a result of the incident at Hillsborough, stricter rules had to apply to their claims than was the case with the primary victims. The starting point of any secondary victim's claim for damages the psychiatric injuries must be reasonably foreseeable. This is only the first hurdle placed in the pursuer's way. There are a further three tests that the pursuer must satisfy:

- Do they belong to a group of individuals that the courts should recognise are capable of suffering psychiatric injury as a result of the defender's negligence?
- How close to the accident was the pursuer in terms of time and space?
- How was the psychiatric injury caused?

The pursuer will find the above tests very difficult to satisfy in order to succeed in his claim. Significantly, in **Alcock** all the pursuers (the secondary victims) failed to meet one of the three tests listed above and, therefore, none of the claims was successful. In **White and Others *v* Chief Constable of the South Yorkshire Police (1998)** the pursuers could not class themselves as primary victims. The pursuers in this case were police officers who had come to the rescue of many of the victims of the

Hillsborough disaster. The pursuers claimed that their employer, the South Yorkshire Police force, owed them a duty of care for the psychiatric injuries that they had suffered in the line of carrying out their duties and in their role as rescuers. The House of Lords disagreed stating that they were secondary victims. Therefore, the pursuers had to satisfy the tests laid down by the House of Lords in **Alcock**. The House of Lords stressed the fact that the pursuers lacked a close relationship with the primary victims (often expressed as the ties of love and affection). Their Lordships were at great pains to stress the fact that rescuers should not expect to receive preferential treatment when claiming compensation for psychiatric injuries that they had suffered.

b) The drivers and the passengers of the vehicles who are involved in the crash are, of course, primary victims and they will find it much easier to bring a claim for psychiatric injuries before the courts. In terms of the relatives of the primary victims, special care will have to be paid to the criteria laid down by the House of Lords in **Alcock and Others *v* Chief Constable of the Yorkshire Police (1992)**. It is, again, worth noting that all the claims of the relatives (who were secondary victims) in **Alcock** failed. The **Alcock** criteria is not easy to satisfy. Relatives of the primary victims may be able to rely on the previous decision of **McLoughlin *v* O'Brian (1983)** to establish a claim for psychiatric injury. The rescuers as a result of the decision in **White and Others *v* Chief Constable of the South Yorkshire Police (1998)** will be classed as secondary victims and, therefore, under the criteria outlined by the House of Lords in **Alcock (1992)**, it is unlikely that any of their claims for psychiatric injuries will succeed. In all probability, the rescuers will lack the necessary ties of love and affection to sustain a successful claim.

c) Quite simply, it is unlikely that Tracy's claim for psychiatric injury would satisfy the tests laid down by **Alcock (1992)**. Furthermore, Tracy's situation is reminiscent of **Bourhill *v* Young (1942)** where a woman who had a nervous disposition went to the scene of an horrific accident to satisfy her own curiosity. The woman promptly suffered nervous shock when she witnessed the aftermath of the accident and claimed that this had caused her to miscarry her pregnancy. The court held that the driver of the motorcycle who caused the accident did not owe the woman a duty of care because she was not in his contemplation when he was driving negligently. She had come to the scene of the accident after it had occurred and had never been endangered by the driver's negligent actions.

13 **a)** Trespass is defined as a temporary intrusion upon land or property. A landowner's primary remedy will concern the right to have trespassers ejected from his land. However, the means used to effect the ejection of an individual from the property should be reasonable. A landowner would not be treated sympathetically by the courts if he was shown to have used force to eject a person from his property (see **Winans *v* Macrae (1885)**.

b) This would be said to occur if a landowner's use of his property causes harm or interference to a neighbour's property. Nuisance is not a one-off event but a series of ongoing occurrences. The neighbour would be entitled to apply to the courts for the purposes of an interdict. The landowner could even be liable in damages for the harm he has caused. It is important for us to remember that if the nuisance has been tolerated or consented to by a neighbour for over 20 years (the negative prescription period), he will have no remedy. In other words, his inaction or his consent means that he will have to live with the nuisance. For examples of nuisance see **Miller *v* Jackson (1977)**, **Webster *v* Lord Advocate (1984)**, **RHM Bakeries (Scotland) Ltd *v* Strathclyde Regional Council (1985)**. A defender will really only be able to justify a nuisance if he can prove that the nuisance occurred as a result of his compliance with statutory authority (see **Lord Advocate *v* North British Railways (1894)**).

c) Spiteful use of property rights may be actionable before the courts even if the act complained of is something the landowner is legally entitled to do (see **Campbell *v* Muir (1908)**). A neighbour must be able to prove in this situation that the landowner has used his legitimate rights purely for spite so as to prevent the neighbour making full use of his own property rights. The spiteful action need only occur once in order for the pursuer to prove malice on the part of the other landowner. The remedy of interdict is available and the issue of damages may also arise.

d) It has been (unsuccessfully) argued that an owner or an occupier of property could be strictly liable where something was poured or thrown out of a building (the *actio de effusis dejectis*) causing harm to the victim. Similarly, where something was placed on the building or attached to the building fell, causing harm to the victim, (the *actio de positis vel suspensis*) it has been argued (again unsuccessfully) that the owner or the occupier would be under strict liability. It has even been suggested that these delicts are not a proper part of Scots law. Bankton, one of the Institutional Writers,

had argued, however, that Scots law had adopted these two actions from Roman law (*Institute* 1.4.31 and 32). Baron Hume, another Institutional Writer had discussed both actions in his *Lectures* Vol. 3, Chapter 16. Hume had, however, spoken about these actions in terms of negligence and fault as opposed to examples of strict liability. The position has now been clarified somewhat by the Court of Session's decision in **McDyer *v* Celtic Football and Athletic Company Ltd and Others (3 March 2000)**. The issue as the Court of Session saw it could be dealt with in terms of the Occupiers' Liability (Scotland) Act 1960. It will be remembered, of course, that the occupier has to demonstrate he has taken reasonable care to ensure that a person entering his premises will not suffer injury or damage by reason of any danger due to the state of the premises or of anything done or omitted to be done on them. The pursuer's claim based on the *actio de positis vel suspensis* implying strict liability was, therefore, largely irrelevant and unnecessary.

e) A landowner would not be entitled to divert the stream for irrigation and manufacturing purposes if this adversely affected the rights of other landowners whose property the river flowed through. Diverting the course of a stream is permissible as long as the water is returned to the stream before it enters the property of a lower proprietor. There are dangers attached to the diversion of streams and any landowner who carries out such an operation will owe very important responsibilities to his neighbours. Furthermore, under the Water Act 1989, it is an offence for an individual to pollute a river. At all times, landowners must have regard to the common interest of the owners in connection with the stream (see **Kerr *v* Earl of Orkney (1857)** and **Caledonian Railway Co *v* Greenock Corporation (1917)**).

Chapter 4 (pp.346–50)

1 **a)** For the purposes of the Consumer Rights Act 2015, a sale of goods transaction will involve a trader selling tangible goods to a consumer buyer in exchange for a money consideration called the price. The consumer buyer will have an expectation that she will become the owner of the goods, i.e. that the trader will eventually pass good title to the consumer buyer in respect of the goods. A sale of goods operates in a very different way from contracts of lease or hire where the consumer pays to use the goods for a defined period. In such transactions, the consumer is the user of the goods and does not expect to become their owner.

b) (i) In terms of Section 2(2) of the Consumer Rights Act 2015, a trader is defined as 'a person acting for purposes relating to that person's trade, business, craft or profession, whether acting personally or through another person acting in the trader's name or on the trader's behalf'.

(ii) Section 2(3) of the Consumer Rights Act 2015, a consumer is an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession.

(iii) Section 2(8) of the Consumer Rights Act 2015 defines goods as meaning any tangible, moveable items. This definition may include water, gas and electricity 'if and only if they are put for supply in a limited volume or set quantity'.

(iv) Interestingly, the Consumer Rights Act 2015 does not seek to define services in relation to consumer contracts – which are now covered by the provisions of the Act.

(v) Section 2(9) of the Consumer Rights Act 2015 addresses the issue of digital content, which means data that is produced and supplied in digital form.

c) The contract between Tartan Touring and Cameron Coachbuilders is a business to business transaction (B2B) and, therefore, it is not covered by the Consumer Rights Act 2015. Section 2(3) of the Consumer Rights Act defines a consumer as 'an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession'.

Neither Tartan nor Cameron can be said to fall under the above definition. They are both traders or businesses and their contract falls outside the scope of the Consumer Rights Act 2015.

The 1979 Sale of Goods Act will continue to regulate sale of goods transactions in the following situations:

- Business to business sales (**B2B** contracts), i.e. the transaction between Tartan and Cameron
- Consumer to consumer sales (**C2C** contracts)
- Consumer to business sales (**C2B** contracts)

So, if a transaction for the supply of goods is not regarded as a consumer transaction, it will fall outside the scope of the Consumer Rights Act 2015 and may be governed by the Sale of Goods Act.

It looks as if the seven buses supplied by Cameron to Tartan are simply not fit for their purpose and this is a breach of Section 14(3) of the Sale of Goods Act 1979 (see **Priest *v* Last (1903)**; **Baldry *v* Marshall (1925)** and **Griffiths *v* Peter Conway Ltd (1939)**).

2 a) (i) Such situations can arise when the trader supplies goods that breach, for example, another person's intellectual property rights, i.e. a trademark, copyright or design right. The consumer buyer would be unable to use the goods because they would be at risk of being sued by the person who has the intellectual property rights. This would be a breach of the consumer's right to enjoy quiet possession of the goods, which is guaranteed by Section 17 of the Consumer Rights Act 2015. Another important protection for consumers contained in Section 17 is that she has the right to enjoy quiet possession of the goods after the contract has been implemented. Effectively, the trader promises that no third party can dispute the consumer's right to own the goods or possess them that would disturb his enjoyment of them. Any disturbance of the consumer's right of quiet possession by third parties will mean that a potential claim lies against the trader (see **Niblett Ltd *v* Confectioners' Materials Co Ltd [1921]**; **McDonald *v* Provan (of Scotland Street) Ltd (1960)**; and **Microbeads AC *v* Vinhurst Road Markings Ltd [1975]**). This implied term that the buyer is entitled to enjoy quiet possession of the goods can operate very harshly against a trader who has acted in good faith.

(ii) Such situations may arise where goods have been stolen and subsequently sold on to innocent third parties. Stolen property or property obtained by fraudulent means will almost always be returned to the true owner. The innocent third party will have a remedy against the trader for the return of the purchase price and for any additional damages. It should be appreciated that the trader is in breach of Section 17 of the Consumer Rights Act 2015. The trader themselves will have a remedy against the person who supplied them with the stolen goods in terms of Section 17 of the 2015 Act, but difficulties may be experienced if the trader dealt direct with the thief or the fraudster: these individuals tend to disappear and it can be very difficult to trace them (see **Morrison *v* Robertson (1908)** and **Rowland *v* Divall [1923]**). Critically, however, the trader must have acted in good faith when she purchased the goods from the fraudster or the thief: if she suspected that there was something wrong with the title to the goods this would put a completely different slant on things. Quite simply, the trader would not be acting in good faith when they purchased the goods.

b) Crossan, a thief, cannot pass good title to Mullan's car. The vehicle remains the property of Mullan (the true owner) despite the theft. The *nemo dat quod non habet* rule applies here: if you don't have title to goods or the authority to sell them, then you cannot pass good title to another individual. The cases of **Morrison *v* Robertson (1908)** and **Rowland *v* Divall [1923]** are particularly instructive here in that property which has been stolen or obtained by fraudulent means will almost always be returned to the true owner. Section 17 of the Consumer Rights Act 2015 is particularly important here: the trader must have the right to supply the goods. The fact that the car is stolen property means that the trader (Marvellous Motors) will be in breach of Section 17 and McInarlin, the consumer buyer, (who will be forced to return the car to Mullan) has the right to sue the trader for the return of the purchase price and any damages that may be relevant. Marvellous Motors may have a claim for compensation against Crossan, but this is only practical if they can find him!

3 a) According to Section 2(8), the Consumer Rights Act 2015 only applies to a particular class of goods – all tangible, moveable property with the exception of money. Moveable goods are all goods which are by their very nature able to be physically transferred from seller to buyer in a contract of sale. Tangible means that the goods have a physical shape. Thus, tangible moveable goods would cover all property that is tangible and that can be moved, for example a chair, a table, a stereo system, a DVD and a television – the list is endless.

b) No, Derek and Marina will not be permitted to have their dispute resolved under the Consumer Rights Act 2015. The major types of property that are not covered by the Act include heritable property (land and building and anything attached to them) because such items, although tangible are not moveable. Furthermore, the Act does not cover currency transactions and contracts for the transfer of intangible (incorporeal) moveable property. Examples of this type of property would include shares in a company, patents, trade marks and copyrights and other legislation will be applicable to transfers involving these types of goods.

4 a) In terms of Sections 9–18 of the Consumer Rights Act 2015, consumer buyers entering into a sale of goods transaction with a trader benefit from the protection of **TEN** key legal rights. These legal rights are automatically incorporated into every contract of sale, i.e. they are assumed to form part of the terms and conditions of every sale. These rights are known as the statutory terms and are outlined below:

- The goods to be of satisfactory quality **(Section 9)**
- Fitness for particular purpose as disclosed by the consumer **(Section 10)**

- Conform to description **(Section 11)**
- Pre-contract information **(Section 12)**
- Goods to match sample **(Section 13)**
- Goods to match model **(Section 14)**
- Goods supplied and installed **(Section 15)**
- Digital content **(Section 16)**
- Trader to have the right to supply the goods **(Section 17)**
- Goods to conform to express terms **(Section 18)**

b) (i) Kevin can bring a claim against the local gents' clothing store in terms of Section 13 of the Consumer Rights Act 2015: goods must correspond or match a sample that the trader has shown to the consumer. The mere fact that a trader provides a sample to the consumer is not enough for the transaction to be regarded as sale by sample – there must be clear evidence that the parties intended the transaction to operate in this way. Section 13(1) of the Consumer Rights Act will apply to a contract to supply goods by reference to a sample of the goods that is seen or examined by the consumer before the contract is made.

Section 13(2) clarifies the rights or the expectations of consumers when traders supply goods by reference to a sample:

- The goods will match the sample except to the extent that any differences between the sample and the goods are brought to the consumer's attention before the contract is made; and
- That the goods will be free from any defect that makes their quality unsatisfactory and this would not be apparent on a reasonable examination of the sample.

The consumer will not have accepted the goods until he has had an opportunity to compare the goods with the sample, and will be able, therefore, to reject the goods, even though they have been delivered, if the goods do not correspond with the sample. The trader is entitled to assume that the consumer will examine the sample. This means that the trader will lose any protection guaranteed by the statutory right of satisfactory quality if the defect could have been discovered by reasonable examination of the sample. This will be the case whether or not there has in fact been an examination of the sample. A reasonable examination for the purpose of a goods supplied by reference to a sample is the type of examination which is usually carried out in the trade or business concerned. Relevant cases dealing with sales by sample are **Ruben *v* Faire (1949)** and **Steels & Busks Ltd *v* Bleecker Bik & Co Ltd (1956)**.

(ii) Tariq has been supplied with a car that is not of satisfactory quality. Goods will fail to comply with the statutory term of satisfactory quality (**Section 9 of the Consumer Rights Act 2015**) if they suffer from some sort of manufacturing defect or because they were faulty to a greater or lesser degree. To put it another way, if the trader had supplied a similar or identical product in perfect working order there would have been no cause for complaint from the consumer. Section 9 of the Consumer Rights Act 2015 expressly states that a trader supplying goods to a consumer will be under a duty to ensure that the goods are of 'satisfactory quality'. The standard of quality that consumers are entitled to expect in relation to goods supplied under the contract has an interesting history. Prior to 1994, the standard of quality that the buyer could expect was that of merchantable quality. The Sale and Supply of Goods Act 1994 comprehensively reformed this area of the law in favour of the consumer. Previously, the requirement that goods had to be of merchantable quality was often a problematic concept. Goods that were slightly defective did not always mean that the seller had failed to comply with the requirement of merchantable quality. The concept of merchantable quality, therefore, could be a difficult one to understand, especially for consumers, and it has to be said that the courts did not always take a consistent or helpful approach when dealing with cases involving this issue as can be seen from the following example: **Millars of Falkirk *v* Turpie (1976)**.

There is absolutely no doubt that consumers are now far better protected in relation to disputes with traders over the quality of the goods. The judicial reasoning behind the decision in **Millars of Falkirk *v* Turpie (1976)** has long since been comprehensively rejected as can be seen in important decision of the Inner House of the Court of Session: **Lamarra *v* Capital Bank plc & Shields Automative Ltd t/a Shields Land Rover (2006)**.

According to Section 9 of the Consumer Rights Act 2015, 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. A point worth noting in relation to the operation of Section 9 and one that will be discussed further in connection with partially defective goods and minor defects, is that satisfactory quality critically depends on the expectations of a *reasonable person*. The reference to a reasonable person in this Section of the Act goes some way to providing traders with protection from consumers who have impossibly high standards that can never be satisfied. Section 9(3) contains a list of five aspects or examples of quality that consumers can use to help them decide

whether the goods supplied by traders are in any way **unsatisfactory**:

- Fitness for all the purposes for which goods of the kind in question are commonly supplied
- Appearance and finish
- Freedom from minor defects
- Safety
- Durability

(iii) Fabulous Fashions is in breach of Section 11 of the Consumer Rights Act 2015: goods supplied by a trader must conform with their description. In terms of Section 11 of the Consumer Rights Act 2015, if the trader describes the contract goods in a certain way, for example a black leather jacket, the consumer is entitled to receive goods that conform to this description. So, if the seller supplied a brown leather jacket to the buyer, she would be in breach of her obligation under Section 11. It should be appreciated, of course, that there is nothing wrong with a brown leather jacket (it is not defective in any way), but it is not what the buyer asked the seller to supply to him under the terms of their contract and, therefore, the seller has committed a material breach of the agreement. As we shall see, Section 11 does not address the issue of damaged or defective goods or goods that are not fit for their purpose – such issues are properly treated as potential breaches by the trader of Sections 9 and 10 of the Consumer Rights Act 2015 respectively.

Several examples of sellers supplying goods that failed to conform with the requirement that they comply with their description can be seen below:

- **Nichol *v* Godt (1854)**
- **Beale *v* Taylor [1967]**

An important point to note is that for the consumer to succeed in any claim under Section 11 of the Consumer Rights Act 2015, she must be able to show that she relied on the trader's description of the goods. It will not be enough for the consumer to say that the trader uttered a misleading statement when describing the goods, this statement **must** actually influence the consumer. If the trader can prove that the consumer did not rely or was not influenced by the description of the goods, then there is no breach of Section 11. So, for example, if the consumer decided to commission her own expert to verify the authenticity of an antique to which the trader had applied a description ('I believe that the vase is from the late Ming Dynasty period'), by doing so it is perfectly obvious that she is not prepared to accept the trader's statement or description at face value. In other words, she has not relied upon or been influenced by the trader's description of the goods. If the expert (wrongly) states that the vase is from the late Ming Dynasty period and the consumer proceeds to purchase the item, it was not the trader's description that swayed her, but rather the appraisal of the expert appointed by her to verify the authenticity of the goods. The consumer should, therefore, pursue the expert for damages **not** the trader based on a contractual duty of care owed by the expert to his client. Such a scenario can be seen in the following case: **Harlingdon *v* Hull Fine Art Ltd [1990]**.

5 **a)** Goods will fail to comply with the statutory term of satisfactory quality in terms of **Section 9** of the Consumer Rights Act 2015 if they suffer from some sort of manufacturing defect or because they were faulty to a greater or lesser degree. To put it another way, if the trader had supplied a similar or identical product in perfect working order there would have been no cause for complaint from the consumer. In stark contrast, goods may not be fit for their purpose because of their design or mode of construction in terms of **Section 10** of the Consumer Rights Act 2015. By no stretch of the imagination could the goods be regarded as defective or faulty in any way – they are simply unsuitable for the consumer's intended purpose. If the trader attempted to repair or to modify such a product this would a totally inappropriate response to the consumer's problem. The goods are in perfect working order, but to all intents and purposes they are of absolutely no practical use to the consumer. A racing bicycle, for example, is not fit for the purpose of off-road racing – only a mountain bike in such circumstances would be adequate. Clearly, if the trader supplied the consumer with a racing bicycle in place of a mountain bike, the item would not be fit for its purpose. A particularly instructive case in that it goes a long way to dispel the confusion that often surrounds these two heads of liability in Sections 9 and 10 of the Consumer Rights Act 2015, i.e. satisfactory quality and fitness for purpose respectively is **Baldry *v* Marshall (1925)**.

b) Hassan's dispute with Marvellous Motors (the trader) is almost a mirror image of the case of **Baldry *v* Marshall (1925)** where a perfectly functioning car was supplied to the buyer, but it was the wrong car for his stated purposes, which he had made very clear to the trader. The car supplied to Hassan is not fit for a particular purpose and therefore the trader is in breach of Section 10 of the Consumer Rights Act 2015. Other relevant cases of the issue of fitness for a particular purpose are **Priest *v* Last (1903)** and **Griffiths *v* Peter Conway Ltd (1939)**.

6 **a)** The Sale and Supply of Goods to Consumers Regulations 2002 do contain a number of advantages for consumers. The introduction of new subsections 2D to 2F to Section 14 of the Sale of Goods Act 1979 which make a seller liable for public statements made in relation to the goods, for example advertising and guarantees. The burden of proof would be placed firmly on the seller's shoulders to show that public statements had not influenced the buyer to enter the contract.

The Regulations also introduce new provisions to the Sale of Goods Act 1979 in the shape of Sections 48A to 48D. the aim of these new Sections is to give consumers more remedies in situations where the goods do not conform to the contract at the time when the buyer becomes the owner of the goods. Goods which do not conform to the contract of sale within six months of the date of delivery to the consumer will be presumed not to have been in conformity with the contract at the time of delivery.

In certain circumstances, the buyer may ask the seller to repair the goods or replace them. The seller will be under a duty to give effect to the buyer's wishes within a reasonable time. The seller must not cause significant inconvenience to the buyer and the seller has responsibility for paying any necessary costs which arise as a result of the buyer's choice of remedy (labour, material or postage). However, the buyer's rights are limited in the sense that it may be impossible for the seller to provide the buyer with his preferred remedy. Furthermore, the buyer's choice of remedy may either place the seller under a completely unreasonable burden or it may be simply more appropriate for the seller to give the buyer a reduction in the price of the goods or, as a last resort, cancellation of the contract (rescission) may be the only reasonable solution. Although the Regulations use the language of consumer choice, the seller will still have a great deal of say as to whether the goods are repaired or replaced.

If the seller fails to comply with the buyer's wishes within a reasonable time, the buyer will, in any case, be able to demand a reduction in price or rescission of the contract. The courts have power under the Regulations to award an appropriate remedy to a consumer – although it may not be the one originally requested. However, the remedy of rescission must still be exercised speedily in Scotland and the new Regulations most certainly do not give a consumer a six-month period in which to make up his mind whether to accept or reject the goods. The Regulations also establish a very peculiar legal position. The Regulations give the consumer a right of rescission in respect of the contract, but the seller may be able to side-step this by repairing or replacing the goods. However, many consumers may not realise that the Sale of Goods Act continues to give them a right of rescission which is completely independent of the new Regulations. Consumers who are aware of their legal rights will be able to push for rescission of the contract despite the Regulations.

Undoubtedly, the Regulations increase consumer protection, but they do contain a number of weaknesses. In terms of the buyer's right to insist upon a particular remedy, the Regulations may use the language of consumer choice. However, the seller will still have a great deal of say as to whether the goods are repaired or replaced. Furthermore, the two rights of rescission will only cause confusion to consumers and may even be exploited by unscrupulous traders. The positive aspects of the Regulations are the fact that guarantees are now directly enforceable against sellers of goods and the presumption that goods which develop defects within six months of purchase (assuming normal use by the consumer) must have been defective when purchased are certainly to be welcomed.

b) As explained above in **6a)**, the store is very much liable for the manufacturer's guarantee in terms of new subsections 2D to 2F to Section 14 of the Sale of Goods Act 1979 which make a seller liable for public statements made in relation to the goods, for example advertising and guarantees. Under the Sale and Supply of Goods to Consumers Regulations 2002 outlined above, consumers have more remedies in situations where the goods do not conform to the contract at the time when the buyer becomes the owner of the goods. Ethsham could ask the seller to repair the goods or replace them. The seller, however, as discussed above can still determine the actual remedy. In many cases, cancellation of the contract (rescission) may be the only reasonable solution. Crucially, Ethsham still retains his right to have the contract cancelled under the Sale of Goods Act because the goods are clearly not of satisfactory quality. Section 15B of the Sale of Goods Act 1979 allows Ethsham to exercise his right of rejection of the goods. This remedy will only be available to the buyer if the seller has committed a material breach of contract, for example a breach of one of the implied terms in Sections 12, 13, 14 and 15. If the buyer chooses to reject the goods, he will be able to claim back part or all of the price that he may have paid. Additionally, he may also sue the seller for damages.

7 **a)** Unscrupulous traders will always attempt to exclude or limit the statutory terms that protect

consumers in terms of Sections 9–18 of the Consumer Rights Act 2015 in relation to contracts for the supply of goods. Such an attempt by traders will be automatically void in terms of Section 31 of the Act. Section 31 actually goes further and also makes void attempts by traders to exclude or limit their liability to consumers in terms of delivery of the goods (under Section 28 of the Act) and the passing of risk (under Section 29 of the Act).

Not surprisingly, any attempt by a trader to limit or exclude her liability under a digital content in relation to the statutory duties or remedies contained in Sections 33–46 of the Consumer Rights Act 2015 will be automatically void and unenforceable in terms of Section 47 of the 2015 Act. This is in line with attempts by traders to limit or exclude their liability to consumers in supply of goods contracts (Section 31) and services contracts (Section 57).

Section 57 of the Consumer Rights Act 2015 operates in a very similar way to its counterparts in Section 31 (which covers contracts to supply goods) and Section 47 (which covers the supply of digital content). Consumers will not be bound by attempts by traders to limit or exclude their liability under a service contract in relation to the statutory duties in Sections 49–53 of the Act. Any such attempt by traders will be unenforceable and automatically void.

b) No, Best Flicks will not be able to enforce the clause in its contract with Sarah. Such an attempt on its part would represent a breach of Section 47 of the Consumer Rights Act 2015 and would, therefore, be automatically void.

8 **a)** One crucial issue that we must consider is that of risk. The issue of risk relates to any harm or damage caused to the goods and, more importantly, who will have to bear the loss should this happen, i.e. the trader or the consumer.

Section 29 of the Consumer Rights Act 2015 now addresses the issue of risk in relation to contracts of sale before and after the physical possession of the goods has been transferred to the consumer (i.e. delivery has taken place). This is an area of the law that has been much simplified over the years in relation to consumer contracts for the sale of goods (the same cannot be said of business to business contracts of sale). The basic rule is that risk will lie with the trader until such time as he is able to transfer physical possession of the goods to the consumer or someone identified by her to take possession of the goods. The law governing risk in consumer contracts was originally introduced as part of a package of reforms contained in the Sale and Supply of Goods to Consumers Regulations 2002 (since repealed).

There is an important exception to the rule governing risk in a contract of sale: if the consumer has insisted that the goods be delivered to a carrier of her own choosing (and that carrier was not offered by the trader as an option), the risk will transfer to the consumer at the point when the goods are passed or delivered to her named carrier. This makes perfect sense as the carrier is the named agent or personal representative of the consumer for the purposes of this transaction.

Interestingly, both parties to the contract (consumer and trader) owe one another a common law duty as custodians to take care of each other's property. If the goods were lost or damaged as a result of one party's negligence or carelessness, the owner may very well consider raising a delictual action for breach of a duty of care.

Section 29(6) of the Consumer Rights Act states that the rules relating to risk will also apply to contracts for the sale of second-hand goods that are sold at a public auction as long as the individuals can attend the auction sale in person. This is quite significant given the fact that most of the provisions in Chapter 2 of the Consumer Rights Act are not applicable to second-hand goods sold at auction.

The complexities surrounding the issue of risk and how it traditionally operated in relation to contracts for the sale of goods can be seen in the case of **Philip Head & Sons *v* Showfronts Ltd (1970).**

b) (i) This is a business contract (not a consumer contract) and Section 20 of the Sale of Goods Act 1979 would operate. Unfortunately, Smith Solicitors will have to bear the loss because ownership of the goods passed to them upon the conclusion of the sale. Smith Solicitors could always sue Luxury Leather in a delictual action if it became apparent that it had breached its duty to Smith Solicitors as custodians of the goods. However, in certain situations the rule in Section 20 could be made redundant. In a non-consumer contract (like the one here) if delivery of the goods was delayed and, as a result, they were damaged lost or stolen, the party responsible for the delay (the seller or the buyer) would have to bear responsibility for the loss. So, if the seller failed to deliver the goods on time to the buyer and after this the goods were damaged, lost or stolen, the seller would have to bear responsibility for this even if the buyer was now the owner and, therefore, potentially the one who has to bear the risk.

(ii) Lynne and Euan have a consumer contract with Luxury Leather. Section 29 of the Consumer Rights Act 2015 deals differently with consumer contracts. It will now be the case that risk will not pass to a consumer buyer until the goods are delivered by the seller to him. The seller could hand the goods to the buyer personally or to the buyer's agent. Once these conditions have been met, the buyer will be responsible for the goods.

9 All of the situations relate to Section 18 of the Sale of Goods Act 1979.

a) This situation involves a contract where there was an unconditional order for the sale of specific goods in a deliverable state. Property in the goods passed to Jasminder under Rule 1. She has become the owner of the goods and she is responsible for them and, therefore, she will have to bear the loss (see **Tarling *v* Baxter (1827)**).

b) This situation involves a contract for the sale of specific goods and the seller is bound to do something to put them into a deliverable state. Property in the goods will not pass to Steve until the adjustments have been made to the car in terms of Rule 2. Until these adjustments are carried out, Reddie Motors remains the owner of the goods and, therefore, continues to have responsibility for the car (see **Underwood *v* Burgh Castle Brick & Cement Syndicate (1922)**).

c) This situation involves a contract for the sale of goods in a deliverable state, but the seller is bound to weigh, measure or test, or do anything else to calculate the price. Property in the goods will not pass to FreshFields Supermarket in terms of Rule 3 until Farmer Giles weighs the potatoes in order to calculate the price (see **Nanka-Bruce *v* Commonwealth Trust Ltd (1926)**).

d) This situation involves the goods being delivered to the buyer on approval or a sale or return basis. Property in the goods has passed to Norma in terms of Rule 4 when she did anything inconsistent with the seller's ownership by signifying her acceptance; or adopts the goods as her own (by using them); or retaining them without giving notice of rejection (see **Elphick *v* Barnes (1880)** and **Kirkham *v* Attenborough (1897)**).

e) This situation involves a contract for the sale of unascertained or future goods by description. Property in the goods passed to Bill from Sweeney's Slaughterhouse in terms of Rule 5 when goods, complying with the contractual description, were unconditionally appropriated to the contract in a deliverable state. Appropriation of the goods occurred when Andy and Jamal signed the delivery note and were allowed to take the goods away.

10 a) (i) Digital content to be of satisfactory quality

Section 34(1) of the Consumer Rights Act 2015 states that every contract to supply digital content 'is to be treated as including a term that the quality of the digital content is satisfactory'.

Section 34(2) provides an explanation as to what is meant by the standard of satisfactory quality in relation to digital content that a reasonable person would be entitled to expect.

Certain factors are taken into account when assessing whether digital content complies with the requirement of satisfactory quality:

- any description of the digital content
- the price (if relevant)
- all the other relevant circumstances.

All the other relevant circumstances might include public statements made by the trader or the producer (or their representatives) that might include advertising and labelling of the digital content. Such public statements may, of course, influence the consumer's perceptions of the product. Critically, however, it will be unreasonable for the consumer to rely on public statements of the trader, producer or their representatives in the following circumstances:

- Where she could not have been aware when entering the contract with the trader
- Before the contract was concluded, the statement had been publicly withdrawn
- To the extent that it contained anything that was incorrect or misleading, it had been publicly corrected.

Quality in relation to digital content will include its state and condition and it may also be subject to the following aspects (where appropriate):

- fitness for all the purposes for which digital content of that kind is usually supplied
- freedom from minor defects
- safety
- durability.

Consumers will not enjoy the protection of Section 34 in relation to the following circumstances:

- [anything] that is specifically drawn to the consumer's attention before the contract is made
- where the consumer examines the digital content before the contract is made, which that examination ought to reveal, or
- where the consumer examines a trial version before the contract is made, which would have been apparent on a reasonable examination of the trial version.

(ii) Digital content to be fit for a particular purpose

Section 35 of the Consumer Rights Act 2015 states that the trader must ensure that digital content being supplied to the consumer must be fit for its purpose.

In relation to contracts for the supply of goods, we have already discussed the difference between satisfactory quality and fitness for purpose. A similar discussion arises here in relation to contracts for the supply of digital content: the product may be defective and, therefore, the issue is one of quality. In other situations, the product supplied does not suffer from any defects (and is in full working order), but it is totally unfit for the consumer's purposes.

It is very important to appreciate that the trader will not be liable if the consumer either expressly or impliedly failed to make known her purpose for entering a contract for the supply of digital content. This is a similar situation to contracts for the supply of goods in relation to the issue of fitness for purpose (Section 10) where the consumer must make known her reason for entering the contract in order to obtain the benefit of the trader's skill and expertise (see cases involving the supply of goods discussed earlier in the Chapter which are particularly helpful:

Priest *v* Last (1903); Baldry *v* Marshall (1925); and **Griffiths *v* Peter Conway Ltd (1939)**).

(iii) Digital content to be as described

Section 36 of the Consumer Rights Act 2015 states that every contract to supply digital content is to be treated as including a term that the digital content will match any description of it given by the trader to the consumer. In situations, where the consumer examines a trial version before the contract is concluded, it is not sufficient that the digital content matches (or is better than) the trial version if the digital content does not also match any description of it given by the trader to the consumer.

It should, of course, be recalled that identity is the key to description of a product – to paraphrase Lord Diplock's remarks in **Ashington Piggeries Ltd *v* Christopher Hill Ltd (1972)**. Description is not concerned with quality or fitness for purpose in relation to the digital content supplied by the trader.

The key question (and issue) here is: did the consumer receive the digital content for which they entered the contract? If, for example, a consumer pays to receive a movie streaming service and selects the latest *Star Wars* movie, for viewing, he may not enjoy the experience, but he got what he specifically requested and paid for and there is certainly no breach of Section 36 of the Consumer Rights Act on the trader's part. It would also be debatable as to whether the consumer had claims under Section 34 (satisfactory quality) and Section 35 (fitness for purpose)! The trader is also under a duty to ensure that any information about the description of digital content complies with the requirements of Schedules 1 and 2 of the Act and the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013. Such information about the main characteristics, functionality and compatibility of the digital content to be supplied to the consumer is to be treated as included as a term of the contract. If there are any changes that are subsequently made to the information given by the trader to the consumer before the contract is concluded, it will not be regarded as part of the agreements unless the parties have expressly agreed to it.

(iv) Other pre-contract information to be included in the contract

Section 37 of the Consumer Rights Act 2015 ensures that any additional information that the trader provides to the consumer before the conclusion of the contract (over and above what is required by Schedules 1 and 2 of the Act and the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013) is to be treated as part of the agreement.

Any change to that information provided by the trader that is made before entering into the contract or later, is not effective unless it has been expressly agreed between the consumer and the trader.

(v) Trader's right to supply digital content

Section 41 of the Consumer Rights Act 2015 makes it explicitly clear that any digital content that has been supplied under the contract and that the consumer has paid for, the trader must have the right to supply that content to the consumer; and any digital content that the trader agrees to supply under the contract and that the consumer has paid for, the trader must have the right to supply it to the consumer at the time when it is to be supplied.

b) Younus would most likely be unsuccessful in his claim against Yangste regarding his dissatisfaction with the movie that he viewed. He is unlikely to be able to argue that Yangste provided him with digital content that failed to comply with the Consumer Rights Act 2015 in terms of Section 34 (digital content to be of satisfactory quality); Section 35 (digital content to be for a particular purpose); and Section 36 (digital content to be as described).

That said, Younus may have a potential claim against Yangste if they did not have the right to broadcast the movie in the first place, i.e. they were

in breach of another person's intellectual property rights. This would represent a breach of Section 41 of the Consumer Rights Act 2015 on Yangste's part: they must have the right to supply the digital content.

11 **a)** According to Section 61(1) delivery is defined as the voluntary transfer of possession from one person to another. Goods, therefore, are considered to be delivered if the seller delivers them physically to the buyer or his agent. In many situations, symbolic delivery of the goods will be enough, for example, where the seller hands over the only set of keys to the buyer granting him access to the warehouse where the goods are stored. Where bulk goods owned commonly are concerned (Sections 20A and 20B) delivery can occur when the goods are appropriated to the contract with the result that the ownership transfers from seller to buyer. It is worth emphasising that the delivery of the goods does not mean that the seller has necessarily transferred the ownership of the goods to the buyer.

b) (i) Section 29. Where the contract stipulates that the seller must deliver the goods to the buyer but no time period for this has been agreed by the parties, delivery must take place within a reasonable time. Delivery must take place at a reasonable hour of the day.

(ii) Section 30. Where a larger quantity of goods is delivered, the buyer may accept the amount and pay for the contract amount and reject the remainder. The buyer could accept all the goods if he so wishes, but he must pay for the extra goods. The buyer can only reject the whole of the goods if the surplus is a material breach of contract. (See **Robertson *v* Stewart (1928)** and **Shipton, Anderson & Co *v* Weil Bros & Co (1912)**.)

(iii) Section 31. Unless the parties agree otherwise, the buyer should not have to accept delivery of the goods by instalments. (See **Maple Flock Co Ltd *v* Universal Furniture Products (Wembley) Ltd (1934)**.)

(iv) Section 32, but a distinction is now made between a business buyer and a consumer buyer. If the contract states that the seller must deliver the goods to a business buyer, delivery to a carrier by the seller will discharge this duty. A seller must enter a contract of carriage on terms which are beneficial/reasonable to the buyer. In these circumstances, the seller should have regard to the type of goods and all the circumstances when he enters a contract with the carrier. If the seller does not take reasonable care and the goods are damaged in carriage, the buyer may reject the goods and sue the seller for damages. (See **Young *v* Hobson & Partner (1949)**.)

If the buyer is a consumer, delivery of the goods to a carrier by the seller is not to be regarded as delivery to the buyer. This will be the case where the seller is authorised or required to send the goods to the buyer. However, if the buyer arranges for the seller to deliver goods to a carrier who is acting as his agent, this will mean that the goods have been delivered to the buyer. After all, by appointing a carrier to act as his agent, the buyer is sending this person to uplift the goods on his behalf.

(v) Section 34. The buyer must accept goods which are delivered and which conform to the contract. If the buyer has not yet had an opportunity to examine the goods which have been delivered, he is considered not to have accepted them until he has had a reasonable chance to examine them. The buyer, of course, will wish to examine the goods in order to ensure that they comply with the contract.

(vi) Section 36. Unless the parties agree otherwise, if the buyer rightfully refuses to accept goods which have been delivered, he is not obliged to return them to the seller. All the buyer must do is inform the seller about his refusal to accept the goods.

(vii) Section 37. If the buyer wrongfully neglects or refuses to take delivery of the goods, he will be liable for damages to the seller.

(viii) Section 35A. The buyer may reject the goods owing to a breach of contract on the part of the seller which affects some or all of the goods. In this situation, the buyer will have the right of partial rejection. The buyer may even accept some of the goods, i.e. those which are not affected by the breach and reject the remainder.

(ix) Section 35. The buyer is considered to have accepted the goods:

- When he communicates his acceptance to the seller
- When he does anything in relation to the goods which is inconsistent with the seller still being the owner (for example by using them)
- When he has held on to the goods and he has not informed the seller that he intends to reject them. The buyer must inform the seller within a reasonable time that he intends to reject the goods. After the passage of a reasonable time, the buyer loses his right to cancel the contract (See **Mechans Ltd *v* Highland Marine Charters Ltd (1964)**.)

(x) Section 33. Goods delivered to a distant place. If the seller agrees to deliver goods at his own risk, the risk of damage to or destruction of the goods remains with the seller until delivery is accomplished. This is regardless of whether ownership has passed

to the buyer. Crucially, however, the buyer must accept any deterioration in the goods which normally occurs in the course of transit.

12 Section 19 of the Consumer Rights Act makes it clear that a consumer will have certain remedies where the trader has failed to supply goods complying with the contract. One of the main remedies is the right to reject goods supplied by the trader and Section 20 spells out its parameters.

The consumer's remedies for breach of contract are:

- **Section 21 – partial rejection**
- **Section 22 – time limit for the short term right to reject**
- **Section 23 – the right to a repair or a replacement**
- **Section 24 – the right to a price reduction and the final right to reject**

Essentially, this means that the consumer will have remedies against the trader for breachess of contract regarding the following matters:

- The goods to be of satisfactory quality **(Section 9)**
- Fitness for particular purpose as disclosed by the consumer **(Section 10)**
- Conform to description **(Section 11)**
- Pre-contract information **(Section 12)**
- Goods to match sample **(Section 13)**
- Goods to match model **(Section 14)**
- Goods supplied and installed **(Section 15)**
- Digital content **(Section 16)**

There is one important exception to the consumer's right to enforce contractual terms: if the consumer herself supplied the goods to the trader, she will not be permitted to use the remedies in Sections 22–24 of the Consumer Rights Act.

13 a) Goods to match the sample shown by the trader

Section 13 of the Consumer Rights Act 2015 addresses this issue.

Section 13(1) of the Consumer Rights Act will apply to a contract to supply goods by reference to a sample of the goods that is seen or examined by the consumer before the contract is made.

Section 13(2) of the Act clarifies the rights or the expectations of consumers when traders supply goods by reference to a sample:

- **The goods will match the sample except to the extent that any differences between the sample and the goods are brought to the consumer's attention before the contract is made; and**
- **The goods will be free from any defect that makes their quality unsatisfactory and this would not be apparent on a reasonable examination of the sample.**

The consumer will not have accepted the goods until she has had an opportunity to compare the goods with the sample, and will be able, therefore, to reject the goods, even though they have been delivered, if the goods do not correspond with the sample.

The trader is entitled to assume that the consumer will examine the sample. This means that the trader will lose any protection guaranteed by the statutory right of satisfactory quality if the defect could have been discovered by reasonable examination of the sample. This will be the case whether or not there has in fact been an examination of the sample. A reasonable examination for the purpose of a goods supplied by reference to a sample is the type of examination that is usually carried out in the trade or business concerned. The mere fact that a trader provides a sample to the consumer is not enough for the transaction to be regarded as sale by sample – there must be clear evidence that the parties intended the transaction to operate in this way. The cases of **Steels & Busks Ltd *v* Bleecker Bik & Co Ltd (1956) & Ruben *v* Faire (1949)** are particularly useful in this area of the law.

b) Duration of satisfactory quality in a consumer contract for the sale of goods

Before the introduction of the (now repealed) Sale and Supply of Goods to Consumers Regulations 2002, the law was very unclear as to the length of time during which goods must meet the standard of satisfactory quality. Admittedly, Section 14(2B) of the Sale of Goods Act 1979 (and now Section 9 of the Consumer Rights Act 2015) explicitly state that the durability of the goods is an important aspect of satisfactory quality. What the Sale of Goods Act most certainly did not attempt, however, was to state the length of time that goods should comply with the requirement of satisfactory quality. Disputes between the seller and the buyer involving the issue of durability would turn on their own facts (see **Mash and Murrell *v* Joseph I Emmanuel (1961), (1962) & Lamarra *v* Capital Bank plc & Shields Automotive Ltd t/a Shields Land Rover (2006)**). In any case, the seller was liable for any defects that were not obvious to the buyer when the goods were originally supplied and that only later emerged to cause the buyer problems. As demonstrated in **Grant *v* Australian Knitting Mills Ltd (1936)**, the buyer could not have been aware when he purchased the underwear that they contained a latent defect, i.e. an excess of the chemical sulphite that should have been removed as part of the manufacturing process. It was only some time after the goods

had been delivered and used by the buyer that their unsatisfactory nature became all too apparent.

As a result of Section 24 of the Consumer Rights Act 2015 (a provision that was first introduced by the Sale and Supply of Goods to Consumers Regulations 2002), there is a strong presumption operating against the trader that, if the goods suffer from or develop defects within six months, they did not meet the statutory requirement of satisfactory quality. The trader is, of course, perfectly at liberty to challenge this presumption. It should be appreciated, however, that the final right of rejection available to consumers does not confer upon them an option to wait six months before deciding whether or not to bring an action against the trader for supplying unsatisfactory goods. The consumer is still under a duty to take reasonably swift steps to bring a claim against the trader when she discovers that the goods are not of satisfactory quality. The six-month time period laid down by Section 24 merely recognises that some defects (particularly those of a latent nature) may take longer to appear. A trader who attempts to limit drastically the period of time in which defective goods can be returned by the consumer (for example '*Faulty or defective goods must be returned within 30 days of purchase*') will not be treated sympathetically under the Act. Generally speaking, consumers must accept that the goods will not always meet the requirement of satisfactory quality as time marches on – deterioration of the goods through normal use, accidental damage and even misuse by the consumer may mean that the goods will not always remain free from defects for long. In such circumstances, the trader is not responsible for the fact that the goods no longer comply with the requirement of satisfactory quality.

c) Strict liability of the trader in a consumer sale of goods transaction

The trader is liable for all breaches of the statutory terms in Sections 9–18 of the Consumer Rights Act 2015 even though she is merely marketing the goods as a wholesaler or a retailer. This means that the trader is also liable for any defects that were not apparent when the goods were originally supplied, but which later emerge within six months of the goods being supplied to the consumer (**Section 24 of the Consumer Rights Act 2015**). The trader cannot use the fact that the goods have a manufacturing defect in order to escape her liability to the consumer. The consumer's contract is with the trader and it is irrelevant to the consumer whether the defect has been caused by a manufacturing fault or not. All the consumer is concerned with is that the trader has supplied him with faulty goods. In this way, the trader's liability is said to be strict in the sense that the consumer does not have to prove fault or blame on the trader's part. A trader can in turn sue the manufacturer for supplying her with defective goods if the consumer has successfully sued her for defects in the goods. In **Grant *v* Australian Knitting Mills Ltd (1936)**, the retailer was strictly liable to Grant for the sale of dangerous and defective goods that caused injury. Clearly, the injuries were caused as a direct result of the manufacturer's negligence, i.e. the failure to remove the dangerous chemical from the underwear. However, the consumer had a contract with the retailer and it was the retailer who remained strictly liable for the defective goods and for the buyer's injuries. The retailer would, of course, have a contractual claim for damages against the manufacturer. It is important to appreciate that the trader is not just potentially liable to the consumer for the price of the goods. The consumer may have suffered a personal injury (as in **Grant *v* Australian Knitting Mills Ltd (1936)**) or his property may have been damaged as a result of using the defective goods. The trader will, therefore, have to compensate the consumer for any injuries suffered or any damage caused as a result of using the goods. The trader's liability is also said to be strict if she breaches any of the other statutory terms in relation to Sections 9–18 of the Consumer Rights. In these situations, the consumer does not need to prove fault on the trader's part. It is important for the trader to be aware of the following situation. Should he sell goods to the consumer that cause injury to third parties or damage to the property of these individuals as a direct consequence of the consumer using the goods, he must compensate a consumer who has been successfully sued by a third party. The trader, however, will escape liability if the consumer has continued to use the goods in the full knowledge that they have become defective and dangerous.

The case of **Lambert *v* Lewis (1981)** is a powerful warning to consumers who continue to use goods that they are fully aware are defective and dangerous.

d) Delivery of goods

Section 59 of the Consumer Rights Act 2015 defines delivery of goods supplied under a contract between a trader and a consumer as the 'voluntary transfer of possession from one person to another'.

Goods, therefore, are considered to be delivered if the seller delivers them physically to the buyer or his agent. In many situations, symbolic delivery of

the goods will be enough, for example, where the seller hands over the only set of keys to the buyer granting him access to the warehouse where the goods are stored. It is worth emphasising that the delivery of the goods does not mean that the seller has necessarily transferred the ownership of the goods to the buyer (see **Aluminium Industrie Vaassen BV *v* Romalpa Aluminium Ltd (1976) and Armour and Another *v* Thyssen Edelstahlwerke AG 1990)**). Delivery is about the transfer of possession as Section 59 makes abundantly clear.

Section 28 of the Consumer Rights Act 2015 applies to any **sales contract** and, unless otherwise agreed by the parties to the agreement, it is assumed that the contract will contain a term that the trader *must* deliver the goods to the consumer.

e) The legal status of guarantees supplied by the trader to consumer buyers of goods

If a guarantee is issued by a trader in relation to goods supplied under a consumer contract, this undertaking or statement may also give an indication as to the length of time that a consumer can reasonably expect the goods to meet the appropriate standard of quality. If, for example, a television broke down in the first five months following its purchase by a consumer buyer, when it was guaranteed for three years, this might be a strong indication that the product contained a major defect. Section 30 of the Consumer Rights Act 2015 states that a guarantee is a contractual obligation owed by the guarantor. This means that it will be directly enforceable against any person (the trader) who uses the guarantee in connection with goods that are supplied to consumer. Traders will have to be extremely careful in these circumstances as they often use guarantees to market the goods to potential buyers. Consumers may well be swayed by the trader placing a great deal of emphasis on, for example, a manufacturer's guarantee as this may encourage them to enter a contract for the supply of these goods. All guarantees must be in intelligible English and they must be made available in writing to consumers, if so requested, within a reasonable time.

14 Morag should be made aware that any business wishing to carry out consumer credit activities must now be fully authorised by the Financial Conduct Authority. Previously, the Office of Fair Trading had operated a licensing system and this was carried over by the Financial Conduct Authority during the initial period when it took over responsibility for the regulation of the industry (from 1 April 2014). This arrangement (known as the interim period) had the aim of promoting continuity and stability as the handover of responsibilities between the two regulators took place. By 15 May 2014, the Financial Conduct Authority had written to every consumer credit business that held an interim permission to inform them that they were legally obliged to submit an application for full authorisation in order to comply with the new regulatory requirements. All such applications had to be submitted to the Financial Conduct Authority between 1 October 2014 and 31 March 2016 and each consumer credit business was given a specified three-month window during this period in which to submit their application. Failure to complete an application within the specified window meant that any business would not be permitted to continue to carry out consumer credit activities and that they would be in breach of the new regulatory system. New applicants for full authorisation were permitted to submit an application to the Financial Conduct Authority at any time.

Businesses are obliged to pay a one-off fee to the Financial Conduct Authority when submitting their application for authorisation and, furthermore, an annual fee is payable for each year that they continue to be authorised. When a business is given full authorisation under the regulatory system, the Financial Conduct Authority categorises it according to whether it is involved in 'high risk' or 'low risk' consumer credit activities and such a distinction will depend on the size of the business, the number of its customers and the risk potentially posed by its activities to retail customers.

The Financial Conduct Authority can take any information about a creditor's circumstances into account when considering whether to grant or renew authorisation. Creditors must be fit to carry on commercial activities regulated by the Consumer Credit Act 1974, the Financial Services and Markets Act 2000 and the European Union's Consumer Credit Directive and they must continue to adhere to these standards of fitness while they hold an authorisation from the Financial Conduct Authority.

15 Sheila and her husband can cancel the contract. As should be apparent from the study of contract law, it is usually the case that once a legally enforceable agreement has been formed both parties are now committed to it and for one of them to break the contract would give the other party the right to sue. Under the Consumer Credit Act 1974, however, it is possible for the debtor, in certain situations, to withdraw from the credit agreement without being sued by the creditor for breach of contract. The debtor's right to cancel an agreement was deliberately introduced in order to clamp down on

the disreputable practice of door-to-door salesmen pressurising people to enter credit agreements which they did not want or could not afford.

It is now common practice for a creditor and debtor to conclude a consumer credit agreement away from or off the creditor's trade premises, for example, in the debtor's own home. The creditor or his agent must have made oral representations to the debtor in order to induce her to enter the agreement. In these circumstances, special protection exists to protect debtors in that they are entitled to exercise their right to cancel the agreement (Section 67 of the Consumer Credit Act 1974). The rationale behind the protection in Section 67 is that it was thought that debtors would often be reluctant to ask a determined sales person to leave their home and, in desperation, they might succumb to high pressured sales tactics and sign the agreement – even if this was not in their best interests. In theory, it is thought to be much easier for debtors to walk out of the creditor's trade premises if they have significant doubts about the wisdom of entering into the agreement.

A credit agreement that is entered into off the creditor's trade premises must contain a statement that the debtor is entitled to exercise his rights of cancellation. A copy of the agreement must be provided to the debtor either by post or email within seven days of its conclusion. The debtor is then entitled to a cooling-off period of five days (which does not include the day the copy of the agreement was received by him) in which he may choose to cancel the contract with the creditor. If the debtor exercises his cancellation rights, this will mean that the credit agreement and any linked transactions cease to have any legal effect. The creditor must repay any sums paid by the debtor during the very brief duration of the agreement and the debtor must also return any goods that he has received.

In addition to the five-day cooling-off period (Section 67 of the 1974 Act), new Section 66A of the Consumer Credit Act 1974 gives debtors a general right to withdraw from a consumer credit agreement with 14 days of the conclusion of the agreement or the date upon which they receive their copy of the agreement or, for credit cards, when debtors are notified of their credit limit. This right to cancel a credit agreement has been conferred on debtors as a result of the European Consumer Credit Directive (2008/48/EEC), which was transposed into UK law as a result of Regulation 13 of the Consumer Credit (EU Directive Regulations) 2010, but it could be a double-edged sword that may catch out the unwary.

It is important to note that although debtors may have the right to cancel the consumer credit agreement, the contract for the supply of goods or services will still be enforceable by the trader and the debtor will have to make payment by alternative means. Debtors will have to be particularly aware of these types of consequences when entering a hire purchase agreement for the supply of goods. In such circumstances, the debtor will not simply be obliged to return the goods to the supplier thus ending the agreement: she will have to pay the full purchase price to the supplier within 30 days of cancellation and she will also assume full ownership or title to the goods. Under new Section 55A of the Consumer Credit Act 1974, this is a feature of hire purchase agreements that creditors must disclose to debtors. Additionally, cancellation of any credit agreement will oblige the debtor to repay any credit 'without undue delay' (certainly no later than 30 days) and interest is also payable up to the point that the credit is repaid. Significantly, the creditor is not legally obligated to repay any money that the debtor has already paid under the credit agreement. Admittedly, there is a vague statement in Section 66A that the agreement should be regarded as if it had never been concluded between the parties – whatever that may mean. Perhaps worryingly, the debtor's right of cancellation under Section 66A does not address situations where the debtor has entered into a credit transaction that involves a part-exchange of goods, for example, where a debtor exchanges a second-hand motor vehicle in order to purchase a newer model. Furthermore, if the credit agreement depends on the debtor providing security for the loan, this arrangement will continue to be enforceable by the creditor despite the cancellation of the agreement. It is therefore, submitted that the debtor's right to withdraw from a credit agreement will have to be exercised with some caution. Again, Section 55A will mean that creditors will have to spell out all the legal consequences of cancellation to debtors.

In certain circumstances, debtors will not be permitted to cancel a consumer credit agreement:

- Where the amount of credit provided is greater than £60,260
- Agreements secured on heritable property, i.e. land and buildings.

The Financial Services (Distance Marketing) Regulations 2004, which implement European Union Directive 2002/65/EC cover situations where a debtor enters into a credit agreement with a creditor at a distance, i.e. usually the contract will

have been concluded by telephone or online and not on the creditor's trade premises.

The Regulations place an obligation on the creditor to provide (in good time) to the debtor the following information:

- The creditor's name and address
- Details of the main features of the credit agreement
- The total price payable for the credit
- The arrangements by which the debtor repays the credit
- The debtor's right to withdraw from the credit agreement.

16 Under Sections 140A and 140B of the Consumer Credit Act 1974, a court may examine the terms of a credit agreement in order to establish whether it operates fairly between the parties and to ensure that it is not an extortionate agreement. An agreement may be considered extortionate if the debtor is forced to make grossly exorbitant payments under the agreement to the creditor. The term grossly exorbitant means that the agreement would fall foul of the ordinary principles of fair dealing. In other words, a reasonable or fair-minded person would consider the agreement to be completely unbalanced in that it blatantly favoured the creditor's interests. Usually, a credit agreement will be examined in this way when the debtor makes an application to the court. How will the court make its decision? The court will look at the following factors:

- Current interest rates at the time when the bargain was made
- The personal circumstances of the debtor including his age, experience and health
- The level of financial pressure that the debtor was experiencing when he entered the agreement
- The level of risk that the creditor was accepting and his relationship with the debtor
- Any other material facts or circumstances.

17 Yes, the bank should have taken more care when it used the advertisement. There are strict controls imposed on businesses which advertise credit facilities to members of the general public. Under Section 44 of the Consumer Credit Act 1974, the UK Government's Secretary of State for business issues has the power to make Regulations in relation to credit advertising activities. Clearly, the ways in which credit is presented to members of the public could be a very influential reason for their decision to enter a credit agreement. It is, therefore, of vital importance that debtors are given the correct information by advertisers. Section 46 of the Act states that it is an offence for advertisements to be false or misleading in a material respect. The duty imposed on creditors in Section 46 is fleshed out by the Consumer Credit (Advertisements) Regulations 2010 (which replace the previous 2004 Regulations except in relation to credit agreements secured on land) now cover advertising relating to the provision of consumer credit in any form that would include print, radio, television, mobile phone texts, film, video, DVD, notices, goods, circular letters or price lists.

On 3 December 2014, the Financial Conduct Authority and the Advertising Standards Agency signed a Memorandum of Understanding in order to facilitate better co-operation and co-ordination between the two bodies in respect of their various responsibilities. Previously, the Advertising Standards Agency had been highly critical of adverts run by creditors that promote socially irresponsible uses for credit for 'frivolous' or non-essential purchases (in 2012, a website, Sunny Marketing Ltd, which had pictures of three women carrying shopping bags was the subject of a successful complaint and, in 2013, a payday lender, First Finance (UK) Ltd was the subject of another complaint because it appeared to encourage debtors to apply for credit to finance their social lives).

In particular, the Memorandum of Understanding in the section entitled 'Rules' states that:

14.1 'Offers of financial products must be set out in a way that allows them to be understood easily by the audience being addressed. Marketers must ensure that they do not take advantage of consumers' inexperience or credulity.'

14.2 'Marketing communications should state the nature of the contract being offered, any limitation, expense, penalty or charge and the terms of withdrawal. Alternatively, if a marketing communication is short or general in its content, free material explaining the offer must be made readily available to consumers before a binding contract is entered into.'

14.3 The basis used to calculate any rate of interest, forecast or projection must be apparent immediately.

In Chapter 3 of its own Consumer Credit Sourcebook, the Financial Conduct Authority is at great pains to state that advertising must be 'clear, fair and not misleading'. In situations where creditors are suspected of using misleading advertising, the Financial Conduct Authority can issue a direction (a legal request) to have the offending advertisement removed. Creditors are

given the opportunity to provide evidence that the advertisement does not mislead debtors whereupon a final decision will be made whether to amend, withdraw or enforce the direction. Directions that are enforced are usually published on the Financial Conduct Authority's website together with a copy of the advertisement and the justification for enforcement. Creditors who are unhappy about the decision of the Financial Conduct Authority to enforce the direction are entitled to submit a challenge to the Upper Tribunal, which deals with consumer credit matters.

Consumer credit advertising covering consumer hire activities is now covered by the general legal principles contained in the Consumer Protection from Unfair Trading Regulations 2008 and Part 8 of the Enterprise Act 2002 also applies to advertising in respect of consumer credit activities.

Regulation 3 imposes the following general requirements on consumer credit advertisements:
- [they must] use plain and intelligible language;
- be easily legible (or, in the case of any information given orally, clearly audible); and
- specify the name of the advertiser.

Regulation 4 provides strict guidelines as to what sort of information will appear in it (its content). Advertisements should be clearly understood by debtors. In all advertisements, the creditor's name must be included and, if certain financial information is used, the creditor's business address must also be included. Regulation 4 also states that where an advertisement uses an interest rate, the creditor must provide a representative example so that the debtor can understand how this figure has been calculated. In terms of Regulation 5, the representative example shall include the following information:
- the rate of interest, whether fixed, variable or both
- the nature and amount of any other charge included in the total charge for credit
- the total amount of credit
- the representative APR
- in the case of credit in the form of a deferred payment for specific goods, services and land or other things, the cash price and the amount of any advance payment.

Additionally (except in the case of open end credit agreements), the creditor must specify:
- the duration of the agreement
- the total amount payable by the debtor and the amount of each repayment of credit.

Generally speaking, creditors should be aware of the following guidelines in respect of advertisements:

When a credit advertisement includes any one or more of the following:
- Amount of credit
- Deposit on account
- Cash price
- Advance payment

It must include:
The name of the advertiser (this is required in all credit advertisements).

When a credit advertisement includes any one or more of the following:
- Frequency of repayments
- Number of repayments
- Description (not amount) of any other payment or charge

It must include:
- The name of the advertiser
- Typical APR

When a credit advertisement includes any one or more of the following:

- Amount of any repayment
- Amount of any other payment or charge
- Total amount payable

It must include:
- The name of the advertiser
- A postal address (in most cases)
- Typical APR
- Amount of credit
- Any deposit on account
- Cash price of goods or services
- Any advance payment
- Frequency, number and amounts of repayments
- Description and amount of any other payment or charge
- Total amount payable

In terms of Regulation 9 of the Consumer Credit (Advertisements) Regulations 2010, the creditor must state whether the debtor has to pledge a security for the loan and, if so, the nature of this security. Regulation 10 includes a list of restricted expressions that cannot be used by the creditor in the advertisement – unless certain conditions are fulfilled. These restricted expressions include:
- the word 'overdraft'
- the expression 'interest free'
- the expression 'no deposit' or any similar expression
- the expression 'loan guaranteed' or 'pre-approved' or any similar expression
- the expression 'gift', 'present' or any similar expression
- the expression 'weekly equivalent' or any expression to the like effect.

Creditors must also include warnings in an advertisement to potential debtors that clearly highlight the consequences of debtors breaching the terms of any agreement. Very often, the creditor will be under a duty to place prominent warnings in advertisements (depending, of course, on the nature or type of agreement) that should make it very clear to prospective debtors the consequences of breaching the consumer credit agreement that they may later enter. Examples of the kinds of warnings that should be used by the creditor in the appropriate circumstances can be seen below:

Example 1

YOUR HOME MAY BE REPOSSESSED IF YOU DO NOT KEEP UP REPAYMENTS ON A MORTGAGE OR ANY OTHER DEBT SECURED ON IT.

Example 2

THINK CAREFULLY BEFORE SECURING OTHER DEBTS AGAINST YOUR HOME.

Example 3

CHECK THAT THIS MORTGAGE WILL MEET YOUR NEEDS IF YOU WANT TO MOVE OR SELL YOUR HOME OR YOU WANT YOUR FAMILY TO INHERIT IT. IF YOU ARE IN ANY DOUBT, SEEK INDEPENDENT ADVICE.

Example 4

CHANGES IN THE EXCHANGE RATE MAY INCREASE THE STERLING EQUIVALENT OF YOUR DEBT.

Example 5

YOUR HOME MAY BE REPOSSESSED IF YOU DO NOT KEEP UP REPAYMENTS ON A HIRE AGREEMENT SECURED BY A MORTGAGE OR OTHER SECURITY ON YOUR HOME.

Regulation 7 imposes a duty on creditors to ensure that any mention of the APR is transparent and can be easily understood by potential debtors. If, for example, the APR is a variable rate of interest, i.e. it is not a fixed rate and, therefore, subject to change, the advertisement must clearly state this.

It is also worth bearing in mind that the Consumer Protection from Unfair Trading Regulations 2008 will apply to consumer credit advertising. The 2008 Regulations will provide debtors with remedies if the information in a credit advertisement is regarded as misleading or if the advertiser omits to include certain information that could have an important bearing on the decision of the debtor to enter a credit agreement or not. It is also possible for consumer credit advertisers to commit a criminal offence in terms of the 2008 Regulations in relation to a misleading advertisement. Furthermore, in terms of Part 8 of the Enterprise Act 2002, the Financial Conduct Authority and other enforcement bodies may take legal action against a credit advertiser if they are of the opinion that the advertisement breaches the collective interests of consumers.

18 If the debtor defaults on the agreement, the creditor, in terms of Section 87 of the Consumer Credit Act 1974, must serve a default notice on the debtor. Without serving this default notice, the creditor is not entitled to use any of the following remedies for breach of contract:

1 To end the agreement
2 To demand earlier repayment of any money owed by the debtor under the agreement
3 To recover possession of any goods that the debtor holds
4 To behave as if any of the debtor's rights under the agreement have been suspended, limited or even terminated
5 To enforce any security

It should be noted that the terms of the credit agreement will often state what action the creditor will be able to take against the debtor if he defaults. Only some of the options listed in 1 to 5 may be available to the creditor. The agreement will, therefore, determine what the creditor can and cannot do. The important thing to remember is that any of the actions open to the creditor under the agreement will be useless if a default notice was not served on the debtor.

If the creditor wishes to sue for payments that the debtor has fallen behind with, he is entitled to so without having to serve a default notice. Furthermore, credit card companies often prevent debtors from using a card if the credit limit has been reached and default notices are not required for this type of action. Under Section 88, the default notice must contain certain important information. Sections 86B and 86C now mean that a creditor is legally obliged to inform a debtor that they have breached the agreement by written notice. Section 86B applies to fixed sum credit and section 86C applies to running account credit.

Section 131 allows the creditor to apply to court for what is called a protection order. The creditor can also protect himself by including termination and accelerated payments clauses in the consumer credit agreement.

19 **a)** Running account credit is where the debtor can borrow money up to an agreed limit. This

category would cover bank overdrafts, credit cards and store cards (Section 11: Consumer Credit Act).

b) Fixed-term credit is credit where the sum borrowed by the debtor is fixed at the beginning of the agreement. This category includes bank loans and hire purchase agreements (Section 11: Consumer Credit Act).

c) Restricted use credit is where the sum borrowed by the debtor is for an agreed purpose, for example, a car loan from a bank. This category includes bank loans and hire purchase.

d) Unrestricted use credit is where the debtor is completely free to spend the credit provided on whatever he wishes. This category would include credit cards, store cards and bank overdrafts.

e) Debtor–creditor agreements are where the debtor simply borrows money from the creditor. The creditor is not involved in any further transaction which the debtor may enter with a supplier of goods. The creditor lends the money to the debtor and this credit will be used to pay for the goods from the supplier. This is the traditional type of credit agreement and would cover such activities as bank loans.

f) Debtor–creditor–supplier agreements are where the creditor and the supplier of goods may be the same person or where the supplier has links to a creditor who will provide credit to the supplier's customers (the debtors). This is a very common arrangement where car dealerships are concerned in that customers will buy a car from the dealer and then be offered credit to pay for their purchase through a finance house or a bank associated with the dealer (Section 12: Consumer Credit Act 1974).

20 The Consumer Credit Act recognises a number of exempt agreements where, generally, the rules regulating consumer credit agreements do not apply. The following are exempt agreements:

1 First charge mortgages
The vast majority of mortgage-lending in relation to domestic or residential heritable property will be exempt. Such loans can be provided by a local authority, a named bank, building society or insurance company for the purpose of the debtor purchasing the property. These types of arrangements will, in the main, be regulated by other UK legislation such as the Financial Services Act 1986.

2 Second charge mortgages
Certain second charge mortgage which are secured on heritable property (any exemption will depend on the type of the agreement and the indemnity of the mortgage lender). These arrangements are often entered by debtors to raise additional finance (often with the permission of the primary mortgage lender) by means of a 'second mortgage' over the property. Such an arrangement will be ranked lower than the primary or first charge mortgage which the property owner has granted to a bank.

3 Certain credit agreements involving goods and services
Agreements involving the provision of goods or services in which the debtor has to repay the sum borrowed within one year and the payments must not exceed four instalments will benefit from an exemption.

4 Charge cards
Charge cards and other credit agreements which oblige the debtor to repay fully any balance at the end of the relevant period.

5 Agreements with credit unions
Agrements entered into with credit unions in situations where the APR does not exceed more than 26.9 per cent.

6 Low cost debtor–creditor agreements
This is an agreement where the cost of the credit does not exceed a predetermined rate of interest or a rate of interest that is one per cent above the highest of lenders' base rates in the 28 days leading up to the formation of the contract.

7 Credit to be used in international trade transactions
Credit provided in connection with an international trade contract, i.e. where the parties to the contract are based in different states, for example, the United Kingdom and the USA.

8 Credit to 'high net worth' individuals
This exemption has been inserted by Section 3 of the Consumer Credit Act 2006 (new Section 16A of the Consumer Credit Act 1974). Loans to persons who are deemed to be 'high net worth' individuals, i.e. such individuals will have a net income greater than £150,000 or net assets greater than £500,000 and they will have to provide evidence of their income and/or assets.

9 Loans greater than £25,000 to business organisations
Finance to businesses where the value of this loan is greater than £25,000 and this arrangement is primarily for commercial purposes. With reference to business loans, it should be appreciated that any business organisation which borrows a sum less than £25,000 will remain regulated by the consumer credit legislation.

10 Buy-to-let loans
Buy-to-let loans where the debtor borrows a sum to purchase heritable property. To qualify for exemption, such loans cannot be secured on the debtor's main residence (i.e. where they are domiciled) and the debtor (or a family member) is not permitted to use or occupy at least 40 per cent (by reference to the land area) of the heritable property.

21 Manuel could be guilty of a criminal offence in terms of both Part 2 of the Consumer Protection Act 1987 and the General Product Safety Regulations 2005 which impose a general safety requirement on retailers, suppliers and distributors in relation to the supply of dangerous and harmful products.

How is Part 2 of the Consumer Protection Act 1987 enforced? The local council's trading standards officer will be the Act's first line of defence. Under Section 14, they can issue **suspension notices** which effectively prevent suppliers from selling goods which appear to breach the general safety requirement. Under the Act, an aggrieved supplier has the right to challenge the imposition of a suspension notice and s/he may even be given compensation if it can be proved that the trading standards officer acted wrongly. The trading standards officer also has the power to apply to the Procurator Fiscal for a **forfeiture order** which would allow him/her to confiscate the dangerous goods.

Furthermore, Section 13 of the Act gives powers to the UK Government's Secretary of State for business issues and s/he can issue a **prohibition notice** which has the effect of preventing suppliers continuing to sell goods without his consent. The Secretary of State has the additional power under Section 13 of being able to force a trader to publish, at his/her own expense, a **warning notice** about goods which are considered to be dangerous. The worst situation, however, that a manufacturer or retailer could face is a criminal prosecution for breach of the general safety requirement in terms of the General Product Safety Regulations 2005 or for failure to comply with an order or a notice issued under the Act. Under Section 11(2), the Secretary of State is also given powers to make regulations relating to the safety of products.

Which defences could Manuel use under Part 2 of the Consumer Protection Act 1987?
a) that Manuel took all reasonable precautions and exercised all due diligence to avoid committing a crime

b) the offence was caused by another person or due to the fact that the Manuel relied on information supplied by another person (this other person **must** be identified)

c) Manuel could show that he did not know or had no reason to suspect that the goods were not in compliance with the general safety requirement.

What do the General Product Safety Regulations 2005 have to say about the safety of products? The regulations are primarily concerned with ensuring the safety of products which consumers will use or are very likely to use. Producers and distributors of goods will now have to be very careful when they supply goods. The regulations apply to second-hand goods. The regulations cannot be made use of where the products have been supplied for repair or reconditioning before use. This is, of course, as long as the supplier clearly informs the person with whom he is doing business that the product may not be safe (**Regulation 4**).

Who will be covered by the Regulations? Producers and distributors will fall within this legislation. According to Regulation 2, a producer of goods can either be a manufacturer or an own-brander. If the manufacturer does not have a place of business or a representative within the European Union, then the person who imported the goods into the European Economic Area (a wider grouping of countries than just the 27 members of the EU) shall be regarded as the producer. Producers can also be any other professionals in the supply chain whose actions can affect the safety of the product. A distributor is any professional whose activity does not affect the safety qualities of a product.

What is a safe product? The answer to the question can be found in **Regulation 2** which states that a safe product: means a product which, under normal or reasonably foreseeable conditions of use including duration and, where applicable, putting into service, installation and maintenance requirements, does not present any risk or only the minimum risks compatible with the product's use, considered to be acceptable and consistent with a high level of protection for the safety and health of persons.

What is the general safety requirement? This is contained in regulation 5(1) which states that 'no producer shall place a product on the market unless the product is a safe product'. A safe product is one which does not present any risk or only the minimum risks when the product is used normally or under reasonably foreseeable conditions, including duration. Regard must be had to whether or not the use of the product was acceptable and consistent with a high level of protection for the

health and safety of people. A number of issues **must** be directly addressed:

a) the characteristics of the product, including its composition, packaging, instructions for assembly and, where applicable, instructions for installation and maintenance

b) the effect of the product on other products, where it is reasonably foreseeable that it will be used with other products

c) the presentation of the product, the labelling, any warnings and instructions for its use and disposal and any other indication or information regarding the product

d) the categories of consumers at risk when using the product, in particular children and the elderly.

Regulation 7 places a duty on producers to supply consumers with the relevant information regarding the product so all the risks of using the product are readily transparent. The producer should safeguard him/herself against any risks which the product may present and, if the worst comes to the worst, they may even have to recall or withdraw the product from the market.

Regulation 8 imposes a duty on a distributor to 'act with due care in order to help ensure compliance with the applicable safety'.

Regulation 9 places a duty on a distributor or a producer with the effect that they **must** act with due care in order to ensure compliance with the general safety requirement in regulation 5. A distributor should on no account supply goods which they know to breach the general safety requirement. Furthermore, a distributor should monitor the safety of products, notify enforcement agencies if they placed a dangerous product and pass on information to his/her customers regarding any risks.

NB A producer or a distributor shall commit a criminal offence if (i) they offer or agree to place on the market any dangerous product or (ii) expose any such product for placing on the market or (iii) offer or agree to supply any such product or (iv) expose or possess any such product for supply.

Defences: Under Regulation 29, the defence of due diligence is available, i.e. the accused took all reasonable steps and exercised all due diligence to avoid committing the offence. The accused could allege (the defence of incrimination) that someone else committed the offence or that s/he relied on information supplied by another. This other person **must** be identified.

Regulation 30 also provides a defence in respect of the supply of antiques. As previously remarked, the supply of antiques is not covered by the Regulations and it will, therefore, not be competent to bring a prosecution under the Regulations in respect of this matter.

Enforcement of the Regulations: Local authority trading standard departments have responsibility for the enforcement of the Regulations (**see Part 2 of the Consumer Protection Act 1987**).

Penalties for contravention of the Regulations: A producer or distributor who places a dangerous product on the market for supply to consumers potentially commits a criminal offence which could be punishable by a maximum fine of £5,000 and/or a prison sentence of up to three months.

22 Hugh will have to pay particular attention to the provisions of the Consumer Protection from Unfair Trading Regulations 2008. These Regulations introduce major changes to the field of consumer law and, at the same time, supersede several earlier pieces of legislation which had previously governed retail practices. Part III of the Consumer Protection Act 1987 (Misleading Price Indications) is repealed in its entirety and large parts of the Trade Descriptions Act 1968 have been replaced as a result of the new laws. The law relating to unfair terms in consumer contracts will be governed by the Consumer Rights Act 2015 and will not be affected by the 2008 Regulations.

The purpose of the Regulations: the most important feature of the Regulations is that they impose a general duty on retailers and traders to act fairly and honestly in their dealings with consumers. More specifically, the new laws target particular trading practices which are deemed to be aggressive or misleading where consumers are concerned and certain practices will be banned altogether. As the title of the Regulations suggests it will be consumers, i.e. individuals who purchase products for their own private use who will benefit the most from the protection offered by the new legislation. For the most part, business or non-consumer contracts will not be affected, but there may be situations where such contracts can have an impact on consumers and, therefore, the Regulations might apply. A trader may sell products mainly to other businesses, but if there is a possibility that consumers might purchase these items then the Regulations will almost certainly apply to the transaction. Wholesalers or suppliers dealing with supermarkets, for example, will have to

ensure that they meet the requirements of the Regulations because such transactions have a direct impact on the consumers who will go on to purchase these products. Obviously, it will be up to the British courts to provide guidance as to the scope and the effect of the Regulations.

In theory, the Regulations should provide protection to consumers before they enter a contract, during the currency of the contract and even after the conclusion of the contract.

Traders or retailers who are involved in the promotion, sale or supply of products to or from consumers will have to aware of the provisions of the new laws. Any act or omission by a trader or retailer which prejudices or harms the rights of consumers may fall foul of the Regulations. It is important to note that transactions which involve the trader or retailer purchasing a product from a consumer are also covered by the Regulations. This would include a situation where a motor dealer purchases a used car from a customer as part of a trade-in deal for a new motor vehicle and where the sales person acting for the dealership deliberately underestimates the value of the second-hand vehicle.

The general prohibition (Regulation 3): Regulation 3 prohibits, in a general sense, unfair commercial practices. A commercial practice will be regarded as unfair if the retailer or trader has behaved in a way which is not **professionally diligent** and if it materially distorts or is likely to **materially distort** the behaviour of the **average consumer**. The essential thing to focus on here is that the behaviour of the retailer or trader (whether by act or omission) has caused the consumer to make a decision which has left him/her materially disadvantaged. In other words, the consumer has made a decision which they would probably not have made if the retailer or trader had acted with honesty and integrity. The previous regulatory body, the UK Office of Fair Trading had suggested that such a situation could arise if consumers proceeded to purchase a product that they would not normally have purchased or if they failed to exercise their cancellation rights under the contract as a direct result of the retailer's or trader's conduct.

Misleading commercial practices (Regulations 5–7): Regulations 5–7 ban commercial practices by a trader which are deemed to be misleading (whether such practices involve an act or omission) or aggressive and again where the average consumer is influenced to such an extent whereby they make a different decision which, in the short or long term, could be harmful or detrimental to his or her interests. It will be necessary for the courts to consider evidence as to what is an aggressive or misleading commercial practice by a trader or retailer and the likely effect of such conduct on consumers. If a consumer can demonstrate that a trader behaved in a dishonest or unreasonable way and this led him or her to suffer real harm as a result there will surely be a strong case to answer.

The Regulations also attempt to deal with situations where traders who are a party to a Code of Practice where the use of such a Code promotes unfair commercial practices. Most of the time, enforcement agencies will attempt to encourage traders and trade associations to alter the Code of Practice in order to promote fairer commercial practices. Consumers who feel that they have been penalised as a result of an unfair commercial practice permitted by a Code of Practice can pursue a civil action using Part 8 of the Enterprise Act 2002.

Automatically unfair commercial practices: Schedule 1 to the Regulations goes further and pinpoints 31 commercial practices which are to be regarded as automatically unfair and, therefore, unlawful. These practices are listed in Schedule 1 of the Regulations.

Penalties for breach of the Regulations: More seriously, in terms of Regulation 13, traders could face criminal penalties if they are found to be committing an unfair commercial practice. If the trader is convicted of a summary offence, s/he could be fined up to a maximum sum of £5,000. If, however, the offence is an indictable one, the guilty party could be facing a maximum prison sentence of two years and/or a £5,000 maximum fine. Some of the criminal offences will be strict liability offences and all that is required is for the prosecution to show that the trader committed the prohibited act. Other types of offences will rely on the Scottish prosecution authorities being able to prove that not only did the prohibited act occur (the *actus reus*), but that the trader intended to commit this offence (the *mens rea*).

There are, however, defences available to a trader who is prosecuted under the Regulations:

- Due diligence (Regulation 17)
- Innocent publication of advertisement (Regulation 18)

23 The letter containing the advice to Bridget and Frances would have to contain the information so that they were fully aware of the legal rules affecting their business. There are two sets of Regulations of which they should be made aware:

- the Electronic Commerce (EC Directive) Regulations 2002

- The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013

Enforcement of the Distance Selling and Consumer Contracts Regulations Both the Distance Selling and E-Commerce Regulations can be enforced the Competition and Markets Authority, local authority trading standards departments throughout the UK and the devolved Government Department for business matters in Northern Ireland. All these organisations can enforce the Regulations by applying for the appropriate court order.

The Electronic Commerce (EC Directive) Regulations 2002 Regulation 7 states that any business using electronic communications to promote the sale or supply of goods or services must clearly indicate to potential customers that these are commercial communications coming from a business. Regulation 7 also places a duty on a business to identify any discounts, gifts, promotions or games that it may be promoting and any conditions which are attached to these should be made readily accessible to customers.

In terms of Regulation 8, businesses will have to be careful that, when they send unsolicited emails to potential customers, they clearly identify these as unsolicited commercial communications.

Regulations 6 and 9 impose a duty on businesses to provide the following information to customers:

- A full business name and (geographical) address including an email contact address
- A proper explanation of the business's pricing policy including delivery costs and taxes
- A VAT number where applicable
- Details of membership of a trade or professional association where applicable
- Details of whether the finalised contract will be stored and how it can be accessed by the business
- Details of how a customer can check and correct any errors contained in the contract
- The language which will be used to make the contract
- Codes of conduct to which the business is a party
- The terms of the contract should be made readily available to customers so that they can be saved by downloading onto the customer's own computer
- If the contract is being concluded electronically, the different technical steps for the consumer to follow to conclude the contract.

In terms of Regulation 11, businesses will have to provide electronic acknowledgement of a customer order quickly and efficiently and there will have to be in place a facility which allows the customer to correct any errors relating to the order for which the business is responsible.

Failure on the part of the business to have such a facility in place may mean that the customer is entitled to cancel the contract (Regulation 15).

The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013

The above Regulations were brought into force by the UK Parliament on 13 June 2014 in order to implement the European Union's Consumer Rights Directive (2011/83/EU). Amongst other things, the 2013 Regulations replace the older Consumer Protection (Distance Selling) Regulations 2000, which still continue to regulate consumer contracts made before 13 June 2014. The 2013 Regulations are an important source of legal protection for consumers covering the following matters:

- Provision of information from traders to consumers about the contract
- The right of consumers to cancel contracts
- The right of consumers to receive refunds.

The Regulations cover consumer contracts whether they are made on the trader's premises, off the trader's premises or by distance selling. There is also a close relationship between the 2013 Regulations and the Consumer Rights Act 2015.

Exempt contracts

Not all consumer contracts will be covered by the 2013 Regulations and Regulation 6 lists those agreements that are to be exempted from its provisions:

- Gambling
- Banking, credit, insurance, personal pension, investment or payment services
- The creation of immovable property or of rights in immovable property
- Rental of accommodation for residential purposes
- The construction of new buildings, or the construction of substantially new buildings by the conversion of existing buildings
- The supply of foodstuffs, beverages or other goods intended for current consumption in the household and which are supplied by a trader on frequent and regular rounds to the consumer's home, residence or workplace
- Package travel, package holidays and package tours
- Certain aspects of timeshare, long-term holiday product, resale and exchange contracts
- Contracts concluded by means of automatic vending machines or automated commercial premises

- Contracts concluded with a telecommunications operator through a public telephone for the use of the telephone
- Contracts concluded for the use of one single connection, by telephone, internet or fax, established by a consumer
- Contracts under which goods are sold by way of execution or otherwise by authority of law.

The provision of information by traders to consumers

The amount of information that traders are expected to provide to consumers about a contract will very much depend on *where* the agreement was concluded between the parties:

- On the trader's premises
- Off trade premises
- By a distance selling method, i.e. via the internet or by telephone.

The trader will have to provide less detailed information if the contract was concluded with the consumer on trade premises, but there will be a requirement to provide more detailed information if the contract was made off trade premises or if the parties were at a distance. The information supplied by the trader must usually be provided in a durable form, for example in writing or email – although it would be acceptable to provide the information to the consumer by telephone if the contract was concluded using this type of communication method. In any event, the trader must provide confirmation that the contract has been concluded and such confirmation must ensure that all the relevant information is provided to the consumer in a durable form at this point in the parties' dealings with each other.

Contracts concluded on trade premises

Regulation 9 of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 makes it very clear that the trader is under a legal duty to furnish the consumer with appropriate information concerning the goods or services that are to be supplied under the contract. Schedule 2 of the Regulations provides details of the information that the trader must provide to the consumer in these circumstances:

- the main characteristics of the goods or services, to the extent appropriate to the medium of communication and to the goods or services
- the identity of the trader (such as the trader's trading name), the geographical address at which the trader is established and the trader's telephone number
- the total price of the goods or services inclusive of taxes, or where the nature of the goods or services is such that the price cannot reasonably be calculated in advance, the manner in which the price is to be calculated
- where applicable, all additional delivery charges or, where those charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable
- where applicable, the arrangements for payment, delivery, performance, and the time by which the trader undertakes to deliver the goods or to perform the service
- where applicable, the trader's complaint handling policy
- in the case of a sales contract, a reminder that the trader is under a legal duty to supply goods that are in conformity with the contract
- where applicable, the existence and the conditions of after-sales services and commercial guarantees
- the duration of the contract, where applicable, or, if the contract is of indeterminate duration or is to be extended automatically, the conditions for terminating the contract
- where applicable, the functionality, including applicable technical protection measures, of digital content
- where applicable, any relevant compatibility of digital content with hardware and software that the trader is aware of or can reasonably be expected to have been aware of.

Contracts concluded off trade premises or at a distance

Regulations 10 and 13 of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 also emphasise the fact that traders are legally obliged to provide consumers with the appropriate levels of information concerning the goods or services which are to be supplied under the contract if it is concluded off premises or at a distance. In particular, Regulation 13 makes it very clear that a consumer will not be bound by a distance contract until the trader provides the required information about the contract.

Typically, distance selling will involve the following methods:

- Telephone sales including mobile phones
- Text messaging
- Sales over the internet
- Digital TV shopping channels/interactive TV
- Facsimilies
- Email
- Catalogues
- Catalogues advertising in the media, for example supplements in newspapers.

Schedule 2 of the Regulations, again, lists the information that the trader must provide to the consumer in such circumstances:

- the main characteristics of the goods or services, to the extent appropriate to the medium of communication and to the goods or services
- the identity of the trader (such as the trader's trading name)
- the geographical address at which the trader is established and, where available, the trader's telephone number, fax number and email address, to enable the consumer to contact the trader quickly and communicate efficiently
- where the trader is acting on behalf of another trader, the geographical address and identity of that other trader
- if different from the address provided in accordance with paragraph (c), the geographical address of the place of business of the trader, and, where the trader acts on behalf of another trader, the geographical address of the place of business of that other trader, where the consumer can address any complaints
- the total price of the goods or services inclusive of taxes, or where the nature of the goods or services is such that the price cannot reasonably be calculated in advance, the manner in which the price is to be calculated
- where applicable, all additional delivery charges and any other costs or, where those charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable
- in the case of a contract of indeterminate duration or a contract containing a subscription, the total costs per billing period or (where such contracts are charged at a fixed rate) the total monthly costs
- the cost of using the means of distance communication for the conclusion of the contract where that cost is calculated other than at the basic rate
- the arrangements for payment, delivery, performance, and the time by which the trader undertakes to deliver the goods or to perform the services
- where applicable, the trader's complaint handling policy
- where a right to cancel exists, the conditions, time limit and procedures for exercising that right in accordance with Regulations 27 to 38
- where applicable, that the consumer will have to bear the cost of returning the goods in case of cancellation and, for distance contracts, if the goods, by their nature, cannot normally be returned by post, the cost of returning the goods
- that, if the consumer exercises the right to cancel after having made a request in accordance with Regulation 36(1), the consumer is to be liable to pay the trader reasonable costs in accordance with Regulation 36(4)
- where under Regulation 28, 36 or 37 there is no right to cancel or the right to cancel may be lost, the information that the consumer will not benefit from a right to cancel, or the circumstances under which the consumer loses the right to cancel
- in the case of a sales contract, a reminder that the trader is under a legal duty to supply goods that are in conformity with the contract
- where applicable, the existence and the conditions of after-sale customer assistance, after-sales services and commercial guarantees
- the existence of relevant codes of conduct, as defined in Regulation 5(3)(b) of the Consumer Protection from Unfair Trading Regulations 2008, and how copies of them can be obtained, where applicable
- the duration of the contract, where applicable, or, if the contract is of indeterminate duration or is to be extended automatically, the conditions for terminating the contract
- where applicable, the minimum duration of the consumer's obligations under the contract
- where applicable, the existence and the conditions of deposits or other financial guarantees to be paid or provided by the consumer at the request of the trader
- where applicable, the functionality, including applicable technical protection measures, of digital content
- where applicable, any relevant compatibility of digital content with hardware and software that the trader is aware of or can reasonably be expected to have been aware of
- where applicable, the possibility of having recourse to an out-of-court complaint and redress mechanism, to which the trader is subject, and the methods for having access to it.

Schedule 2 also states that in the case of a public auction, the information listed below may be replaced with the equivalent details for the auctioneer:

- the identity of the trader (such as the trader's trading name), the geographical address at which the trader is established and the trader's telephone number
- the total price of the goods or services inclusive of taxes, or where the nature of the goods or services is such that the price cannot reasonably be calculated in advance, the manner in which the price is to be calculated

- where applicable, all additional delivery charges or, where those charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable
- where applicable, the arrangements for payment, delivery, performance, and the time by which the trader undertakes to deliver the goods or to perform the service.

Failure by the trader to provide information

If the trader fails to provide the required information to the consumer under the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 could mean that the consumer's cancellation rights in respect of the contract can be extended to 1 year.

The consumer's right to cancel distance or off-premises contracts

Regulation 29 of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 states that consumers who have concluded distance or off premises contracts with traders a general right to cancel the agreement without incurring liability. Which?, the well-known UK consumer advocacy organisation, makes a very valid point by stating that these cancellation rights 'are more generous than if you bought goods or services from a high street shop'.

Regulation 30 provides the details of the relevant cancellation period which can be summarised as follows:

- the right to cancel an order for goods made at a distance begins when the consumer receives the goods and this right lasts for a period of 14 days (Regulation 30)
- the right to cancel a service made when the parties are at a distance from each other commences instantly when the contract is concluded and lasts for a period of 14 days (Regulation 30)

Admittedly, some traders may operate a more generous cancellation period than the statutory period of 14 days and it is important for consumers to check the terms of their contracts to see if such a situation applies to them. It is important to emphasise that the 2013 Regulations generally prohibit traders from operating cancellation periods which are less than the statutory period of 14 days. Generally speaking, traders should not supply the service until such time as the 14-day cancellation period has passed – unless the consumer specifically requests earlier performance of the contract (Regulation 36). In such situations, consumers will still retain the right to cancel the service (the consumer advocacy organisation, Which? uses the example of a gym membership), but they will have to pay for the cost of the service up until the point that the contract was cancelled and, if the service was provided in full before the expiry of the 14-day period, the consumer may lose her cancellation rights in their entirety.

Furthermore, the consumer will lose the right to cancel the contract in the following circumstances:

- Where enhanced delivery is chosen by the consumer, for example guaranteed next day delivery (**Regulation 34(3)**)
- Where the value of the goods is diminished by consumer handling (**Regulation 34(9)**)
- Where the goods are returned by the consumer (**Regulation 35(5)**)
- Where the consumer requests early supply of the service (**Regulation 36(4)**.)

In contracts for the supply of digital content, for example music or film, it is particularly important that the consumer is made aware of the fact that her cancellation rights will be lost or waived if she goes ahead and downloads this content within the 14-day cancellation period (Regulation 37). If the consumer wishes to retain her cancellation rights in such a situation, she should not attempt to download the relevant digital content until the 14-day cancellation period has expired. The right of cancellation will also not be available to the consumer if the goods are CDs or DVDs or software where the packaging or wrapping have been opened, perishable goods such as foodstuffs and goods which have been made to according the personal instructions of the consumer.

Regulation 32 states that in order to exercise her cancellation rights, the consumer must either use the model cancellation form which can be found in Part B of Schedule 3 of the 2013 Regulations or by making any other clear statement clarifying the reasons for cancelling the contract. The trader should acknowledge receipt of the consumer's cancellation of the contract. If a dispute arises around the cancellation of the contract, the burden of proof will be on the consumer to demonstrate that she cancelled the agreement within the statutory period of 14 days.

Regulation 33 states that the effect of cancellation of the contract by the consumer means that the duties of the parties to perform the agreement have effectively ceased.

Regulation 35 acknowledges that where the right of cancellation is exercised by the consumer, it will be the trader's responsibility to arrange collection of the goods if:

- the trader has offered to collect them
- in the case of an off-premises contract, the goods were delivered to the consumer's home when the contract was entered into and could not, by their nature, normally be returned by post.

In other situations, where it is not the responsibility of the trader to collect the goods, the consumer should return them or physically hand them over to the trader or his authorised agent or representative. The address to which the goods should be returned should be one specified by the trader and, if no such address has been specified, an address at which the trader previously stated that the consumer could use in order to contact him. Failing this, the consumer can return the goods to any place of business of the trader.

Failure to inform consumers about their cancellation rights

In terms of Regulation 31, a trader who fails to provide a consumer with the relevant information concerning her cancellation rights runs the risk that the statutory cancellation period of 14 days may be extended to 1 year.

More seriously, in terms of Regulation 19, a failure by a trader to inform a consumer of her cancellation rights may constitute a criminal offence. The trader is entitled to rely on the defence of due diligence (in terms of Regulation 20) if he can show that the breach of Regulation 19 was due to the act or default of another person or as a result of relying on information given to him by another person and that he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by himself or any person under his control. Regulation 21 also sets out the possibility that someone other than the trader can commit an offence under Regulation 19 and may also face criminal prosecution – regardless of whether proceedings have been initiated against the trader. Regulation 22 recognises that corporate bodies and their officers can be guilty of an offence under Regulation 19.

Under Regulation 24, if a duly authorised officer of an enforcement authority has reasonable grounds for suspecting that an offence has been committed under Regulation 19, that officer may require a person carrying on or employed in a business to produce any document relating to the business, and take copies of it or any entry in it for the purposes of determining whether such an offence has been committed. If the officer has reasonable grounds for believing that any documents may be required as evidence in proceedings for such an offence, he may seize and detain them and shall, if he does so, inform the person from whom they are being seized.

In terms of Regulation 25, it will be a criminal offence for any person to obstruct the investigation of an authorised officer acting in pursuance of his enforcement functions under Regulation 24. Admittedly, Regulation 26 preserves the right of a person not to answer the question of an authorised officer if such a response might lead to them incriminating themselves.

The consumer's right to a refund

If a consumer contract that was concluded at a distance or off trade premises is cancelled, the issue of a refund being made to the consumer becomes relevant in terms of Regulation 34 of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013. The consumer should receive a refund within 14 days of either the goods being physically returned to trader or the consumer supplying proof that they have returned the goods, for example a Royal Mail recorded or registered delivery receipt whichever event is the earlier. The trader can reduce the amount of the refund if the consumer has diminished the value of the goods through excessive handling on her part. When consumers are returning goods purchased off premises or at a distance, they are expected to take the same care as regards their handling as would be the same for goods purchased in a retail outlet. In terms of refunding delivery costs, the trader is only obliged to repay to the consumer the cost of basic delivery in relation to the goods. In situations, where the consumer chose an enhanced delivery service, for example guaranteed next day delivery, the trader will not have to reimburse the cost of this service to the consumer.

Inertia selling

Regulation 39 of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 addresses the practice of inertia selling where goods are delivered to potential customers by unscrupulous traders who never requested delivery of such items in the first place and are then bombarded by requests for payment and then threats of legal action by these traders in order to secure payment. Previously, the Unsolicited Goods and Services Acts 1971 and 1975 went a long way to prevent these kinds of trade practices. The 2013 Regulations insert a new provision – Regulation 27A – into the Consumer Protection from Unfair Trading Regulations 2008 which gives protection to consumers in that it permits the recipient to treat the unsolicited goods as an unconditional gift with no need to make payment to the unscrupulous trader.

Additional payments under a contract

Regulation 40 stipulates that under a consumer contract, the consumer is not obliged to pay an additional payment to the trader over and above the remuneration agreed for the trader's main obligation unless, before the contract was concluded, the trader obtained the consumer's express consent. The trader is not entitled to assume that a consumer has agreed to make an additional payment merely because she failed to change a default option (such as a pre-ticked box on a website). If the trader receives such an additional payment without having secured the consumer's express consent, the contract is to be treated as providing for the trader to reimburse this payment to the consumer.

Help-line charges over the basic rate

Regulation 41 applies to situations where a trader operates a telephone line which permits consumers to make contact with the trader by telephone regarding contracts which they have concluded with the trader. A consumer who contacts the trader using such a facility must not pay more than the basic telephone rate. If a consumer who contacts a trader in this way in pays more than the basic telephone rate, the contract is to be treated as containing a provision for the trader to pay to the consumer any amount by which the charge paid by the consumer for the call is more than the basic rate.

Time for delivery of the goods and passing of risk

Regulation 42 deals with delivery of the goods from the trader to the consumer and ensures that goods must be delivered without undue delay and, in any event, not more than 30 days after the conclusion of the contract between the parties.

Regulation 43 addresses the issue of the passing of risk from trader to consumer and stipulates that the goods will remain at the trader's risk until they come into the physical possession of the consumer or a person identified by the consumer to take possession of the goods. In situations where the goods are delivered to a carrier who has been instructed or commissioned by the consumer to deliver the goods and has not been named as an option for the consumer by the trader, the goods are at the consumer's risk on and after delivery to the carrier.

The Consumer Rights Act 2015 now contains identical provisions about delivery of goods (Section 28) and the passing of risk (Section 29).

Complaints under the Regulations

In terms of Regulation 44, the Competition and Markets Authority (CMA) will have the primary responsibility to consider any complaint received from or on behalf of a consumer concerning a breach or contravention of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 unless the complaint appears to be frivolous or vexatious or another enforcement authority has notified the CMA that it has agreed to consider the complaint. In addition to the CMA, the following bodies are also enforcement authorities for the purposes of the 2013 Regulations:

- every local weights and measures authority in the UK
- the Department of Enterprise, Trade and Investment in Northern Ireland.

24 There are a number of issues which arise as a result of Lloyd's problem with the jewellers:

- The service provider's duty of skill and care
- Performance of a service within a reasonable time period.

Chapter 4 of the Consumer Rights Act 2015 (Sections 48–57) covers the supply of services by traders to consumers. Section 48 of the Act states that Chapter 4 of the Act applies to a contract where a trader supplies a service to a consumer. The Act does not cover the following types of contracts to supply services:

- Employment contracts and contracts of apprenticeship
- In Scotland, gratuitous contracts

A consumer is entitled to the following statutory rights in relation to contracts for the provision of services by a trader:

- Service to be performed with reasonable skill and care (Section 49)
- Information about the trader or service to be binding (Section 50)
- Reasonable price to be paid for a service (Section 51)
- Service to be performed within a reasonable time (Section 52)
- Relation to other law on contract terms (Section 53)

The duty of skill and care: The trader must perform the service with the requisite degree of skill and care. That is to say that the trader must take reasonable care when providing the service – the level of care that consumers would be entitled to expect from a reasonably competent member of a trade or profession, for example

a motor mechanic, a plumber, a solicitor or an accountant (see **McIntyre *v* Gallacher (1883)**). Admittedly, many trades or professions will have highly detailed rules which spell out what constitutes the standard of professionalism that users of services are entitled to expect from traders. In other situations, the customs and practices of the trade or profession under scrutiny may be so well established or widely accepted that the question of whether the trader has failed to deliver a decent service will be largely a foregone conclusion.

As should be obvious to students of the law of delict, any individual who claims to possess special skills or experience (see **Chaudhry *v* Prabhakar (1989)** in Chapter 5) or who states that s/he is proficient when it comes to the delivery of a particular service must meet the standards of a reasonably competent member of the trade, profession or occupation which routines delivers such a service.

What if the contractor or trader is acting on an unpaid basis for a member of the public, i.e. undertaking a mandate or acting as a gratuitous agent? In Scotland, the duty of skill and care expected of a particular contractor will not be any less stringent merely because that individual was acting on an unpaid basis (see both **Copland *v* Brogan (1916)** and **Chaudhry *v* Prabhakar (1989)**). Contractors or traders acting on an unpaid basis must, therefore, take the same sort of care that would be expected of them in the management of their own affairs.

It therefore follows that individuals qualified or licensed to carry out a particular occupation, trade or profession satisfies certain minimum requirements and if they fall below the accepted standard then this would leave them open to a potential negligence action. Obviously the consequences of negligence in certain professions (the medical profession) may be more serious than other trades or occupations (accountants) (see **McIntyre *v* Gallacher (1883)** and **Bolam *v* Friern Management Committee (1957)**).

Obviously, when the contractor belongs to a particular profession or trade, the member of the public will have selected this person because s/he has the perfectly reasonable belief that the contractor will have the necessary level of skill and care to complete transactions successfully.

Performance of a service within a reasonable time period: What if the trader cannot perform the service within a reasonable time period? Section 52 of the Consumer Rights Act 2015 applies to situations where the trader and the consumer have not expressly fixed the time for the service to be performed and they have not said how it is to be fixed. The trader *must* perform the service within a reasonable time period. What if the contractor cannot perform the service within a reasonable time period? Section 52 goes on to state that a reasonable time is a question of fact. It is highly probable that the contractor is potentially liable to the recipient of the service who, unsurprisingly, is unlikely to be happy with excessive delays. There is a potential problem here because the key question will centre around the issue of what is meant by the passage of a reasonable time? In one situation, the passage of a certain time period may be regarded as completely excessive whereas in another situation the passage of the same length of time could hardly be used as justification to raise a legal action. It follows from this line of reasoning that it will be absolutely impossible to lay down a universally accepted definition of what is a reasonable time for performance of a service. Consequently, it will still be left largely to the courts to exercise their judgement in this matter. A reasonable time could, therefore, be little as a few hours, a few days, a few weeks or a few months. Clearly, the courts will have to determine the issue by looking closely at the intentions of the parties to the contract and the circumstances of the case (see **Charnock *v* Liverpool Corporation (1968)** and **Charles Rickards Ltd *v* Oppenhaim (1950)**).

Chapter 5 (pp.417–20)

1 **a)** There are five ways in which an agency relationship can be established:

1 By express contract

2 Implied by the conduct of the parties or by law (see Section 5 of the Partnership Act 1890, Section 6 of the Limited Liability Partnership Act 2000 and **Hely-Hutchinson *v* Brayhead Ltd (1968)**)

3 By holding out (see **Hayman *v* American Cotton Oil Co (1907)**)

4 By ratification (see **Kelner *v* Baxter (1866)** and **Keighley Maxted & Co *v* Durant (1901)**)

5 By necessity (see **Couturier *v* Hastie (1856)**, **Great Northern Railway *v* Swaffield (1874)** and **Springer *v* Great Western Railway (1921)**).

b) (i) Beverley is Katrina's agent and, therefore, Beverley negotiated a binding contract with Jocelyn on Katrina's behalf. Katrina has effectively

appointed Beverley by holding her out as her agent. Katrina is personally barred from denying that Beverley is her agent (see **Hayman *v* American Cotton Oil Co (1907)**).

(ii) This is an example of ratification. In order for the principal to be able to ratify an unauthorised transaction, a number of conditions must be satisfied:

- The agent must disclose all material facts surrounding the contract so that the principal is fully aware of all liabilities that he is taking on.
- The principal must ratify the contract within a reasonable time.
- The principal must have existed at the time the contract was entered into.
- The principal must have the power and capacity to ratify the act otherwise the contract will be void.
- The agent must act with an identifiable principal in mind and not contracting on his own with hope that he will find someone who will later ratify the contract. It is important that the third party knows that the agent *is* acting as an agent and does not believe the agent to be in business on his own account.
- The principal will not be in a position to ratify any contract that is illegal.

Jonathan has ratified or approved his agent's unauthorised actions and he is bound into a contract for the house *and* the adjoining piece of land (see **Kelner *v* Baxter (1866)** and **Keighley Maxted & Co *v* Durant (1901)**).

2 a) The relationship between an agent and his principal is known as a fiduciary relationship, i.e. a relationship of trust. At all times, the agent is expected to act in the best interests of the principal. This means that the principal's interests must come first. The agent must ensure that there are no conflicts of interest. As with all contracts, the agent will enjoy the protection of certain rights, but the agreement also imposes certain duties which are owed to the principal.

The law imposes five key duties upon the Agent:

- To obey the instructions of the principal (see **Gilmour *v* Clark (1853)**)
- To exercise skill and care (see **Copland *v* Brogan (1916)** and **Chaudhry *v* Prabhakar (1989)**)
- To act in person (see **Black *v* Cornelius (1879)**)
- To keep proper accounts (see **Tyler *v* Logan (1904)**)
- To act in good faith (see **McPherson's Trustees *v* Watt (1877)**, **Liverpool Victoria Legal Friendly Society *v* Houston (1900)**, **Lothian *v* Jenolite Ltd (1969)**, **Islamic Republic of Iran Shipping Lines *v* Denby (1987)** and **Attorney-General for Hong Kong *v* Reid (1994)**).

The agent enjoys the following rights in relation to his principal under the agency agreement:

- Right to receive payment (see **Kennedy *v* Glass (1890)** and **Dudley *v* Barnet (1937)**)
- Right to be indemnified by the principal (see **Stevenson & Sons *v* Duncan (1842)** and **Drummond *v* Cairns (1852)**
- Right of lien over the principal's property (see **Sibbald *v* Gibson (1852)**)

b) Mitchell has entered into a contract with the prospective client on his principal's behalf. It does not matter if the principal does not wish to honour this contract with the tenant, Mitchell is still entitled to be paid for his services (see **Kennedy *v* Glass (1890)** and **Dudley *v* Barnet (1937)**). Furthermore, Mitchell is still entitled to be indemnified by the principal for any expenses that he has properly incurred in the course of his duties (see **Stevenson & Sons *v* Duncan (1842)** and **Drummond *v* Cairns (1852)**). If the tenant sued Mitchell for breach of the tenancy agreement in place of the principal, Mitchell would be entitled to be indemnified by the principal for this. Finally, Mitchell may be able to exercise his right of lien over any property of the principal that he rightfully possesses in order to make the principal come to his senses and pay for his services (see **Sibbald *v* Gibson (1852)**).

3 a) An agent can have two types of authority:

- Actual
- Ostensible

Actual authority is the true extent of the authority that the principal gives to an agent. The principal can give the agent this type of authority expressly or impliedly. Express, actual authority will be contained in either a written document or in verbal instructions that the principal issues to the agent (see **Ireland *v* Livingston (1872)**).

If a situation arises where the agent acts outwith his actual authority, but the principal does not discipline the agent for what would almost certainly be seen as a serious breach of the agency agreement, then any third parties dealing with the agent would be entitled to assume that the agent was acting within his actual authority. Where the principal appears to approve or endorse the actions of an agent acting outwith his actual authority, this is known as ratification.

Implied, actual authority will arise where the agent holds a particular position and it is implied by law or by the behaviour of the principal and the agent that this kind of agent would have actual authority to bind the principal into contracts with third parties

(see Section 5 of the Partnership Act 1890, Section 6 of the Limited Liability Partnership Act 2000 and **Hely-Hutchinson *v* Brayhead Ltd (1968)**).

Ostensible authority is the authority that a third party believes that the agent possesses. Ostensible authority is not true authority, it is fictitious and exists only in the mind of the third party. The principal, however, has encouraged the third party to believe that the agent has the necessary authority. The third party must show that the principal's statements or behaviour encouraged him to believe that the agent had the necessary authority (see **Watteau *v* Fenwick (1893), Barry, Ostlere & Shepherd Ltd *v* Edinburgh Cork Importing Co (1909), International Sponge Importers *v* Watt & Sons (1911)** and **Freeman & Lockyer *v* Buckhurst Park Properties (Mangal) Ltd (1964)**). A third party's claim that he believed that the agent had ostensible authority purely because the agent told him that he had been given authority by his principal will not be accepted by the courts. The false impression of authority must have been created by the principal's actions (see **Reckitt *v* Barnet & Company (1929)**).

The third party may have been encouraged by the principal to believe that the agent had authority to act in a particular way for the following reasons:

1 The agent's authority has been changed or limited in some way. Stupidly, however, the principal fails to tell third parties of this very important change and so third parties understandably continue to believe that the agent still has the same powers.

2 The agent did not have authority to act in a particular way when he entered a contract with the third party. The principal, however, decides to ratify or approve the contract and this leads the third party to assume that this type of contract is well within the agent's powers. Again, the principal will have failed to take steps to notify the third party of the true extent of the agent's authority.

3 The agent has had implied authority in the past, for example, he may be a partner in a firm or a director of a company. Third parties dealing with these types of agents would have been entitled to assume that they possessed certain powers or had authority to enter into contracts of a particular kind. However, these individuals may have had their authority limited or withdrawn by their principals, but this fact has not been publicised to third parties.

It is vitally important that the principal communicates any change in the agent's authority to third parties. If the principal does notify third parties about the true extent of the agent's authority then he will not be held accountable for any of the agent's unauthorised actions.

If there are circumstances which should have caused the third party to suspect that the agent was acting outwith his authority, but the third party still goes ahead with the contract then the principal will not be legally bound. The third party's remedy is to sue the agent for what is known as breach of warranty of authority.

b) In the case of **Reckitt *v* Barnet & Company (1929)** where an agent who had the authority to write cheques for the company, paid a private debt using money in his principal's account. *Held*: the principal was entitled to recover his money from the third party, as they should have suspected that the agent did not have the authority to write company cheques in order to pay a private debt. This is the type of transaction that the third party should have questioned because it should have been immediately obvious that the principal was unlikely to allow his bank account to be used by the agent in this way.

However, where Lindsey-Anne is concerned, she does not have authority to write cheques and we do not know if the store was aware of the limits on this particular partner's authority to bind the firm. In terms of Section 5 of the Partnership Act 1890, Lindsey-Anne as a partner does have authority implied by law to bind the firm into contract with third parties when acting in the normal course of the firm's business. See also **Hely-Hutchinson *v* Brayhead Ltd (1968)** for an example of an agent's implied authority. The question here would centre around whether or not the purchase of a computer should have excited the suspicions of the store. This seems like a perfectly normal type of transaction for a partner to enter on the firm's behalf. Furthermore, was the store even aware of the limits placed on Lindsey-Anne's authority? If it did have knowledge of this lack of authority on Lindsey-Anne's part, it would completely undermine its argument that she possessed ostensible authority to bind the firm. In the past have the other partners communicated the fact that Lindsey-Anne lacks authority to bind the firm to the store and other third parties?

If there are circumstances which should have caused the third party to suspect that the agent was acting outwith his authority, but the third party still goes ahead with the contract then the principal will not be legally bound. The third party's remedy is to sue the agent for what is known as breach

of warranty of authority (see **Anderson *v* Croall (1903)**).

4 **a)** An agent expects to receive some sort of reward for performing services for the principal. In Scotland, a person can act for someone very much like an agent, but this type of representative would not expect to receive a reward. Sometimes this type of relationship is referred to as gratuitous agency or unpaid agency. It is more properly called mandate and the person who acts in this way is known as a mandatary. Although acting on an unpaid basis, a mandatary will still owe a duty of care to the person for whom he is acting. This means that a mandatary will not be able to use the fact that he was acting unpaid as a defence to a claim of negligence.

b) Joe is acting on an unpaid basis as a mandatary (i.e. an unpaid agent) for Michelle. It would appear that Joe has been negligent when he was examining the car and this negligence has caused loss to Michelle. Following the cases of **Copland *v* Brogan (1916)** and **Chaudhry *v* Prabhakar (1989)**, it is likely that Joe will be liable to Michelle for the consequences of his negligence. It makes no difference that Joe was acting on an unpaid basis. A mandatary must take the same sort of care that would be expected of him in the management of his own affairs. Had Joe been looking for a car of his own, he would probably have taken much greater care than the level of care that he displayed when selecting a car for Michelle.

5 **a)** A fiduciary relationship is a relationship of confidence that imposes a special duty of care on one or both of the parties. Examples of such relationships include those of solicitor/client, principal/agent, doctor/patient, parent/child and the partners in a firm. If a party owes a fiduciary duty to someone else this means that he must disclose all material facts to the other person. The duty arising from these types of fiduciary relationships are different from the duties that arise under contracts *uberrimae fidei*, i.e. of the utmost good faith. In contracts *uberrimae fidei*, it is the nature of the contract, for example, an insurance contract which requires disclosure in spite of the relationship between the parties. In the fiduciary situation it is the relationship of the parties and not the particular contract which gives rise to the need to disclose.

At all times, the agent is expected to act in the best interests of the principal. This means that the principal's interests must come first. The agent must ensure that there are no conflicts of interest. The agent must not divulge any confidential information in relation to the principal's business that he obtains in the course of his agency. It is often the case that a dishonest agent will be able to profit personally from the agency because of his position or because third parties may offer him a benefit or bribe if the agent introduces them to his principal. It is worth emphasising that an agent who sees the opportunity to make a fast buck or take advantage of some benefit which comes his way will not have the principal's best interests at heart. The agent may view these benefits as perks of the job, but such behaviour could result in disastrous consequences for the principal. The agent may not have properly scrutinised the deal proposed by the third party and this could cause the principal some serious losses in the future. There does not need to be an actual conflict between the agent's and the principal's interests. It is very often enough for there to be a potential conflict. If the agent sees an opportunity to make a profit, the principal should always be informed of this. It will then be completely up to the principal whether or not to allow the agent to receive the benefit. It is often forgotten that the only reason that the agent is in a position to receive a benefit is because the principal appointed him in the first place.

The extent of the agent's fiduciary duty is limited to how it affects the agency agreement. It is still entirely possible for an agent to promote his own interests when he is not acting for the principal. The agent may even act for a number of different principals. If a principal wished to prevent his agent from pursuing his own interests outside the agency agreement or from working on behalf of other principals, there would have to be an express term in the agency agreement to this end. Such a condition could never be implied into all agency agreements. However, such a restraint of trade might be declared illegal if it was in any way excessive or anti-competitive. For examples of the fiduciary nature of the agency relationship see the following cases: **McPherson's Trustees *v* Watt (1877)**, **Liverpool Victoria Legal Friendly Society *v* Houston (1900)**, **Lothian *v* Jenolite Ltd (1969)**, **Islamic Republic of Iran Shipping Lines *v* Denby (1987), Guinness Plc *v* Saunders and another (1990)** and **Attorney-General for Hong Kong *v* Reid (1994)**.

b) Bob has breached his fiduciary duty to his principal by making secret profits. This is a very serious breach of the agency contract. There are a number of serious consequences which arise as a result of an agent making a secret profit:

1 The agent has committed a material breach of the agency agreement and the principal is, therefore entitled to terminate the contract with immediate effect.

2 The agent cannot claim payment for that particular transaction.

3 The agent can be sued by the principal with the intention of recovering the secret profit that the agent has made.

4 The third party may find that the principal refuses to honour the contract that the agent negotiated.

5 The third party himself may be sued by the principal if he bribed or encouraged the agent to breach his fiduciary duty to the principal.

6 If the third party refuses to pay the bribe or the commission to the agent, the agent cannot take legal action against the third party because their agreement is illegal and, therefore, unenforceable.

7 Bribery is a criminal offence in terms of the Bribery Act 2010.

For examples of an agent making secret profits see **Islamic Republic of Iran Shipping Lines *v* Denby (1987)** and **Attorney-General for Hong Kong *v* Reid (1994)**.

6 In the event of an emergency, a person is deemed by law to have the authority to act as agent for another party. However, it must be impossible for the person acting as agent of necessity to contact the principal. Before the use of modern communications such as faxes, telephones, ship-to-shore radios and email, this type of agency was extremely useful, but it is now highly unlikely that a principal would be unable to be contacted in an emergency situation. In saying that, however, this type of agency should not be written off completely and it may still undoubtedly have its uses. There will clearly be situations where an agent has to come to decision very rapidly in order to protect the principal's interests and he may not enjoy the luxury of attempting to communicate the principal in order to obtain further instructions. As long as the agent of necessity acts in good faith to protect the interests of the principal, he will not be held liable for any losses which his actions may have caused the principal (see **Couturier *v* Hastie (1856)**, **Great Northern Railway *v* Swaffield (1874)** and **Springer *v* Great Western Railway (1921)**).

7 **a)** Regulations 3 and 4 of the Commercial Agency Regulations 1993 describe the duties of an agent and his principal.

The agent's duties (Regulation 3)
- The agent must protect the principal's interests by acting dutifully and in good faith at all times.
- The agent must make proper efforts to negotiate and, where appropriate, conclude the transactions that he has responsibility for.
- The agent must provide the principal with all the information that he has at his disposal.
- The agent must obey all reasonable instructions given to him by the principal.

The principal's duties (Regulation 4)
- The principal must pay or remunerate the agent for carrying out his duties under the agency agreement.
- The principal must reimburse the agent for any expenses that the agent has incurred in the line of duty.
- The principal must provide the agent with the necessary documents and the necessary information relating to the goods in order for the agent to carry out his duties.
- The principal must tell the agent within a reasonable time whether he intends to honour or refuse to honour the contract that the agent has set up with a third party.
- The principal must inform the agent within a reasonable time of any breach of the contract with the third party that the principal is responsible for.

According to Regulation 5(1), the rights and duties contained in Regulations 3 and 4 are not negotiable and both parties are bound by them whether they like them or not.

b) (i) The principal is legally obliged to give Lesley-Anne notice if he decides to terminate the agreement. Regulation 15 establishes compulsory minimum notice periods which the parties have to obey if they wish to end the agreement. The basic periods of notice are as follows:
- One month's notice during the first year of the agreement
- Two months' notice during the second year of the agreement
- Three months' notice during the third year or any subsequent year of the agreement

So, in total, Lesley-Anne would be entitled to seven months' notice since she has worked for the principal for seven years.

(ii) The Agent's right to an indemnity or compensation is contained in Regulations 17 to 19. Indemnity and compensation are two different things as Lord MacFadyen in **Hardie Polymer Ltd *v* Polymerland Ltd (2001)** pointed out:

'Compensation and indemnity are distinct concepts. It is not surprising that there are elements of similarity between them, since they are alternative ways of making provision for the same situation, namely the termination of the agency contract.'

In **King *v* T Tunnock Ltd (2000)** the Court of Session made a distinction between compensation and indemnity:

'On any view indemnity and compensation, as set out by both Directive and Regulations, have different features … The agent is entitled to compensation for damage he suffers as a result of the termination of his relationship with the principal. The word "suffers" is in the present tense, which suggests that the point of time defining damage is the termination of the agency. Moreover, what is compensated is "the termination of his relations with his principal". The emphasis is not on his future loss but on the impact of the severance of his agency relationship with the principal. An agency generally has commercial value.'

According to Regulation 17, therefore, the agent will be entitled to be compensated by the principal where he has suffered loss as a result of the principal terminating the commercial agency agreement. Usually, according to Regulation 17(2), the agent shall be entitled to be compensated rather than indemnified, unless the commercial agency agreement specifies that she is entitled to receive an indemnity.

In the English High Court decision **Moore *v* Piretta PT Ltd (1998)** Deputy Judge John Mitting QC described the agent's claim to an indemnity in the following terms:

'The purpose of the indemnity seems to me to be to award a share of the goodwill built up by the efforts of the agent to him on the termination of the agency. Otherwise the whole benefit of that goodwill will remain with his former principal.'

An agent will be entitled to be compensated by the principal where he has suffered loss as a result of the principal terminating his agency agreement and he will be entitled to an indemnity where he has increased the number of the principal's customers or where he has dramatically increased the amount of the principal's business with existing customers.

It is likely that Lesley-Anne will be entitled to an indemnity to reflect her efforts in building up the principal's business. In terms of Regulation 17(4), the amount of the indemnity awarded to the agent shall not be greater than a figure equivalent to an indemnity for one year calculated from the commercial agent's average annual remuneration over the previous five years and, if the contract goes back less than five years, the indemnity shall be calculated on the average for the period in question (NB The question does not ask you to calculate the amount of an indemnity or compensation for that matter owed to Lesley-Anne).

It is important to note that the payment of an indemnity does not prevent the agent from seeking compensation or damages from the principal. Regulation 17(6) states that the agent shall be entitled to compensation for damages that he has suffered as a result of the principal ending the commercial agency agreement. Regulation 17(7) strongly suggests that the agent will have suffered loss or damage in one or both of the following situations:

- Loss of future commission by the agent
- The agent has been unable to recover any expenses which he properly incurred on the principal's behalf.

The agent's claim for compensation should be lodged, however, within one year of the end of the agreement. If the agent's death has caused the agreement to end, then the agent's estate will not be prevented from pursuing the principal for any compensation or expenses owed.

For cases dealing with an agent's right to an indemnity or compensation see **Graham Page *v* Combined Shipping and Trading Co Ltd (1997)**, **Moore *v* Piretta PT Ltd (1998)**, **King *v* T. Tunnock Ltd (2000)**, **Duffen *v* FRABO *SpA* (2000)**, **Ingmar GB Ltd *v* Eaton Leonard Technologies Inc (2001)**, **Hardie Polymer Ltd *v* Polymerland Ltd (2001)**, **Barrett McKenzie *v* Escada (UK) Ltd (2001)**, **Tigana Ltd *v* Decoro (2003)**, **Smith, Bailey Palmer *v* Howard & Hallam Ltd (2006)** and **Lonsdale (t/a Lonsdale Agencies) *v* Howard & Hallam Limited (2007)**.

Lord Hoffman in **Lonsdale (t/a Lonsdale Agencies) *v* Howard & Hallam Limited (2007) UKHL 32** has explicitly criticised the reasoning of the Extra Division of the Court of Session (given by Lord Caplan) in **King *v* T. Tunnock Ltd (2000)** which was used to determine the amount of compensation payable to the agent. The Court of Session had expressly overruled the decision

of the Sheriff at first instance who was strongly of the opinion that the value of the commercial agency was worth nothing. Lord Hoffman stressed that the notional value of a commercial agency must be determined by '… circumstances as they existed in the real world at the time: what the earnings prospects of the agency were and what people would have been willing to pay for similar businesses at the time'.

(iii) Regulation 20 deals with restrictive covenants in commercial agency agreements. Firstly, in order for a restraint of trade clause to be valid, it must be in writing and it must cover the group of customers and goods to which the agent's work was connected. Secondly, the maximum amount of time that such clause can last for is two years after the end of the agency agreement. The clause in Lesley-Anne's agreements is, therefore, excessive and will be void.

(iv) According to **Ingmar GB Ltd *v* Eaton Leonard Technologies Inc (2001)** the Regulations will apply even if the parties have attempted to exclude them by stating in their agreement that the agreement is governed by the law of a state which is not a member of the European Union.

8 **a)** General agents act for the principal in connection with all of his interests in a particular line of business. One example of a general agent is a solicitor. General agents can possess both actual and ostensible authority.

Special agents, on the other hand, have extremely limited authority. They usually act for the principal in one type of transaction only. An example of a special agent would be an estate agent. Special agents possess actual authority only.

See **Morrison *v* Statter (1885)** and **The Ocean Frost (1986)** for an illustration of general and special agents.

b) Where the third party is aware of the existence of the agent's principal, such a person is referred to as a disclosed principal. It does not matter whether the third party can name the principal personally (see **The Santa Carina (1977)**). It is important to determine whether the agent is acting for a disclosed or an undisclosed principal. Generally, an agent who acts for a disclosed principal plays no further part in proceedings when an agreement is eventually completed between the principal and the third party. Should a dispute arise in relation to the agreement, the agent – as long as he acted properly – will not be liable to the third party for the principal's failure to honour the agreement.

The position is more complicated where the agent has not revealed to the third party that he is acting for a principal. Should the principal fail to honour the agreement, the third party will, naturally enough, sue the agent. At this moment, the agent may then reveal the fact that he was acting as an a agent. It will be up to the third party whether he wishes to sue the principal or the agent for breach of contract. Once the third party makes this choice, such a decision will be final.

It is usually a sensible precaution on the agent's part to indicate to third parties that he is acting as an agent in order to avoid any potential liability in the future. It is widely understood that the initials pp at the end of a letter indicate that the signatory is acting as an agent and not acting in his personal capacity:

Yours sincerely
Alistair B Wylie
pp The Business Law Consultancy

Therefore, Alistair B Wylie is clearly indicating to anyone who receives this letter that he has signed the letter in his capacity as an agent of The Business Law Consultancy (see **Stewart *v* Shannessy (1900)**).

c) A *del credere* agent is an agent who introduces third parties to his principal and, critically, he promises to indemnify or compensate the principal if the contract does not go as planned and the principal suffers losses as a result (see **Couturier *v* Hastie (1856)**).

d) An agent can either be an employee or an independent contractor. An agent who is an employee will carry out services for the principal under a contract *of* service, whereas an independent contractor carries out services for the principal under a contract *for* services. It may be useful to think of a contract of service as an employment contract and, by way of a comparison, a contract for services involves a situation where the agent will hire out his services on an as required basis to the principal. A solicitor may serve as a useful example. If a solicitor works permanently for the legal services department of a local council, he will be an agent and an employee of the council. If, however, a solicitor is a partner in a private law firm and hires out his services to private clients as and when they require his advice and assistance, he will be acting as an agent, but he is an independent contractor and not an employee of his private clients.

Not all employees, of course, can call themselves agents of their employer. It should be remembered that the most important function of an agent is to bind his principal into contracts with third

parties. Many employees will simply not have the power to do this. It is highly unlikely that someone who works on a factory production line and has absolutely no dealings with third parties would be in a position to describe himself as his employer's agent.

9 The agency relationship, like any contract, can be terminated in a number of different ways. This can be done by:

- Mutual agreement
- Principal withdrawing the agent's authority
- The agent withdrawing from the relationship
- Bankruptcy of the principal
- Death or insanity
- The expiry of a fixed term contract

In relation to a partnership, a former partner in order to escape liability will have to publicise his departure from the firm in the *Edinburgh Gazette* and this is regarded as giving proper notice to third parties of his changed role in relation to the business.

The termination of a commercial agency agreement is governed by the rules contained in Regulations 14 to 16 of the Commercial Agency Regulations 1993. As we have seen, Regulation 15 establishes compulsory minimum notice periods which the parties have to obey if they wish to end the agreement.

10 There are a number of different business organisations which exist under Scots law:

- Sole Trader
- Partnerships (Partnership act 1890)
- Limited Partnerships (Limited Partnership Act 1907)
- Limited Liability Partnerships (Limited Liability Partnerships Act 2000)
- Corporate Bodies (Companies Act 1985)

It is very important to be able to differentiate between types of business because they are all governed by different rules.

11 Section 24 of the Partnership Act 1890 will provide Cameron, Howard and Iain with many of the answers to the questions that they are asking. It should be stressed from the beginning, however, that the Partnership Act 1890 only provides guidelines which the partners are free to ignore if they so wish. In theory, the partners are largely left to run their business as they see fit. If the partners have chosen to depart from any of the rules contained in the Partnership Act 1890, the courts will have to respect this decision.

a) As regards the personal liability of each partner to the firm's creditors should the business run up debts or should it fail completely, all the partners are expected to contribute equally towards any losses that the firm may suffer. In other words, the three partners are jointly and severally liable for the firm's debts or losses (see **Stewart *v* Buchanan (1903)**). This means that the partners can be sued collectively (i.e. as a group) or individually by the firm's creditors. The firm's creditors are supposed to sue the firm first and it is only if the firm has no assets to meet its liabilities that the creditors should move against the partners. All partners can expect to share equally in the profits that a partnership makes.

b) Section 5 of the Partnership Act 1890 states that a partner in a firm is considered to be an agent of the firm and of his fellow partners (see **Bryan *v* Butter Brothers & Co (1892)**). A partner will, therefore, have implied, actual authority to bind the firm and his fellow partners in respect of contracts negotiated and entered into with third parties in the usual course of the firm's business. Furthermore, according to Section 24 of the 1890 Act, all partners have the right to participate in the running of the partnership.

c) Section 24 states that all the partners must first agree before any new partner can join the partnership.

d) The relationship of the partners is characterised by its fiduciary nature and it is important that the partners disclose all material facts that could affect the partnership. Such material facts would include situations where some or all the partners are participating in other business ventures – especially rival business ventures (see **Pillans Bros *v* Pillans (1908)**). Generally speaking, the partners will not be allowed to participate in rival business ventures without first having obtained the consent of their fellow partners, which in many situations will not be forthcoming. If a partner goes ahead and participates in a rival business venture without informing his fellow partners, he may well be making secret profits with all the consequences that this entails. The Partnership Act 1890 spells out the fiduciary duties of a partner in the following ways:

1 Every partner must keep proper accounts when handling and receiving partnership funds on behalf of his fellow partners. A partner is also under a duty to inform his fellow partners about any matter which may affect the firm (Section 28).

2 Every partner must inform his fellow partners of any profit made or benefit received as a result of his position as a partner or as a result of using the firm's property or assets (Section 29).

3 Any partner who competes against the firm by running another business without having been

given permission by his fellow partners will have to hand over all profits made in the course of the competing business to the firm (Section 30). (See **Pillans Bros *v* Pillans (1908)**.)

e) Sections 10, 11 and 12 of the Partnership Act impose the burden of vicarious liability on the firm for any delicts or negligent acts which are committed by the partners. This means that the firm will be liable to a third party if a partner injures the third party or if damage is caused to the third party's property while the partner is acting in the course of the firm's business,. It is important to stress that the firm will not be liable where one partner causes loss or injury to a fellow partner while acting in the course of the partnership business. In such a situation, the injured partner would have to sue the partner who had committed the wrongful act in his personal capacity. (See **Mair *v* Wood (1948)** and **Kirkintilloch Equitable Co-operative Society Ltd *v* Livingstone (1972)**.)

f) The rules concerning termination of partnership are contained in Sections 32 to 35 of the Partnership Act 1890.

If a partnership was created for a fixed period of time, the business comes to an end when this period expires. The members of a firm may set up a business which is to operate for, say, five years (Section 32). Once this five-year period has passed, the business is at an end. However, there is nothing to stop the partners continuing in business together after the expiry of the five-year period if they are so minded. (See **Neilson *v* Mossend Iron Co (1886)**.)

If the firm was set up to achieve a particular goal, it will come to an end when this purpose is accomplished (Section 32). (See **Winsor *v* Schroeder (1979)**.)

The death of a partner dissolves the firm (Section 33), but Iain, Cameron and Howard have agreed that the partnership will not necessarily be dissolved due to the death of one of them. (See **Thomson *v* Thomson (1962)**.)

The bankruptcy of a partner also dissolves the firm. The partnership agreement usually provides that the business shall continue to operate with the participation of the solvent partners. This means that the dissolution is, again, only a technical one, and the bankrupt partner's share is paid out to his trustee in bankruptcy. The partnership agreement must address the possibility of a member's bankruptcy occurring in the future so that the firm can continue to operate in these circumstances. It is no use agreeing to continue to keep the business running after the bankruptcy of one of the partners has occurred, if this eventuality is not covered by the partnership agreement (Section 33).

If a partner's share in the partnership comes under the control of a creditor to whom the partner owes a private debt, the remaining solvent partners of the firm can exercise an option to dissolve the business (Section 33). The Partnership Act 1890 does not indicate whether this can be done by a single partner, or by a majority of the partners or whether such a decision would have to be unanimous.

If the operation of the partnership becomes illegal, the business will be dissolved (Section 34). (See **Stevenson & Sons Ltd *v* AG Für Cartonnagen Industrie (1918)**.)

A partner may apply to the courts so that an order for the dissolution of the partnership can be issued (Section 35) in the following circumstances: a partner suffers from some mental disorder or insanity; a partner suffers from some permanent incapacity; a partner conducts himself in a way that is harmful to the continued operation of the business; a partner persistently commits a breach of the partnership agreement or conducts himself in a way that it would be unreasonable to expect the other partners to continue working with him; where the business can only be carried on at a loss; or where the court thinks that it would be just and equitable that the partnership should be dissolved. (See **Thomson, Petitioner (1892)**.)

Under Section 17 of the Partnership Act, new partners joining the firm will not be responsible for any partnership debts or wrongful acts committed by the business that were run up or occurred before their involvement in the firm. (See **Thomson *v* Balfour, Boag & Sons (1936)**.) Similarly, a partner who has left the firm will cease to have any responsibility for business liabilities after his departure. (See **Tower Cabinet Co Ltd *v* Ingram (1949)**.) A former partner in order to escape liability will have to publicise his departure from the firm in the *Edinburgh Gazette* and this is regarded as giving proper notice to third parties of his changed role in relation to the business. It is worth pointing out that former partners continue to be liable for business debts or for wrongful acts committed by the partnership which occurred during their involvement with the firm.

g) Section 24 states that the partners can reach a decision by majority vote. However, any changes to the nature of the partnership agreement must be agreed by all of the partners. Section 25 prevents a majority of partners from expelling a fellow partner from the firm, unless this power

is part of the contract of partnership. If such a power of expulsion exists, the partners who wish to make use of it must be seen to be acting in good faith.

12 A limited partnership allows the firm to have silent or limited partners who take no part in the day-to-day running of the firm's business and, furthermore, these individuals enjoy limited liability. This type of business is governed by the Limited Partnerships Act 1907. Unlike a traditional partnership, this type of business must be registered with the Registrar of Companies in Edinburgh. The following information must be supplied to the Registrar:

- The name of the limited partnership
- A brief description of the type of business that it carries on
- The location of its main office
- The full names of each of the partners
- A statement, if appropriate, of how long the partnership is to last and the date upon which the business began
- A statement that the partnership is limited and who the limited partners are
- The amount of each limited partner's contribution to the business.

The Act allows at least one general partner and one limited partner to form a business. However, there must always be at least one general partner at any time. The limited partner is effectively a silent or a sleeping partner and plays no part in the day-to-day running of the business. In an ordinary partnership, all the partners operate under the burden of unlimited liability where they will all be responsible for the firm's debts. This is not the case in a limited partnership, where the limited partner will lose only the amount of money that he advanced to the firm. If the limited partner becomes involved in the daily management of the business, his liability for business debts or delicts which were the responsibility of the business would become unlimited. Limited partners see their role as that of an investor wishing to make a profit. They do not want to be bogged down with the responsibilities of management. The 1907 Act makes it quite clear that a majority of the general partners will decide the aims and the policies of the business. A limited partner will not even be able to oppose the introduction of a new general partner if the existing general partners have made up their minds on this matter.

Even the death, lunacy or bankruptcy of a limited partner will not mean that the partnership has to be ended as with an ordinary firm. It will be the general partners who will decide when the business is to be ended. The major disadvantage of being a limited partner is that it will not be possible for such a person to withdraw his investment while the partnership is still trading. The general partners may allow a limited partner to transfer or assign his investment in the business to a third party, the public must be notified by the placing of an advertisement to this effect in the *Edinburgh Gazette*. These types of businesses tend to be encountered rarely because private limited companies are seen as a more popular means of investing money.

The relationship between the general partners is governed by the Partnership Act 1890 and the associated case law in mostly the same way as would be found in an ordinary firm.

13 The Limited Liability Partnership Act 2000 came into force on 6 April 2001. The Act introduces a new type of business vehicle in addition to companies, traditional partnerships, limited partnerships and sole traders. According to Section 1 of the Act, a limited liability partnership or LLP is a corporate body which has completely separate legal personality from that of its members. Section 1 also makes it very clear that the law of partnership does not apply to LLPs.

A business trading as a limited liability partnership will be immediately recognisable by the use of the initials LLP after its name.

It was originally thought that LLPs would be attractive business organisations for existing professional partnerships such as law firms, surveyors and accountants. In many situations, though they are exceptions, such businesses have faced difficulties in trying to run limited companies because of the rules laid down by their professional associations. The major advantage of setting an LLP for existing partnerships is that the members can limit their liability. In a traditional style partnership, it will be remembered that should the business fail and run up huge debts, the members will face the burden of unlimited liability. This effectively means that creditors of the partnership can and will pursue the members to their last penny. The partner's personal assets, for example, a home, savings, a car and other valuables will be eyed up by creditors. Existing limited companies, however, are prevented from re-registering as LLPs.

Section 2 of the Act contains the rules for establishing an LLP: it must have at least two members who have signed an incorporation document; the founding members of the LLP must register this incorporation document and other necessary documentation with the Registrar of Companies; and a registration fee is also payable by the proposed members of the LLP to the Registrar of Companies.

If an LLP operates with just one member for more than six months, the business loses the protection of limited liability and the remaining member will have complete responsibility for any business debts or liabilitites.

An LLP must be registered with the Registrar of Companies who will issue a certificate of incorporation signifying that the business has complied with all necessary legal requirements (Sections 2 and 3).

It is very important that those people who are involved in running an LLP should not be called partners. The proper term for these individuals is members. Section 4 states that the first members of the LLP are those individuals whose names appear on the incorporation document which is delivered to the Registrar. At least two members must be 'designated members' and their names must be given to the Registrar as such. Designated members have additional responsibilities in comparison to the general members of an LLP. The designated members will be responsible for administrative and filing duties which would normally be carried out by a director or a company secretary in a company.

Although there is no legal requirement for LLP members to commit anything to paper, Section 5 of the Act makes it clear that it would be a very sensible practice for the LLP members to draw up a detailed members' agreement (currently known as a partnership agreement). This agreement would deal with all the important issues that the business will face.

According to Section 6, the members of an LLP are to be regarded as the agents of the business. If an individual ceases to be an LLP member, this fact must be communicated to third parties dealing with the business and, additionally, there is a legal requirement to inform the Registrar of Companies. Failure to inform third parties dealing with the business that someone is no longer an LLP member means that the former member will continue to be regarded as being involved in the business.

Section 7 describes a number of situations where an individual will lose the right to be involved in the affairs of the LLP as a member.

An LLP is classed as a completely separate legal person from its members and the members enjoy limited liability, unlike partners in a traditional firm.

Any changes in the membership of an LLP must be notified to the Registrar of Companies within 14 days. When there is any change in the name or residential address of a member, notice of this fact must be given to the registrar within 28 days. The Registrar does not require notice where individuals either become or cease to be designated members of the LLP. Failure to comply with these notice requirements is a criminal offence (Section 9).

LLPs will have to publish financial accounts containing the same sorts of detail as a similarly sized limited company and these accounts and an annual return will have to be submitted to the Registrar of Companies (Sections 10 to 13).

14 Someone or a group of people will often be required to set up a company and comply with all the necessary registration procedures. Practical steps will have to be taken by such an individual or individuals such as buying or leasing property in order to have premises for a registered office, entering into contracts with third parties in order to buy or lease equipment that will be used by the new company or entering into contracts of employment with prospective employees of the new business. Clearly, it would not make good business sense to wait until all the legal requirements of the registration process had been complied with before attending to these important matters. The sooner everything is in place, the sooner the new business can begin to trade and, hopefully, begin to make profits for its members.

A person who takes care of these matters before the company is formed is referred to as a promoter. In **Twycross *v* Grant (1877)**, a promoter was defined as someone who undertakes to form a company with reference to a given project, and to set it going, and who takes the necessary steps to accomplish that purpose. A promoter of the company is not an agent of the company (see **Tinnevelly Sugar Refining Co *v* Mirrlees, Watson & Yaryan Co Ltd (1894)**). Section 51(1) of the Companies Act 2006 makes the legal position of promoters very clear. They are not to be regarded as agents of a non-existent company. As a promoter is not an agent of the new company, he has no right to be paid for his services. In reality, many promoters are likely to be directors or members of the new company and, therefore, they have an interest in setting the company up. In any case, the new board of directors may have powers in the Articles of Association to pay the promoter or reimburse him for his expenses.

The downside of being a promoter is that they are personally responsible for any contracts that they enter into with third parties. The company cannot sue or be sued in relation to contracts that were formed before it was registered. This is a dangerous situation for the promoter because

it means that the company need not reimburse him for any expenses that he is out of pocket as a result of entering into contracts with third parties. A promoter is regarded as having a fiduciary relationship with the yet non-existent company. This means that the promoter cannot use his position to make a profit unless the directors or members of the new company are aware of this and are comfortable with this situation. This means that a promoter will have to account for everything that he has done in his role. It is not beyond the realms of possibility that the new board of directors or members might sue a promoter to regain any secret profit that he has made from his activities.

A promoter can always try to escape personal liability for contracts with third parties by insisting that third parties agree not to sue him in the event that the company fails to honour the contract once it has been registered. Alternatively, a promoter may insist that the contracts will only take effect when the new company is legally recognised and that such a contract will be between the new company and the third party.

15 All limited companies, whether private or public, must be registered under the Companies Act. This means that the company becomes an independent legal person in its own right, legally separate from its members and officers, a person recognised by the law, a person capable of having rights and taking on duties which the courts will recognise and enforce.

When a company with limited liability becomes a separate legal person this process is referred to as 'the veil of incorporation'.

It is worth remembering that separate corporate personality means that: the company can raise legal actions in its own right and be the subject of legal actions against it; the company has legal capacity and becomes a party to the contracts which it enters into; the company can exercise ownership over its property; the company continues to exist despite changes in its membership; and the company's members enjoy limited liability.

The concept of separate corporate personality was forcefully recognised by the House of Lords in the case of **Salomon *v* Salomon & Co Ltd (1897)**. A court will ignore the concept of separate corporate personality in the following circumstances:

1 In a public company, there must be at least two members. If, for a period of more than six months, the company operates with a single member this individual becomes personally responsible for all debts of the business.

2 If a company was set up so that the members can carry out an illegal activity, they will not be allowed to benefit from the Salomon rule.

3 In times of war, a company that is controlled by citizens of an enemy state will not be allowed to continue trading for the duration of hostilities. Normally, the law is not interested in the nationalities of individual members, but in times of war this becomes a very important issue.

4 Company officers, for example directors and company secretaries, will have to be especially careful when signing cheques in their personal capacity and where third parties will not be aware that they are doing so on behalf of the company. Additionally, the company officer can make an error when he writes the name of the company on a cheque that will be given to the third party. In both situations, the company officer will be personally responsible to the third party if the company does not meet the debt that the cheque represents.

When the concept of separate corporate personality is sometimes ignored by the courts, this is known as 'lifting the veil of incorporation'.

16 **a)** According to Section 33 of the Companies Act 2006, the provisions of a company's constitution bind the company and its members as if it were a covenant, i.e. a contract and the members must observe these provisions. In other words, the members and the company are legally bound to each other as much as the parties would be in any normal contractual relationship. Furthermore, any money owed to the company by a member in terms of the Constitution is to be treated as a debt owed by that member to the company. Section 33 of the Companies Act 2006 has, therefore, a number of consequences for members of a company:

1 If a member feels that one of his membership rights that he enjoys under the company's constitution has been ignored or abused by the company, he can raise a legal action against the company and force it to recognise these rights (see **Wood *v* Odessa Waterworks Co (1889)**).

2 The company can raise a legal action against members of the company who breach the rules regulating membership as laid out in the company's constitution (see **Hickman *v* Kent or Romney Marsh Sheep Breeders' Association (1915)**).

3 The members can sue one another for breach of the company's constitution (see **Rayfield *v* Hands (1960)**).

4 The rights given to members under the company's constitution cannot be enforced by non-members or where the member is effectively acting as an outsider (see **Eley *v* Positive Life Assurance Co Ltd (1876)**).

b) (i) Stephanie's position as a Director is under threat, not her position as a shareholder which remains unaffected. Stephanie cannot rely upon Section 33 of the Companies Act 2006 to try and prevent her removal as a Director because this right does not relate to her role as a shareholder (see **Eley *v* Positive Life Assurance Co Ltd (1876)**).

(ii) Emma must use the company's arbitration procedure and the company can raise a legal action against members of the company who breach the rules regulating membership as laid out in the company's constitution by raising a legal action at the Court of Session (see **Hickman *v* Kent or Romney Marsh Sheep Breeders' Association (1915)**). **Section 33 of the Companies Act 2006** means that the arbitration procedure forms part of a binding contract between Emma and her fellow shareholders and the company.

(iii) Gillian's uncles must purchase her shares as they are bound to do so because the provisions in the company's constitution form a binding contract in terms of **Section 33 of the Companies Act 2006** (see **Rayfield *v* Hands (1960)**).

(iv) The shareholders will have to establish whether they are entitled to receive debentures in terms of the company's constitution. If so, they can raise an action against the company in terms of **Section 33 of the Companies Act 2006** to force the payment of dividends. However, if the payment of dividends is purely discretionary, the company may well have the right to issue debentures as an alternative (see **Wood *v* Odessa Waterworks Co (1889)**).

17 **a)** Form 10 will contain the following information:

1: The company name – any name can be chosen for the business as long as the last word is 'limited', 'ltd' or 'plc'. A register of names is maintained by the Registrar of Companies at Companies House and names must comply with the requirements of the Companies Act 2006 (these rules supersede the rules previously contained in the Business Names Act 1985).

In **Exxon *v* Exxon Insurance Consultants (1972)** an insurance company attempted to use the name Exxon. The Standard Oil Company which traded under the internationally recognised name of Exxon objected to this because it would suggest to many people that the insurance company was connected to Standard Oil when this was not the case. The oil company raised a successful legal action which prevented the insurance company from using the name Exxon.

As a result of Section 69 of the Companies Act 2006, a third party can object to the attempted use of a new company name on the ground of 'opportunistic registration'. An individual can raise an allegation of 'opportunistic registration' against a new company in the following circumstances:

- If the new company's name is identical to that of an existing company in which the individual who has made the complaint enjoys goodwill in the older, established business; or
- If the new company's name is so similar that its continued use in the United Kingdom would cause a belief to arise that there is a connection between the new business and the older, established business.

In terms of Sections 70–73 of the Companies Act 2006, the Secretary of State has appointed a number of Adjudicators who sit on the Company Names Tribunal (which operates under the jurisdiction of the UK Intellectual Property Office) and these individuals will hear and decide any challenges to the continued use of a particular name by a new company. Section 73 gives the adjudicators the right to order the company to change its name.

2: The location of the registered office – every company must have a registered office as soon as it commences trading or within 14 days of its incorporation, whichever is earlier. The memo must state whether the registered office is in Scotland, England and Wales (the office can be in either) or just Wales.

3: The limitation of liability statement (appropriate to PLCs and companies limited by shares) – this is a statement to confirm that the liability of the members is limited.

4: The capital of the company – this information states the amount of nominal or authorised share capital and its division into shares of a fixed amount.

5: A public limited company statement – if the company is to be a PLC, this is a statement by the members to this effect.

Since the earlier reforms introduced by the Companies Act 1989 and the most recent reforms contained in the Companies Act 2006, there is no

longer any need for a company to have a detailed and exhaustive objects clause. In any case, as a result of the reforms contained in the Companies Act 2006, from 1 October 2009, there will no longer be any need for a company to state publicly what its objects are. It will simply be assumed that a company incorporated in the United Kingdom after 1 October 2009 is a general commercial company involved in trade or business whatsoever. Reliance on the old *ultra vires* rule by Ashbury to get out of the contract with Tartan Transport will be fruitless and unsuccessful.

b) i) It will be assumed that Ashbury is a general commercial company engaged in any trade or business whatsoever and, therefore, the contract can be enforced by Tartan Transport. Since the earlier reforms first introduced by the Companies Act 1989 and consolidated by the Companies Act 2006, there is no longer a legal requirement for a company to list its objects or business activities individually and in detail. It will be presumed by outsiders that all contracts entered into with a company are enforceable.

ii) There may be limits on the directors' authority in the company's articles of association, but this need not concern outsiders dealing with the company. Any concerns over the validity of contracts entered into by the directors on behalf of the company are, therefore, an internal matter involving themselves and the shareholders. In this way, directors may find themselves personally liable to the company and the shareholders to account for any unauthorised transactions for which they have responsibility. So Donna and her fellow directors could face legal action from both the company and the shareholders if they have done anything which goes beyond the authority conferred upon them as officers and agents of Ashbury.

18 Clearly, the members of a limited company and those of a public limited company enjoy the protection of limited liability in the event that either business organisation becomes insolvent. However, there are clear differences between these two business organisations.

The main characteristics of a private limited company are:

1 Company name must end in 'limited' or 'ltd'

2 The articles of association of a private limited company may provide for a right of pre-emption so that when a member wishes to sell or to transfer ownership of his shares he must first offer them to existing members

3 There is no minimum capital requirement

4 The shares in a private limited company cannot be traded or listed on the stock exchange

5 Only one director is required, but this individual must be at least 16 years of age

6 A private company limited by shares or by guarantee need only have one member

7 There is no upper age limit for directors

8 No requirement to hold an Annual General Meeting of the members unless the articles of association insist on this event being held. In any case, the articles of association can always be changed by the members via a special resolution

9 There is no longer any need to have a Company Secretary

10 Audited accounts must be produced within 9 months of the year end

11 Trading can start as soon as a Certificate of Incorporation is obtained

A private company limited by shares and an unlimited company with a share capital may re-register as a public limited company (PLC). A private company must pass a special resolution to allow it to become registered as a public limited company. A copy of the members' special resolution and the appropriate application form must be lodged with the Registrar of Companies in order to give legal effect to this change.

The main characteristics of a public limited company are:

1 The company name must end in 'public limited company' or 'plc'

2 Members must be free to transfer their shares as they please

3 A public company must have minimum issued share capital of at least £50,000 or 65,600 Euro (previously the minimum share capital had to be in Sterling)

4 Shares can be listed on the stock exchange and can be traded

5 There must be at least two directors

6 There is a continuing requirement to have a Company Secretary

7 There must be at least two members

8 Directors are no longer required to retire when they reach the age of 70 (under the previous Companies Act of 1985 this was the case), but there is now a minimum age requirement of 16

9 An Annual General Meeting of the shareholders must be held

10 Audited accounts must be produced within 7 months of the year end

11 After incorporation, a 'trading certificate' issued by the Registrar of Companies no longer has to be in the form of a statutory declaration

Chapter 6 (pp.507–10)

1 **a)** If you are an employee, i.e. you have a contract of service, you are theoretically in a much better position than someone who has a contract for services, i.e. an independent contractor. This is an absolutely critical distinction in UK employment law and one that we shall return to time and time again in this particular area. If you are an employee the law gives you greater protection and more benefits that you would not receive if you were merely an independent contractor for services. Some of the benefits/protections to which employees are entitled include: statutory protection against unfair dismissal; entitlement to compensation if they are made redundant; a statutory right to a minimum period of notice of termination of their employment contracts; rights to maternity pay and leave; rights to paid paternity leave; the right to time-off for public duties; the right to statutory sick pay; and access to important social security and welfare benefits.

It is worth emphasising that those individuals who work as independent contractors (under a contract for service) are highly unlikely to receive any of these benefits. So, it follows that if a particular contract comes to an end, an independent contractor, for example, will not be entitled to a redundancy payment. However, employers should be aware that other classes of people in the workforce, known by the catch-all term 'worker', have been given rights under a variety of statutes (see the Working Time Regulations 1998, the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, Fixed-Term Employees (Prevention of Less Favourable Treatment), the Agency Workers Regulations 2010 and the Equality Act 2010).

b) Over many years, British judges have developed a number of different tests in an attempt to determine whether someone works under a contract of service or a contract for services. However, the British courts have not always applied these tests in a way that makes sense to the lay person and even to lawyers. These tests include the: Control Test (see **Mersey Docks and Harbour Board *v* Coggins & Griffith (Liverpool) Ltd (1947)**); the Economic Reality Test (see **Ready Mixed Concrete (South East) Ltd *v* Minister of Pensions (1968)**); and the Organisation or Integration Test (see **Hall *v* Lorimer (1992)**).

These tests are different tools that a judge can use to determine whether a contract of service or a contract for services exists.

c) Following the decision of the House of Lords in **Carmichael *v* National Power PLC (2000)**, it is highly likely that Leigh, Lloyd and Laurence have a contract for services with the Metropolitan University of Aberdeen as guides in its Wilsonian Museum. In other words, the three individuals are not employees of the University. Therefore, none of them will be able to take the University to an Employment Tribunal alleging unfair dismissal.

One area of the law that causes particular difficulty for employers are contracts involving the use of casual and atypical workers. (See **Rodger *v* C & J Contracts Ltd, 30 March 2005; Younis *v* Trans Global Projects Ltd** and **Charnock 6 January 2006;** and **Protectacoat Firthglow Ltd *v* Szilagyi (2009)**.) Casual and atypical are being increasingly used by employers and one of the main concerns here is whether these individuals should be given the benefit of employment rights. Usually, the employment status of such workers is resolved by asking a relatively simple question, i.e. when the employer offers such an individual work is s/he bound to carry out the work for the employer? If the answer is in the positive, then the worker is likely to be an employee and not an independent contractor for services. In more recent times, the courts have also tended to stress the importance of a mutuality of obligation between an employer and employee. In other words, the employee is under a duty to accept work when the employer requires his services. Leigh, Lloyd and Laurence are casual workers – they are not under an obligation to accept work that the University offers them.

2 **a)** It may now be said that true freedom of contract hardly exists at all as far as the employer is concerned. This doctrine is based on the idea that the parties are free to choose the terms and conditions which will be contained in the final version of the employment contract. The idea of freedom of contract also presupposes that genuine negotiations have taken place between the parties. It is debateable whether many employees ever really enjoyed the notion (let alone the practice) of freedom of contract. In any case, Parliament has intervened in so many ways that the employer has

lost the right to dictate some of the most important terms of the contract.

Examples of parliamentary intervention include:
- the Health and Safety at Work Act 1974
- the National Minimum Wage Act 1998
- the Working Time Regulations 1998
- the Employment Relations Act 1999
- the Employment Act 2002
- the Employment Relations Act 2004
- the Equality Act 2006
- the Work and Families Act 2006
- the Equality Act 2010

Furthermore, many employment law provisions are the product of European Union rules which employers are not allowed to ignore: the Equal Treatment Directive and the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000.

b) Helen's employer may argue that the parties to a contract are entitled to decide the terms of the employment contract. His proposals include breaches of the following legislation:
- The Maternity and Parental Leave etc. and the Paternity and Adoption Leave (Amendment) Regulations 2006
- The Employment Act 2002
- The Maternity and Parental Leave (Amendment) Regulations 2002
- The Maternity and Parental Leave (Amendment) Regulations 2001
- The Maternity and Parental Leave etc Regulations 1999
- The Employment Rights Act 1996
- The Employment Relations Act 1999
- The Social Security Contributions and Benefits Act 1992
- The Statutory Maternity Pay (General) Regulations 1986/1987/1994
- Social Security, Statutory Maternity Pay and Statutory Sick Pay (Miscellaneous Amendments) Regulations 2002
- Work and Families Act 2006
- Statutory Maternity Pay, Social Security (Maternity Allowance) and Social Security (overlapping Benefits) (Amendment) Regulations 2006
- Equality Act 2010
- Children and Families Act 2014
- Shared Parental Leave Regulations 2014

3 **a)** Vicarious liability can arise where there is a contract of service meaning that the employer may be vicariously liable for the delicts or negligence of an employee. This means that the employee can be liable for harm that he did not directly cause. An employer can only be liable for the negligent acts of an employee not an independent contractor (see **Mersey Docks and Harbour Board *v* Coggins & Griffith (Liverpool) Ltd (1947)**, **Trotman *v* North Yorkshire County Council (1998)**, **Lister *v* Hesley Hall (2001)**, **Viasystems (Tyneside) Ltd *v* Thermal Transfer (Northern) Ltd and others (2005)**, **Majrowski *v* Guy's and St. Thomas' Hospital NHS Trust (2006), Green *v* DB Group Services (UK) Ltd (2006) EWHC 1898 (QB), JGE *v* The Portsmouth Roman Catholic Diocesan Trust [2012]** and **Mr A M Mohamud (in substitution for Mr A Mohamud (deceased)) *v* WM Morrison Supermarkets plc [2016]**). Vicarious liability of the employer is another area where it is very important to distinguish between an employee and an independent contractor.

For an employer to be vicariously liable, the harm must have been caused by the employee while within the scope of his employment. The courts will often look to see whether or not the employee was acting within the scope of his employment and this can be a difficult point to establish.

Generally, if the employee was acting for the purpose, protection or enhancement of the employer's business and was not using his employer's time for his own purposes then the employer would be held vicariously liable if the employee committed a delict.

Furthermore, an employer may be vicariously liable for the acts of an employee even if the employee:
- Did what he was employed to do but carrried out these functions in a negligent or unauthorised way
- Was negligent whilst doing something he was not authorised to do
- Committed the act outwith working hours
- Commits an assault in the course of the employment but only with a contract of service

See the following cases for examples of an employer's vicarious liability: **Century Insurance Co *v* Northern Ireland Transport Board (1942)**, **Conway *v* George Wimpey & Co (1951)**, **Williams *v* Hemphill (1966)** and **Rose *v* Plenty (1976)**.

Vicarious liability means that an employer and an employee are both jointly and severally liable for the negligent acts or omissions of the employee that result in harm being caused to third parties (see **Lister *v* Romford Ice and Cold Storage (1957)**).

b) Iain is an independent contractor brought in by the Council's education authority to carry out a job.

The education authority is not responsible for Iain's actions (see **Mersey Docks and Harbour Board *v* Coggins & Griffith (Liverpool) Ltd (1947)**). Iain has been negligent and, therefore, the victims of his negligent acts or omissions should sue his employer – Sparks Ltd. Iain and Sparks Ltd are, of course, jointly and severally liable for any negligent acts or omissions which cause loss or injury.

Vicarious liability only becomes an issue when a contract of service exists. Generally speaking, individuals are not responsible for the negligent actions of an independent contractor (an individual acting under a contract for services).

4 **a)** A written statement of terms and conditions of employment should contain the following:

1 The employer's name

2 The employee's name

3 The date of commencement of employment and the period of any continuous employment

4 Wages/salary details

5 Details of working hours

6 Holiday entitlement/pay and entitlement to accrued holiday pay upon termination of the employment contract

7 Entitlement to sick pay

8 Pensionable service

9 Notice requirements

10 Job title or brief description of the job

11 Whether the job is permanent or for a fixed-term duration

12 The location(s) of the employee's place of work

13 Collective agreements and how they affect the employment contract

14 In situations where the employee may have to work outside the UK for more than a month, the length of such time, the currency in which wages are to be paid, details of any additional payments and benefits and terms about return to the UK

15 Details of the employer's disciplinary code should also be brought to the employee's attention in the written statement of particulars or should refer to a document containing the code to which the employee can readily access

16 The employer's procedure for dealing with employee grievances

A written statement covers a wide range of issues. To reiterate, such a statement must be provided to the employee within two months of the commencement of employment. The statement may be given to the employee by instalments, but a complete statement must be in the employee's possession within the two-month deadline.

If the employer and the employee decide to alter any terms and conditions of employment, a new written statement must be issued no later than one month after the changes have been introduced.

b) Under Section 1 of the Employment Rights Act 1996, employees must be issued with a written statement of the terms and particulars of their contract of employment. It should be noted that this statement is not the contract of employment. Merely, it provides general information about the nature of the relationship and the extent of the main provisions of the agreement. Such a statement must be issued to the employee within two months of the start of the employment contract. If the employer does not give the employee a copy of a written statement of terms and particulars, the employee can take him to an Employment Tribunal for the purpose of forcing him to issue such a statement. However, this is generally an unusual course of action on the part of the employee.

c) In terms of Section 1 of the Employment Rights Act 1996, Jennifer should have been issued with a written statement within two months of her commencing employment at the restaurant. Mark, her employer, has failed to do this. Furthermore, it is likely that Jennifer has been dismissed for continually requesting that she be issued with a written statement. Despite the fact that Jennifer has less than two years' continuous service with her employer, she can lodge a claim with the Office of Employment Tribunals alleging that she has been unfairly dismissed. She must lodge her Employment Tribunal claim within three months of the deadline for the employer to issue her with a written statement. In dismissal claims which involve the issuing of a written statement, the employee does not need to have two years' continuous service (Employment Rights Act 1996). Now, in terms of the Employment Act 2002, an employer who neglects to issue an employee with a written statement may be ordered by an Employment Tribunal to pay an employee four weeks' wages in respect of any failure to issue the statement.

5 **a)** The contract of employment can be influenced by the following sources – statute law, European law, the common law rights and duties of the parties, collective agreements, the written

statement of terms and particulars of employment, handbooks, codes of practice and other documents issued by the employer.

b) Sometimes, employers will prefer to have a situation where terms and conditions of employment can be negotiated collectively with a large number of employees rather than by individual negotiations. Such arrangements are known as 'collective agreements'.

This arrangement allows groups of workers to be employed on identical or fairly similar terms and conditions of employment. Such agreements are usually found in workplaces where there is a recognised trade union which can negotiate with the employer.

It is important to realise that such agreements do not bind the employer and the trade union. It is important to stress that the trade union is not acting as an agent of the employees and, therefore, any agreement negotiated by the trade union with the employer are not legally enforceable against either the employer or the employees. If these agreements are to be enforceable, they must be made part of the employees' contracts of employment. This means that when changes are made to employees' contracts as a result of negotiations under the collective agreement, they will be automatically incorporated into the employees' contracts.

It is probably advisable for the employer to include an express provision in a contract of employment which mentions the collective agreement and the results of any negotiations concluded under such an agreement, i.e. the fact that changes to contracts of employment automatically take effect upon the successful conclusion of negotiations between the employer and the trade union (see **City of Edinburgh Council *v* Brown (1999)** and **John Anderson *v* Pringle of Scotland (1998)**).

c) United Scottish Airlines has unilaterally departed from the provisions of the Collective Agreement which govern redundancy situations. This Agreement forms part of Shirley's contract of employment. Shirley could, therefore take action against her employer to have the provisions of the redundancy policy enforced (see **City of Edinburgh Council *v* Brown (1999)** and **John Anderson *v* Pringle of Scotland (1998)**). However, the employee in **John Anderson** forced his employer to abide by the terms of the Collective Agreement which governed redundancy, but ultimately this did not save his job. If Shirley was unfairly selected for redundancy, she always has the option of lodging a claim for unfair dismissal with the Office of Employment Tribunals in terms of the Employment Rights Act 1996.

6 **a)** The employer's duties under the contract of employment include – the payment of wages, providing work, indemnifying employees, treating employees with trust and respect and to take reasonable care for the safety of employees.

The common law duties of an employee are to provide personal service, to provide loyal service, to obey lawful and reasonable orders and to take reasonable care in the exercise of the employment.

NB All that this question asks is for an outline of the employer's and employee's duties only and not a full discussion of them.

b) (i) Samir's employers have breached the duty of trust and confidence which they owe to their employees. An employer who breaches the duty of trust and confidence by running his business in a corrupt and dishonest manner and this conduct later destroys or seriously damages an employee's future career prospects may have to pay stigma damages to the employee (see **Malik *v* BCCI SA (1997)**). Generally, the employer owes a duty of care not to damage the employee's future career prospects (see also **Spring *v* Guardian Royal Assurance plc (1994)** and **Bartholomew *v* London Borough of Hackney (1999)**).

(ii) William has a duty to pay his employees their wages, but he does not have a duty to provide them with work (see **Turner *v* Sawdon & Co (1901)** and **Collier *v* Sunday Referee Publishing Co Ltd (1940)**). An employer is also under a statutory duty not to make any unauthorised deductions from wages (see the Employment Rights Act 1996).

(iii) Shona's employer is breaching its duty to take reasonable care for the safety of employees. An employer must take reasonable care to ensure that the work is properly and safely organised and an employer must take reasonable care to provide a safe working environment, but this does not mean that he has to ensure that employees are protected from all possible risks. For cases illustrating the employer's duty to take reasonable care for the safety of employees see **Latimer *v* AEC (1952)**, **Withers *v* Perry Chain (1961)** and **Walker *v* Northumberland County Council (1995)**. Furthermore, it is worth noting that the employer's common duties which aim to protect the health and safety of employees establishes a regime of civil liability. In other words, should the employer breach these duties, he will most likely face a civil action by the injured

employee who will be attempting to recover compensation.

An employer may use two defences if a delictual claim is brought by an employee that he is in breach of one of his common law duties: contributory negligence and *volenti non fit injuria* (those who wish an injury cannot be injured).

The Health and Safety at Work Act 1974, on the other hand, makes an employer criminally liable if he fails to take reasonably practicable steps to protect the health and safety of his employees. An employer will, therefore, face criminal penalties in a criminal court for breaches of the Act. This means that an employer could face both a criminal action and a civil action for damages where he has neglected to obey the criminal law and the common law regulating the employees' health and safety.

(iv) Norrie is being ordered to take part in an illegal activity and, therefore, Norrie's employer would not be able to argue that he has given this employee a lawful order. Norrie would be within his rights to refuse to obey this order (see **Ottoman Bank *v* Chakarian (1930)**, **Bouzourou *v* Ottoman Bank (1930)**, **Morrish *v* Henleys (Folkestone) Ltd (1973)** and **Macari *v* Celtic Football and Athletic Company Ltd (1999)**).

(v) Gerry must not attempt to cheat his employer or to behave in a dishonest fashion towards his employer. This is clearly what he is doing by competing against his employer in order to make secret profits (see **Reading *v* Attorney-General (1951)**).

Furthermore, an employee is expected to serve his employer loyally which means that he must not do anything that would harm his employer's business by carrying out work for business rivals. Even work that the employee carries out in his own time may actually interfere with the employer's interests – especially if these activities could be viewed as harming the employer's business. The employee should not divulge any trade secrets or business secrets to his employer's rivals that he has acquired in the course of his employment (see **Forster & Sons Ltd *v* Suggett (1918)** and **Robb *v* Green (1895)**).

(vi) David owes an implied duty of care to his employer and he committed an act of negligence by leaving the keys in the vehicles ignition. Breach of the duty of care may arise in situations where the employer is held liable to an innocent third party for the negligent actions of his employee. The employer (or more likely his insurance company) can always exercise the right to sue the employee for breach of his duty of care. Insurance companies appear to have an informal agreement that they will not pursue the employee for breach of his duty should they have to pay out to his employer under an insurance policy. This has meant in practice, that these types of cases tend to be few and far between, but not unheard of (see **Lister *v* Romford Ice and Cold Storage (1957)** and **Janata Bank *v* Ahmed (1981)**).

7 **a)** The contract of employment can be terminated like any other contractual agreement, for example, material breach, mutual agreement, frustration, operation of law, completion of task and expiry of a fixed-term contract. However, it should be remembered that the Employment Rights Act 1996 lays down minimum periods of notice that the employer must adhere to when he wishes to terminate the contract.

b) Hannah's employer is treating the contract of employment as frustrated. Frustration occurs when the contract becomes impossible to perform or further performance becomes radically different from the agreement that was originally contemplated by the parties (**Lord Radcliffe: Davis Contractors Ltd *v* Fareham UDC (1956)**). The Employment Appeal Tribunal sitting in England has stated that frustration of contract in employment cases means that the employee loses his entitlement either to notice or to a payment in lieu of notice (**G F Sharp & Co Ltd *v* McMillan (1998)**) and, if this decision was followed in Scotland, Hannah would not be entitled to a period of notice or to a payment in lieu of notice.

8 **a)** Unfair dismissal should be seen as a dismissal which contravenes statute. If the employee qualifies for protection against unfair dismissal he can request that the employer provide a written reason for the dismissal. Failure by an employer to issue a written response would be highly suspect and an Employment Tribunal would be entitled to imply that the employer had not acted fairly when he dismissed the employee. Generally, an employee who has less than two years' continuous employment cannot lodge a claim for unfair dismissal with the Office of Employment Tribunals. There are, however, many exceptions to the rule that an employee cannot sue for unfair dismissal if the period of continuous service is less than two years (discrimination claims being the main exception). An employee who has been unfairly dismissed must lodge a claim to the Office of Employment Tribunals.

Wrongful dismissal arises in situations where an employer dismisses the employee in breach of his contract. In order to claim that he has been

wrongfully dismissed, the employee does not have to show that he has had continuous service with his employer for at least two years. Employees with over two years' continuous service can also claim wrongful dismissal. Claims for wrongful dismissal should be lodged with the Office of Employment Tribunals within three months (less one day) of the date of the employee's dismissal.

b) Charlene would have a potential claim for wrongful dismissal, i.e. a dismissal which is in breach of her contract of employment (see **Morran *v* Glasgow Council of Tenants (1998)**). We are not told about the precise reasons for Charlene's dismissal, but she may also have a claim for unfair dismissal in terms of the Employment Rights Act 1996. It would obviously be important to investigate Charlene's employment circumstances before talking about the possibility of an unfair dismissal claim.

9 **a)** The employee's right to claim constructive dismissal arises in situations where the employer's conduct is to be regarded as a material breach of the employment contract and the employee is left with no alternative but to resign. However, the employee's resignation is not treated as the act which terminates the contract, rather it is the employer's conduct. The employer's conduct must be so serious in order to justify the employee's decision to resign. When an employee claims that he has been constructively dismissed, he is claiming that he was unfairly dismissed. The right of constructive dismissal would arise in situations where the employer made unauthorised deductions from wages, where the employer refused to follow the proper disciplinary or grievance procedures or where the employee was ordered to use equipment that was clearly dangerous (see **Sharp *v* Western Excavating Ltd (1978)**, **Sinclair *v* Fritz Companies (1999)**, **France *v* Westminster City Council (2003)**, **Wishaw & District Housing Association *v* Moncrieff (2009)** and **Nationwide Building Society *v* Niblett (2009)**).

b) Rose has been treated very badly by her colleague. The employer has committed a material breach of contract by failing to investigate Rose's grievance but Rose has less than two years continuous service required to take an unfair dismissal claim to an Employment Tribunal. Rose would be better advised to take a claim for wrongful dismissal rather than constructive dismissal.

10 **a)** Penny has probably been dismissed from employment on the grounds of her trade union membership and activity. Such a dismissal would be unfair in terms of Section 152: Trade Union and Labour Relations (Consolidation) Act 1992 (see **O'Donovan *v* Central College of Commerce (2003)**).

b) An employee's misconduct could be used to justify dismissal in terms of Section 98(2) of the Employment Rights Act 1996. Although the act of misconduct committed by Colin took place outside his employment, his employer would be entitled to argue that it had a bearing on his continued employment with the building society. Customers of the building society would expect the manager to have a reputation for honesty and integrity. Colin now sadly lacks these qualities. It is likely that the building society could claim that Colin's dismissal for misconduct was justified in the circumstances (see **H B Raylor *v* McArdle EAT 573/84** and **McLean *v* McLane Ltd EAT 682/96**). The employer is under a duty, however, to carry out a reasonable investigation and he must have reasonably believed the employee to be guilty of misconduct in order for the dismissal to be fair (see **British Home Stores Ltd *v* Burchell (1980)**).

c) Section 139(1) of the Employment Rights Act 1996 states that dismissal on the grounds of redundancy will occur if:

1. The employer has ceased or intends to cease carrying on the business; or
2. The requirements for employees to carry out work of a particular kind or to carry it out at the place in which they are employed have ceased or diminished.

It is important to determine whether an employee has been dismissed on the grounds of redundancy or if the employee and the employer have both agreed to bring the contract to an end. Obviously, if both parties have agreed to a mutual termination of the contract of employment, no dismissal on the grounds of redundancy can be said to have taken place. It is vitally important to establish, therefore, who was responsible for bringing the employment to an end. If the employer was responsible, then potentially the employee has a claim for a redundancy payment and, if the procedures were not properly carried out, the employee may have a further claim for unfair dismissal (see **Caledonian Mining Ltd *v* Bassett & Steel (1987), Murray *v* Foyle Meats Ltd (1999)** and **Lomond Motors Ltd *v* Clark (2009)**).

Dismissal on the grounds of redundancy will be automatically unfair if the employee was selected for redundancy in relation to any of the following:

1 Participation in trade union activities (Section 153: Trade Union and Labour Relations (Consolidation) Act 1992).

2 Pregnancy or for a reason connected with it (Section 99: Employment rights Act 1996).

3 Making a protected disclosure in terms of the Public Interest Disclosure Act 1998 (Section 103A: Employment Rights Act 1996).

4 Raising or taking action on the grounds of health and safety (Section 100: Employment Rights Act 1996).

5 Involvement in activities related to his role as a trustee of an occupational pension scheme (Section 102: Employment Rights Act 1996).

6 Assertion of the right not to be forced to work on a Sunday because was classified as a protected worker or a betting shop worker or because he has given an opting out notice to the employer (Section 101: Employment Rights Act 1996).

7 Assertion of certain statutory rights (Section 104: Employment Rights Act 1996).

8 Acting as an employee representative during consultations in relation to proposed redundancies or during the transfer of an undertaking (Section 103: Employment Rights Act 1996; and Regulations 10 and 11: Transfer of Undertakings (Protection of Employment) 1981).

d) Monica has been dismissed for making a public disclosure in terms of the Public Interest Disclosure Act 1998. This action by her employer constitutes an unfair dismissal in terms of Section 103A of the Employment Rights Act 1996 (see **Miklaszewicz *v* Stolt Offshore (2002)**, **El-Megrisi *v* Azad University (IR) in Oxford (2009)**, **Woodward *v* Abbey National plc (2006)** and **Street *v* Derbyshire Unemployed Workers Centre (2009)**).

In assessing how reasonably the person who made the disclosure has acted, an Employment Tribunal will wish to know to whom was the disclosure made, were serious concerns being raised by the disclosure, has the employer's conduct caused third parties to be exposed to danger, and has the disclosure breached a duty of confidence the employer owed a third party. If the disclosure was addressed to an employer or a prescribed regulator, the reasonableness of their response will be very important. Employment Tribunals will often examine an employer's internal whistle-blowing procedure (assuming, of course, that one exists) in order to assess if the employee's concerns or complaints were dealt with properly.

e) Reza is contractually bound to obtain the appropriate qualifications in order to secure his continued employment. He has failed to do this and his employer would be entitled to dismiss him on the grounds of his lack of qualifications in terms of Section 98(2) of the Employment Rights Act 1996 (see **Blackman *v* Post Office (1974)** and **Tayside Regional Council *v* McIntosh (1982)**). Reza's dismissal would, therefore, be fair.

f) Susan's dismissal is automatically unfair because her employer has decided to dismiss her for pregnancy-related reasons. This is a breach of Section 99 of the Employment Rights Act 1996 (see **O'Neill *v* Governors of St Thomas More (1996)**).

g) Arlene is being dismissed specifically on the grounds of her dreadful sickness record. Arlene's dismissal will be fair, in terms of Section 98(2) of the Employment Rights Act 1996, if the employer follows the guidelines laid down in **East Lindsey District Council *v* Daubney 1977** where the Employment Appeal Tribunal stated that before an employee decides to dismiss an employee on the grounds of ill-health proper consultation must have taken place. Proper consultation will consist of the following factors:

- The employer must hold discussions with the employee at the outset of the illness and these should continue throughout the course of the illness. The employee should be alerted when his dismissal is a serious option.
- There should be personal contact between the employer and the employee.
- The employee should be asked for his opinion regarding his medical condition by the employer.
- The employer should consider alternative employment for the employee within the organisation.

In **Taylorplan Catering (Scotland) Ltd *v* McInally (1980)** the Employment Appeal Tribunal again stressed the importance of the employer holding consultations with a sick employee. Such a consultation exercise means that the employer's need to have the employee present at work can be weighed against the employee's need to be given time to regain his health and fitness which makes his return to work possible.

This area is now more complicated as a result of the Equality Act 2010. When dealing with an employee who is absent from work due to ill-health, a reasonable employer should take steps to establish whether the individual in question is suffering from a disability. A disability will affect not only the individual's ability to perform his job,

but also his ability to perform normal day-to-day activities. If this is the case, the employer will have to make reasonable adjustments in terms of Section 20 of the Equality Act 2010 to the employee's working conditions in order to aid his return to work.

h) Ellie has been dismissed for raising a health and safety complaint and probably for her role as a health and safety representative in the workplace. Her dismissal would be automatically unfair in terms of Section 100 of the Employment Rights Act 1996. Ellie does not need to have two years' continuous service with her employer in order to lodge a claim for unfair dismissal with the Office of Employment Tribunals (see **Hynes *v* D E Bliss (Builders) ET Case No. 12874/96** and **Harvest Press Ltd *v* McCaffrey (1999)**).

i) Sheelagh will have to dismiss Andrew in order not to contravene statute – specifically the Consumer Credit Act 1974. The dismissal will be fair in terms of Section 98(2) of the Employment Rights Act 1996 (see **Yarrow *v* QIS Ltd ET Case No. 1270/79** and **Appleyard *v* F M Smith (Hull) Ltd (1972)**). These kinds of dismissals are particularly common in relation to health and safety issues or where the employee holds a position as a driver and he has received a ban in terms of the road traffic legislation.

j) The employer's action in dismissing these three individuals is a breach of Section 16 and Schedule 5: Employment Relations Act 1999 because they are taking part in lawful, balloted industrial action. The employer is not allowed to dismiss employees who are taking part in lawful, balloted industrial action for the first eight weeks of such action. This protection is absolute as long as the employee does not commit a further unlawful act over and above his initial breach of contract (i.e. by going on strike). A dismissal, regardless of the employee's age or length of service, will be automatically unfair as long as it is connected to the industrial action. This statutory protection could be extended beyond the first eight weeks if the employer has not taken reasonable steps to end the dispute.

After the initial period of eight weeks has ended, the employer cannot be selective as to which employees he decides to dismiss. All those employees engaged in the industrial action must be dismissed no matter what their motives were for taking part might have been. If the employer decides to dismiss the employees who took part in industrial action, he cannot take back any of the dismissed employees for a period of at least three months.

If employees are taking part in unofficial industrial action, they will have no protection against dismissal. It is important to note that the employees who have been dismissed must be involved in unofficial action on the date of their dismissal. However, the employer cannot dismiss employees who have returned to work after taking part in an unofficial strike. A dismissal in those circumstances would not prevent these employees from lodging a claim for unfair dismissal with the Office of Employment Tribunals.

k) Kevin's employer has decided to dismiss him from his employment on the grounds of some other substantial reason. Section 98(1)(b) of the Employment Rights Act 1996 gives an employer the opportunity to argue that an employee has been dismissed for some other substantial reason. This is a potentially a very broad category, but it should be viewed as dealing only with a very small number of situations that are not covered by the other four named categories in Section 98(2) of the 1996 Act.

The employer must show that the substantial reason used to justify the employee's dismissal was potentially a fair one. Once this has been established, the employer must convince the Employment Tribunal that its actions leading to the dismissal of the employee have been reasonable. The substantial reason for dismissal must not be trivial or frivolous. The category of some other substantial reason has been used to justify dismissal where the employer tries to protect the employee from divulging business secrets to competitors or where the employee is attempting to establish a rival business of his own (see **Abey *v* R & E Holdings (Yorkshire) Ltd t/a Quick Pass School of Motoring ET Case No 14985/82**). In **Simmons *v* S D Graphics Ltd EAT 548/79** the Employment Appeal Tribunal pointed out that in situations where two employees with a close personal relationship both have access to confidential information, it is for the Tribunal to examine the facts in order to determine whether or not the decision of one of their employers to dismiss one of these individuals was for some other substantial reason.

11 Sections 111 to 132 of the Employment Rights Act 1996 contain much of the detail relating to remedies for unfair dismissal.

The two orders that an Employment Tribunal can issue requesting that the employee be re-employed are:

1 Reinstatement orders
2 Re-engagement orders

In most situations, an Employment Tribunal will award compensation to the dismissed employee. Compensation consists of two parts:

1 The basic award
2 The compensatory award

The basic award that the employee receives could be reduced for a number of reasons:

- Where the employee's conduct has contributed to the dismissal.
- Where the employer gave the employee a redundancy payment or ex-gratia payment.
- Where the employee has unreasonably refused an offer of reinstatement from the employer.

From 6 April 2017, the compensatory award is now subject to a limit of £80,541. The award will cover immediate loss of wages, future loss, loss of pension rights and loss of statutory protection. The maximum award may be much greater in health safety dismissals, whistle-blowing cases and cases involving discrimination.

On Thursday 15 July 2004, the House of Lords delivered its judgement in the case of **Dunnachie *v* Kingston upon Hull City Council (2004)**. Previously, Lord Hoffman had suggested in another decision of the House of Lords (**Johnson *v* Unisys (2001)**) that compensation for injury to feelings in an unfair dismissal claim might be part of any award paid to a successful claimant at an Employment Tribunal Hearing. In **Dunnachie *v* Kingston upon Hull City Council (2004)**, their Lordships (Lord Hoffman amongst them) killed off any idea that an award for unfair dismissal could include injury to an employee's feelings for the manner of the dismissal.

Compensation, therefore, in unfair dismissal claims will be concerned with the employee's economic losses only.

In several situations, the Employment Tribunal can issue an Interim Order which means that the dismissed employee's contract will continue to have legal force until the outcome of the case is decided. An Interim Order can also be used to prevent the employee from being dismissed until the Employment Tribunal has made its decision. The employee, therefore, will continue to enjoy the benefits of his employment contract while his claim for unfair dismissal is being heard and ultimately decided upon. An Interim Order will only be granted in trade union dismissals, health and safety dismissals and dismissals where the employee has made a protected disclosure.

Chapter 7 (pp.607–9)

1 UK legislation prohibits a number of types of discrimination in employment with regard to the following:

1 Gender or sex (Section 11: the Equality Act 2010), Equal Pay Directive 75/117/EEC, the Equal Treatment Directive 76/207/EEC.

2 Marital status (Section 8: the Equality Act 2010), Equal Pay Directive 75/117/EEC and the Equal Treatment Directive 76/207/EEC.

3 Colour, nationality, racial, ethnic or national origin (Section 9: the Equality Act 2010).

4 Disability (Section 6: the Equality Act 2010).

5 Being a part-time worker (the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000).

6 Being a fixed-term worker (the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002).

7 Sexual orientation (Section 12: the Equality Act 2010).

8 Religious or philosophical beliefs (Section 10: the Equality Act 2010).

9 On the grounds of a person's age (Section 5: the Equality Act 2010).

10 On the grounds that a person is going or has undergone gender reassignment (Section 7: the Equality Act 2010)

11 On the grounds that the person is an agency worker (The Agency Workers Regulations 2010).

2 An employee or a job applicant can experience discriminatory or less favourable treatment in the following situations:

- Lack of promotion and training opportunities
- Different pay scales and conditions of employment
- Unfairness in the recruitment process
- Dismissal from employment
- Failure to receive the same contractual benefits as fellow employees
- Different retirement ages
- Different dress codes
- Unilateral changes to an employee's contract of employment
- Age requirements in relation to certain posts
- Harassment and victimisation
- Selecting certain individuals for redundancy first
- Refusal to allow more flexible working patterns

Discrimination means that an individual or a group of individuals will suffer less favourable treatment by reason of gender or sex, gender reassignment, colour, nationality, racial, ethnic or national origin, disability, sexual orientation, religious or philosophical beliefs or employment status and this difference in treatment cannot be objectively justified.

3 a) The concept of direct discrimination is regarded as prohibited conduct in terms of Section 13 of the Equality Act 2010. Direct discrimination could, for example, arise if a woman or a member of an ethnic minority has been subjected to a detriment in relation to their employment if the employer treats them less favourably than s/he treats or would treat other persons. The reason for this less favourable treatment is related to the person's gender or their membership of a racial group. Very often, a person will be accused of direct discrimination because s/he has consciously made a decision to discriminate against someone by reason of a person's gender or race or sexual orientation (see **Greig *v* Community Industry (1979)**, **James *v* Eastleigh Borough Council (1990)**, **King *v* Great Britain-China Centre (1991)**, **Jones *v* Tower Boot (1997), Bull & Another *v* Preddy & Another [2013]** and **Ashers Bakery *v* Lee (2016)**).

Indirect discrimination, on the other hand, is also an example of prohibited conduct in terms of Section 19 of the Equality Act 2010.

Indirect discrimination, for example, on the grounds of sex, colour or nationality, will occur when an employer:

- Applies to an individual a condition or requirement which the employer appears to apply equally to everyone; and
- The proportion of people from the affected person's group (based on sex, colour or nationality) that can comply is considerably smaller than the proportion of people not from that group who can comply with it; and
- The employer cannot justify the requirement or condition on gender neutral or non-racial grounds; and
- The requirement or condition is to the affected person's detriment, because he or she cannot comply with it.

At first glance, the condition or the requirement that the employer imposes on everyone looks completely harmless. However, upon a closer inspection, it becomes obvious that more men than women can comply *in practice* with the employer's condition or requirement or that more white people can comply with the requirement or condition than can people from an Afro-Caribbean background, for example (see **Singh *v* Rowntree MacKintosh (1979)**, **J H Walker Ltd *v* Hussain & Ors (1996), London Underground *v* Edwards (No 2) (1998)** and **Network Rail Infrastructures Ltd *v* Gammie (2009)**).

Indirect discrimination covers both formal and informal practices. Informal practices might include advertising posts or promotion opportunities by word of mouth as opposed to advertising these.

b) Advertisements used in the recruitment process or the use of particular job titles in employment will be unlawful if they give the impression that a person from a particular gender or racial group will be given preferential treatment. If a public house placed an advertisement in the local paper stating that it required a barman, it would give a strong impression that women need not apply for the position as the employer obviously favours men over women. This would be an example of direct sex discrimination in terms of Section 1 of the Sex Discrimination Act 1975 (see **Greig *v* Community Industry (1979)** and **James *v* Eastleigh Borough Council (1990)**).

The advertisement is also an example of indirect sex discrimination and is, therefore, illegal in terms of Section 1(1)(b) and Section 2 of the Sex Discrimination Act 1975 for the following reasons:

In situations where an employer imposes 'desirable' and 'essential' criteria in a job advertisement, they may be examples of indirect discrimination (**Falkirk Council *v* Whyte (1997) IRLR 560**). In **Briggs *v* NE Education and Library Board (1990) IRLR 181** a requirement of the employer that the successful applicant for a job be able to work full-time was an example of indirect discrimination because fewer female applicants could comply in practice with this condition than their male counterparts. Furthermore, the statement that this position would suit a single person might mean that the employer is indirectly discriminating against job applicants who are married who might think that being single is a criterion for the job.

c) McTavish's recruitment procedures are clearly examples of indirect discrimination on the grounds of colour or nationality which would be unlawful in terms of Section 19 of the Equality Act 2010 because the criteria for production line workers applies to an individual a condition or requirement which the employer appears to apply equally to everyone; and the proportion of people from the affected person's group (based on race) that can comply is considerably smaller than the

proportion of people not from that group who can comply with it; and the employer cannot justify the requirement or condition on non-racial grounds; and the requirement or condition is to the affected person's detriment, because he or she cannot comply with it. The criteria for production line workers may also be an example of indirect discrimination in terms of a person's race, ethnic or national origin. The Equality Act 2010 states that indirect discrimination by the employer will occur when he applies a provision, criterion or practice which is applied to everyone; and this provision, criterion or practice puts (or would put) people from the affected person's race or ethnic or national origin at a particular disadvantage; and the employer cannot show that the provision, criterion or practice is a proportionate means of achieving a legitimate aim. Fewer numbers of people from particular racial groups will possess a high degree of fluency in spoken and written English if compared with white applicants. This will also be true where the possession of educational qualifications from British schools and colleges is concerned because many members of racial groups may have been educated outside the UK. As for preference being given to residents of Dalry and its surrounding area, many of the inhabitants of this location will tend to be overwhelmingly white because racial minorities tend to congregate in larger towns and cities – again this requirement could be an example of indirect discrimination. The aptitude test could also be viewed as indirect discrimination because it will tend to favour those applicants coming from a white British cultural and educational background. As we have seen, in situations where an employer imposes 'desirable' and 'essential' criteria in a job advertisement, they may be examples of indirect discrimination (**Briggs *v* NE Education and Library Board (1990)** and **Falkirk Council *v* Whyte (1997)**).

Jutinder Singh, as a Sikh, is a member of a racial group for the purposes of Section 9 of the Equality Act 2010. Section 9 of the 2010 Act defines a person's race as meaning his or her colour, race, nationality or ethnic or national origin. The requirement that drivers have neat and tidy haircuts and be clean shaven could potentially be an example of indirect discrimination in terms of Section 19 of the Equality Act because fewer Sikhs in comparison with other racial groups can comply in practice with the employer's requirement. It is unlikely that McTavish would be successful if it tried to justify such a condition, although indirectly discriminating against Sikh employees or job applicants. (See **Singh *v* Rowntree MacKintosh (1979)** and **Mandla *v* Dowell Lee (1983)**.) It may be legally permissible to apply certain criteria to jobs if these can be objectively justified by the employer, i.e. they are a proportionate means of achieving a legitimate aim, for example, for reasons of hygiene or health and safety (see **Singh *v* Rowntree MacKintosh (1979)**).

4 **a)** To make offensive remarks of a sexually or racially motivated nature to a person is regarded as prohibited conduct and will be regarded as direct sex or racial discrimination in terms of Section 26 of the Equality Act 2010. To harass anyone because they have a protected characteristic as outlined under the Equality Act 2010 or to harass anyone because of their employment status (as a part time worker, fixed-term temporary employee or agency worker) will be regarded as a breach of UK and EU equality legislation. Making discriminatory comments about a woman's body or racist comments in relation to a person's colour or race will amount to less favourable treatment. One sexually or racially motivated remark could amount to harassment. Employment Tribunals have been greatly assisted by the publication of a European Commission Code of Practice on Measures to Combat Sexual Harassment. In **Wadman *v* Carpenter Farrer Partnership (1993)** the Employment Appeal Tribunal stated that Tribunals should use the Code to decide when sexual harassment has taken place (see **also Porcelli *v* Strathclyde Regional Council (1986)**, **Institu Cleaning Co Ltd *v* Heads (1995)** and **Jones *v* Tower Boot (1997)**).

The European Union's Equal Treatment Directive (2002/73/EEC) is particularly important in relation to the issue of harassment.

The most significant change that the Directive made was to redefine the meaning of sexual harassment. This means that both sex-based harassment and harassment generally will be expressly forbidden under the Equality Act 2010. A person will have subjected a woman to harassment (including sexual harassment) on the grounds of her sex if he engages in unwanted conduct that:

1 Violates her dignity.

2 Creates an intimidating, hostile, degrading, humiliating or offensive environment for her.

Furthermore, harassment will arise if a man has engaged in any form of unwanted verbal, non-verbal or physical conduct of a sexual nature that has the purpose or effect of:

1 Violating her dignity.

2 Creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

3 Subjecting her to less favourable treatment because of her rejection of or submission to unwanted conduct of a kind mentioned in 1 or 2 above.

Whether or not, the conduct complained of amounts to harassment will very much depend on the victim's perception of the treatment to which she has been subjected.

Obviously, all the circumstances of the situation will have to be taken into account and the victim will have to demonstrate that she had a reasonable belief that she was being subjected to some sort of harassment. It is worth noting that the provisions on harassment also apply to men and those individuals who are in the process of undergoing gender re-assignment (i.e. those who have decided to undergo a sex change operation).

In **Reed and Bull Information Systems *v* Stedman (1999) IRLR 299** the Employment Appeal Tribunal laid down some guidelines as to what constitutes unwanted conduct in cases of sexual harassment. The test for sexual harassment is a subjective one in that great stress will be placed on the feelings of the person who was subjected to the remark or the behaviour in question. It is up to the recipient to decide what is welcome and what is offensive.

Obviously, racist remarks and racist behaviour should be treated completely differently in that they should not be tolerated at all. Racist remarks and behaviour will almost always be offensive in nature. Employers can be vicariously liable for acts of harassment committed by their employees against colleagues or members of the public. In order for an employer to be liable in this way, such behaviour must have taken place on at least two separate occasions (in other words, it must be reasonably foreseeable) and the employer must be aware of these occurrences, but has not taken reasonable steps to prevent such conduct from occurring in the future.

Section 26 of the Equality Act 2010 gives employees the right to bring a claim for harassment against their employers if they have been subjected to this type of behaviour while at work. In its original form, Section 26 was wider in its scope because, potentially, it made employers liable for harassment – even if the alleged act had been committed by a third party, for example a client of the employer. This type of discriminatory behaviour was known as third party harassment.

On 1 October 2013, the UK Coalition Government amended Section 26 of the Equality Act 2010 and abolished the provisions on third party harassment. Interestingly, the Chartered Institute of Personnel Development (CIPD) noted that 71 per cent of respondents to the Government's consultation exercise had opposed the abolition of the third party harassment rules. Despite the change to the law, it would be very unwise for an employer to ignore complaints from employees about third party harassment. The degree of control that the employer has over the situation and knowledge of the behaviour of third parties will be absolutely critical factors in these types of cases when it comes to determining liability.

b) Tony has undoubtedly committed various acts of sexual harassment against Sharon that are in breach of Section 26 of the Equality Act 2010. Sharon has not sought or welcomed Tony's approaches and he has created an environment that is hostile and intimidating for her. His conduct is totally offensive and unlawful. Sharon is being subjected to this treatment because of her gender (Section 11 of the Equality Act 2010).

5 a) Section 27 of the Equality Act 2010 provides protection to individuals who have been involved in some way in discrimination actions. Sometimes, for example, an employer will subject individuals to less favourable treatment in the future because, at one time, they have had some involvement in a discrimination claim against the employer (see **Waters *v* Commissioner of Police for the Metropolis (2000)**). It will be unlawful for an employer to victimise or harass such individuals in the following situations:

1 Where a person has brought an Employment Tribunal or a court action against the employer in terms of the Equality Act 2010, for example sex, race or disability cases.

2 Where a person has given evidence in support of someone who has taken an Employment Tribunal or a court action under the Equality Act 2010.

3 Where a person has taken a legitimate course of action, for example making a complaint against the employer in relation to the Equality Act 2010.

4 Where a person has made allegations against the employer that discrimination has occurred which is unlawful in terms of the Equality Act 2010.

5 In terms of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, any part-time worker who makes a complaint or proceeds with an action under the Regulations has the right not to be victimised by the employer. Victimisation could take the

form of dismissal or some other detriment, for example harassment. If the employer dismisses a part-time worker for enforcing her rights under the Regulations, such a dismissal will be automatically unfair (Regulation 7). This protection is also extended to any other worker who agrees to be a witness or give evidence in respect of any complaint made against an employer under the Regulations.

6 Regulation 6 of the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 makes it very clear that employees who make complaints against the employer or who give evidence on behalf of a discriminated colleague have the right not to be victimised by the employer in respect of unfair dismissal or other detriments.

7 Regulation 17 of the Agency Workers Regulations 2010 prohibits those individuals who are working as agency workers from being subjected to a detriment such as unfair dismissal or victimisation if they have made a claim or assisted anyone to make a claim under the Regulations.

Very significantly, the House of Lords decided that victimisation after a contract has ended is unlawful (see **Relaxion Group plc *v* Rhys-Harper (FC)**, **D'Souza *v* London Borough of Lambeth**, **Jones *v* 3M Healthcare Limited and Others (2003) UKHL 33**).

b) Shamaila has undoubtedly suffered victimisation on racial grounds as a result of her ex-employer's refusal to give her a reference. The employer's refusal to give a reference to Shamaila is motivated by her decision to take out an Employment Tribunal claim alleging race discrimination. The employer's act of victimisation would be a breach of Sections 9 and 27 of the Equality Act 2010. The decision of the House of Lords in **Relaxion Group plc *v* Rhys-Harper (FC)**, **D'Souza *v* London Borough of Lambeth**, **Jones *v* 3M Healthcare Limited and Others (2003)** means that people like Shamaila can now take action against their employers even after the employment has ended because acts of victimisation committed by employers can continue to take place.

6 **a)** This statement is highly accurate because until the introduction of the Employment Equality (Sexual Orientation) Regulations 2003 (now replaced by the Equality Act 2010), the House of Lords made it very clear that discrimination on the grounds of a person's sexual orientation was not covered by previous legislation such as the Sex Discrimination Act 1975 (see **Macdonald *v* Advocate General for Scotland** and **Pearce *v* Governing Body of Mayfield School (2003)**).

As a result of the Human Rights Act 1998, the situation improved and a person now enjoys substantial protection in relation to his or her sexual orientation. Article 8 of the European Convention on Human Rights establishes the places a duty on a public authority to have respect for a person's private life. Furthermore, Article 14 of the European Convention confers a right on individuals not to be subjected to discrimination. So, employers who are defined as a public authority will have to ensure that they do not discriminate against an employee on the grounds of sexual orientation.

From 1 December 2003 it became unlawful to discriminate against someone by reason of that person's sexual orientation. The Employment Equality (Sexual Orientation) Regulations 2003 were originally introduced to provide protection to employees like Macdonald and Pearce who suffer discrimination in employment by reason of their sexual orientation. In the their judgement, the House of Lords drew attention to the 2003 Regulations, but stated that its introduction would be too late for both Macdonald and Pearce. The 2003 Regulations have since been repealed and replaced by the Equality Act 2010. In terms of Section 12 of the Equality Act 2010, sexual orientation is a protected characteristic. Please note that the Equality Act 2010 provides protection not just to employees in terms of their sexual orientation, but also to users of services (see specifically **Bull and Another *v* Preddy and Another [2013]** and **Lee *v* Ashers Bakery [2016]**).

b) In terms of the Equality Act 2010, Terry could attempt to argue that he has experienced an act of direct discrimination on the grounds of his sexual orientation (Sections 12 and 13) when he was refused promotion. Terry will have the right to bring a discrimination claim on the grounds of his sexual orientation before the Employment Tribunal or the Sheriff Court. (See **Whitfield *v* Cleanaway UK (2005)**, **Phillips *v* Atherton (2005)**, **Reaney *v* Hereford Diocesan Board of Finance (2007), English *v* Thomas Sanderson Ltd (2008), Bull and Another *v* Preddy and Another [2013]** and **Lee *v* Ashers Bakery (2016)**.)

7 Schedule 9 of the Equality Act 2010 continues to allow situations where employers and organisations will be permitted in certain, appropriate circumstances to behave in a way that would, otherwise, be regarded as unlawful discrimination.

Under previous equality legislation, for example the Sex Discrimination Act 1975 and the Race Relations Act 1976, an employer could treat a job applicant less favourably by relying on the defence that the successful candidate must be of a particular gender or belong to a particular racial group. This was an example of a genuine occupational requirement and, to rely upon this defence the condition or requirement, the employer had to demonstrate that it was objectively justified (see **O'Connor *v* Kontiki Travel (1976), Wylie *v* Dee & Co (Menswear) Ltd (1978), Case 222/84 Johnston *v* Chief Constable of the Royal Ulster Constabulary [1986]** and **Reaney *v* Hereford Diocesan Board of Finance (2007)**).

Schedule 9 of the Equality Act 2010 does permit discrimination, for example, against transsexuals in employment in specific circumstances:

1 If the post in question is associated with organised religion and there is a requirement that the post-holder is not a transsexual *so as to comply with the doctrines of the religion or so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers*.

2 If it is a proportionate means of *ensuring the combat effectiveness of the armed forces.*

These are examples of genuine occupational requirements that an employer is permitted to use in order to justify what would otherwise be regarded as unlawful discrimination against transsexual persons.

In terms of Schedule 9, employers must demonstrate that the condition or criterion placed on the post is:

1 A genuine occupational requirement

2 It is objectively justified in the circumstances and is a proportionate means of achieving a legitimate aim

3 The unsuccessful applicant does not meet requirement

4 With the exception of the 'protected characteristic' of sex, the employer has reasonable grounds for not being satisfied that the candidate meets this requirement.

How would this work in practice?

A number of examples should illustrate the use of genuine occupational requirements in practice:

1 It will continue to be legal for a Rape Counselling Service to hire female applicants to act as counsellors in preference to male applicants. This would seem to be perfectly sensible given the nature of the work that the post-holder is expected to undertake. Being female is a genuine occupational requirement for the post that can be objectively justified and is a proportionate means of achieving a legitimate aim. Unsuccessful male (obviously) applicants do not meet the requirement placed on the post by the employer.

2 It will still be legitimate (on the grounds of authenticity) for a modelling agency to hire male models in preference to female colleagues for the purpose of modelling men's clothing for a photo shoot. Again, the fact that the employer is favouring one gender group over another (this time men over women) is an example of a genuine occupational requirement that can be objectively justified and is a proportionate means of achieving a legitimate aim. It should go without saying that female models are unlikely to comply with the requirement that successful applicants for the assignment be male.

Many employers will, of course, attempt to rely on the defence of genuine occupational requirements but, ultimately, it may be up to a court or Tribunal to determine whether such a condition is a sham that has no real connection with the employment in a particular situation.

It has been commented that the provisions in Schedule 9 of the Act have been worded much more generally than in previous equality legislation, but significantly this is an area of the law that changes little.

The Equality and Human Rights Commission in its Statutory Code provides the following example whereby an employer will be able, quite legitimately, to rely on a genuine occupational requirement:

Example: A local council decides to set up a health project that would encourage older people from the Somali community to make more use of health services. The council wants to recruit a person of Somali origin for the post because it involves visiting elderly people in their homes and it is necessary for the post-holder to have a good knowledge of the culture and language of the potential clients. The council does not have a Somali worker already in post who could take on the new duties. They could rely on the occupational requirement exception to recruit a health worker of Somali origin.

When can genuine occupational requirements be used?

1 Organised religion

Organised religions will still be able to discriminate against individuals on the grounds of sex, marital status, gender reassignment and sexual orientation in order to comply with relevant religious doctrines and the strongly held beliefs of the adherents of the relevant congregation. Genuine occupational requirements can also be applied to appointments of certain staff members in religious educational institutions, for example a candidate for head teacher of a Roman Catholic school must be a practising member of that faith group. Additionally, academic posts at certain universities (where the governing instrument permits) can be given to ordained priests.

The Equality and Human Rights Commission in its Statutory Code provides the following examples of genuine occupational requirements in relation to organised religion:

Example 1

An orthodox synagogue could apply a requirement for its rabbi to be a man.

Example 2

An evangelical church could require its ministers to be married or heterosexual if this enables the church to avoid a conflict with the strongly held religious convictions of its congregation.

2 Age discrimination

Discrimination in relation to a person's age will be permitted in relation to conditions of service such as benefits based on length of service, compulsory retirement ages, redundancy pay, the national minimum wage and life assurance. Employers often justify age discrimination on grounds of health and safety. This may be a legitimate concern as employees get older if they are carrying out potentially dangerous jobs or they are working with dangerous machinery. Employers will have to be careful that they deal with the issue of a person's age with consideration and sensitivity as the following case demonstrates:

Case C-447/09 Prigge and Others *v* Lufthansa [2011] the Court of Justice of the European Union stated that a compulsory retirement age of 60 for all pilots employed by Lufthansa, the German national airline was not a proportionate means of achieving a legitimate aim, i.e. health and safety considerations. Pilots should have been treated on their individual merits and to impose a blanket policy on all pilots reaching the age of 60 was nothing less than unlawful age discrimination. It was not a genuine occupational requirement that Lufthansa pilots should be below the age of 60.

3 Statutory authority

There will be circumstances where the policies or practices of an employer – which would otherwise be regarded as unlawful discrimination – will be permitted because the employer can claim legitimately that it is complying with statute.

The Health and Safety at Work Act 1974 and the European Union inspired 'Six Pack' Regulations (see Chapter 6) would, for example, permit employers to discriminate against pregnant women on the grounds that their actions were motivated by an overriding concern to ensure the health and safety of the affected female employees or workers. In these types of situations, pregnant women would not be permitted to carry out certain tasks if in doing so they were being exposed to an unacceptable level of risk.

Currently, the UK permits employers to operate a compulsory retirement age of 65 (although this is projected to rise to 66 by 2018 and then to 67 by 2028 at the very latest). In other circumstances, if an employer placed a requirement on an employee that was based on the 'protected characteristic' of age this would almost certainly amount to unlawful discrimination. Admittedly, current UK law permits older employees to request the right to work beyond the mandatory retirement age and such requests will have to be given due consideration by employers.

The law does permit differences in treatment between different age groups. The National Minimum Wage Act 1998, for example, will continue to operate as before meaning that workers can be paid different minimum wage rates depending on their age. Similarly, the Employment Rights Act 1996 permits employers to pay higher rates of statutory redundancy payments to older workers (dependent, of course, on their length of service). In such situations, it is very likely that older employees may very well have longer service than their younger colleagues and will, therefore, be better off financially under the employer's arrangements, for example, an entitlement to a bonus award for long-service.

There are also exceptions to the general prohibition on discrimination for compliance with statutory authority in relation to national security; positive action that permits certain employment and training opportunities to be targeted at particular age groups; and provision of life assurance cover to retired workers.

An example case where the employer relied on the defence of statutory authority can be seen below:

Varcoe and Southgate *v* Ministry of Justice (2009) this case was discussed earlier in the Chapter and the two claimants who were employed as immigration judges by the Ministry of Justice were unsuccessful in their challenge to the compulsory retirement age of 70 imposed on such posts. The Employment Tribunal noted that the compulsory retirement age of 70 had been imposed by statute and this was enough to defeat the actions by the claimants. Significantly, the Ministry of Justice had also been able to demonstrate that it no longer required the services of the claimants.

4 Armed Forces

The Armed Forces are also able to impose genuine occupational requirements that would have the effect of treating someone less favourably on the grounds of age, disability, sex or by reason of gender reassignment. Such requirements are permitted in order to ensure the effectiveness of the Armed Forces.

5 Supported employment for disabled persons

This will mainly affect charitable organisations that offer supported employment opportunities to disabled persons with the aim of securing employment for these individuals. Clearly, it will be legitimate for charities to continue to give preference to disabled persons when allocating places on a supported employment programme.

6 Crown appointments

Crown employment or appointments may be restricted to persons of a particular birth, nationality, descent or residence.

7 Residency requirements

Direct nationality and indirect race discrimination may be permitted in relation to residency requirements where this sanctioned by other laws, ministerial arrangements or conditions. It is irrelevant whether these laws, arrangements or conditions were enacted or implemented prior to the Equality Act 2010.

8 National security

An employer may be able to discriminate against an individual on the grounds of national security as long as this a proportionate means of achieving this objective (see **Home Office *v* Tariq [2011]** and **Kiani *v* The Secretary of State for the Home Department [2015]** both discussed in Chapter 6).

9 Communal accommodation

An employer may be permitted to discriminate against certain employees in relation to the protected characteristics of sex and gender reassignment when allocating communal accommodation. The employer may provide communal sleeping arrangements, for example dormitories as part of the workers' conditions of service and for reasons of privacy and decency, the employer decides that such communal sleeping arrangements will be for the use of, for example male workers only.

When an employer decides that a transsexual person will not be permitted to use its communal accommodation, such a decision must be objectively justified, i.e. it is a proportionate means of achieving a legitimate aim. Such a ban cannot be operated on a blanket basis, the employer will be under a duty to review such a requirement in relation to each person who may be treated less favourably by the operation of this procedure. The employer may have to consider whether it is appropriate to modify or expand the relevant accommodation and it would also be sensible to monitor the use of these facilities by persons with different 'protected characteristics' in order to have a full picture of the various needs of members of the work-force. If an employer makes the decision to exclude someone from using communal accommodation, reasonable alternative arrangements must be put in place so as to minimise the inconvenience that might otherwise be caused to the affected person.

The Equality and Human Rights Commission in its Statutory Code provides an example of the correct approach that employers should take in relation to the matter of communal accommodation:

Example: At a worksite, the only sleeping accommodation provided is communal accommodation occupied by men. A female worker wishes to attend a training course at the work site but is refused permission because of the men-only accommodation. Her employer must make alternative arrangements to compensate her where reasonable; for example, by arranging alternative accommodation near the worksite or an alternative course.

10 Training for persons who are not European Economic Area (EEA) citizens

The EEA comprises the 28 European Union member states and, additionally, Lichtenstein, Iceland and Norway. Employers are permitted to employ non-EEA citizens where the purpose of such a training arrangement allows the individuals in question to acquire skills that will be used outside the United Kingdom. The Equality and Human Rights Commission in its Statutory Code

of Practice on Employment uses the example of someone coming to the UK to be trained in medical skills that will be used in that person's country of origin.

11 Employment services

Vocational training providers may be allowed to limit access on courses that they run to people with certain 'protected characteristics' if the training is directly linked to types of work to which a genuine occupational requirement has been applied. Employment Services can include private job agencies and even public organisations such as Jobcentre Plus. Arrangements whereby employers are supplied with people to carry out work for them by employment businesses will also be covered by this part of the Act.

(i) In terms of Schedule 9 of the Equality Act 2010, Joanne would be able to claim that being female for the role of Juliet in Shakespeare's play is a genuine occupational qualification. It is necessary for physiological reasons (not physical strength or stamina) to cast a female actor. The employer requires a candidate to be a member of a particular sex.

(ii) Kenny's decision not to employ Amanda as a labourer on the building site is an example of direct sex discrimination and, therefore breaches Sections 11 and 13 of the Equality Act 2010 (see **Greig *v* Community Industry (1979)**). Physical strength is not a genuine occupational qualification in terms of Section 9 of the Equality Act 2010.

(iii) Greenhill Men's Voluntary Association would probably be successful in justifying its decision to discriminate against Debbie by relying on the genuine occupational qualification laid down in Section 9 of the Equality Act 2010. The holder of the job provides individuals with personal services aimed at promoting their welfare or educational services and where those services can be most effectively provided by a person of a particular sex – in this case a man.

(iv) The Georgian Cultural Society would be able to rely on Section 9 of the Equality Act 2010. It will be a genuine occupational qualification where the holder of the job provides individuals with personal services aimed at promoting their welfare and where those services can be most effectively provided by a person of that particular racial group. Zura quite clearly meets the conditions laid down by this particular occupational qualification.

(v) The restaurant owner's attempt to rely on Section 9 of the Equality Act 2010 by claiming that being Indian is a genuine occupational qualification for holding the post of chef would fail. The Equality Act does recognise situations where a person is required to serve food and drink to the public in a place where members of a particular racial group are required to promote authenticity. It does not matter whether this work is carried out on a paid basis or not. This genuine occupational requirement allows Indian and Chinese restaurants to employ Indian and Chinese waiting and bar staff in order to provide customers with an authentic experience. However, it does not cover situations where staff do not have contact with the public, for example, kitchen staff. Being ethnic Indian is not a genuine occupational requirement for working as a chef in the kitchen of an Indian restaurant. Angus has suffered direct race discrimination in terms of Sections 9 and 13 (see **King *v* Great Britain-China Centre (1991), Jones *v* Tower Boot (1997)** and **R(E) *v* Governing Body of JFS (2009)**).

(vi) The police service would be able to rely on the genuine occupational qualification contained in Section 9 of the Equality Act 2010 by claiming that an artist's or photographic model is required for the production of a work of art or visual image where members of particular racial groups are needed for reasons of authenticity.

8 **a)** Section 66 of the Equality Act, Article 157 Treaty on the Functioning of the European Union, the Equal Pay Directive and the Equal Treatment Directive all ensure that employees and those individuals who come under the European Union definition of a 'worker' benefit from the inclusion of an equality clause whereby it will be implied that men and women in the same employment or work should receive equal pay for equal work. The equal pay laws are not about establishing fair pay for everyone. Claims can only be brought if a person of a particular sex can show that s/he does not receive equal pay for equal work in comparison to a colleague of the opposite gender or sex and the reason for this difference is related purely to the claimant's gender or sex. Sections 72–76 of the Equality Act 2010 insert a maternity equality clause into a woman's contract in relation to maternity pay and occupational pensions. In the past, women were often severely disadvantaged in relation to these areas while pregnant.

b) An employer could breach the equal pay provisions of the Equality Act 2010 by treating men and women differently in relation to the following:

- different salary rates that are unjustified
- pensions
- employers' contributions to pensions
- concessionary travel
- social security benefits
- maternity pay
- sick pay

- paid leave
- contractual and statutory redundancy pay
- overtime pay
- compensation for unfair dismissal.

c) (i) Section 65(1) of the Equality Act states that women (and men too!) have the right to equal treatment in pay where they are employed on:

- Like work with a man
- Work rated to equivalent to that of a man
- Work of equal value compared to that of man

Like work this applies in situations where a woman is doing the same or broadly similar work to a man. There may indeed be differences between the work carried out by the man and the women, but these are so slight or have little practical importance (see **Capper Pass *v* Lawton (1977)**).

(ii) Work rated as equivalent applies to situations where a job evaluation scheme is carried out. This category applies when a man and the woman are not engaged in the same line of work. A woman who is employed as nursery nurse by a local council may be able to claim that she performs work rated as equivalent in comparison to a male clerical worker who receives a higher salary. Under the job evaluation scheme, both jobs must have an equal value in relation to the types of demands made upon a worker under such headings as effort, skill and decision-making. The jobs are broken down into their various functions and points will be awarded to each worker in relation to a function or heading. The scheme must be scrupulously fair in that it must be analytical and deploy objective (quantitative) criteria (**Eaton Ltd *v* Nuttall (1977)**). Furthermore, the study should have been carried out at the organisation where the employee and her comparator are employed. Should the female worker's job receive a different score from that of her male comparator, she will not be in a position to claim that her work should be rated as equivalent. Job evaluation schemes can always be challenged on the basis that the employer did not use objective criteria when comparing a woman's job with that of a male comparator (see **Ryder and 113 Others *v* Warwickshire County Council and Others ET Case No 1301481/97**). It is necessary to have regard to the full results of the job evaluation scheme, including the allocation of the claimant to the scale or grade at the end of the process (see **Springboard Sunderland Trust *v* Robson (1992)**).

(iii) A woman may be able to claim that her work is equal value to that of a male comparator in situations where a job evaluation scheme has not been carried out. Again, the man and the woman are not engaged in like work, but this procedure allows the woman to compare herself to a man who is engaged in a completely different type of work. It is perfectly possible for the work carried out by a cleaning lady to be compared to that of a male solicitor who work for the same or associated employer. An Employment Tribunal can determine whether a woman is engaged in work of equal value in comparison to a male worker and the services of an independent expert are no longer required as used to be the case. When deciding whether a woman is employed in work of equal value, the Employment Tribunal will look at the demands made on the workers under such headings as effort, skill and decision-making (**Ms White and Others *v* Alstons (Colchester) Ltd (1987)**).

Section 65 of the Act uses a similar scheme as the Equal Pay Act 1970 did in order to determine whether male and female workers are engaged in equal work.

d) In terms of Section 69, the employer can still rely on the defence of a material factor to justify differences in pay and conditions (see **Glasgow City Council *v* Marshall (2000)**). The material factor that the employer seeks to rely upon must be objectively justified in the sense that it is a proportionate means of achieving a legitimate aim. Interestingly, the word 'genuine' (which was in Section 1(3) of the Equal Pay Act 1970) has not been carried over to the Equality Act 2010. This means that employers now merely have to justify differences in pay and other contractual benefits on the basis of there being a material factor defence.

It is worth noting that the legislation makes it mandatory for employers to achieve equality in relation to occupational pension schemes (Sections 61–63 of the Equality Act 2010).

9 Originally, Section 138 of the Equality Act 2010 continued the process whereby employees could serve a questionnaire on employers requesting answers to specific questions in situations where unlawful discrimination was suspected or alleged. Employers were given 8 weeks in which to respond to such questionnaires. It is important to understand that employers and other organisations were never legally obligated to answer questionnaires or, for that matter, specific questions contained therein, but failure to do so might well have led an Employment Tribunal to draw an unfavourable conclusion regarding the treatment of employees or workers. The pre-Equality Act legislation, for example the Sex Discrimination Act 1975, the Race Relations Act 1976 and the Disability discrimination Act 1995 all provided for specific styles of questionnaire that complainants

could serve on a party suspected of less favourable treatment. At first, the Equality Act 2010 did not specify a particular style of questionnaire, but this omission was later remedied with the introduction of the Equality Act 2010 (Obtaining Information) Order 2010 (SI 2010/2194), which came into effect on 1 October 2010. Schedules 1 and 2 (Parts 1 and 2) of the Order provided the format of the questionnaires that should be used by complainants from that date onwards and the use of the old style questionnaires was discontinued.

For better or for worse, the UK Coalition Government (2010–15) repealed Section 138 of the Equality Act 2010 in relation to alleged acts of discrimination that were carried out after 6 April 2014. That said, however, employees and workers who suspect that they have suffered discrimination can still write to employers voicing their suspicions and requesting responses to their enquiries. Failure to respond to these questions or evasive answers may be treated with suspicion by Employment Tribunals and courts. The upshot is that, despite the repeal of Section 138 of the Act, it would be a very foolhardy or unwise employer who would choose to ignore requests for information from employees or workers who believe that they have experienced discrimination. The Advisory, Conciliation and Arbitration Service (ACAS) provides six questions (or more accurately Steps) that employees, job applicants and workers can use in order to frame enquiries about perceived discriminatory treatment.

The Coalition Government defended its decision to abolish the statutory questionnaire procedure by stating that solicitors representing claimants were still perfectly entitled to apply to the Office of Employment Tribunals for the granting of an Order for further and better particulars which would compel employers, within reason, to provide the information sought. As Thompsons Solicitors, a leading UK employment law firm, made it clear in its submission to the former Government's consultation process, such Tribunal Orders were not the proper way of acquiring information which were normally provided as part of the questionnaire procedure. Thompsons quoted Mr Justice Wood in **Byrne *v* Financial Times Ltd [1991]** who had explained the rationale behind Orders for further and better particulars:

General principles affecting the ordering of further and better particulars include that the parties should not be taken by surprise at the last minute; that particulars should only be ordered when necessary in order to do justice in the case or to prevent adjournment; that the order should not be oppressive; that particulars are for the purpose of identifying the issues, not for the production of the evidence [Thompsons' emphasis]; and that complicated pleadings battles should not be encouraged'.

The questionnaire procedure was an attempt to make the issues surrounding equal pay claims easier to understand and identify and reduce the delays that were often a feature of such cases and it is perhaps regrettable that the UK Coalition Government (2010–15) repealed Section 138 of the Equality Act 2010. The use of such questionnaires was also used to promote out of court settlements between the parties to a claim. By serving a questionnaire, it allowed the employee to request important information from the employer which should help establish whether there is a potential case to answer in terms of an equal pay claim. The questionnaire and the responses were then often used in evidence at an Employment Tribunal hearing. It was then for an Employment Tribunal to decide whether discrimination has taken place. Employers were, therefore, encouraged to cooperate with such a questionnaire and submit answers within an 8-week period, but some information could be withheld on the grounds of confidentiality. Until recently, if the employer failed or refused to cooperate with the questionnaire procedure, this behaviour could be viewed very suspiciously by an Employment Tribunal. Now, a failure by an employer to provide answers or a refusal to co-operate will not of itself be viewed negatively.

10 **a)** Prior to the introduction of the Equality Act 2010, the law on disability discrimination was mainly contained in the Disability Discrimination Act 1995. According to Section 6 of the Equality Act, a person (P) has a disability if:

1 P has a physical or mental impairment, and

2 the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

This is an important definition because the disability can either be a physical, sensory or mental impairment. Previously, popular notions of a disabled person may have centred around a person in a wheelchair. The definition of a disabled person under the Act would, obviously, include such an individual, but people suffering from a medically recognised psychiatric illness would also be protected. The disability must also be substantial, i.e. not trivial and must have a long-term adverse effect on a person's ability to carry out normal day-to-day activities. Merely because someone is ill does not mean that she is disabled in terms of the

Act. The illness could be short-term and the person suffering from it could make a full recovery in a very short space of time.

The number of conditions that can be regarded as a disability has steadily increased and, from 2005 onwards, the following medical conditions were covered by disability discrimination laws:

- HIV and AIDS
- Multiple sclerosis
- Cancer
- Mental illness

Some conditions, however, are not regarded as a disability within the meaning of Section 6 of the Act and would include:

- An addiction involving drugs such as alcohol or nicotine
- Latent genetic defects or the propensity towards genetic conditions
- A condition or a compulsion where a person lights fires, engages in acts of theft or commits acts of physical or sexual abuse against another person
- Exhibitionism and voyeurism
- Impairments such as hay fever (which although it can have a substantial adverse effect on day to day activities last only for a brief period)
- Physical disfigurements such as tattoos and body piercing

A disability or an impairment will be regarded as having a long-term effect in the following circumstances:

1 it has lasted at least 12 months

2 the period for which it lasts is likely to be at least 12 months; or

3 it is likely to last for the rest of the life of the person affected.

Disability: a contested concept?

Situations will undoubtedly arise whereby employers and service providers will contest whether employees, workers and clients have a genuine disability. An interesting example of this type of situation occurred in a request for a preliminary ruling from a Danish Court (the District Court of Kolding) to the Court of Justice of the European Union under Article 267 of the Treaty on the Functioning of the European Union: see **Case C-354/13 Kaltoft *v* Municipality of Billund**.

b) In terms of Section 20 of the Equality Act 2010, an employee or a member of the public could experience discrimination where the employer or a service provider either refuses or fails to make reasonable adjustments to accommodate the person's disability (see **SCA Packaging Limited *v* Boyle (2009)**). *Section 21 of the 2010 Act also specifies that failure to make reasonable adjustments by an employer will be regarded as an act of discrimination against a disabled person*. Reasonable adjustments are measures which can be put in place in order to eliminate or adapt any physical features of premises or organisational practices that would place a disabled person at a substantial (i.e. not trivial) disadvantage in comparison with a non-disabled person. When a disabled person brings a claim against another individual on the grounds that he has failed to make reasonable adjustments, courts or tribunals must be satisfied that there is, in fact, a duty to make such adjustments. When such a duty has been established, the courts or tribunals must then ask whether or not reasonable steps have been taken to put adjustments in place that will remove the substantial disadvantage in relation to the disabled person.

The Employment Tribunal can then subsequently determine whether the employer has failed to implement the duty to make reasonable adjustments. The following factors are reasonable adjustments that might put in place by employers and/or service providers:

1 Making adjustments to premises

2 Transferring some of the disabled person's duties to another person

3 Greater flexibility in working patterns

4 Providing suitable, alternative employment

5 Making physical changes to a work station

6 Time-off to attend medical treatment

7 Providing training opportunities

8 Modifying equipment

9 Modifying instructions and training or reference manuals

10 Modifying procedures for testing and assessment

11 Providing an interpreter or a scribe

12 Providing appropriate supervision

A very significant case around the concept of reasonable adjustments was **Cordell *v* Foreign & Commonwealth Office [2011]** where the employer was able to demonstrate that the adjustments requested to a post by an employee were anything but reasonable.

Employers and service providers may be able to argue that they are not under a duty to make reasonable adjustments if either they did not know or could not have been reasonably expected to know that a person is disabled. This argument, however, will fail if it can be implied that an organisation's agents or employees had knowledge of the disability. Employers particularly have a duty to take more active steps to discover whether any of their employees are, in fact, disabled and what reasonable adjustments can be put in place to accommodate them.

A failure by an employer to consider making reasonable adjustments to the post of a disabled person may well result in the dismissal of the employee, which could be an unfair dismissal on the grounds of disability discrimination. The employee's case for disability discrimination will be greatly strengthened if the reasonable adjustments that the employer should have made to the post would have resulted in the disabled person remaining in employment (see **Fareham College Corporation *v* Walters (2009), Wilcox *v* Birmingham CAB Services Ltd [2011]** and **Donnelly *v* Environment Agency [2013]**).

c) As a person with a disability in terms of Section 6 of the Equality Act 2010, Matthew could potentially take legal action against the shopping centre (a service provider) in the Sheriff Court for failure to make reasonable adjustments to accommodate his disability in terms of Sections 20 and 21 of the Equality Act 2010 (see **Project Management Institute *v* Latif (2007)** and **FirstGroup plc *v* Paulley [2017]**).

d) Simon's employer could argue that it is objectively justified in dismissing him in terms of Schedule 9 of the Equality Act 2010, i.e. on grounds of health and safety. Schedule 9 of the 2010 Act states that less favourable treatment of a disabled employee can only be justified if, but only if, the reason for the less favourable treatment is material to the circumstances of the particular case and substantial. It is for the employer to prove that the less favourable treatment was justified. When the employer relies on the justification defence, his reasons for doing so cannot be minor or trivial. The employer must demonstrate that he will face serious problems if he is not permitted to treat the employee less favourably on the grounds of disability.

The employer would, of course, be expected to take all reasonable steps when dealing with Simon's condition and the school would be well advised have to take into account expert medical and health and safety opinions before going down the road of dismissing Simon from his employment.

11 Kathy has suffered discrimination by reason of her status as a part-time worker. This is illegal in terms of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000. Regulation 5 is very explicit that it will be an act of discrimination to treat a part-time worker less favourably than a comparable full-time worker. Part-time workers have often experienced less favourable treatment at the hands of their employers in respect of being denied access to employment, promotion and training opportunities. There can also be significant differences (in a negative sense) between the terms and conditions that full-time workers enjoy and those of part-time workers.

As Kathy is an employee, she is quite clearly covered by the Part-time Workers Regulations 2000 (Regulation 1), i.e. she falls within the definition of a worker.

It is important that a part-time worker (such as Kathy) who makes an allegation of discrimination against her employer is able to compare herself to a full-time comparator. Regulation 2(3) lists various types of contracts which are considered to be very different in nature:

1 Employees employed under a contract that is not a contract of apprenticeship.

2 Employees employed under a contract of apprenticeship.

3 Workers who are not employees.

4 Any other description of worker that it is reasonable for the employer to treat differently from other workers on the ground that workers of that description have a different type of contract.

A part-time worker cannot compare herself to *any* full-time comparator. It would not be the correct legal approach for a part-time worker employed under an apprenticeship contract to compare her situation to full-time worker who is employed on a contract which is not an apprenticeship contract. A part-time apprentice alleging less favourable treatment must compare her situation with a worker employed under a full-time apprenticeship contract (see **Matthews and Others *v* Kent and Medway Towns Fire Authority and Others (2003)** and **Wippel *v* Peek & Cloppenburg GmbH Co KG (2005)**).

Generally speaking, part-time workers bringing a claim of less favourable treatment against their employer must meet the requirements laid down in Regulation 2(4) which makes it very clear that a part-time worker must demonstrate the following:

1 She and her comparator are employed by the same employer under the same type of contract; and

2 She and her comparator are engaged in the same or broadly similar work.

However, where Kathy is concerned the Regulations grant important rights to workers in two situations:

1 Those workers who have previously held a full-time position and who now wish to change to part-time work (Regulation 3).

2 Workers returning from a period of absence who previously held a full-time position but who now wish to change to a part-time work. This would cover workers returning from maternity leave (Regulation 4).

Workers in the above two situations may actually find that their part-time terms and conditions of employment are less favourable than their previous full-time employment. The Regulations come to these workers' assistance because they permit them to compare their current part-time contracts to their previous full-time contracts.

Kathy can ask the employer to explain the difference in treatment. The employer has 21 days from the employee requesting an explanation to issue a written statement laying down the reasons for the difference in treatment between part-time and full-time workers (Regulation 6). It is open to the employer to deny that any discrimination has taken place. The employer's statement can be used in Employment Tribunal proceedings at a later date. If the employer fails to provide a statement on request or issues reasons for the treatment that could be considered evasive, it is up to the Employment Tribunal to draw its own conclusions. If the employee still wishes to take matters further, she is entitled to lodge an Employment Tribunal application within three months (less one day) of the conduct complained of (Regulation 8).

An employer will be able to justify less favourable treatment on objective grounds. Objective reasons for discrimination may be that the part-time worker has inferior qualifications or less experience than her full-time colleague and this explains the difference in treatment (see **Glasgow City Council *v* Marshall (2000)** – an equal pay case where a material factor was held to be genuine and, therefore, objectively justified).

For cases involving allegations of part-time worker discrimination see **Clarke & Powell *v* Eley Kinoch Ltd (1982)**, **Bilka-Kaufhaus *v* Weber Von Hartz (1986)** and **R *v* Secretary of State for Employment *ex parte* Equal Opportunities Commission (1994)**, **Matthews and Others *v* Kent** and **Medway Towns Fire Authority and Others (2003)** and **Wippel *v* Peek & Cloppenburg GmbH Co KG (2005)**.

12 Angela has experienced less favourable treatment as a result of her status as a fixed-term employee which is a breach of the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002. For the purposes of the Regulations, a permanent employee is someone who is not on a fixed-term contract. Permanent employees will, therefore, enjoy contracts for an indefinite or an indeterminate period of time. A fixed-term employee is defined, in terms of the Regulations, as someone who is employed on a contract that will last for a specified period of time or whose employment will end when a specified task has been completed or when a specified event either occurs or does not occur (Regulation 1).

The fact that Angela's employer has refused to pay her sick pay is an example of less favourable treatment by reason of her fixed-term employee status in terms of Regulation 3. If a fixed-term employee decides to make an allegation of discrimination against the employer, it is important that they are able to compare themselves to a permanent employee (Regulation 2). The fixed-term employee cannot choose any permanent colleague with whom to compare himself. The comparator must be employed by the same employer and do the same or broadly similar work (the influence of the original Equal Pay Act 1970, the provisions of which are now to be found in the Equality Act 2010, can undoubtedly be felt here). The employee must show that she has similar skills, qualifications and experience to her comparator. Like must be compared with like as much as possible. If the employee cannot point to a comparator in his workplace, he can always search for another permanent employee to make a comparison, as long as this individual is employed by the same employer the only difference being that he employed at a another workplace.

The employee has a right to ask the employer to respond to his allegation of discrimination. The employer should respond by issuing a written statement, within 21 days of the employee's original request, setting out the reasons for the treatment that the employee has experienced (Regulation 5). The employer is perfectly at liberty to take issue with the employee's perception that he has somehow been discriminated against by reason of his status as a fixed-term employee. If the employee is still not satisfied with the employer's written response, she is entitled to lodge an

Employment Tribunal application within three months (less one day) of the conduct complained of (Regulation 7).

An employer will only be able to justify less favourable treatment of a fixed-term employee on objective grounds (Regulation 4). An employer may be able to justify the less favourable treatment by bringing evidence which demonstrates that a permanent worker has better qualifications and/or more experience than the person bringing the complaint.

13 **a)** Section 10 of the Equality Act states that a person's religion and philosophical beliefs are protected characteristics. The Equality Act 2010 replaces the older Employment Equality (Religion or Belief) Regulations 2003, which were confined to the sphere of employment. The protection offered by the Equality Act is much broader than the Regulations as it is not just confined to the area of employment, but also covers the provision of goods and services. When the Employment Equality (Religion or Belief) Regulations 2003 were originally introduced, for the first time they outlawed discrimination and harassment on grounds of religion or belief in large and small workplaces in England, Scotland and Wales, both in the private and public sectors. Admittedly, the Race Relations Act 1976 did, in very limited circumstances, prevent individuals suffering discrimination by reason of their religious beliefs (see **Singh *v* Rowntree MacKintosh (1979), Seide *v* Gillette Industries Ltd (1980), Mandla *v* Dowall Lee (1983)**; and **J H Walker Ltd *v* Hussain & Others (1996)**).

Section 10 of the Equality Act 2010 addresses the issue of religion or belief in the following terms:

1 Religion means any religion and a reference to religion includes a reference to a lack of religion.

2 Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief.

Religious beliefs

What constitutes religious beliefs has been clearly stated by the UK Supreme Court in **R (on the application of Hodkin and another) *v* Registrar General of Births, Deaths and Marriages [2013]**.

Philosophical beliefs

If we can now be certain of the parameters of religious beliefs courtesy of Lord Toulson in **R (on the application of Hodkin and another) *v* Registrar General of Births, Deaths and Marriages [2013]**, the same cannot be said of philosophical beliefs. It is immaterial whether or not a person's beliefs are considered similar to a religious belief. This is highly significant and demonstrates quite clearly that the Equality Act 2010 (and previously the 2003 Regulations) is not just confined to the protection of religious beliefs as can be seen in the following cases: **Grainger plc v Nicholson (2009), Hashman *v* Milton Park (Dorset) Ltd (t/a Orchard Park) [2011], Maistry *v* BBC [2011], Lisk *v* Guardian Shield [2011], Anderson *v* Chesterfield High School [2012] and General Municipal and Boilermakers Union v Henderson [2015].**

Defining philosophical beliefs

Following the Grainger decision, an amendment was made to the law (and now contained in the Equality Act 2010), that it is unlawful to subject individuals to less favourable treatment on the grounds of their philosophical beliefs and it is immaterial whether or not these beliefs are considered similar to a religious belief. This is a highly significant development that demonstrates quite clearly that the Equality Act is not just confined to the protection of religious beliefs.

The trouble with the Grainger decision is that it has opened up a new whole area of complexity (or a can of worms) in attempting to determine when a belief is a philosophical belief worthy of legal protection.

b) The local authority may be able to justify its refusal to give Heather an interview for the post of head teacher by relying on Schedule 9 of the Equality Act 2010. Schedule 9 permits an employer to apply a genuine occupational requirement to particular employment. In certain situations, an employer will be able to insist that an applicant or an employee must be of a particular religion or hold particular religious beliefs. Local authorities in Scotland will still be able to insist that being a practising Roman Catholic is a genuine occupational requirement for head teachers of Roman Catholic schools. When applying genuine occupational requirements, the Equality Act 2010 states that the employer must either show that the individual to whom it is applied could not comply with the condition or the employer reasonably believed this to be the case.

However, the decisions in **Glasgow City Council *v* McNab (2007)** and **Reaney *v* Hereford Diocesan Board of Finance (2007)** demonstrate that employers will have to be able to justify objectively their reliance on genuine occupational requirements (and in both decisions, the employers

could not do so) and were found to have treated the Claimants less favourably.

14 **a)** Section 136 of the Equality Act 2010 deals with the issue of the burden of proof in discrimination claims, which is of vital importance if a complaint should form the basis of legal proceedings.

Generally, the onus or responsibility will be placed on the shoulders of the Claimant (the person alleging that s/he has suffered some form of discrimination), i.e. s/he must prove on the balance of probabilities that unlawful discrimination has taken place.

If the Claimant can identify facts or circumstances that support an inference of discrimination, the burden of proof will shift to the employer or service provider who must either demonstrate that the allegations are unfounded or that the treatment was objectively justified in some kind of way.

The Equality and Human Rights Commission provides invaluable guidance on this issue in its Statutory Code of Practice on Employment:

Example: A worker of Jain faith applies for promotion but is unsuccessful. Her colleague who is a Mormon successfully gets the promotion. The unsuccessful candidate obtains information using the questions procedure in the Act that shows that she was better qualified for the promotion than her Mormon colleague. The employer will have to explain to the tribunal why the Jain worker was not promoted and that religion or belief did not form any part of the decision.

In three conjoined appeals before the English Court of Appeal on 18 February 2005, guidelines were established in relation to the operation of the burden of proof to be followed in all discrimination cases. The cases were:

- **Igen Ltd and others *v* Wong** (race discrimination)
- **Emokpae *v* Chamberlin Solicitors** (sex discrimination)
- **Webster *v* Brunel University** (race discrimination)

The above appeals provided guidance to courts and tibunals when dealing with the issue of the burden of proof in discrimination cases. A number of things can be taken from the Court of Appeal's judgements. It has since become apparent that, when an allegation of discrimination forms the basis of legal action, a two-stage enquiry must be followed.

Firstly, the factual basis of the claim must be established and, if it appears at this stage that the employer has a case to answer, the burden of proof will transfer from the claimant to the employer. Once the claimant has succeeded in establishing that there is a case to answer, the second stage of the Tribunal's enquiry can proceed.

Here the claimant must be able to identify facts which demonstrate on the balance of probabilities that:

(i) s/he suffered an unlawful act of discrimination and

(ii) that the other party (for example the employer or service provider) committed the act in question that forms the basis of the complaint.

Following the conclusion of the second stage of the enquiry, if a court or tribunal finds that an employer's or service provider's explanation of the alleged discriminatory treatment is unsatisfactory it must find in favour of the claimant.

In the light of the above three appeals, employers and service providers will have to be aware that any unreasonable behaviour on their part towards a claimant combined with factors such as gender, race, disability, sexual orientation etc. (i.e. a protected characteristic), an Employment Tribunal or court may well reverse the burden of proof and find in favour of the claimant.

Cases that provides a practical illustration of how the burden of proof in discrimination claims operates can be seen in **Dattani *v* Chief Constable of West Mercia Police (7 February 2005), Madarassy *v* Nomura (2007)** and **Canadian Imperial Bank of Commerce *v* Beck [2010]**.

b) Section 123 of the Equality Act 2010 deals with time limits for the lodging of equality claims before Employment Tribunals by aggrieved employees. Generally speaking, most employment equality claims must be lodged with the Tribunal within three months (less one day) of the act complained of, for example racial or sexual harassment or disability discrimination. There are a number of exceptions that fall outside the three month time limit and include:

1 Equal pay claims or other equality clause cases for which there is a six-month time period (less one day) for the submission of claims

2 In situations, where Parliament has decreed that a different time limit should apply to certain types of claims

3 Equality cases involving members of the UK armed services also benefit from the above six-month time limit; but this exception does not extend to civilian employees who must submit complaints to a Tribunal within the normal three-month period

4 Situations where the claim has not been submitted timeously, but a Tribunal is of the view that the interests of justice would be served if the complaint was permitted to proceed to a Hearing.

An example of an Employment Tribunal permitting a claim to proceed that may have been submitted technically beyond the relevant time limits occurred in **O'Reilly *v* (1) BBC & (2) Bristol Magazines Ltd (2010)**. The Tribunal concluded that O'Reilly's claims should be permitted to proceed on just and equitable grounds. O'Reilly (a BBC journalist and presenter) would be substantially prejudiced by a refusal to allow her claims to proceed and this far outweighed any inconvenience that would be experienced by her employers.

15 **a)** The statement is completely untrue – both UK law (the Equality Act 2010) and EU law (the Equal Treatment Directive) prohibits discrimination on the grounds of a person's age. A person's age is a protected characteristic in terms of Section 5 of the Equality Act 2010. Admittedly, it was not until 2006 that age discrimination was made unlawful in the United Kingdom with the introduction of the Employment Equality (Age) Regulations 2006. The law is now much wider in that it is not just confined to the scope of employment, but covers areas such as the provision of goods and services, education and transport.

b) (i) George has suffered direct discrimination in relation to his age which is a breach of Sections 5 and 13 of the Equality Act 2010. By using certain words or phrases like 'youthful enthusiasm', George's employer is demonstrating a clear preference for younger employees at the expense of older employees (see **McCoy *v* McGregor and Sons Limited and others (2007)** and **Canadian Imperial Bank of Commerce *v* Beck [2010]**).

(ii) Again, Munro is suffering direct discrimination in relation to his age which breaches Sections 5 and 13 of the Equality Act 2010. Munro's situation is very similar to the case of **Hutter *v* Technische Universität Graz (2009)** in which the Court of Justice of the European Union decided that an employer's decision to ignore an employee's work experience gained before reaching the age of 18 was unlawful direct discrimination on the grounds of age.

(iii) The first thing to say to Carla about retirement is that there is no automatic legal right conferred on workers to continue working beyond the current age of 65 [in 2017] or whatever it eventually settles at. An employer who insists that an individual retire on their 65th birthday will not be breaking the law. An employer who insists that an individual retire on his/her 65th birthday will not be breaking the law.

Admittedly, there is a requirement placed on the employer to consider seriously any requests by an individual to be permitted to work beyond the age of 65. There had been a suggestion that the Equality Act 2010 should have obligated employers to abolish the compulsory retirement age of 65. This suggestion, as we shall see, was somewhat premature and the Court of Justice of the European Union gave cautious approval to the UK's default or mandatory retirement age of 65 (see **Incorporated Trustees of the National Council on Ageing (Age Concern England) *v* Secretary of State for Business, Enterprise and Regulatory Reform 2009** discussed below).

Compulsory retirement ages set by EU member states are essentially a proportionate means of achieving a legitimate aim, i.e. the orderly management of a country's labour market and the opening up of employment opportunities for younger people. Several cases have dealt with the issue of compulsory retirement ages: **Hampton *v* Ministry of Justice (2007), Varcoe and Southgate *v* Ministry of Justice (2009)** and **Incorporated Trustees of the National Council on Ageing (Age Concern England) *v* Secretary of State for Business, Enterprise and Regulatory Reform (2009).**

In **Incorporated Trustees of the National Council on Ageing (Age Concern England) *v* Secretary of State for Business, Enterprise and Regulatory Reform (2009),** the National Council on Ageing (previously known as Heyday) made an application to the English High Court for a judicial review concerning certain aspects of the then age discrimination laws. In particular, the Council wished the High Court to scrutinise the legality of the compulsory retirement age of 65 in the United Kingdom and whether this breached European law (the EC Equal Treatment Framework Directive (2000/78). The European Directive permits member states to justify different treatment of individuals on grounds of age if those differences 'are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary'.

Given the complexity of the issue, the High Court decided to refer the matter to the Court of Justice of the European Union for a preliminary ruling

under what is now Article 267 of the Treaty on the Functioning of the European Union (TFEU).

The conclusion of the judgement of the Court of Justice in this case is that the UK's then compulsory retirement age of 65 did not breach European law because it could be justified as a proportionate way of achieving a legitimate aim and there was no obligation for UK law to set out explicitly a list of permissible legitimate aims.

Responsibility for implementing the guidance in this preliminary ruling then passed to British Courts and Employment Tribunals (see **Age UK, R (on the application of) *v* Attorney General [2009]**). In **Age UK, R (on the application of) *v* Attorney General [2009]** following in the wake of the Court of Justice's preliminary ruling, the English High Court ruled that the then UK compulsory age of retirement of 65 did not not breach the age discrimination laws because it could be regarded as a proportionate way of achieving a legitimate social aim, i.e. the regulation of the labour market in this country. Admittedly, the judge in this case, Mr Justice Blake, did state that there were compelling reasons for reviewing the compulsory retirement age, but he noted that discussions in this area may be of historical interest only as the then UK Government of Gordon Brown had indicated that the retirement age was to be increased from age 65 to 67.

Currently, the UK permits employers to operate a compulsory retirement age of 65 (although this is projected to rise to 66 by 2018 and then to 67 by 2028 at the very latest). In other circumstances, if an employer placed a requirement on an employee which was based on the 'protected characteristic' of age this would almost certainly amount to unlawful discrimination. Admittedly, current UK law permits older employees to request the right to work beyond the mandatory retirement age and such requests will have to be given due consideration by employers.