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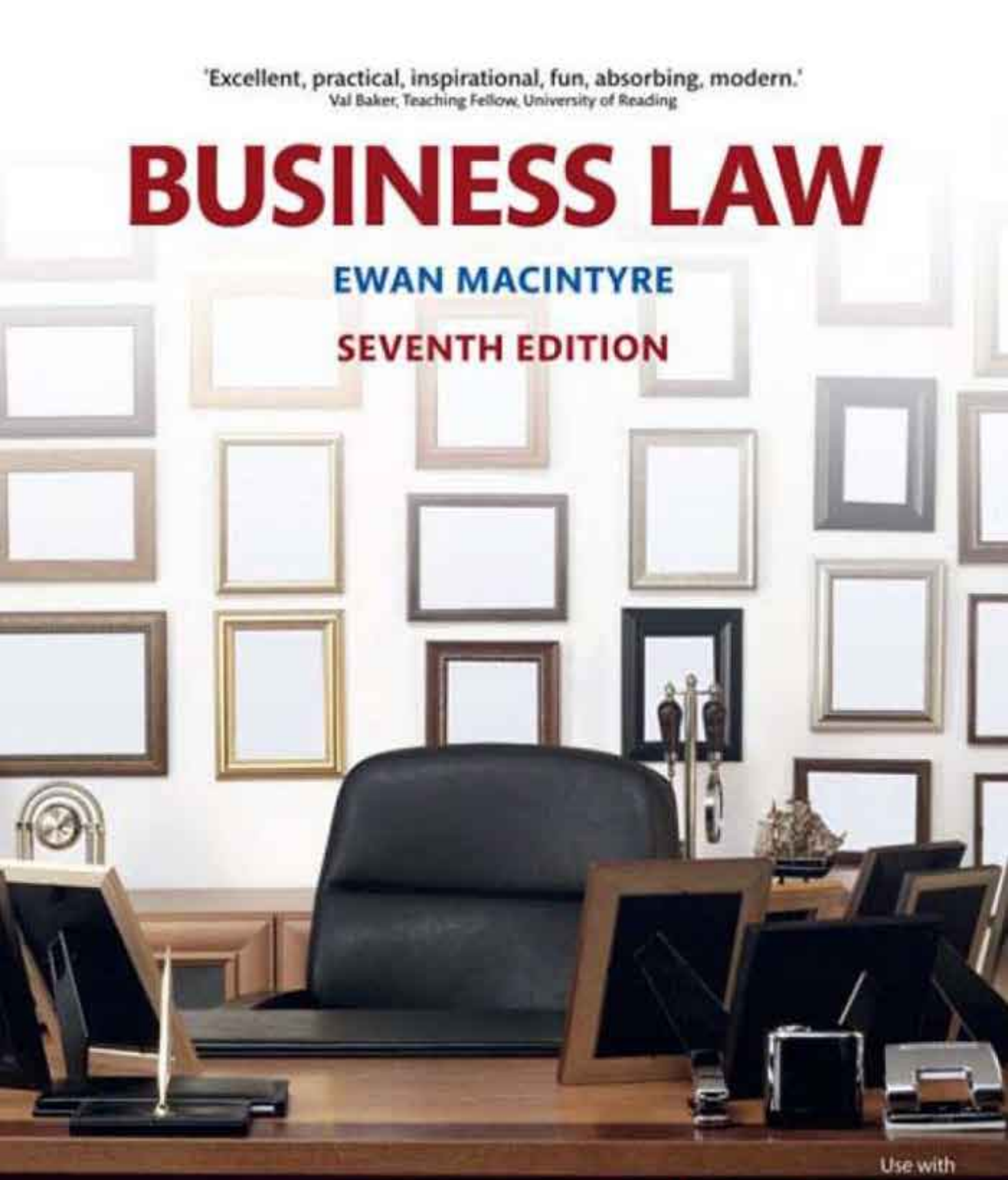
BUSINESS LAW

EWAN MACINTYRE

SEVENTH EDITION



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BUSINESS LAW

SEVENTH EDITION

EWAN MACINTYRE

Whether you are a budding entrepreneur or aim to be a CEO, MacIntyre's ***Business Law*** is the foremost text for non-law students seeking an understanding of the legal principles that apply to business. Each chapter begins with a clear outline of the topics to be covered, helping you break your learning down into manageable sections and fully grasp all aspects of the subject confidently. In addition, the text also offers questions to test your understanding, key points to guide your learning and tasks to help you apply what you have learned to business situations.

Highly regarded for its comprehensive coverage, ***Business Law*** continues to provide you with an extensive and detailed guide to all aspects of law encountered in the business world. This seventh edition is fully updated with all recent changes and developments in the law.

Ewan MacIntyre is a Senior Lecturer in Law at Nottingham Law School and has extensive experience of teaching business law. He is also the author of the concise ***Essentials of Business Law*** and the revision guide ***Law Express: Business Law***, both published by Pearson.

'Excellent, practical, inspirational, fun, absorbing, modern.'
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Business Law

Seventh edition

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Preface

Changes in the law

The major change to this edition is an in-depth consideration of the Consumer Rights Bill, which is set to receive Royal Assent in June 2014. Once the Bill becomes the Consumer Rights Act 2014 it will bring about the most significant changes to the Sale of Goods Act since the SGA was first passed in 1893. The CRA 2014 will also replace the Unfair Terms in Consumer Contracts Regulations 1999 and the Unfair Contract Terms Act 1977, in so far as that Act applies to consumer contracts. This edition of the text also considers in detail the Defamation Act 2014 and the Supreme Court decision in *Prest* v *Petrodel Resources Ltd* [2013] UKSC 35, which authoritatively examined the concept of the corporate veil. New cases are included throughout the text. The most important of these, in the order in which they first appear in the text, are:

Farstad Supply A/S v *Enviroco Ltd* [2011] 1 WLR 921
Cusack v *London Borough of Harrow* [2013] UKSC 40
Jet2Com v *Blackpool Airport Limited* [2012] EWCA Civ 417
Yam Seng Pte Ltd v *International Trade Corporation Ltd* [2013] EWHC 111 (QB)
Eco 3 Capital Ltd v *Ludsin Overseas Ltd* [2013] EWCA Civ 413
Progress Bulk Carriers Ltd v *Tube City LLC* [2012] All ER (D) 122
Robertson v *Swift* [2012] EWCA Civ 1794
Grimes v *Gubbins* [2013] EWCA Civ 37
Daventry District Council v *Daventry and District Housing Ltd* [2012] 1 WLR 1333
Bank of Scotland v *Qutb* [2012] EWCA Civ 1661
Crocs Europe BV v *Spectrum Agencies* [2012] EWCA Civ 1440
Cavanagh v *Evans* [2012] ICR 1231
Taylor v *A Novo UK Ltd* [2013] WLR (D) 119
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Cairns v *Modi* [2012] EWCA Civ 1382
Gray v *Thames Trains* [2009] AC 1339
Joyce v *O'Brien* [2013] EWCA Civ 546
Coventry v *Lawrence* [2012] EWCA Civ 26
Barr v *Biffa Waste Services Ltd* [2012] EWCA Civ 312
Stannard v *Gore* [2012] EWCA Civ 1248
Weddall v *Barchester Healthcare Ltd*; *Wallbank* v *Wallbank Fox Designs Ltd* [2012] EWCA Civ 25
Motor Depot Ltd v *Kingston upon Hull City Council* [2012] EWHC 3257
UCB Home Loans Corp Ltd v *Soni* [2013] EWCA Civ 62
Brumder v *Motornet Service and Repairs Ltd* [2013] EWCA Civ 195
Prest v *Petrodel Resources Ltd* [2013] UKSC 34
Maidment v *Attwood* [2012] EWCA Civ 998
Birmingham City Council v *Abdulla* [2012] UKSC 47
Seldon v *Clarkson Wright and Jacques* [2012] UKSC 16
North v *Dumfries and Galloway Council* [2013] UKSC 45

The aim of this book

This book aims to provide a comprehensive treatment of business law in a way which is both interesting and easily understood. The text covers most areas which could be classified as business law in an academically rigorous way. More specifically this text aims to be:

- **Comprehensive** in its scope, covering not only the more traditional business law subjects, but also the English Legal System, Employment, Consumer Credit, Intellectual Property, Trade Descriptions, Misleading Price Indications, Competition Law and Product Safety.
- **Holistic** in its approach. In every chapter there are numerous cross-references to other sections of the text, demonstrating the inter-relationship between the various subject areas.
- **Thorough** in its treatment of the law. Despite the easily readable style of the text, difficult issues are dealt with thoroughly even in areas where the law is highly technical.
- **Easy to read.** The style of the text is straightforward and accessible. The policy behind the law is explained, making comprehension of the law much easier.
- **Well structured**. In every chapter the text frequently reminds the reader of the main issues involved and the context of the particular subject being considered.

- **Up to date** in its treatment of the law. The text reflects the changes made by recent cases, and legislation and above all by EU law. The accompanying web sites will deal with changes to the law and keep the text as up to date as possible.

Who should use this book?

This book is intended to be suitable for a wide variety of students who study Business Law; for example:

- **Undergraduates** who study one or more law modules as part of their accountancy, business studies or business-related degrees.
- Students on **professional courses,** such as ACCA, CIMA, ILEX, ICAEW, IComA and ICSA.
- **HNC/D students**.
- **Postgraduate students** who need a thorough grounding in business law.

Distinctive features

Clear structure

The book is very clearly structured. The text in each chapter is broken up with several sets of 'Test your understanding' questions. These are designed to keep the reader firmly focused on the main issues with which the text deals. 'Key Points' at the end of each chapter have the same aim. The text is detailed, but the reader is frequently reminded of the context and structure of the material.

Study skills section

The study skills section is designed to give students a clear explanation of the skills they should apply when answering legal questions. The technique of answering a problem-style question is considered in some detail. I very much hope that this section will inspire readers and allow them to see that legal assessments do not require rote learning and reproduction of facts, but do invite evaluation, analysis and application of conflicting principles.

Multiple choice and summary questions

Each chapter ends with a selection of multiple choice and summary questions. These questions are designed to be intellectually demanding and to give the reader the chance to apply the law contained in the preceding chapter to problem situations. The answers to the questions can be found in the Instructor's Manual, which is available to lecturers.

Selected further readings

At the end of the book there is a short bibliography, suggesting further reading for those who want to know more about a particular subject area.

Guided tour

How can I get the most out of my study?

Use the **study skills** section at the beginning of the book for essential advice on the skills you will need in studying law, from lectures and seminars to coursework and exams.

Study skills

Get organised from the start

When you start your course, decide how much time you can afford to devote to your study of each subject. Be realistic when doing this. There will be a lot to learn and that is why your time must be managed as effectively as possible. Listen to your lecturers, who will explain what is expected of you. Having made your decision to devote a certain amount of time per week to a particular subject, stick to what you have decided. If it will help, draw up a weekly chart and tick off each period of study when you complete it. You should attend all your lectures and tutorials, and should always read the pages of this book which are recommended by your lecturer. Steady work throughout the year is the key to success.

Take advantage of what your lecturer tells you

Many lecturers set and mark their students' assessments. Even if the assessment is externally set and marked, your lecturer is likely to have experience of past assessments and to know what the examiners are looking for. Take advantage of this. If you are told that something is not in your syllabus, don't waste time on it. If you are told that something is particularly important, make sure you know it well. If you are told to go away and read something up, make sure that you do. And if you are told to read certain pages of this book, make sure that you read them. You may be told to read this book after you have been taught, so as to reinforce learning. Or you may be told to read it beforehand, so that you can apply what you have read in the classroom. Either way, it is essential that you do the reading.

After the lecture/tutorial

As soon as a lecture or tutorial is over, it is tempting to file your notes away until revision time. You probably understood the ground that was covered and therefore assumed that it would easily be remembered later. However, it is an excellent idea to go over what was covered within 24 hours. This need not take too long. You should check that all the points were understood, and if any were not you should clear them up with the help of your notes and this book. Make more notes as you do this. Give these notes a separate heading, something like 'Follow up notes'. These additional notes should always indicate which aspects of the class seemed important. They should also condense your notes, to give you an overview of the material covered.

In many cases your lecturer will be setting your exam or coursework. If a particular area or topic is flagged up as important, it is more likely to be assessed than one which was not. Even if your assessment is externally set, your lecturer is likely to know which areas are the most important, and thus most likely to be tested. Fifteen minutes should be plenty to go over a one hour class. Each 15 minutes spent doing this is likely to be worth far more than an extra 15 minutes of revision just before the exam.

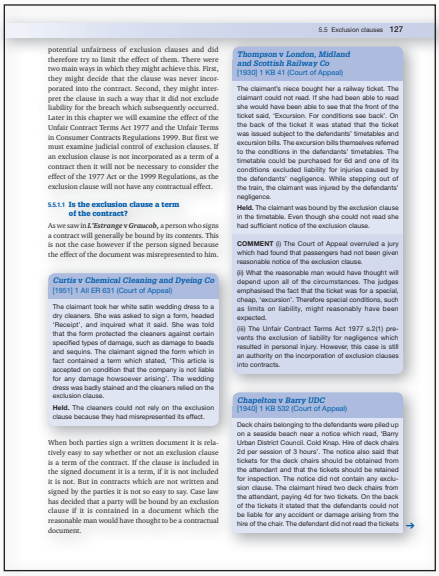
Answering questions

What skills are you expected to show?

In 1956 Benjamin Bloom categorised the skills which students are likely to be required to display when being assessed. These skills are shown in Figure 1. Each skill in the pyramid builds upon the one beneath it.

What are the main facts and decisions arising from cases?

Case summary boxes throughout the chapters highlight the key legal principles and important facts of those essential key cases, making them easier to remember.



5.5 Exclusion clauses 127

potential unfairness of exclusion clauses and did therefore try to limit the effect of them. There were two main ways in which they might achieve this. First, they might decide that the clause was never incorporated into the contract. Second, they might interpret the clause in such a way that it did not exclude liability for the breach which subsequently occurred. Later in this chapter we will examine the effect of the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999. But first we must examine judicial control of exclusion clauses. If an exclusion clause is not incorporated as a term of a contract then it will not be necessary to consider the effect of the 1977 Act or the 1999 Regulations, as the exclusion clause will not have any contractual effect.

5.5.1.1 Is the exclusion clause a term of the contract?

As we saw in ***L'Estrange v Graucob***, a person who signs a contract will generally be bound by its contents. This is not the case however if the person signed because the effect of the document was misrepresented to him.

Curtis v Chemical Cleaning and Dyeing Co [1951] 1 All ER 631 (Court of Appeal)

The claimant took her white satin wedding dress to a dry cleaners. She was asked to sign a form, headed 'Receipt', and inquired what it said. She was told that the form protected the cleaners against certain specified types of damage, such as damage to beads and sequins. The claimant signed the form which in fact contained a term which stated, 'This article is accepted on condition that the company is not liable for any damage howsoever arising'. The wedding dress was badly stained and the cleaners relied on the exclusion clause.

Held. The cleaners could not rely on the exclusion clause because they had misrepresented its effect.

When both parties sign a written document it is relatively easy to say whether or not an exclusion clause is a term of the contract. If the clause is included in the signed document it is a term, if it is not included it is not. But in contracts which are not written and signed by the parties it is not so easy to say. Case law has decided that a party will be bound by an exclusion clause if it is contained in a document which the reasonable man would have thought to be a contractual document.

Thompson v London, Midland and Scottish Railway Co [1930] 1 KB 41 (Court of Appeal)

The claimant's niece bought her a railway ticket. The claimant could not read. If she had been able to read she would have been able to see that the front of the ticket said, 'Excursion. For conditions see back'. On the back of the ticket it was stated that the ticket was issued subject to the defendants' timetables and excursion bills. The excursion bills themselves referred to the conditions in the defendants' timetables. The timetable could be purchased for 6d and one of its conditions excluded liability for injuries caused by the defendants' negligence. While stepping out of the train, the claimant was injured by the defendants' negligence.

Held. The claimant was bound by the exclusion clause in the timetable. Even though she could not read she had sufficient notice of the exclusion clause.

COMMENT (i) The Court of Appeal overruled a jury which had found that passengers had not been given reasonable notice of the exclusion clause.

(ii) What the reasonable man would have thought will depend upon all of the circumstances. The judges emphasised the fact that the ticket was for a special, cheap, 'excursion'. Therefore special conditions, such as limits on liability, might reasonably have been expected.

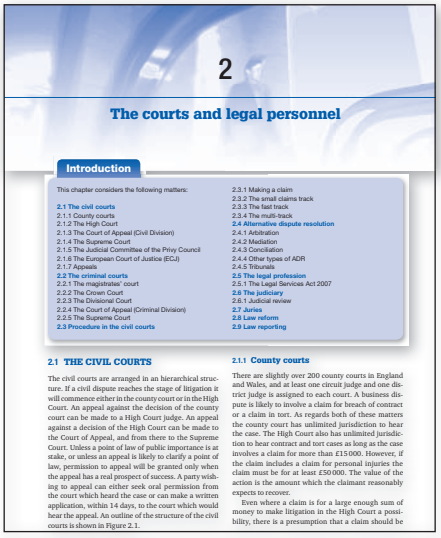
(iii) The Unfair Contract Terms Act 1977 s.2(1) prevents the exclusion of liability for negligence which resulted in personal injury. However, this case is still an authority on the incorporation of exclusion clauses into contracts.

Chapelton v Barry UDC [1940] 1 KB 532 (Court of Appeal)

Deck chairs belonging to the defendants were piled up on a seaside beach near a notice which read, 'Barry Urban District Council. Cold Knap. Hire of deck chairs 2d per session of 3 hours'. The notice also said that tickets for the deck chairs should be obtained from the attendant and that the tickets should be retained for inspection. The notice did not contain any exclusion clause. The claimant hired two deck chairs from the attendant, paying 4d for two tickets. On the back of the tickets it stated that the defendants could not be liable for any accident or damage arising from the hire of the chair. The defendant did not read the tickets →

Will difficult concepts in law be presented in a manageable way?

New **bulleted chapter introductions** help students break down each area of the law, whilst the two-colour design aids navigation throughout. **Examples, figures** and **flowcharts** also provide visual learning of those complex legal structures and processes.



2

The courts and legal personnel

Introduction

This chapter considers the following matters:

2.1 The civil courts
2.1.1 County courts
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2.2 The criminal courts
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2.1 THE CIVIL COURTS

The civil courts are arranged in an hierarchical structure. If a civil dispute reaches the stage of litigation it will commence either in the county court or in the High Court. An appeal against the decision of the county court can be made to a High Court judge. An appeal against a decision of the High Court can be made to the Court of Appeal, and from there to the Supreme Court. Unless a point of law of public importance is at stake, or unless an appeal is likely to clarify a point of law, permission to appeal will be granted only when the appeal has a real prospect of success. A party wishing to appeal can either seek oral permission from the court which heard the case or can make a written application, within 14 days, to the court which would hear the appeal. An outline of the structure of the civil courts is shown in Figure 2.1.

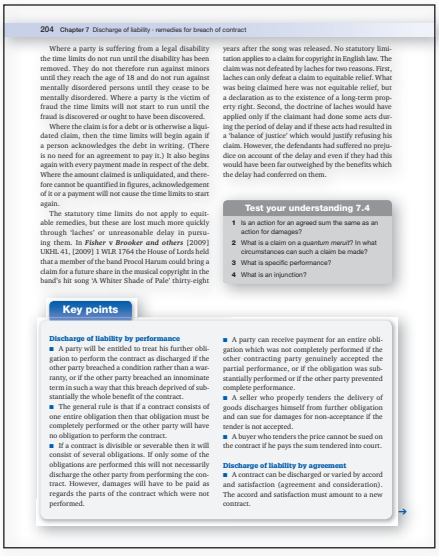
2.1.1 County courts

There are slightly over 200 county courts in England and Wales, and at least one circuit judge and one district judge is assigned to each court. A business dispute is likely to involve a claim for breach of contract or a claim in tort. As regards both of these matters the county court has unlimited jurisdiction to hear the case. The High Court also has unlimited jurisdiction to hear contract and tort cases as long as the case involves a claim for more than £15 000. However, if the claim includes a claim for personal injuries the claim must be for at least £50 000. The value of the action is the amount which the claimant reasonably expects to recover.

Even where a claim is for a large enough sum of money to make litigation in the High Court a possibility, there is a presumption that a claim should be

What are the main points I should be aware of after reading this chapter?

Key points are listed at the end of every chapter. These pick out the essential information from the chapter you have read.



204 Chapter 7 Discharge of liability remedies for breach of contract

Where a party is suffering from a legal disability the time limits do not run until the disability has been removed. They do not therefore run against minors until they reach the age of 18 and do not run against mentally disordered persons until they cease to be mentally disordered. Where a party is the victim of fraud the time limits will not start to run until the fraud is discovered or ought to have been discovered.

Where the claim is for a debt or is otherwise a liquidated claim, then the time limits will begin again if a person acknowledges the debt in writing. (There is no need for an agreement to pay it.) It also begins again with every payment made in respect of the debt. Where the amount claimed is unliquidated, and therefore cannot be quantified in figures, acknowledgement of it or a payment will not cause the time limits to start again.

The statutory time limits do not apply to equitable remedies, but these are lost much more quickly through 'laches' or unreasonable delay in pursuing them. In ***Fisher v Brooker and others*** [2009] UKHL 41, [2009] 1 WLR 1764 the House of Lords held that a member of the band Procol Harum could bring a claim for a future share in the musical copyright in the band's hit song 'A Whiter Shade of Pale' thirty-eight years after the song was released. No statutory limitation applies to a claim for copyright in English law. The claim was not defeated by laches for two reasons. First, laches can only defeat a claim to equitable relief. What was being claimed here was not equitable relief, but a declaration as to the existence of a long-term property right. Second, the doctrine of laches would have applied only if the claimant had done some acts during the period of delay and if these acts had resulted in a 'balance of justice' which would justify refusing his claim. However, the defendants had suffered no prejudice on account of the delay and even if they had this would have been far outweighed by the benefits which the delay had conferred on them.

Test your understanding 7.4

1 Is an action for an agreed sum the same as an action for damages?
2 What is a claim on a *quantum meruit*? In what circumstances can such a claim be made?
3 What is specific performance?
4 What is an injunction?

Key points

Discharge of liability by performance

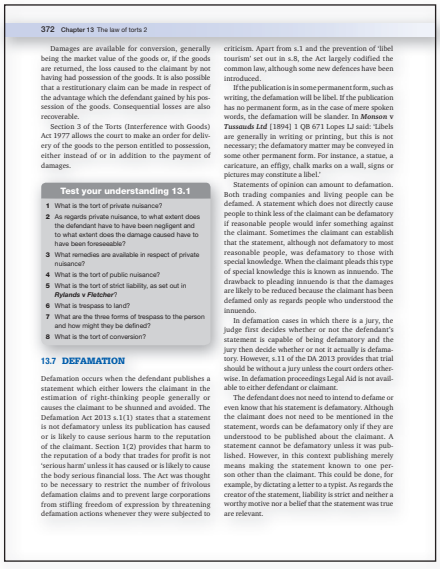
- A party will be entitled to treat his further obligation to perform the contract as discharged if the other party breached a condition rather than a warranty, or if the other party breached an innominate term in such a way that this breach deprived of substantially the whole benefit of the contract.
- The general rule is that if a contract consists of one entire obligation then that obligation must be completely performed or the other party will have no obligation to perform the contract.
- If a contract is divisible or severable then it will consist of several obligations. If only some of the obligations are performed this will not necessarily discharge the other party from performing the contract. However, damages will have to be paid as regards the parts of the contract which were not performed.
- A party can receive payment for an entire obligation which was not completely performed if the other contracting party genuinely accepted the partial performance, or if the obligation was substantially performed or if the other party prevented complete performance.
- A seller who properly tenders the delivery of goods discharges himself from further obligation and can sue for damages for non-acceptance if the tender is not accepted.
- A buyer who tenders the price cannot be sued on the contract if he pays the sum tendered into court.

Discharge of liability by agreement

- A contract can be discharged or varied by accord and satisfaction (agreement and consideration). The accord and satisfaction must amount to a new contract. →

How can I check I've understood what I've read?

Test your understanding questions appear throughout the chapters to ensure you understand the topics as you read. Answers to these questions are provided at the back of the book.



372 Chapter 13 The law of torts 2

Damages are available for conversion, generally being the market value of the goods or, if the goods are returned, the loss caused to the claimant by not having had possession of the goods. It is also possible that a restitutionary claim can be made in respect of the advantage which the defendant gained by his possession of the goods. Consequential losses are also recoverable.

Section 3 of the Torts (Interference with Goods) Act 1977 allows the court to make an order for delivery of the goods to the person entitled to possession, either instead of or in addition to the payment of damages.

Test your understanding 13.1

1 What is the tort of private nuisance?
2 As regards private nuisance, to what extent does the defendant have to have been negligent and to what extent does the damage caused have to have been foreseeable?
3 What remedies are available in respect of private nuisance?
4 What is the tort of public nuisance?
5 What is the tort of strict liability, as set out in ***Rylands v Fletcher***?
6 What is trespass to land?
7 What are the three forms of trespass to the person and how might they be defined?
8 What is the tort of conversion?

13.7 DEFAMATION

Defamation occurs when the defendant publishes a statement which either lowers the claimant in the estimation of right-thinking people generally or causes the claimant to be shunned and avoided. The Defamation Act 2013 s.1(1) states that a statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant. Section 1(2) provides that harm to the reputation of a body that trades for profit is not 'serious harm' unless it has caused or is likely to cause the body serious financial loss. The Act was thought to be necessary to restrict the number of frivolous defamation claims and to prevent large corporations from stifling freedom of expression by threatening defamation actions whenever they were subjected to criticism. Apart from s.1 and the prevention of 'libel tourism' set out in s.8, the Act largely codified the common law, although some new defences have been introduced.

If the publication is in some permanent form, such as writing, the defamation will be libel. If the publication has no permanent form, as in the case of mere spoken words, the defamation will be slander. In ***Monson v Tussauds Ltd*** [1894] 1 QB 671 Lopes LJ said: 'Libels are generally in writing or printing, but this is not necessary; the defamatory matter may be conveyed in some other permanent form. For instance, a statue, a caricature, an effigy, chalk marks on a wall, signs or pictures may constitute a libel.'

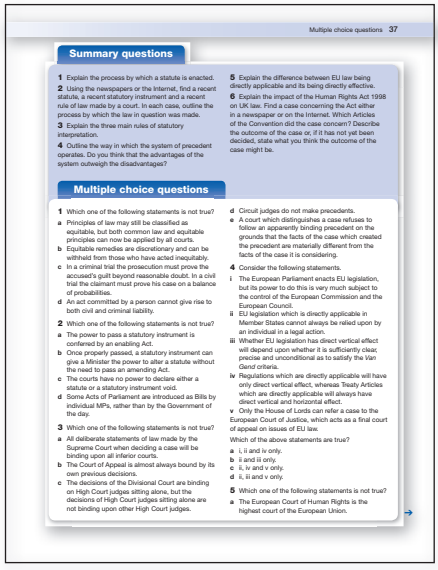
Statements of opinion can amount to defamation. Both trading companies and living people can be defamed. A statement which does not directly cause people to think less of the claimant can be defamatory if reasonable people would infer something against the claimant. Sometimes the claimant can establish that the statement, although not defamatory to most reasonable people, was defamatory to those with special knowledge. When the claimant pleads this type of special knowledge this is known as innuendo. The drawback to pleading innuendo is that the damages are likely to be reduced because the claimant has been defamed only as regards people who understood the innuendo.

In defamation cases in which there is a jury, the judge first decides whether or not the defendant's statement is capable of being defamatory and the jury then decide whether or not it actually is defamatory. However, s.11 of the DA 2013 provides that trial should be without a jury unless the court orders otherwise. In defamation proceedings Legal Aid is not available to either defendant or claimant.

The defendant does not need to intend to defame or even know that his statement is defamatory. Although the claimant does not need to be mentioned in the statement, words can be defamatory only if they are understood to be published about the claimant. A statement cannot be defamatory unless it was published. However, in this context publishing merely means making the statement known to one person other than the claimant. This could be done, for example, by dictating a letter to a typist. As regards the creator of the statement, liability is strict and neither a worthy motive nor a belief that the statement was true are relevant.

How can I check I've learnt what I've read?

Summary questions and **multiple-choice questions** extensively test what you have learnt in each chapter.



Multiple choice questions 37

Summary questions

1 Explain the process by which a statute is enacted.
2 Using the newspapers or the Internet, find a recent statute, a recent statutory instrument and a recent rule of law made by a court. In each case, outline the process by which the law in question was made.
3 Explain the three main rules of statutory interpretation.
4 Outline the way in which the system of precedent operates. Do you think that the advantages of the system outweigh the disadvantages?
5 Explain the difference between EU law being directly applicable and its being directly effective.
6 Explain the impact of the Human Rights Act 1998 on UK law. Find a case concerning the Act either in a newspaper or on the Internet. Which Articles of the Convention did the case concern? Describe the outcome of the case or, if it has not yet been decided, state what you think the outcome of the case might be.

Multiple choice questions

1 Which one of the following statements is not true?
a Principles of law may still be classified as equitable, but both common law and equitable principles can now be applied by all courts.
b Equitable remedies are discretionary and can be withheld from those who have acted inequitably.
c In a criminal trial the prosecution must prove the accused's guilt beyond reasonable doubt. In a civil trial the claimant must prove his case on a balance of probabilities.
d An act committed by a person cannot give rise to both civil and criminal liability.

2 Which one of the following statements is not true?
a The power to pass a statutory instrument is conferred by an enabling Act.
b Once properly passed, a statutory instrument can give a Minister the power to alter a statute without the need to pass an amending Act.
c The courts have no power to declare either a statute or a statutory instrument void.
d Some Acts of Parliament are introduced as Bills by individual MPs, rather than by the Government of the day.

3 Which one of the following statements is not true?
a All deliberate statements of law made by the Supreme Court when deciding a case will be binding upon all inferior courts.
b The Court of Appeal is almost always bound by its own previous decisions.
c The decisions of the Divisional Court are binding on High Court judges sitting alone, but the decisions of High Court judges sitting alone are not binding upon other High Court judges.
d Circuit judges do not make precedents.
e A court which distinguishes a case refuses to follow an apparently binding precedent on the grounds that the facts of the case which created the precedent are materially different from the facts of the case it is considering.

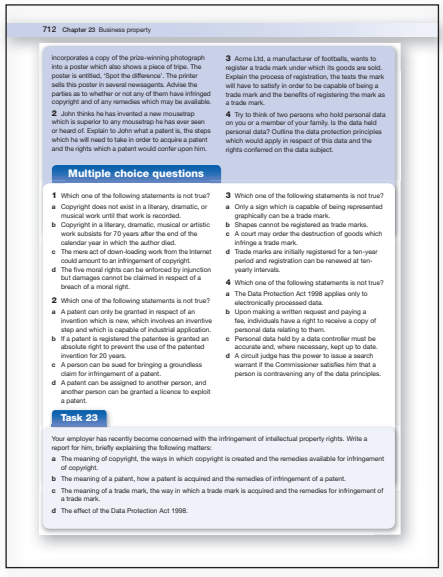
4 Consider the following statements.
i The European Parliament enacts EU legislation, but its power to do this is very much subject to the control of the European Commission and the European Council.
ii EU legislation which is directly applicable in Member States cannot always be relied upon by an individual in a legal action.
iii Whether EU legislation has direct vertical effect will depend upon whether it is sufficiently clear, precise and unconditional as to satisfy the *Van Gend* criteria.
iv Regulations which are directly applicable will have only direct vertical effect, whereas Treaty Articles which are directly applicable will always have direct vertical and horizontal effect.
v Only the House of Lords can refer a case to the European Court of Justice, which acts as a final court of appeal on issues of EU law.

Which of the above statements are true?
a i, ii and iv only.
b ii and iii only.
c ii, iv and v only.
d ii, iii and v only.

5 Which one of the following statements is not true?
a The European Court of Human Rights is the highest court of the European Union.

How can I apply my knowledge of the law?

Tasks at the end of each chapter provide exercises to help you to apply the law you have learnt to scenarios.



712 Chapter 23 Business property

incorporates a copy of the prize-winning photograph into a poster which also shows a piece of tripe. The poster is entitled, 'Spot the difference'. The printer sells this poster in several newsagents. Advise the parties as to whether or not any of them have infringed copyright and of any remedies which may be available.

2 John thinks he has invented a new mousetrap which is superior to any mousetrap he has ever seen or heard of. Explain to John what a patent is, the steps which he will need to take in order to acquire a patent and the rights which a patent would confer upon him.

3 Acme Ltd, a manufacturer of footballs, wants to register a trade mark under which its goods are sold. Explain the process of registration, the tests the mark will have to satisfy in order to be capable of being a trade mark and the benefits of registering the mark as a trade mark.

4 Try to think of two persons who hold personal data on you or a member of your family. Is the data held personal data? Outline the data protection principles which would apply in respect of this data and the rights conferred on the data subject.

Multiple choice questions

1 Which one of the following statements is not true?
a Copyright does not exist in a literary, dramatic, or musical work until that work is recorded.
b Copyright in a literary, dramatic, musical or artistic work subsists for 70 years after the end of the calendar year in which the author died.
c The mere act of down-loading work from the Internet could amount to an infringement of copyright.
d The five moral rights can be enforced by injunction but damages cannot be claimed in respect of a breach of a moral right.

2 Which one of the following statements is not true?
a A patent can only be granted in respect of an invention which is new, which involves an inventive step and which is capable of industrial application.
b If a patent is registered the patentee is granted an absolute right to prevent the use of the patented invention for 20 years.
c A person can be sued for bringing a groundless claim for infringement of a patent.
d A patent can be assigned to another person, and another person can be granted a licence to exploit a patent.

3 Which one of the following statements is not true?
a Only a sign which is capable of being represented graphically can be a trade mark.
b Shapes cannot be registered as trade marks.
c A court may order the destruction of goods which infringe a trade mark.
d Trade marks are initially registered for a ten-year period and registration can be renewed at ten-yearly intervals.

4 Which one of the following statements is not true?
a The Data Protection Act 1998 applies only to electronically processed data.
b Upon making a written request and paying a fee, individuals have a right to receive a copy of personal data relating to them.
c Personal data held by a data controller must be accurate and, where necessary, kept up to date.
d A circuit judge has the power to issue a search warrant if the Commissioner satisfies him that a person is contravening any of the data principles.

Task 23

Your employer has recently become concerned with the infringement of intellectual property rights. Write a report for him, briefly explaining the following matters:
a The meaning of copyright, the ways in which copyright is created and the remedies available for infringement of copyright.
b The meaning of a patent, how a patent is acquired and the remedies of infringement of a patent.
c The meaning of a trade mark, the way in which a trade mark is acquired and the remedies for infringement of a trade mark.
d The effect of the Data Protection Act 1998.

Table of cases

Cases that have received detailed treatment in case summary boxes are indicated in **bold** in the case name and in the appropriate page number

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Study skills

Get organised from the start

When you start your course, decide how much time you can afford to devote to your study of each subject. Be realistic when doing this. There will be a lot to learn and that is why your time must be managed as effectively as possible. Listen to your lecturers, who will explain what is expected of you. Having made your decision to devote a certain amount of time per week to a particular subject, stick to what you have decided. If it will help, draw up a weekly chart and tick off each period of study when you complete it. You should attend all your lectures and tutorials, and should always read the pages of this book which are recommended by your lecturer. Steady work throughout the year is the key to success.

Take advantage of what your lecturer tells you

Many lecturers set and mark their students' assessments. Even if the assessment is externally set and marked, your lecturer is likely to have experience of past assessments and to know what the examiners are looking for. Take advantage of this. If you are told that something is not in your syllabus, don't waste time on it. If you are told that something is particularly important, make sure you know it well. If you are told to go away and read something up, make sure that you do. And if you are told to read certain pages of this book, make sure that you read them. You may be told to read this book after you have been taught, so as to reinforce learning. Or you may be told to read it beforehand, so that you can apply what you have read in the classroom. Either way, it is essential that you do the reading.

After the lecture/tutorial

As soon as a lecture or tutorial is over, it is tempting to file your notes away until revision time. You probably understood the ground that was covered and therefore assumed that it would easily be remembered later. However, it is an excellent idea to go over what was covered within 24 hours. This need not take too long. You should check that all the points were understood, and if any were not you should clear them up with the help of your notes and this book. Make more notes as you do this. Give these notes a separate heading, something like 'Follow up notes'. These additional notes should always indicate which aspects of the class seemed important. They should also condense your notes, to give you an overview of the material covered.

In many cases your lecturer will be setting your exam or coursework. If a particular area or topic is flagged up as important, it is more likely to be assessed than one which was not. Even if your assessment is externally set, your lecturer is likely to know which areas are the most important, and thus most likely to be tested. Fifteen minutes should be plenty to go over a one hour class. Each 15 minutes spent doing this is likely to be worth far more time than an extra 15 minutes of revision just before the exam.

Answering questions

What skills are you expected to show?

In 1956 Benjamin Bloom categorised the skills which students are likely to be required to display when being assessed. These skills are shown in Figure 1. Each skill in the pyramid builds upon the one beneath it.

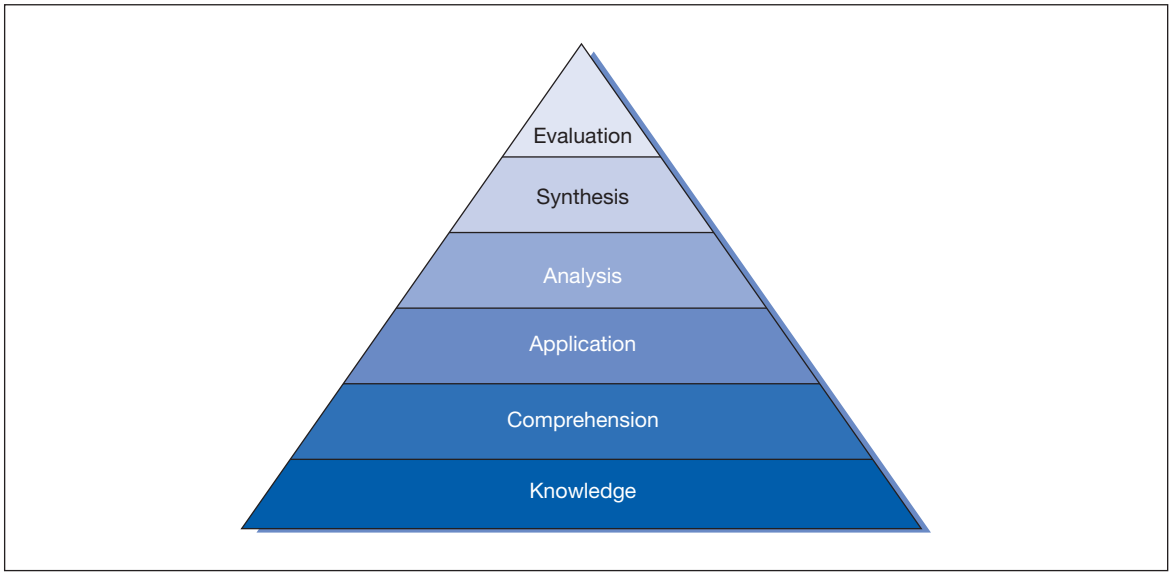

Figure 1 Study skills

Before deciding which skills you might be required to demonstrate, a brief explanation of the skills, in a legal context, needs to be made.

Knowledge, on its own, is not nearly as important as many students think. On the one hand, knowledge is essential because without knowledge none of the other skills are possible. But mere knowledge is unlikely to score highly in a traditional law assessment. Most assessments require comprehension, analysis and application. An exam question **might** require mere knowledge by asking something such as, *'List the terms implied by the Sale of Goods Act 1979'*. But not many assessments are so limited. Far more likely is a question such as, *'Describe the terms implied by the Sale of Goods Act 1979 and analyse the extent to which they adequately protect buyers of goods'*. This is a very different question. It requires knowledge, of course, but it also requires the higher level skills. It is these later skills which gain the higher marks. In 'open-book' exams especially, mere knowledge is likely to be worth very little.

Comprehension cannot be shown without knowledge. Some questions do require just knowledge and comprehension, for example, *'Explain the effect of the Contracts (Rights of Third Parties) Act 1999'*. But you should make sure that this is all the question requires. For example, if the question had said, *'Consider the extent to which the Contracts (Rights of Third Parties) Act 1999 has changed the law relating to privity of contract',* most of the marks would be gained for application, for showing how the Act would have affected the pre-Act cases such as ***Tweddle*** v ***Atkinson*** and ***Beswick*** v ***Beswick***. Knowledge of the Act, and comprehension of it, would be needed in order to achieve this. But if there was no application then the question would not have been answered.

Application of the law is very commonly required by a legal question. There is little point in knowing and understanding the law if you cannot apply it. The typical legal problem question, which sets out some facts and then asks you to advise the parties, always requires application of the law. It is not enough to show that you understand the relevant area of law, although some credit is likely to be given for this, you must then apply the law to advise the parties. These problem questions frequently also allow you to demonstrate analysis, synthesis and evaluation, as we shall see below when we consider how to answer such a question. However, this is not always true. When there is only one relevant case, and where it is obviously applicable, mere application of that case is all that is required.

Analysis of the law occurs when you recognise patterns and hidden meanings. You break the law down into component parts, differentiating and distinguishing ideas. For example, you might explain how one case (***Adams*** v *Lindsell*, set out at 3.2.1) introduced the postal rule on acceptance of contracts, and how another case (***Holwell Securities Ltd*** v *Hughes*, set out slightly later at 3.2.1) limited its application. Having

made such an analysis of the law you could apply it to a problem question.

Synthesis is the gathering of knowledge from several areas to generalise, predict and draw conclusions; precisely the skill required to deal with the more complex problem questions!

Evaluation of the law requires you to compare ideas and make choices. It is a useful skill in answering problem questions. For example, in a problem question on offer and acceptance you might need to evaluate the applicability of ***Adams* v *Lindsell*** and ***Holwell Securities Ltd* v *Hughes***. Evaluation is often asked for in essays, for example, *'Consider the extent to which the Unfair Terms in Consumer Contracts Regulations 1999 add to the protection of consumers conferred by the Unfair Contract Terms Act 1977. Do you think that the combined effect of the Regulations and the Act adequately protect consumers against unfair contract terms?'* When you evaluate you are giving your own opinion, realising that there are no absolutely right and wrong answers. But it is not pure opinion which is required. You must demonstrate the lower level skills described above in order to give some justification for your opinion. You also evaluate when deciding which legal principles are most applicable and should therefore be applied.

When you look at past assessments, try to work out which skills are required. Then make sure that you demonstrate these skills. Do not introduce the higher level skills if they are not expected of you in a particular question. For example, the very simple question, *'List the terms implied by the Sale of Goods Act 1979',* is looking only for knowledge. No extra marks will be gained for evaluating the effectiveness of the terms. It must be said that such a question would be more suitable to a test than to an exam. But the point is, see what skills the question requires and make sure that you demonstrate those skills.

Answering problem questions

Almost all law exams have some problem questions, such as the end of chapter questions in this book. These questions require application of the law rather than mere reproduction of legal principles.

You should always make a plan before you answer a problem question. Read the question thoroughly a couple of times, perhaps underlining important words or phrases. Problem questions can be lengthy, but the examiner will have taken this into account and allowed time for thorough reading of the question. So don't panic or read through too hurriedly. Next, see what the question asks you to do. (This is usually spelled out in the first or the last sentence of the question.) Then identify the legal issues which the question raises. Finally, apply the relevant cases to the issues and reach a conclusion.

The following question can be used as an example. It requires knowledge of the law relating to offer and acceptance of contracts. The law in this area is set out at the beginning of Chapter 3, between 3.1 and 3.22, and at the beginning of Chapter 4, between 4.1 and 4.1.1.1. So it might be a good idea to read these pages before you use the example.

> Acme Supastore advertised its 'price promise' heavily in the *Nottown Evening News*. This promise stated that Acme was the cheapest retailer in the city of Nottown and that it would guarantee that this was true. The advertisement stated: 'We are so confident that we are the cheapest in the area that we guarantee that you cannot buy a television anywhere in Nottown cheaper than from us. We also guarantee that if you buy any television from us and give us notice in writing that you could have bought it cheaper at any other retailer within five miles of our Supastore on the same day we will refund double the price difference. Offer to remain open for the month of December. Any claim to be received in writing within 5 days of purchase.' Belinda saw the advertisement and was persuaded by it to buy a television from Acme Supastore for £299. The contract was made on Monday 3 December. On Saturday 8 December Belinda found that a neighbouring shop was selling an identical model of television for £289 and had been selling at this price for the past six months. Belinda immediately telephoned Acme Supastore to say that she was claiming double the difference in price. She also posted a letter claiming this amount. The letter arrived on Monday 10 December. Acme Supastore are refusing to refund any of the purchase price. Advise Belinda as to whether or not any contract has been made.

The final sentence of the question tells you what you are required to do – advise Belinda as to whether or not a contract has been made. If you have read the relevant extracts from Chapters 3 and 4 you will have seen that the requirements of a contract are an offer, an acceptance, an intention to create legal relations and consideration. So if these are all present a contract will exist. Notice that all the question asks you is whether or not a contract exists. It did not ask what remedies might be available if such a contract did exist and was breached. It might have done this, but it did not. So make sure you answer the question asked.

The first legal issue is whether the advertisement is an offer. So first define an offer as a proposal of a set of terms, with the intention that both parties will be contractually bound if the proposed terms are accepted. Then you apply your legal knowledge in depth. The advertisement might be an invitation to treat. ***Partridge* v *Crittenden*** (considered at 3.1.2) established that most advertisements are not offers. If advertisements were classed as offers problems with multiple acceptances and limited stock of goods would soon arise. The advertisement here, like the one in ***Partridge* v *Crittenden,*** uses the word 'offer'. But this advertisement can be distinguished from the one in ***Partridge* v *Crittenden*** because it shows a much more definite willingness to be bound. Nor would possible multiple acceptances cause a problem here. There would be no need for Acme to hold unlimited stock. If many people accepted, Acme would need only to make multiple price refunds, which would probably be small. So the multiple acceptance issue would not indicate a lack of intention to make an offer.

You then compare the advertisement in the question to the one in ***Carlill's*** case (see also considered at 3.1.2), noting similarities and differences. (Analysis, evaluation and synthesis will be shown in a really good answer.) There is no need to reproduce all the facts of ***Carlill's*** case. You might point out that the advertisement in the question said that it was guaranteeing that what it said was true, and that this is similar to the Smoke Ball Company's advertisement, which said that money had been deposited in the bank to show that they meant what they said. You would explain that whether or not there is an intention to create legal relations is an objective test and that in this commercial context it would be presumed that there was an intention unless there was evidence to suggest otherwise. Again, a comparison could be made with ***Carlill's*** case where, as in the question, the advertisement was made in a commercial context. You might explain that, as in ***Carlill's*** case, the advertisement set out what action was required to accept the offer and that acceptance could be made only by performing the requested act. In both the question and ***Carlill's*** case a valid acceptance could not be made by merely promising to perform the requested act. It is a feature of an offer of a unilateral contract that acceptance can be made only by performing the act requested. Acme's offer, like the one in ***Carlill's*** case, seems to be the offer of unilateral contract.

Next you would consider whether the offer had been accepted within the deadline, noting that the terms of the offer ruled out acceptance by telephone. The letter would have been within the deadline only if the postal rule applied. The rule should be explained and analysed, along with the limitations put upon it by ***Holwell Securities Ltd* v *Hughes***, which is set out at 3.2.1. An analysis of this case would probably lead you to conclude that the postal rule would not apply, particularly as the advertisement in the question said that the acceptance had to be received before the deadline. In ***Holwell Securities Ltd* v *Hughes*** the Court of Appeal refused to apply the postal rule because acceptance had to be made 'by notice in writing' and it was held that this meant that it had to be received to be effective.

Next we would explain that there could have been consideration from both parties. Acme's consideration would have been their promise to give the refund. Belinda's consideration would have been performing the act requested. You might think it a waste of time to mention consideration. It would be a waste of time to consider it at length. But consideration is a requirement of a valid contract and you were asked to advise whether or not a contract existed. If you were absolutely certain that there was no valid acceptance it might be all right to say that there was therefore no need to consider consideration. But whether or not the postal rule would apply is not a matter of certainty. You might be wrong to say that it would not apply. If this was the case, consideration would be a part of the answer. If you reach a conclusion before the end of a question, which makes further investigation of the question unnecessary, you should conduct that further investigation anyway. It is most unlikely that a question has been set where the first line gives the answer and the rest of the question is irrelevant. For example, you might have decided that Acme's advertisement was definitely an invitation to treat. If this were true then there could have been no contract. (Belinda would have made an offer which was not accepted.) So if you did decide that the advertisement was an invitation to treat, by all means say so. But then explain that it might possibly have been an offer and go on to consider the rest of the question.

You should reach a conclusion when answering a problem question. But your conclusion might be that it is uncertain how the cases would apply and that therefore there might or might not be a valid contract. Do not be afraid of such a conclusion. Often it is the only correct answer. If a definite answer to any legal problem could always be found cases would never go to court.

Finally, do not be on Belinda's side just because you have been asked to advise her. Belinda wants an objective view of the law. A lawyer who tells his or her client what they want to hear does the client no favours at all. The client may well take the case to court, lose the case when the judge gives an impartial decision, and then be saddled with huge costs. If the news is bad for Belinda, as it probably is, then tell her so.

Try to practise past problem questions, but make sure that they are from your exam, and that there is no indication that future questions will be different. It can be very helpful to do this with a friend, or maybe a couple of friends, and to make a bit of a game of it. Find some old questions and give yourselves about ten minutes to make a plan of your answer. Then go through the questions together, awarding points for applying relevant cases or for making good points. It is probably best to keep this light-hearted but perhaps gently criticise each other (and yourself!) if you are missing things out.

Finally, it can be an excellent technique to get together with a small group of friends who all set a problem question for each other. First, you have to define the subject you are considering, perhaps formation of a contract. Then go over all the past questions. Then each try and set a similar question, along with a 'marking plan' showing how you would allocate a set number of marks (maybe 20). In the marking plan make sure that you list the skills which should be shown, analysis, application etc. This will get you thinking like the examiner. It is hoped that it will show you that all of the questions have great similarities and that the same things tend to be important in most answers. Lecturers who set a lot of exams know that most questions on a particular topic are looking for the same issues, that the same cases tend to be important, and that it is very difficult to invent wholly original questions. By the time you have set each other questions in this way the real exam questions should look a lot easier.

Using cases and statutes

Whenever you can, you should use cases and legislation as authority for statements of law. In the section above, on answering problem questions, we saw how ***Carlill's*** case might be used. Notice how different that use was from writing ***Carlill's*** case out at great length and then saying that the advertisement in the question is just the same and so ***Carlill's*** case will be applied. To do that not only wastes a lot of words but, worse, it shows little application of the law. You have recognised that the case might apply, but you have not applied it convincingly. To apply the case well you will need to analyse it, and to evaluate arguments and ideas. As we have seen, these are the skills which score the highest marks.

If a question on satisfactory quality within the Sale of Goods Act 1979 concerned a car sold by a taxi driver, you would want to apply ***Stevenson*** v ***Rogers***, which is set out in Chapter 8 at 8.2.4. There would be no point in writing out all of the facts. You might say that ***Stevenson*** v *Rogers* established that whenever a business sells anything it does so in the course of a business for the purposes of s.14(2) SGA. Better still, you might say that the taxi driver will have sold the car in the course of a business for the purposes of s.14(2) SGA, because this is essentially the same as the fisherman in ***Stevenson*** **v** ***Rogers*** selling his boat. In each case what was sold was not an item the business was in business to sell, but a business asset which allowed the business to be carried on.

As for sections of statutes, there is usually little point in reproducing them in full if you can briefly state their effect. But they might be worth reproducing in full if you are going to spend a lot of time analysing them. For example, if a large part of a question was concerned with whether or not a car was of satisfactory quality, you might reproduce the statutory definition of satisfactory quality in full, or at least fairly fully. But you would do this only because you would then go on to analyse the various phrases in it, perhaps devoting a brief paragraph to each relevant phrase. Reproducing a statute is particularly likely to be a bad idea if you can take a statute book into the exam with you.

In this study skills section I have concentrated on how to answer legal questions. I hope that this will be useful to you. I also hope that you enjoy the subject and enjoy reading this book. Above all, I hope that you appreciate that the study of law is not a dry matter of learning facts and reproducing them. Some learning is necessary, but the true fascination of the subject lies in the endlessly different ways in which legal principles might apply to any given situation.

Lastly, I wish you good luck with your assessments. But in doing so I remind you of the famous reply of Gary Player, the champion golfer, when he was accused of winning tournaments because he was lucky. He admitted that he was lucky, but said that the more he practised the luckier he seemed to get. So practise your study skills, put in the work and make yourself lucky!

1

The legal system

Introduction

This chapter considers the following matters:

1.1 Features of the English legal system
1.1.1 Antiquity and continuity
1.1.2 Absence of a legal code
1.1.3 The law-making role of the judges
1.1.4 Importance of procedure
1.1.5 Absence of Roman law
1.1.6 The adversarial system of trial
1.2 Classification of English law
1.2.1 Public law and private law
1.2.2 Common law and equity
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1.3 Sources of English law
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1.3.2 Judicial precedent
1.4 European Union law
1.4.1 The institutions of the European Union
1.4.2 Sources of community law
1.4.3 The European Court of Justice
1.4.4 Supremacy of EU law
1.5 The European Convention on Human Rights
1.5.1 The Human Rights Act 1998
1.5.2 The European Convention on Human Rights
1.5.3 The European Court of Human Rights
1.5.4 The impact of the Human Rights Act

1.1 FEATURES OF THE ENGLISH LEGAL SYSTEM

The English legal system is unlike that of any other European country. An outline knowledge of the features which make the English system so distinct is essential to an understanding of English law and the English legal process.

1.1.1 Antiquity and continuity

English law has evolved, without any major upheaval or interruption, over many hundreds of years. The last successful invasion of England occurred in 1066, when King William and his Normans conquered the country. King William did not impose Norman law on the conquered Anglo-Saxons, but allowed them to keep their own laws. These laws were not uniform throughout the kingdom. Anglo-Saxon law was based on custom and in different parts of the country different customs prevailed.

In the second half of the twelfth century King Henry II introduced a central administration for the law and began the process of applying one set of legal rules, 'the common law', throughout England. Since that time, English law has evolved piecemeal. For this reason the English legal system retains a number of peculiarities and anomalies which find their origins in mediaeval England.

The world history of the past few hundred years has been a litany of revolution and conquest. The new rulers of a country tend to start afresh with the law. In the Soviet Union the communists introduced Soviet law, in France Napoleon introduced the Napoleonic code, in the United States the founding fathers wrote the American Constitution. But England is one of the very few countries to have survived the last nine hundred years with no lasting revolution from within or foreign conquest from abroad. Some English laws and legal practices have evolved continuously since the time of King Ethelbert, who became king of Kent in the year 580. The Norman