UWE Bristol | University of the West of England

Legal Practice Course
2016 – 2017

CIVIL LITIGATION
PRE-COURSE MATERIALS

1 Introduction

- These Pre-Course Materials are designed to give you a basis upon which to build your studies during the Civil Litigation course. Civil Litigation is the first part of the Litigation course. It is combined with Criminal Litigation, which you will study later during Stage 1. It is one of three 'Core Practice Areas' included in Stage 1 of the Legal Practice Course (the others being Business Law & Practice and Property Law & Practice).

- The Pre-Course materials for Civil Litigation consist of Student Instructions and the three documents that follow. **Please read these materials prior to starting the Civil Litigation course.** The content should set you up with background knowledge about the law and procedure that you will need to understand and work effectively during the case studies which you will be using.

2 Aims

The aim of these pre- course materials is to:

- Consolidate your knowledge of aspects of contract law that are relevant to the Civil Litigation course.

- Outline initial aspects of the law of evidence relevant to civil litigation.

- Introduce you to the Civil Procedure Rules which govern the procedure for determining disputes in the civil courts.

3 Preparation

Activity 1: Aspects of Contract Law

Read Document 1 in the Bundle, "Principles of Contract Law".

Activity 2: Introduction to Evidence

Read Document 2, "Introduction to the Law of Evidence".

Activity 3: Introduction to the Civil Procedure Rules

Read Document 3, "Introduction to the Civil Procedure Rules". In this activity, you will also be asked to look at the Civil Procedure Rules which can be found on the Ministry of Justice website and also to think about the stages you would expect to occur during a civil litigation dispute.

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DOCUMENT 1

Principles of Contract Law

One of the SRA's pre-course requirements for the LPC is that you have a basic knowledge and understanding of Contract Law, specifically:

- Formation of contracts;
- Formalities of written contracts;
- General principles concerning implied terms;
- Misrepresentation;
- Discharge;
- Remedies for breach of contract.

You will have covered these topics during your undergraduate studies or CPE/GDL, but that may be some time ago (particularly if you studied Contract Law in the first year of your degree). In any event, a refresher would be useful.

Much of the Civil Litigation course is based on contractual claims and most of the topics listed above arise at some point during the course. We suggest you may want to spend some time looking over your notes on Contract Law and/or revise from a basic Contract Law textbook. Focus on the topics listed above. You need not spend time reviewing other topics such as Privity of Contract or Promissory Estoppel. While these may become important in practice, they do not arise in the context of our Civil Litigation course.

In addition, it would be helpful for you to have a basic knowledge and understanding of the law relating to the sale of goods and supply of services in cases relating to businesses. You do not need to learn the detail. Focus on implied terms and remedies.

The notes set out in this document are intended to remind you of the key principles and should also provide a useful reference note to refer back to as you go through the course.

1. The contents of a contract

1.1 Introduction

The rights and remedies available to the parties to a contract depend on whether the damage they have suffered arises from a misrepresentation or a breach of contract. Furthermore both misrepresentations and terms fall into different categories, each giving the injured party different rights and remedies.

When a claim is brought before the court it is the court that decides whether there has been a misrepresentation or a breach of a term. The court decides these matters by ascertaining the intentions of the parties, but the fact that the parties describe a term in their contract as either a condition or a warranty is not conclusive.

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If it is a term which has been broken, the court will decide if the term was a condition, a warranty or an innominate term.

1.2 Pre-contractual statements

Mere puffs

These are exaggerated claims of a vague and unspecific nature which are neither representations nor terms of a contract and for which there is no civil remedy if they are false. Claims in advertisements often fall into this category.

Representations

These are pre-contractual statements of fact which induce a party to enter into a contract. If they remain mere representations and do not become terms of the contract then damages are available for misrepresentation but not for breach of contract. The court also has a discretion to rescind the contract (i.e. set it aside). If they are incorporated into the contract and become terms then remedies are available for breach of contract.

1.3 Terms of a contract

Conditions

These are terms of major importance which go to the root of the contract. A breach of condition is a repudiatory breach which gives the injured party the right to treat himself as discharged from the contract. Additionally or alternatively the injured party may claim damages.

Warranties

These are terms which are collateral to the main purpose of the contract. A breach of warranty gives the injured party the right to claim damages but not the right to treat the contract as at an end.

Innominate or intermediate terms

The courts have come to accept that there are some terms which are capable of being broken in such a way as to cause either serious or minor damage to the injured party. In such cases the courts have refused to classify these terms, without more, as being either conditions or warranties; such terms are called intermediate or innominate terms. Where the courts decide that a term is an innominate term they go on to consider the effect of the breach in order to determine the remedy. If the breach has caused serious harm it is treated as if it were a breach of condition (i.e. the injured party may treat himself as discharged). If the breach has not had serious consequences it is treated as a breach of warranty (i.e. the injured party may claim damages only).

Express terms

Parties to a contract may put all the express terms of their contract in writing or they may express the terms of their contract orally or they may express some of the terms orally and some in writing.

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Implied terms

Even though the parties have not expressly included a term in their contract, terms may be implied into it. A term can be implied by statute, by the court or by custom. For the purposes of the Civil Litigation course we shall consider in more detail the terms implied by statute into contracts for the sale of goods and contracts for the supply of goods and services.

1.4 Exclusion clauses and the Unfair Contract Terms Act 1977

A contract might contain a term which limits the liability of one of the parties in the event of a breach of contract. In the past the courts tried to control the effectiveness of such terms, in order to protect weaker contracting parties. Legislation limits the extent to which contracting parties can limit their liability for a breach of contract and giving protection, in particular, to consumers.

The main legislation in this field includes the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999 ("UCTTR 1999").

The Consumer Rights Act 2015 ("CRA 2015") which came into force in October 2015:

- **contains all provisions relevant to consumers (and some new ones in relation to matters such as digital content, plus some new remedies).**

- **replaced the UTCCR 1999 in relation to "consumer"[1] contracts. The UTCCR has now been revoked.**

- **amended the Sale of Goods Act 1979 and the Supply of Goods and Services Act 1982. The statutes remain in force but the CRA 2015 has stripped out references to "consumers".**

The case studies that you will encounter on our course will all be based upon contracts between businesses and/or businesses and traders[2].

For these contracts the relevant legislation in relation to unfair contract terms will remain UCTA 1977.

In light of these changes and given that our course will not deal with consumer situation, we will not refer again to the UTCCR 1999 in these materials.

[1] A "consumer" is defined under the Consumer Rights Act 2015 as" an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession'.

[2] A "trader" is defined as "Trader" means 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.

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2 Remedies for breach of contract

2.1 Damages

Damages are probably the most important remedy for breach of contract; they are known as the 'common law' remedy and, provided the claimant wins his or her case, the remedy is said to be available 'as of right'.

In order to investigate the facts in relation to quantum, it will be necessary to consider two separate issues:

(i) What heads of recoverable loss have been suffered in the present case?
(ii) How much can be awarded by the courts?

In a simple debt action where the claimant is suing to recover only a fixed sum of money due from the defendant under the terms of a contract, the sum which the court will award will simply be the fixed sum due from the defendant under the terms of the contract. Damages will not be awarded unless some further damage has been sustained by the claimant.

Types of damages

The claimant's damages will fall into two categories: those losses which rank as special damages and those which rank as general damages.

- **Special damages**

Special damages are those items of financial loss which can be arithmetically quantified. They are losses which accrue from the date of the cause of action up until the date of trial (or settlement of the action if earlier). Examples of special damages include loss of profits up until the date of trial or earlier settlement of the case and the cost of repairs to property.

- **General damages**

These losses are not capable of precise arithmetical calculation in advance of a trial. The trial judge will have to make an assessment by reference to his or her experience of quantifying losses and by reference to precedent cases on damages. Whilst general damages do not have to be itemised as such in the relevant statement of case some general indication of the nature of the claimant's loss should be given, including any unusual losses which have been sustained.

Recoverable losses

The object of damages for breach of contract is to place injured parties in the financial position that they would have been in if the contract had been properly performed. However, not all losses will be compensated. Damages are only recoverable for losses which are judged to be reasonably foreseeable or not too remote. Damages are thus recoverable for losses which:

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- Arise naturally from the breach or

- Were within the reasonable contemplation of both parties at the time the contract was made.

Heads of losses which are recoverable include

Pecuniary losses: diminution in value: i.e. value of the benefit to be derived under the contract minus the value of any benefit actually received; loss of profits arising from breach (subject to the remoteness rules); the cost of repair or putting things right; expenditure wasted in reliance on the contract.

Non- pecuniary losses: personal injury or death; inconvenience; distress (but only where the contract itself is a contract to provide peace of mind or freedom from stress; this is not generally applicable if the contract is purely a commercial contract).

The measure of damages

Once the court has decided that a loss is not too remote it must decide on the quantum or amount of damages to award. There are few set rules on determining this, apart from those in the Sale of Goods Act 1979 (as amended). Under that Act, where there is a non-delivery or non-acceptance of goods and there is an available market for the goods, the measure of damages will be based on their market value. For example if a seller fails to supply goods and the buyer has to buy them elsewhere the measure of damages will be the difference between the contract price and the market price. Damages for losses which are not financial in nature (e.g. hurt feelings, disappointment or inconvenience) are determined by reference to past cases of a similar nature.

The duty to mitigate loss

In breach of contract cases injured parties have a duty to mitigate their losses where this is reasonable and damages will not be awarded for losses suffered by an injured party as a result of the failure to mitigate.

Interest on damages

The claimant is entitled to recover such interest as is expressly provided for in the contract. In the absence of any express clause the court has a discretion to award statutory interest on damages from the date that the cause of action arose to the date of judgment or earlier payment under s35A Senior Courts Act 1981 (High Court) or s69 County Courts Act 1984 (County Courts). In some cases, interest is recoverable under the Late Payment of Commercial Debts Act 1998.

Note that in order to recover interest, whether pursuant to an express term of the contract or under a statutory provision, litigants must make a specific claim for interest in their statements of case; this is known as specifically pleading the interest and if this is not done interest will not be awarded.

2.2 Repudiation

Where there has been a serious breach of contract (a breach of condition), the injured party can treat the contract as discharged or at an end. In other words, injured parties

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can themselves repudiate a contract where there has been a repudiatory breach by the other party. It should be noted, however, that if an injured party repudiates where there has merely been a breach of warranty, then he is himself in breach of contract and the other party may lawfully treat the contract as at an end and seek damages for any losses suffered.

2.3 Equitable remedies

Some remedies are awarded at the discretion of the court to a successful litigant, rather than as of right as in the case of damages. They include:

- Specific performance: A remedy whereby the court orders a party in breach to carry out the terms of a contract; e.g. to perform a contract for the sale of a house.

- Injunctions: These may be granted to restrain a party from breaking a negative stipulation in a contract.

- Rescission: This is an order of the court which requires that the injured party be put back into the position in which he would have been had the contract never been made. It should be distinguished from damages, which purport to put the injured party in the position in which he or she would have been had the contract been properly performed.

2.4 Contracts for the sale of goods and contracts for the supply of goods

Additional remedies are given by statute in the case of breach of these contracts.

3 Sale of defective goods: The Sale of Goods Act 1979 (as amended)

The Sale of Goods Act 1979 (SGA) defines a contract for the sale of goods as one where the seller transfers or agrees to transfer the property in goods for a money consideration called the price (s2(2)).

The SGA implies terms into contracts for the sale of goods, in particular terms as to quality and fitness for purpose.

The SGA does not apply to contracts in which the main object is to carry out work or supply a service, even where goods are also supplied under the contract.

However, The Supply of Goods and Services Act 1982 implies terms into such contracts regarding the quality of the work or service and the quality of the material or goods supplied under it (see below paragraph 4.1).

Neither does the SGA apply to hire or hire purchase contracts, but again implied terms as to the quality and fitness of goods under such contracts are implied by a different Act, namely the Supply of Goods (Implied Terms) Act 1973.

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3.1 Implied conditions where the seller sells goods in the course of a business

Implied condition as to satisfactory quality (S14(2) SGA)

S14(2) provides that where a seller sells goods in the course of a business there is an implied condition in the contract that the goods should be of satisfactory quality.

S14(2A) states that goods are of satisfactory quality if they meet the standard required by a reasonable person taking into account price, description and any other relevant factors.

The section does not apply if a defect has been specifically brought to the buyer's attention prior to the sale. Nor does it apply if the buyer examines the goods prior to the sale and ought to have noticed a defect.

Satisfactory quality includes the following:

- Fitness for the purpose for which such goods are commonly supplied;
- Appearance and finish;
- Freedom from minor defects;
- Safety;
- Durability.

Implied condition as to fitness for purpose (S14(3) SGA)

S14(3) provides that where a seller sells goods in the course of a business there is an implied condition in the contract that the goods should be reasonably fit for any purpose made known by the buyer to the seller.

There is overlap between S14(2) and S14(3). However, S14(3), unlike S14(2), applies if the goods are not fit for an unusual or uncommon purpose, provided the buyer makes this unusual purpose known to the seller prior to the sale.

S14(3) does not apply if the buyer does not rely on, or it would be unreasonable for him to rely on, the seller's skill or judgment.

Strict Liability

Liability for breach of SS14(2) and (3) is said to be strict. This means that provided a claimant can show that the terms apply and were broken the seller will be held liable even though he can show he exercised reasonable care. Sellers are liable for the sale of defective goods in breach of s14 even if they can show that the fault was caused by a third party (e.g. a manufacturer).

3.2 Exclusion of liability for breach of SS14(2) and (3)

The Unfair Contract Terms Act 1977 (UCTA)

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An attempt in a contract to restrict or exclude liability will be effective only if it passes the reasonableness test under the UCTA. S12(1) UCTA 1977. (*The position for consumers from October 2015 is governed by the CRA 2015.)*

3.3 Remedies for breach of S14 SGA 1979

Repudiation of the contract

The terms implied under S14(2) and (3) are conditions as opposed to warranties (see above paragraph 1.3). This means that the buyer may be able to treat the contract as repudiated or terminated if they are broken. This might involve the buyer rejecting the goods or refusing to take delivery of the goods. The buyer may also reclaim the price if he had already paid for the goods or withhold the price if he had not. In addition the buyer can claim damages for any losses caused by the breach of contract.

The right to repudiate is subject to S15A SGA (remedies of buyers in non-consumer cases) and S35 SGA (see below).

In contracts covered by the SGA the buyer loses the right to repudiate the contract and reject the goods for breach of condition if there has been an 'acceptance' of the goods.

Under S35 acceptance occurs if:

- the buyer intimates to the seller that he has accepted the goods;
- the buyer takes delivery of the goods and does any act inconsistent with the seller's ownership;
- the buyer retains the goods beyond a reasonable time without intimating to the seller that he has rejected them.

It can be seen that acceptance in this context has a technical meaning which has nothing to do with offer, acceptance and agreement in the context of general contract law. Offer and acceptance, resulting in the formation of a contract, will already have occurred before acceptance in this context can arise.

Damages

If the seller delivers goods which do not comply with the terms of the contract the buyer may claim damages.

S53 SGA allows the buyer to set off his claim for damages against the seller's claim for the unpaid price.

A buyer may choose to keep goods, treat a breach of condition as if it were merely a breach of warranty and sue for damages. Even if the buyer has lost the right to reject the goods, the remedy of damages is still available.

The object of damages for breach of contract is to place the injured party in the same financial position as if the contract had been performed. Under s53 Sale of Goods Act 1979 losses can be recovered for breach of contract only if (i) the loss arises naturally from the breach and/or (ii) the loss was within the reasonable contemplation of both parties at the time the contract was made. The test of foreseeability in contract law is much higher than in tort in that the claimant must establish that the defendant either

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contemplated or ought to have contemplated the risk of the loss arising as a serious risk.

Remedies of buyers in non-consumer cases

S15A SGA provides that where an implied term is broken and the buyer did not deal as a consumer (see above paragraph 3.3) then the buyer cannot reject for a breach of condition if the breach was so slight that it would be unreasonable to reject. In such cases damages are the only remedy available to the buyer.

4 Supply of defective goods and services: The Supply of Goods and Services Act 1982 (SGSA)

The Sale of Goods Act 1979 implies certain terms into contracts for the sale of goods. The implied terms which we have considered above are those as to quality and fitness for purpose, which are implied only where the seller sells the goods in the course of a business.

In a contract for the provision of work or services, the Supply of Goods and Services Act 1982, not the Sale of Goods Act, might apply if the work or services supplied are defective.

If, as part of a contract for the sale of goods, the seller also supplies a service or performs work, the Sale of Goods Act does not apply to the service element of the contract. The Supply of Goods and Services Act 1982 might apply to the quality of the work or service supplied under the contract.

If the main purpose of a contract is to supply a service and the supply of goods under the contract is merely an adjunct to that main purpose then the Sale of Goods Act does not apply to the contract at all, because it does not fit the definition of a contract for the sale of goods. The Supply of Goods and Services Act 1982 might be applicable to the quality of the work or service supplied under the contract. Also under the Supply of Goods and Services Act there might be terms implied as to quality and fitness for purpose of the goods supplied.

4.1 Implied terms as to quality and fitness for purpose of goods supplied (S4 SGSA 1982)

In a contract where goods are supplied in the course of a business as part of a contract for work and services, the SGSA implies identical terms as to quality and fitness for purpose as those implied by the SGA 1979, in a sale of goods contract. S4(2) implies a condition that goods supplied in the course of a business will be of satisfactory quality. S4(6) implies a condition that goods supplied in the course of a business will be fit for their purpose.

4.2 Exclusion of liability for breach of SS4(2) and (6) SGSA

The Unfair Contract Terms Act 1977

If the customer does not deal as a consumer *(and remember that as noted above the Act no longer covers consumers*) then any attempt in the contract to restrict or exclude liability will be effective only if it passes the reasonableness test under the Unfair Contract Terms Act 1977.

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4.3 Remedies for breach of S4 SGSA 1982

Repudiation of the contract

The terms implied under S4(2) and (6) are conditions as opposed to warranties. This means that the buyer may be able to treat the contract as repudiated or terminated if they are broken. This might involve the buyer rejecting the goods supplied or refusing to take delivery of the goods. The buyer may also reclaim some or all of the price if he had already paid for the goods, or withhold some or all of the price if he had not. In addition the buyer can claim damages for any losses caused by the breach of contract.

In contracts covered by the SGA the buyer loses the right to repudiate under S35 SGA if acceptance has occurred. This does not apply to SGSA contracts. Instead, the common law principle of affirmation is applicable. Under this principle, the right to reject is lost if the customer keeps goods after discovering the defect in them and indicates that he will not be rejecting them.

Damages

If the supplier delivers goods which do not comply with the terms of the contract the buyer may claim damages.

Case law also allows the customer to set off his claim for damages against the supplier's claim for the unpaid price. A customer may choose to keep goods, treat a breach of condition as if it were merely a breach of warranty and sue for damages. Even if the customer has lost the right to reject the goods, the remedy of damages is still available.

Remedies of buyers in non-consumer cases

Where goods are supplied to a buyer who did not deal as a consumer then the buyer cannot reject for a breach of condition if the breach was so slight that it would be unreasonable to reject. In such cases damages are the only remedy available to the buyer.

4.4 Implied term as to reasonable care and skill (S13 SGSA 1982)

S13(1) SGSA provides that where the supplier supplies a service while acting in the course of a business there is an implied term that the service will be carried out with reasonable care and skill.

There are two major differences between the implied terms as to quality and fitness for purpose of (S14 SGA and S4 SGSA) and the implied term that a service will be carried out with reasonable care and skill (S13 SGSA):

- The implied terms as to quality and fitness for purpose of goods can be broken even though the seller was not at fault in any way; whereas liability under S13 SGSA arises only if the service or work has been carried out negligently.

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- The term implied under S13 SGSA is not defined as being a condition or a warranty; it is an innominate term. This means that the remedy to which the injured party is entitled depends on the seriousness of the breach.

4.5 Exclusion of liability for breach of S13 SGSA

The Unfair Contract Terms Act 1977

S2(1) UCTA applies to S13 SGSA. It provides that liability for death or personal injury arising from negligence can never be excluded and terms or notices excluding liability for other losses are effective only if they satisfy the reasonableness test in UCTA.

4.6 Remedies for breach of S13 SGSA 1982

The implied term that services should be carried out with reasonable care and skill is not classified as a condition or a warranty; it is an innominate term (see above). This means that the remedies of injured parties depend on the seriousness of the consequences arising from the breach. Any breach of the implied term will enable the injured party to claim damages. If the consequences are so serious that the injured party is substantially deprived of any benefit under the contract, then he or she may repudiate the contract and sue for damages in respect of any consequential losses.

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DOCUMENT 2

Introduction to the Law of Evidence

1. Introduction

You will cover more detail about the law relating to evidence as you go through the course but the following points should be useful to you by way of an introduction.

For a number of reasons, it is important for a dispute resolution solicitor to understand and to consider the rules of evidence at the outset of a case and to keep them under review as the case progresses. For example:

(i) Initial advice to a client as to whether the client has a claim or defence worth pursuing must include an assessment of the relevant facts and the applicable law. It should also include an analysis of the strengths and weaknesses of the client's case which will require a review of the admissibility and the credibility of the evidence that is, or may be, available.

(ii) When settlement is under consideration, again the strengths and weaknesses of both sides' cases (including evidential issues) must be considered.

(iii) There are a number of pre-trial procedures that demand knowledge of the rules of evidence if they are to be satisfactorily carried out.

2. Some Preliminary Rules

The first two points should be familiar to you already!

The Legal Burden of Proof

In civil cases, a party who asserts that a fact is true has the burden of proving that fact.

The Standard of Proof

A fact must be proved on the balance of probabilities (i.e. it is more likely than not).

Note how finely balanced this standard is. Very small differences in the weight and credibility of the evidence will be potentially important (at its most extreme, the fact is 51% likely to be true compared to 49%).

Method of Proving a Fact

A fact alleged to be true must be proved by evidence. There are exceptions to this rule and when one applies no evidence to prove the fact alleged need be adduced. The two most commonly encountered in civil dispute resolution are:

- where a fact is formally admitted by the party against whom it is alleged; or
- where a fact is inferred. For example, if it is proved that a customer inspected goods, paid for them, took them away and made no complaint, it may be possible to persuade the court to infer from these facts that the goods were of satisfactory quality

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Types of evidence that can be adduced

Evidence can be classified as: (i) oral evidence; (ii) written witness statements; (iii)written expert reports; (iv) documentary; or (v) real.

Oral evidence/ written witness statements

Here you need to consider in particular:

- **Competence**

A witness must be legally competent to give evidence on oath or by affirmation (or by witness statement). Note that a child may give unsworn evidence if he is possessed of sufficient intelligence to justify reception of the evidence and understands the duty to tell the truth (s96 Children Act 1989).

- **Compellability**

In civil proceedings, a witness is always compellable (i.e. can be forced to attend court to give evidence) whatever their status or relationship to a party. However, a relationship between a party and a witness may affect the credibility of the witness's evidence and its "weight" (i.e. the extent to which the court may place reliance on what the witness says).

Documentary evidence

Under the Civil Evidence Act 1995, either original or copy documents can be used. If the authenticity of the document is challenged by an opponent, it will be necessary to authenticate it in a manner approved by the court (by e.g. calling evidence of handwriting).

Real evidence

This means producing a tangible item in court and proving something about its characteristics (or even that it exists) simply by the court seeing it.

3. Admissibility of Evidence

Inadmissible evidence cannot be used to prove a case and there are various rules rendering inadmissible what may appear at first sight to be perfectly acceptable evidence.

3.1 Relevance

To establish whether or not a piece of evidence is relevant requires you to identify the issues in the case clearly. Essentially, you must decide the legal basis of both the claim and any defence and also the facts that each party must prove to establish that claim or defence. Your client may well have views as to relevance which do not accord with your own and in that case you will need (tactfully) to clarify the position.

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For example, a client company may wish to defend a claim for the cost of goods sold and delivered on the basis that it has cash flow problems and so cannot afford to pay until e.g. the goods have been sold on to and paid for by a third party. You will know that this is legally irrelevant and does not provide a defence to an action by the supplier for the cost of the goods. Therefore, evidence of the client's cash-flow problems cannot be adduced even if it is possible to defend the claim on other grounds.

3.2 Evidence of character, previous conduct and/ or convictions

Evidence of character, previous conduct and/or convictions of a party or a witness are generally not considered relevant to prove a fact in issue (and therefore are inadmissible). Such evidence may, however, be considered relevant (and therefore admissible) to show the credibility (or rather, lack of it) of a witness or party.

Note also that Section 11 of the Civil Evidence Act 1968 allows evidence of the fact of a conviction, where relevant, to prove that the party concerned committed that offence. This is an important exception, but it is not one we will consider during the Civil Litigation course.

3.3 Opinion evidence

A witness gives opinion evidence when he draws a conclusion from a set of facts. Such evidence is generally inadmissible in civil proceedings because it is the judge's task to draw conclusions from the facts admitted, inferred or proved in evidence. There are two exceptions:

Expert evidence

"Experts" are permitted to give opinion evidence where the facts are of a type which intrinsically requires expertise e.g. medical, technical or scientific expertise. This is a pragmatic exception: the judge does not have the necessary expertise and it is for the court to decide whether or not to permit expert evidence to be given.

Where expert evidence is required, in order for opinion evidence to be admissible, the "expert" must be an expert within the field about which s/he is giving evidence. Expertise will be judged by the court upon the basis of the "expert's" qualifications and experience.

Section 3(2) Civil Evidence Act 1972

Where a witness (even a non-expert) is able to give evidence of facts he perceived only by straying into giving an opinion on them (because the two are inextricably intertwined) the court will usually deem both elements admissible. A common example of this is evidence from a bystander about the approximate speed at which a passing car was travelling.

3.4 Privileged evidence

There are various types of privileged evidence, all of which will be inadmissible unless the claim to privilege has been waived. The most commonly encountered in civil proceedings are evidence of:

- **Legal advice privilege:** communications between a client and his lawyer where the purpose of the communication is the giving or obtaining of legal advice.

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- **Litigation privilege:** communications between a client and a third party, or the client's lawyer and a third party (e.g. prospective witnesses) where the dominant purpose of the communication is to prepare for pending or contemplated litigation.

- **"Without prejudice"** communications between the parties and/or their lawyers - i.e. negotiations genuinely aimed at a settlement.

Without prejudice communications can be conversations or documents, e.g. letters, reports, statements, records of events or conversations and they may be recorded or stored on electronic or other media. However, none may be relied on in evidence at trial by the opposing party, unless privilege is "waived" by the party or parties entitled to benefit from it.

Thus all parties to litigation may rest assured that they can communicate freely with their legal advisors (e.g. as to the strengths and weaknesses of their case) without the contents of those communications being proved against them in court at a later date. They can also rest assured that they can attempt to settle litigation without that fact and the detail of any offers or negotiations being made known to the court at a later date (if settlement is not achieved) and possibly influencing the court in its decisions. As always, there are exceptions to this general rule.

3.5 Hearsay evidence

In the Civil Evidence Act 1995, Section 1(2) hearsay evidence is defined as:

> "A statement made (1) otherwise than by a person while giving oral evidence in the proceedings, (2) which is tendered as evidence of the matters stated."

The figures do not appear in the Act. We have inserted them to emphasise that there are two parts to the definition and that both parts are important. Every time a witness starts to say "And then I/he said...." and every time a witness wishes to produce a document, potentially this could be hearsay evidence. To decide whether it is or not, the second part of the definition must be considered: why is the evidence being tendered; what is it meant to prove? Again, this requires you to have identified both the legal and factual issues in the case very clearly.

For example, if a witness in the witness box states 'Mr. Smith told me that he saw pink pigs flying past the window', you cannot determine whether this evidence is hearsay or not until you know more about the nature of the case. Why does the advocate wish to extract this piece of evidence from the witness? Is it because the advocate is trying to prove that pigs can fly (which means the evidence is hearsay - pigs flying past the window being the 'matters stated'). Alternatively, is the advocate, by inference from proving only what Mr. Smith said, trying to prove that he was intoxicated (so that the evidence is not hearsay)?

Section 1 of the Civil Evidence Act 1995 provides that hearsay evidence <u>is</u> admissible in civil proceedings. However, there are procedural requirements concerning the admission of hearsay evidence at trial. Generally, notice of a party's intention to use hearsay evidence must be given to the opponent at a prescribed point in the litigation process. If it is not, or if it is given late, then the court may take this into account in deciding how much reliance to place on that evidence. In any event, hearsay evidence has less credibility than direct evidence and indeed the Civil Evidence Act provides a list of factors that the court must take into account in deciding what weight to give to a piece of hearsay evidence adduced before it (e.g. whether it was practicable and

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reasonable for the person whose comment is being reported to attend court to give evidence himself.)

Thus, the distinction between evidence that is hearsay and evidence that is not cannot be ignored by civil litigators. If you have not previously studied the law of evidence, we suggest you go back to the definition above and then to the example given to ensure you have understood how to identify whether or not a particular piece of evidence is hearsay. This can be tricky at first so do persevere!

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DOCUMENT 3

Introduction to the Civil Procedure Rules

1 The Fundamental Purpose of Civil Procedure

Why are rules governing civil procedure needed? They are designed to ensure that disputes that need to be resolved by the civil courts are suitably prepared for trial.

As a bare minimum, it would simply be necessary to ensure that the relevant parties were brought before a tribunal which would hear their respective cases and give judgment. However, such a system would be rough justice. In particular, neither party would know in advance the case he or she had to meet and so would be unable to prepare suitable evidence for the tribunal or to decide whether to concede some or all of their opponent's case.

Thus, a system where, before a case goes to trial, all parties must know what allegations their opponents are making against them and must have the opportunity to prepare suitable evidence in order to meet those allegations, would seem fairer and more efficient. The fundamental purpose of the Civil Procedure Rules (CPR) is to meet these objectives.



2 The Wider Objectives of the Civil Procedure Rules

The current rules of civil procedure are the **Civil Procedure Rules 1998** (the "CPR"). They came into force on 26th April 1999 after an extensive review of the pre-existing rules of court conducted by Lord Woolf. He concluded that the pre-existing system was too slow and too expensive. There were at this time two separate sets of court rules: one for the Supreme Courts (now known as the Senior Courts - the High Court and above) and one for the county courts. This was unnecessarily complicated.

The ways in which Lord Woolf recommended that this be done were in essence:

- To bring about a culture of openness in dispute resolution.
- To make litigation the last resort rather than a first option in the process of dispute resolution.
- To mitigate the economic pressures that a stronger party was able to bring to bear on a weaker one.
- To introduce an overriding objective into the litigation process which would remove from the parties the ability to control the pace of the litigation and the manner in which it was conducted and to give the court responsibility for active case management.

In April 2013 further changes to the rules came into effect (known as the "Jackson" reforms. A key focus of the changes is to increase the importance of keeping the costs

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of litigation under control. Judges have greater powers to impose sanctions and require costs information from parties as cases progress.

3 The Structure of the Civil Procedure Rules (CPR)

The CPR are organised into **Parts**, each one dealing with a distinct topic and being sub-divided into Rules.

The Parts are supported by **Practice Directions** (PDs) which add detailed practical guidance to the rules.

There are also a number of **Pre-Action Protocols.** These are guidelines for the pre-litigation conduct of the parties in particular types of dispute.

In addition, there is a **Practice Direction on Pre-Action Conduct** which describes the conduct the court will normally expect of the prospective parties to litigation prior to the issue of any civil proceedings. One of the principal aims of the Practice Direction on Pre-Action Conduct and the specific Pre-Action Protocols is to encourage the parties to a dispute to settle it without the need to resort to court proceedings.

There are also numerous forms, some of which must be used and some of which may be adapted to suit the detail of a particular case.

4 How to find and use the CPR and associated materials

You can find the rules online as part of the Ministry of Justice website via either of the following:

http://www.justice.gov.uk/courts/procedure-rules/civil
http://www.hmcourts-service.gov.uk/

Her Majesty's Court Service is responsible for the day to day running of the courts on behalf of the Ministry of Justice. Amongst other things, the website contains details of court fees, electronic copies of court forms and contact details for courts.

ACTIVITY: Go to the Ministry of Justice website and locate the CPR. Use the short tasks below to practise finding your way around them. Keep a note of your answers – they will be useful when you start the course!

- **Locate the Part of the CPR which sets out the Overriding Objective. Note what it is about. This is a very important part of the CPR. Why do you think that is?**
- **Now locate the Practice Direction which deals with Pre-Action Conduct. This practice direction includes guidance to the parties about use of Alternative Dispute Resolution. What methods of ADR does it suggest that parties might use? What sanctions does it suggest might be applied to a party who doesn't try to use another method to resolve a dispute before bringing a claim?**

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- **Look at CPR Part 24. What test would a Claimant have to satisfy to persuade a court to enter judgment at an early stage? How would you refer to the rule which sets out this test? (Note that the table a bit further down within these notes will help you with this.)**

The rules and associated materials are updated regularly and you can be assured that the Ministry of Justice site displays the current version. It is also the best place to obtain details of recent and forthcoming changes to the CPR.

Practitioners' Guides

Practitioners' guides supplement the CPR with a detailed commentary contributed by a panel of editors. The commentary provides further guidance as to the interpretation of the rules including an outline of the most relevant case law and extracts from those statutes and statutory instruments most commonly referred to in court proceedings.

One example is Sweet & Maxwell's "Civil Procedure" known as the **White Book**. An electronic version of the White Book is published on Westlaw UK, to which you will have access via UWE library services once you have started the course.

There are a number of "rivals" to the White Book, all of which provide the complete CPR plus a commentary, for example Butterworth's 'The Civil Court Practice' (the Green Book), Blackstone's 'Civil Court Practice' (the Red Book) and Jordan's 'The Civil Court Service' (the Brown Book). The Green Book is available electronically on Lexis Library.

Correct References

As a civil litigator, you need both to be able to find the information you require from the CPR and to communicate it accurately. Whether you are preparing a memo for your supervisor in answer to a research query, or making a submission in court, it will inspire confidence and avoid confusion if you refer to provisions correctly.

Provision	**Comments**
"Part 3"	This refers to the **whole** of Part 3 of the CPR, for example "Part 3 deals with the Court's case management powers".
"Rule 3.3" or "CPR 3.3"	When referring to a particular provision within a Part it is customary to refer to it as shown. These terms should be used in preference to "Part 3.3"; "section 3 of Part 3"; "paragraph 3 of Part 3" or "clause 3 of Part 3".
32 PD 18.2 Or "paragraph 18.2 of the Practice Direction to Part 32"	These are 2 ways of referring to a particular paragraph of a Practice Direction, as shown. Please be careful not to refer to a paragraph in a Practice Direction as a rule, so, for example, Rule 18.2 of PD 32 is incorrect.

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Provision	Comments
Paragraph 4 of the Pre-action Protocol for Personal Injury Claims	This is the correct way to refer to a provision in a pre-action protocol or in the Practice Direction on Pre-Action Conduct.
Section II of the Practice Direction on Pre-Action Conduct	A few Parts and Practice Directions are divided into sections and if you are referring to the entire section, it is appropriate to use that term. Otherwise “section” is usually inappropriate.

5 What stages would you expect a fair litigation process to involve?



The purpose of Civil Procedure is to provide a process that will resolve disputes in a way that deals fairly with all the parties. Using your common sense and background knowledge, can you identify the stages or steps you think would be necessary? In answering this you may find it useful to place the stages you identify on a timeline like this…



Make sure you have clearly identified the **purpose** of each of your stages. When you are ready, please move on to the next page to see the suggested answer.

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The Stages of Litigation

Stage	Pre-action stage	Start of proceedings	Giving details of claim to the Defendant	Defendant's response	Exchange of evidence	Trial	Enforcement
Purpose	To explore settlement without the need for proceedings	The court and the parties need to know when court proceedings have commenced, for example in case the end of the limitation period is near.	The Defendant is entitled to know what the allegations against him/ her are.	The Defendant will need to say whether the claim is disputed and, if so, why. This and the previous stage should enable the Claimant and the Defendant to identify precisely what issues are in dispute.	This enables both parties to understand the detail of the case their opponent will present at trial. This facilitates settlement and avoids "trial by ambush".	To enable all the relevant evidence to be heard, so that a judge can reach a decision as to whether the claim succeeds.	To ensure that the Claimant receives any money that the Defendant has been ordered to pay.

That's all to get you started! The Civil Litigation team look forward to meeting you in Study Unit 1. We hope you will find this course an enjoyable part of your LPC studies.

Emma Whewell (Civil Litigation Subject Head) June 2016

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