

AND the Claimant claims:

- (1) Damages.
- (2) Interest thereon pursuant to statute as aforesaid.

**Claim by personal representative for death of aircraft passenger**

5-C6

1. The Claimant is the widow and administratrix of the estate of CD deceased. Letters of Administration were granted on [insert]. Accordingly the Claimant claims in this action on behalf of the estate of the deceased pursuant to the Law Reform (Miscellaneous Provisions) Act 1934 and further on behalf of the dependants of the deceased pursuant to the provisions of the Fatal Accidents Act 1976. The Claimant lists in schedule 1 of these Particulars of Claim the identity of the dependants on whose behalf she is claiming in this action [insert in schedule 1 those dependants who fall within s.2(4) of the Fatal Accidents Act 1976].

2. The Defendant is and was at all material times carrying on business as an international carrier by air.

3. By a contract between the deceased and the Defendant, the defendant agreed to carry the deceased by air from London to Ontario. The contract was contained in or evidenced by a ticket with reference number.....

4. The said carriage of the defendant was "international carriage" within the meaning of Article 1 of the Warsaw Convention as amended by the Hague Protocol ("the Convention"), as set out in Schedule 1A to the Carriage by Air Act 1961. Or

[4. The said carriage of the Claimant was "international carriage" within the meaning of Article 1 of the Montreal Convention ("the Convention") as inserted and set out in Schedule 1B to the Carriage by Air Act 1961.]

5. At about [time] [date] the aircraft crashed. The deceased died as a result of the crash.

6. As a result of the matters aforesaid, the Claimant and the dependants of CD have suffered damage.

Particulars

(i) Loss of financial support: [insert details of the deceased's age, and earnings. State level of financial support deceased provided to Claimant and dependants.] By reason of the death of the deceased, the Claimant and the dependants have lost the support provided by the deceased.

(ii) Special Damage: [insert any funeral expenses; medical expenses; other special damages.]

7. By reason of Article 17 of the Convention the Defendant is liable to the Claimant for the Claimant's said loss and damage.

8. Further, the Claimant claims interest pursuant to [s.35A of the Senior Courts Act 1981] [s.69 of the County Courts Act 1984] on the said sum or damages found to be due to the Claimant at such rate and for such period as the Court thinks fit.

AND the Claimant claims:

- (1) Damages on behalf of the estate under the Law Reform (Miscellaneous Provisions) Act 1934.
- (2) Damages on behalf of the dependants under the Fatal Accidents Act 1976.
- (3) Damages for bereavement under s.1A of the Fatal Accidents Act 1976.
- (4) Interest thereon pursuant to statute as aforesaid.

**Claim by passenger for lost or damaged baggage during carriage by air**

1. The Defendant is and was at all material times carrying on business as an international carrier by air. 5-C7

2. By a contract between the Claimant and the Defendant, the defendant agreed to carry the Claimant by air from London Heathrow to Amsterdam. The contract was contained in or evidenced by a ticket with reference number.....

3. The said carriage of the Claimant was "international carriage" within the meaning of Article 1 of the Warsaw Convention as amended by the Hague Protocol ("the Convention"), as set out in Schedule 1A to the Carriage by Air Act 1961.

4. On [insert date] at Heathrow airport, the Claimant checked in as registered baggage for his flight with the Defendant two suitcases. The Defendant accepted the suitcases and took charge of them.

5. On arrival at Amsterdam the Claimant observed that one of his suitcases had failed to arrive, and subsequently disappeared, whilst the other had been pierced so as to leave a hole in the side. Subsequently, the Claimant discovered that several items had been taken from this suitcase.

6. By a letter sent two days after his arrival in Amsterdam, the Claimant gave the Defendant notice of the loss of his suitcase. As to the other suitcase, the Claimant gave notice of the damage to it, as well as that some of the contents were missing.

7. By reason of Article 18 of the Convention the Defendant is liable to the Claimant for the Claimant's said loss and damage to his baggage.

8. The Claimant will rely on Article 25 of the Convention to contend that with regard to the loss of his suitcase the Defendant is not entitled to rely on the limits of liability imposed by Article 22 of the Convention. In particular the Claimant will contend that: (1) the fact that the suitcase could not be located subsequently leads to the inference that it was stolen; and (2) the loss of his suitcase whilst in the charge of the Defendant leads to the inference that the suitcase was stolen by a servant or agent of the Defendant who was entrusted with the care of the suitcase.

Particulars

[Insert full particulars of the facts and matters in support of there being a theft; or conduct which amounts to an act or omission done with the intent to cause damage, or recklessly and with knowledge that damage would probably result.]

9. Further, the Claimant claims interest pursuant to [s.35A of the Senior Courts

Act 1981] [s.69 of the County Courts Act 1984] on the said sum or damages found to be due to the Claimant at such rate and for such period as the Court thinks fit.

AND the Claimant claims:

- (1) Damages.
- (2) Interest thereon pursuant to statute as aforesaid.

In respect of a claim under the Montreal Convention repeat as previous form save that the identified paragraphs should be amended as follows:

- (3) The said carriage of the Claimant was "international carriage" within the meaning of Article 1 of the Montreal Convention ("the Convention") as inserted and set out in Schedule 1B to the Carriage by Air Act 1961.
- (7) By reason of Article 17(2) of the Convention the Defendant is liable to the Claimant for the Claimant's said loss and damage to his baggage.
- (8) Replace the reference to Article 25 with Article 22(5). Replace the reference to Article 22 in the third line with a reference to Article 22(2).

**Claim by cargo owner for damages for loss of, or damage to, cargo**

5-C8

1. By a contract of carriage by air ("the agreement") made between the Claimant and the Defendant contained in and/or evidenced by the Defendant's Air Waybill No. [insert] dated [insert] in which the Claimant was named as consignor and ZY was named as consignee, the Defendant agreed for reward to carry a consignment comprising the items listed below ("the consignment") by air from London to Frankfurt.
2. The consignment comprised the items listed below:  
[insert items of consignment].
3. The said carriage by air was international carriage within the meaning of the Warsaw Convention as amended by the Hague Protocol in 1955 and given effect in English law by the Carriage by Air Act 1961 (the Convention). The Convention is set out in the Schedule 1A to the said Act.
4. At all material times the Claimant was the owner of the consignment.
5. On or about [insert date] the consignment was delivered to the Defendant at London Gatwick airport, thereby into the charge of the Defendant as carrier within the meaning of Article 18 of the Convention.
6. During the carriage by air the consignment was lost within the meaning of Article 18 of the Convention.
7. By reason of Article 18 of the Convention the Defendant is liable for the damage caused as a result of the loss of the consignment.
8. Further, the limits of liability specified in Article 22(2) of the Convention do not apply since the loss of the consignment resulted from one or more servants or agents of the Defendant, each acting within the scope of his employment done with intent to cause damage within the meaning of Article 25 of the Convention.

Particulars

[Insert particulars of conduct done with intent to cause damage.]

9. By reason of the loss of the consignment the Claimant suffered loss and damage in the amount of the market value as set out above in paragraph 2 above.
10. The Claimant is entitled to interest on damages pursuant to s.35A of the Senior Courts Act 1981 at such rate and for such period as the Court shall consider to be just.

AND the Claimant claims:

- (1) Damages.
- (2) Interest thereon pursuant to statute as aforesaid.

In respect of a claim under the Montreal Convention repeat as previous form, save for the following changes

- (3) The said carriage of the Claimant was "international carriage" within the meaning of Article 1 of the Montreal Convention ("the Convention") as inserted and set out in Schedule 1B to the Carriage by Air Act 1961.
- (4) Delete entire paragraph, as it is not possible to escape the financial limit of liability.

**Claim by cargo owner for delay**

5-C9

1. By a contract of carriage by air ('the agreement') made between the Claimant and the Defendant contained in and/or evidenced by the Defendant's Air Waybill No. [insert] dated [insert] in which the Claimant was named as consignor and ZY was named as consignee, the Defendant agreed for reward to carry a consignment comprising the items listed below ('the consignment') by air from London to Singapore. The air waybill was marked with an endorsement that the consignment would be delivered on....20.....
2. The consignment comprised fresh flowers which are listed below more fully:  
[insert further particulars of consignment].
3. The said carriage by air was international carriage within the meaning of the Warsaw Convention as amended by the Hague Protocol in 1955 and given effect in English law by the Carriage by Air Act 1961 (the Convention). The Convention is set out in the Schedule 1A to the said Act.
4. At all material times the Claimant was the owner of the consignment.
5. On or about [insert date] the consignment was delivered to the Defendant at London Heathrow airport. The consignment was due to arrive in Singapore the following day, on....20..... In fact the consignment did not arrive in Singapore until one week after the expected date of arrival.
7. As a result of the delayed arrival the consignment suffered damage in that some of the flowers had wilted and others had waned. Accordingly the consignment had suffered damage as a result of the delay in the carriage by air.
8. By reason of Article 19 of the Convention the Defendant is liable for the damage caused as a result of the delay.
9. Further the limits of liability specified in Article 22(2) of the Convention

do not apply since the loss of the consignment resulted from one or more servants or agents of the Defendant, each acting within the scope of his employment done with intent to cause damage within the meaning of Article 25 of the Convention.

**Particulars**

[Insert particulars of conduct done with intent to cause damage.]

10. By reason of the loss of the consignment the Claimant suffered loss and damage in the amount of the market value as set out above in paragraph 2 above.

11. The Claimant is entitled to interest on damages pursuant to s.35A of the Senior Courts Act 1981 at such rate and for such period as the Court shall consider to be just.

AND the Claimant claims:

- (1) Damages.
- (2) Interest thereon pursuant to statute as aforesaid.

In respect of a claim under the Montreal Convention repeat as previous form save that the identified paragraphs should be amended as follows:

- (3) The said carriage of the Claimant was "international carriage" within the meaning of Article 1 of the Montreal Convention ("the Convention") as inserted and set out in Schedule 1B to the Carriage by Air Act 1961.
- (9) Replace the reference to Article 22 in the first line with Article 22(1).  
Replace the reference to Article 25 in the final line with Article 22(5).

**Defence of exceptional circumstances to claim for compensation for delay under EU Regulation 261/2004**

5-C10

- 1. The Defendant admits that it agreed to carry the Claimant on flight [XYZ-123] from London to Sydney on [...].
- 2. The Defendant further admits that Regulation 261/2004 ("the Regulation") is applicable to the circumstances of this case. The Defendant will refer to the Regulation for its relevant terms. In particular Article 5(3) provides that the Defendant shall not be obliged to pay compensation in accordance with Article 7, if it can prove that the cancellation was caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.
- 3. The Defendant further admits that on [...] when the Claimant tried to check in he was informed that his flight had been cancelled and he was offered to be carried on flight [XYZ-456] on the following day. [State reason for cancellation: e.g. Flight XYZ-123 was cancelled because the air space over Europe had been closed on account of the presence of a cloud of volcanic ash in the atmosphere]
- 4. The Defendant admits that the Claimant has made a claim for compensation under Article 7 of the Regulation for payment of Euro 600. It is denied that the Defendant is liable to pay the Claimant any compensation, because the flight was

cancelled due to [insert facts, e.g. the presence of volcanic ash in the atmosphere which closed all air space over Europe]. These were extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken. Accordingly, Article 5(3) of the Regulation is engaged.

5. The Defendant admits that the Claimant has made a claim for care costs pursuant to Article 8 of the Regulation caused by the cancellation but requires the Claimant to prove these costs as he has not provided any evidence to substantiate the costs claimed.

**Defence alleging all necessary measures taken or impossible to be taken to avoid damage occasioned by injury to passenger**

5-C11

- 1. The Defendant admits that it carried the Claimant from London to Paris, and that the carriage was "international carriage" within the meaning of Article 1 of the Warsaw Convention as amended by the Hague Protocol ("the Convention").
- 2. The Defendant contends that [set out relevant facts concerning the incident which is the subject of the claim]. The Defendant admits that an accident occurred within the meaning of Article 17 of the Convention.
- 3. The Defendant, its servants or agents took all necessary measures to avoid the damage alleged to have been suffered by the Claimant. Alternatively, it was impossible for the Defendant, its servants or agents to take such measures to avoid the alleged damage.

**Particulars**

[State the facts relied upon to support the above contention.]

- 4. By reason of Article 20 of the Convention it is denied that the Defendant is liable to the Claimant for the alleged damage.
- 5. The Defendant is unable to admit or deny, but requires the Claimant to prove the injuries, loss or damage alleged and causation thereof.

[Statement of truth]

**Defence alleging contributory negligence**

5-C12

- 1. [Insert details about carriage and events.]
- 2. The damage which the Claimant has allegedly sustained was caused wholly or contributed to by the negligence of the Claimant.

**Particulars**

[Set out full facts in support of Claimant's negligence.]

- (2) £[ ] contractual interest alternatively interest under [s.69 of the County Courts Act 1984] [s.35A of the Senior Courts Act 1981] accrued from [date when each sum became due] to the date of the issue of the claim and continuing at the daily rate of £[ ] until judgment.  
[or, where appropriate]
- (2) Interest under the Late Payment of Commercial Debts (Interest) Act 1998 in the sum of £[ ], calculated at an annual rate of x% from [date when each sum became due] to the date of the issue of the claim, and continuing at the daily rate of £[ ] until judgment.  
[and, for contracts made after August 6, 2002]
- (3) Sum payable under s.5A of the Late Payment of Commercial Debts (Interest) Act 1998: £[ ].

[Statement of truth]

#### Claim by agent for wrongful termination and compensation

21-E6 Particulars of claim to be attached in Claim Form N1 or served subsequently.

1. By a written agreement ("the agency agreement") made on the [date], the Defendant appointed the Claimant for an indefinite period as its sole agent for the sale of [identify the goods] ("the goods") in [identify geographical area]. A copy of the agency agreement is annexed to this Claim Form.
2. Pursuant to the agreement, the Claimant acted as a self-employed sales agent with continuing authority to negotiate and conclude the sale of the goods in the name of the Defendant. The Claimant was thereby a commercial agent within the meaning of the Commercial Agents (Council Directive) Regulations 1993, ("the Regulations"). The relationship between the Claimant and the Defendant was governed by the Regulations.
3. Regulation 15 provides that, for the third and any subsequent years after the commencement of the agency agreement, the agreement could only be determined by 3 months' notice served pursuant to regulation 22.
4. In breach of regulation 15, the Defendant served a notice upon the Claimant on [date], a copy of which is annexed to this Claim Form, which purported to terminate the agency agreement on January 1, 2000.
5. By reason of the wrongful termination, the Claimant is entitled to the commission that he would have earned during the period [date] to [date]. During the 12-month period ending on [date], the average monthly commission earned by the Claimant was £[ ]. The Claimant seeks damages of £[ ].
6. Pursuant to regulation 17, on termination of the agency agreement, the Claimant was entitled to compensation for damage suffered by him.
7. In [date], for the proper performance of the agency agreement, and on the advice of the Defendant, the Claimant installed a new telephone system at his premises at a cost of £[ ]. The cost of the installation was financed by a loan repayable over a period of x months from [date].

8. By reason of the termination of the agency agreement, the Claimant is unable to apply payments of commission to repaying the monthly installments and has thereby suffered damage for which he is entitled to be compensated.
9. The Claimant is entitled to interest pursuant to [s.69 of the County Courts Act 1984] [s.35A of the Senior Courts Act 1981] on all sums found due at such rate and for such period as the Court sees fit.

The Claimant therefore claims:

- (1) Under paragraph 7, damages of £[ ].
- (2) Compensation pursuant to regulation 17 of the Commercial Agents (Council Directive) Regulations 1993.
- (3) Interest pursuant to [s.69 of the County Courts Act 1984] [s.35A of the Senior Courts Act 1981].

[Statement of truth]

#### Claim by Principals against Agents

##### Claim by principal for sums due

Particulars of claim to be attached in Claim Form N1 or served subsequently. 21-E7

1. The Claimant is the owner of a dwelling-house ("the premises") known as [identify the property] which is divided into six self-contained flats.
2. By an agreement made in or about [date], the Defendant agreed to act as the managing agent of the premises. The agreement is contained in and/or evidenced by an exchange of correspondence between the Claimant and the Defendant, the letters in which are dated [date], [date] and [date] respectively. Copies of the correspondence are annexed to this Claim Form.
3. As part of its duties as managing agent, the Defendant was required to collect rents and payments made into slot meters for gas, electricity and telephone charges and to account to the Claimant for them, subject to the payment of costs and disbursements expended upon the premises and deduction of commission at the rate of x% of the rents received.
4. During the period [date] to [date], the Defendant received rents in the sum of £[ ] as well as cash collected from meters. The Defendant has accounted to the Claimant for the sum of £[ ] but has failed to provide a proper account of how the sum is calculated or of what sums he has received or of what sums have been expended in costs and disbursements.
5. The Claimant is thereby entitled to an account of rents received less commission, cash collected and other amounts paid to him in the course of managing the property and all sums paid out by him which have related to the premises.
6. The Claimant is entitled to interest on all sums found due to him at such rate as the Court deems just pursuant to [s.69 of the County Courts Act 1984] [s.35A of the Senior Courts Act 1981].

The Claimant therefore claims:

- (1) An account of all sums received by and paid to the Defendant in the course of managing the premises.
- (2) An order that the Defendant do pay the Claimant all sums found due to him upon the taking of the account.
- (3) Interest pursuant to [s.69 of the County Courts Act 1984] [s.35A of the Senior Courts Act 1981].

[Statement of truth]

#### Claim by principal for damages for breach of instructions

21-E8 *Particulars of claim to be attached in Claim Form N1 or served subsequently.*

1. The Claimant is the owner of a dwelling-house ("the premises") known as [identify the property] which is divided into six self-contained flats.
2. By a written agreement made on [date], the Defendant agreed to act as the managing agent of the premises. A copy of the agreement is annexed to this Claim Form.
3. In the course of a telephone call made by the Claimant to the Defendant in or about [date], as part of his duties under the agreement to manage the premises, the Claimant instructed the Defendant to effect insurance on the premises to the full extent of the cost of reinstating them in the event of their destruction by fire and thereafter to renew the insurance annually when the premium fell due.
4. Pursuant to his instructions, the Defendant arranged insurance for the year commencing [date] but thereafter failed to renew the same when the premium fell due on or about [date]. The failure to renew was a breach of the agency agreement.
5. On [date], at a time when the premises were uninsured, the premises were damaged by fire. Full particulars of the costs of reinstating the premises were sent to the Defendant under cover of a letter dated [date], a copy of which is annexed to this Claim Form, and are estimated at £[ ].
6. By reason of the Defendant's failure to effect and maintain insurance in accordance with the agency agreement and the Claimant's instructions to do so, the Claimant has suffered loss and damage, namely, the cost of reinstatement in the estimated sum of £[ ].
7. The Claimant is entitled to interest pursuant to [s.69 of the County Courts Act 1984] [s.35A of the Senior Courts Act 1981] on all sums found due at such rate and for such period as the Court sees fit.

The Claimant therefore claims:

- (1) Damages.
- (2) Interest pursuant to [s.69 of the County Courts Act 1984] [s.35A of the Senior Courts Act 1981].

[Statement of truth]

#### Claim by principal based on receipt of secret profits, etc.

*Particulars of claim to be attached in Claim Form N1 or served subsequently.* 21-E9

1. The Claimant is an hotelier.
2. By a written agreement made on the [date] the Claimant appointed the Defendant as its agent for purchases of [identify the goods]. A copy of the agency agreement is annexed to this Claim Form.
3. Pursuant to the agreement, the Defendant acted as a self-employed agent with continuing authority to negotiate and conclude purchases in the name of the Claimant. The Defendant was thereby a commercial agent within the meaning of the Commercial Agents (Council Directive) Regulations 1993, ("the Regulations"). The relationship between the Claimant and the Defendant was governed by the Regulations.
4. By regulation 4, a duty was imposed upon the Defendant to act dutifully and in good faith towards the Claimant.
5. In performing the agency agreement, the Defendant was required to select goods that were the most suitable for the needs of the Claimant. The Defendant as an agent undertaking to act for the Claimant in circumstances giving rise to a relationship of trust and confidence owed him a fiduciary duty to prefer his principal's interests to those of his own. The duty included a duty of loyalty and to act in good faith and not to make a profit out of his trust, nor place himself in a position where his duty and his interest conflicted, nor to act for his own benefit or for that of a third person without the informed consent of his principal.
6. By a series of contracts made between the Defendant on behalf of the Claimant and PQ Limited, the Defendant purchased quantities of [identify goods] for use in the Claimant's hotels.
7. Unknown to the Claimant, PQ Limited had agreed with the Defendant to pay him commission at the rate of x% on such sales as the Defendant negotiated with it pursuant to the agency agreement.
8. The Claimant has paid PQ Limited sums totalling £[ ] for the supply of furnishing materials. At the rate of x%, the Defendant will have received £[ ].
9. The commission so agreed was a secret profit and was paid to the Defendant in breach of the fiduciary duty he owed the Claimant.
10. The commission was also paid in breach of the Defendant's duty of good faith owed pursuant to regulation 4.
11. The Defendant is therefore liable to account to the Claimant for all sums paid to him by PQ Limited by way of commission or otherwise.
12. Further, the Claimant has suffered loss and damage and/or the commission so paid is money had and received by the Defendant to the Claimant's use and the Claimant seeks restitution.
13. The Claimant is entitled to interest pursuant to [s.69 of the County Courts Act 1984] [s.35A of the Senior Courts Act 1981] on such sums found due at such rate and for such period as the Court sees fit.

The Claimant therefore claims:

- (1) An account of all sums received from PQ.
- (2) An order for payment to the Claimant of all sums found to have paid out upon the taking of the account and/or damages for breach of contract.
- (3) Interest pursuant to [s.69 of the County Courts Act 1984] [s.35A of the Senior Courts Act 1981].

[Statement of truth]

#### Defences of the Agent

##### Defence that the defendant has fully accounted/settled the account

**21-E10** *To be entered as s.3 of Form N9B or attached as a separate document.*

1. By an account ("the account") enclosed under cover of a letter dated [date] sent by the Defendant to the Claimant prior to the issue of these proceedings, a copy of which is annexed to this Defence, the Defendant accounted to the Claimant for all sums due to him.
2. On [date] the Defendant paid the Claimant the sum of £[ ] in satisfaction of all sums due to him and there are no further amounts due from the Defendant to the Claimant.
3. The Defendant therefore denies that he is liable to account to the Claimant as alleged or at all.

*[If the defence is contained in a separate document attached to the Form N9B]*

[Statement of truth]

##### Defence to a claim by principal based on receipt of secret profits, etc.

**21-E11** *To be entered as s.3 of Form N9B or attached as a separate document.*

1. It is denied that the Defendant was a commercial agent within the meaning of the Commercial Agents (Council Directive) Regulations 1993 and thereby owed the Claimant a duty to act dutifully and in good faith.
2. It is denied that the agreement between the Claimant and the Defendant gave rise to a relationship of trust and confidence whereby the Defendant owed the Claimant a fiduciary duty as alleged or at all. It is expressly denied that the Defendant was not permitted to benefit from the payment of commission paid to him by suppliers.
3. The agreement between the Claimant and the Defendant set out in paragraph 2 of the Particulars of Claim was subject to an implied term in accordance with the custom and usage in the trade that the Defendant was entitled to receive com-

mission from suppliers whose goods were purchased by him as the agent of the Claimant.

4. Further, the Claimant knew that the Defendant was to receive commission from PQ Limited in that invoices in which the payment of commission was set out were sent to the Claimant when refunds were made. In the premises, the Claimant agreed to vary and/or waived such term as the contract may have had restricting the Defendant's right to receive the payment of commission.

5. It is admitted that the Defendant has received commission from PQ Limited in the sum of £[ ] but denied that this amounted to a breach of duty or was a secret profit or that the Defendant is liable to account to the Claimant for the same.

*[If the defence is contained in a separate document attached to the Form N9B]*

[Statement of truth]

##### Defence denying agency and the application of the 1993 Regulations

*To be entered as s.3 of Form N9B or attached as a separate document.*

**21-E12**

1. It is denied that the contract set out in paragraph 2 of the Particulars of Claim was a contract of agency or that the Defendant was, for the purposes of the agreement or at all, the agent of the Claimant.

2. The Defendant was employed by the Defendant as a full-time sales representative. It is denied that he was a self-employed sales agent with continuing authority to negotiate and conclude sales and purchases for or on behalf of the Claimant. In the premises, he was not a commercial agent within the meaning of the Commercial Agents (Council Directive) Regulations 1993 and those Regulations did not govern the relationship between the Claimant and the Defendant.

*[If the defence is contained in a separate document attached to the Form N9B]*

[Statement of truth]

#### Defences of the Principal

##### Defence denying the provision of services

*To be entered as s.3 of Form N9B or attached as a separate document.*

**21-E13**

1. Pursuant to the agency agreement set out in paragraph 2 of the Particulars of Claim, the Claimant was entitled to receive commission in the event of the Defendant entering into a contract for the sale of a [identify the goods] with the supplier, XY Limited.

2. Although ready and willing to do so, the Defendant did not enter into a

## Particulars

- (1) Paragraph 1 above is repeated.
- (2) Sugar and Spice is the only sweet shop in Blanktown High Street.
- (3) The Claimant is red-headed and frequently works on the counter at Sugar and Spice.
- (4) The above facts are widely known among those who reside in and around Blanktown.
5. In their natural and ordinary meaning the said words meant and were understood to mean that the Claimant deliberately short-changed his customers and was accordingly guilty of theft.
6. In consequence the Claimant's reputation has been seriously damaged, and he has suffered considerable distress and embarrassment.
7. Further in consequence the Claimant has suffered a general loss of business.

## Particulars

Turnover in three months before publication

Turnover in month after publication

£[ ]  
£[ ]

8. In aggravation of damages the Claimant will rely on the letter from the editor of the Blanktown Herald dated [date] to the Claimant's solicitors stating that "The Blanktown Herald does not apologise to swindlers."

AND the Claimant claims damages, including aggravated damages, for libel.

**Claim by company and director for damages for libel published in national newspaper—claim for exemplary damages—claim for expenses incurred in mitigation of damage—claim for injunction**

- 37-13
1. The First Claimant company is and was at all material times the owner of factories at [ ] and carries on the business of manufacturing ball-bearings. The Second Claimant is and was at all material times the Managing Director of the First Claimant company.
  2. The First Defendant is the editor and the Second Defendants are the printers and publishers of the Daily Scare, a national newspaper with a very substantial circulation throughout the jurisdiction.
  3. On the front page of the issue of the Daily Scare dated [date], the Defendants and each of them printed and published or caused to be printed and published the following words defamatory of the Claimants and each of them:  
[Here set out verbatim the words complained of.]
  4. In their natural and ordinary meaning the said words meant and were understood to mean:
    - (1) that the First Claimant operates factories which it knows are unsafe and dangerous;
    - (2) that the Second Claimant improperly allows the First Claimant to operate factories which he knows are unsafe and dangerous;

- (3) that the Claimants deliberately or recklessly neglect the safety and welfare of their work-force.
5. In consequence the First and Second Claimants' reputations have been seriously damaged and the Second Claimant has suffered considerable distress and embarrassment.
6. The Claimants will rely on the following facts and matters in support of their claim for damages, including exemplary damages.

## Particulars

- (1) The article complained of was published on the front page under the banner heading "Exclusive".
- (2) On [date] the Claimants supplied to [ ] of the Second Defendants at his request an independent report by [ ], being inspectors and surveyors specialising in factory premises, which confirmed that the First Claimants' factories were safe and satisfied all statutory regulations. The Defendants made no reference to this report in the article complained of and falsely stated that the Claimants had declined to comment on the allegation.
- (3) The primary source for the article complained of was AB, a former employee of the Claimants who, as the Defendants knew, had been dismissed by the Claimants for theft. AB was paid £5,000 for the story by the Second Defendants.
- (4) In the premises the Defendants and each of them published or caused to be published the said words knowing they were false or recklessly, not caring whether they were true or false, having calculated that the benefit to them in terms of increased circulation would outweigh any compensation payable to the Claimants.
7. Further to counteract the adverse effects of the article complained of and to refute its allegations the First Claimant placed advertisements in the Daily Trumpet and the Sunday Bugle and thereby reasonably incurred the following expenses in mitigation of damage.

## Particulars

Cost of advertisement in the Daily Trumpet

£[ ]

Cost of advertisement in the Sunday Bugle

£[ ]

8. The Claimants claim interest pursuant to s.35A of the Senior Courts Act 1981 on the sums claimed under paragraph 7 above for such period and at such rate as the Court may determine.
9. Unless restrained by this Honourable Court the Defendants and each of them will further publish or cause to be published the said or similar words defamatory of the Claimants and each of them.

AND the Claimants claim:

- (1) Damages for libel including exemplary and special damages.
- (2) Interest pursuant to statute on the sum claimed in paragraph 7 above at [ ] per cent from [date of payment] until [date of Claim] and thereafter at the same rate until judgment or sooner payment.
- (3) An injunction restraining the Defendants and each of them, whether by themselves, their servants, or agents or otherwise, from further publishing or causing to be published the said or similar words defamatory of the Claimants and each of them.

**Claim for damages for libel published in radio broadcast—foreign publication**

37-14

1. The Claimant is and was at all material times a well-known actor.
2. The First Defendant is a film and drama critic and radio broadcaster, and the Second Defendants broadcast programmes by radio for general reception throughout the jurisdiction and Scotland.
3. On [date], at about [time], during the course of a programme entitled “Great Gaffes of Today” the Defendants broadcast and published or caused to be broadcast and published by radio the following words defamatory of the Claimant:

[Here set out verbatim the words complained of.]

4. In their natural and ordinary meaning the said words meant and were understood to mean that:

[Here set out the meanings alleged in separate sub-paragraphs.]

5. In consequence the Claimant’s reputation has been seriously damaged and he has suffered considerable distress and embarrassment.
6. The said words are actionable by the laws of Scotland.

AND the Claimant claims damages for libel.

**Claim for damages for libel published in television broadcast—claim for injunction**

37-15

1. The Claimant is and was at all material times a jeweller.
2. The First Defendants produce and market films for television and general release. The Second Defendants broadcast television programmes for general reception in England and Wales.
3. On [date], between [time] and [time] the First Defendants caused to be broadcast and published and the Second Defendants broadcast and published as part of its Crime Catch series a film entitled “The Modern Raffles” made and produced by the First Defendants which included the following words and images defamatory of the Claimant:

[Here set out verbatim the words complained of and summarise any images relied on; e.g.

COMMENTATOR: “Here is AB selling the blue carbuncle from the Moriarty collection.”

(Film of the Claimant talking to a customer in his shop.)]

4. In their natural and ordinary meaning the said words and images meant and were understood to mean that the Claimant is and was a fence for stolen jewellery and is guilty of numerous serious offences of handling stolen goods.

5. In consequence the Claimant’s reputation has been seriously injured and he has suffered considerable distress and anxiety, including a raid by the police on his business premises at [ ] during business hours on the morning after the broadcast complained of.

6. Unless restrained by this Honourable Court the Defendants and each of them will further broadcast and publish or cause to be broadcast and published the said or similar words and images defamatory of the Claimant.

Particulars

- (1) The First Defendants are offering the film complained of for sale to foreign television companies.
- (2) The Second Defendants have provisionally scheduled the film for repeat broadcast on [date]. Further it is the Second Defendants’ general policy to repeat films in the Crime Catch series.

AND the Claimant claims against the Defendants and each of them:

- (1) Damages for libel.
- (2) An injunction restraining the Defendants and each of them, whether by themselves, their servants or agents or otherwise, from further publishing or broadcasting, or causing to be published or broadcast, the said words and images or any words and images similarly defamatory of the Claimants.

**Claim for damages for libel published on the internet — injunction**

37-16

1. The Claimant is and was at all material times a company specialising in the buying and selling of computer equipment with overseas offices and customers in France and Germany.

2. The Defendant is a rival company to the Claimant.

3. On [date] the Defendant published and/or caused to be published a company press release (“the press release”) on a business website (“the web-site”) at “biz.website.com”. The press release contained the following words defamatory of the Claimant:

[Here set out press release in full.]

4. At all material times the web-site was accessible to millions of users of the Internet. The press release was published on the web-site from [date] to at least [date].

8. The Claimant limits its claim for foreign publication to the countries set out in paragraph 1 above, where the press release is also actionable.

9. In their natural and ordinary meaning the said words meant and were

understood to mean that the Claimant is guilty of numerous serious offences of handling stolen goods.

10. In consequence the Claimant's reputation has been seriously damaged.

11. Unless restrained by this Honourable Court the Defendant will further publish or cause to be published the said or similar words defamatory of the Claimant.

AND the Claimant claims against the Defendant:

- (1) Damages for libel.
- (2) An injunction restraining the Defendant, whether by itself, its servants or agents or otherwise, from further publishing or causing to be published, the said words or any words similarly defamatory of the Claimant.

#### Claim for damages for libel in foreign language book

37-17 1. The Claimant is a well-known football manager and is and was at all material times the manager of AB United.

2. The First Defendant is the author and the Second Defendant is the publisher of a book entitled [insert French title] whose English translation is "Great football scandals of our time". The Defendants are both resident within this jurisdiction.

3. On page [ ] of the book which was published on [date], the First Defendant wrote and published and/or caused to be published and the Second Defendant published and/or caused to be published the following words defamatory of the Claimant:

[Here set out the words complained of verbatim in French.]

4. In English translation the said words read as follows:

[Here set out a literal translation.]

5. The Defendants widely circulated and published the book in England, Wales and France. In particular, the Defendants published the book to the following persons all of whom speak French fluently and understood the words complained of.

[Here set out names of publishees relied upon.]

Further or alternatively the Claimant will ask the court to infer that a substantial but presently unquantifiable and unidentifiable number of readers of the words complained of speak French fluently and understood the words complained of.

6. In their natural and ordinary meaning the said words meant and were understood to mean:

[Here set out in separate sub-paragraphs the meanings alleged.]

7. The publication of the book in France is actionable by the law of France. The Claimant will rely upon the presumption that the law of France is the same as the law of England and Wales.

8. In consequence the Claimant's reputation has been seriously injured, and he has suffered anxiety and distress.

AND the Claimant claims damages for libel.

#### Claim for slander and libel—press conference—replication in newspaper—legal/true Innuendo

37-18 1. The Claimant owns and runs a children's zoo at [ ].  
2. The First Defendant is the founder and chairman of Testudo, an association of tortoise lovers. The Second Defendants are the publishers of Amphibian News, a monthly magazine with a substantial circulation among these interested in wildlife.

3. At a press conference attended by numerous representatives of the press (whom the Claimant cannot better identify save that they included a representative from Amphibian News) and held at Testudo's offices at [ ] the First Defendant spoke the following words defamatory of the Claimant in the way of his said business:

"The way P exports tortoises in old biscuit tins is a scandal. It seems kindness is fine, so long as it's cheap."

The First Defendant knew and intended that these words, or their gist, should be republished in the press, and/or authorised their repetition.

4. On page [ ] of the issue of the Amphibian News dated [date], the First Defendant caused to be published and the Second Defendants published the following words defamatory of the Claimant:

"Testudo at their annual press conference cited the transport of tortoises in biscuit tins by P as another example of putting profit before the animal."

5. In their natural and ordinary meaning the words complained of in paragraphs 3 and 4 above meant and were understood to mean that the Claimant transported tortoises by means he knew to be cruel so as to reduce his overheads.

6. Further, by way of innuendo the words complained of in paragraphs 3 and 4 above meant and were understood to mean that the Claimant was a hypocrite.

#### Particulars

(1) In the issue of Amphibian News dated [date], the Claimant had written an article contending that the only way to transport tortoises in comfort was in ventilated wooden boxes, custom built.

(2) The Claimant will invite the court to infer that:

(a) a substantial number of readers of Amphibian News who read the article complained of would also have read the article complained of would also have read the article referred to in (1) above and remembered the gist of its content;

(b) the representative of Amphibian News who attended the press conference would have been aware of the article referred to in (1) above.

7. In consequence the Claimant's personal and business reputation has been seriously damaged and he has suffered considerable distress and embarrassment, including numerous anonymous telephone calls.

8. The words complained of in paragraph 3 above are calculated to disparage the Claimant in his said business.

AND the Claimant claims:

- (1) Damages for slander against the First Defendant under paragraph 3 above.
- (2) Damages for libel against the First and Second Defendants under paragraph 4 above.

**Claim for damages for slander in the way of trade or business—s.2 of the Defamation Act 1952—additional claim for special damage**

- 37-19
1. The Claimant is and was at all material times a building contractor and decorator carrying on business in and around [ ].
  2. The Defendant is an architect.
  3. Between [date] and [date], the Claimant was employed by the [ ] Borough Council ("the Council") under a contract to repair and decorate a number of houses in the district of the Council at [ ].
  4. On or about [date], the Defendant spoke and published the following words defamatory of the Claimant in the way of his said business to AB, the Borough Surveyor, and CD:

"The work on the [ ] estate is appallingly done. P has cynically broken his contract and ought not to be paid a penny more from public funds. That he should have been awarded this contract without malpractice beggars belief."

5. In their natural and ordinary meaning the said words meant and were understood to mean that:
  - (1) the Claimant was in deliberate and cynical breach of his contract with the Council to carry out work on the [ ] estate;
  - (2) the Claimant's work on the [ ] estate was so incompetent that he should never again be employed to carry out public work;
  - (3) the Claimant had obtained the contract by some unspecified act or acts of corruption, or alternatively that there were very strong grounds for so suspecting.
6. In consequence the Claimant's reputation, both personal and as a builder, has been seriously injured and he has suffered considerable distress and embarrassment.
7. In further consequence by letter dated [date], the Council cancelled the written contract dated [date], with the Claimant for additional work on the [ ] estate, whereby the Claimant has suffered damage.

Particulars

Estimated loss profit at [ ] per cent on a fixed contract price of £[ ]  
£[ ]

8. Further or alternatively the said words were calculated to disparage the Claimant in his said trade or business.

AND the Claimant claims:

- (1) Damages for slander.
- (2) Interest pursuant to statute on the sum of £[ ], or such other sum as may be awarded to the Claimant under paragraph 6 above, at [ ] per cent from such date as this court may determine until [date of claim] and thereafter until judgment or sooner payment.

**Defence—putting circulation in issue—admitting publication—denying reference to claimant and any defamatory meaning—denying intention to repeat, but reserving the right to do so—pleading an apology**

1. It is denied that the Daily Speculator has a circulation of many millions. 37-110  
Save as aforesaid paragraphs 1 and 2 of the Particulars of Claim are admitted.
2. It is admitted that the First Defendant wrote and published and the Second Defendants published the words complained of in paragraph 3 of the Particulars of Claim on page 1 of the issue of the Daily Speculator dated [date].
3. It is denied that the said words referred, or were understood to refer or were capable of referring to the Claimant.
4. Further, if, which is denied, the said words were understood to refer to the Claimant, it is denied that they bore, or were understood to bear or were capable of bearing the meanings pleaded in paragraph 4 of the Particulars of Claim or any meaning defamatory of the Claimant.
5. Paragraph 5 of the Particulars of Claim is denied.
6. It is denied that the Defendant has any present intention of further publishing the words complained of. The Claimant is in any event not entitled to an injunction by reason of the matters pleaded in paragraphs 3 and/or 4 above.
7. Alternatively, and only if necessary, the Defendants will rely in mitigation of damage on an apology published on page [ ] of the issue of the Daily Speculator dated [date].

**Defence—partly admitting defamatory meaning—pleading convictions pursuant to s.13 of the Civil Evidence 1968 (as amended by s.12 of the Defamation Act 1996)—pleading justification to the balance of the meaning pleaded by the claimant—s.5 of the Defamation Act 1952—denial of republication—denial of claim for aggravated and exemplary damages**

1. Paragraphs 1 and 2 of the Particulars of Claim are admitted.
2. The Defendants admit that the words complained of meant and were understood to mean that the Claimant had stolen money from his employers, XL Limited. It is otherwise denied that the said words bore, or were understood to bear or were capable of bearing the meanings pleaded in paragraph [ ] of the Particulars of Claim or any meaning defamatory of the Claimant.
3. In their natural and ordinary meaning the said words are true in substance and in fact.

- “(1) In relation to the protected characteristic of age—
- (a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular age group;
  - (b) a reference to persons who share a protected characteristic is a reference to persons of the same age group;
  - (2) A reference to an age group is a reference to a group of persons defined by reference to age, whether by reference to a particular age or to a range of ages.”

So, per s.5(2), a claimant may define himself, say, as 21 or as in the age range 20-25, or as an under-30. In many cases it will be good practice to plead age in more than one of these alternative ways, although proportionality demands that a claimant should not simply plead his age in too many alternative ways. A claim alternatively pleaded on the basis that the claimant was, say, under 25, alternatively under 26, alternatively under 27, would likely be struck out on the grounds that it was scandalous or unreasonable.

**Disability.** Disability is primarily defined at EqA 2010 s.6:

- “(1) A person (P) has a disability if—
- (a) P has a physical or mental impairment, and
  - (b) The impairment has a substantial and long-term adverse effect on P’s ability to carry out normal day-to-day activities.”

The EqA 2010 Sch.1 provides further clarification, particularly with regard to the meaning of “long-term effects”. It also provides for certain medical conditions, e.g. cancer, to be deemed disabilities.<sup>1</sup> Under, s.6(5), the Secretary of State is empowered to issue guidance about matters to be taken into account in deciding any question under s.6(1). The definition of disability has attracted a very large amount of judicial scrutiny, consideration of which falls outside the scope of this work.<sup>2</sup>

It is not normally necessary for a claimant to do any more than plead the existence of a disability and a brief diagnosis—the ET1 claim form contains a box for this information. Where the disability is a past disability or a recurring condition, these should be pleaded. However, for the purposes of a claim of reasonable adjustments (see below), it will ordinarily be necessary to set out brief details of what the employee is able to do or not able to do because of his disability.<sup>4</sup> Because disability is a “gateway” provision, it is not unusual for respondents to attempt to have the disability issue determined at a preliminary hearing. A respondent contemplating this course will either deny the existence of disability (giving reasons where possible) or not admit disability pending the disclosure of medical reports and/or the preparation of an expert’s report.<sup>5</sup> Where an employer admits disability but disputes the nature and/or extent of the adverse effects of the disability upon the claimant, this is a relevant matter for the purposes of the employer’s defence to a claim for reasonable adjustments and it is good practice to plead that dispute as fully as possible.<sup>6</sup> The unavailability of medical records will often be a major impediment to a full pleading by either party on the question of disability.

**Gender Reassignment.** Gender reassignment is defined at EqA 2010 s.7. It includes a person who is proposing to undergo a process of gender reassignment as well as those whose gender reassignment is either underway or complete.

**Marriage and civil partnership.** Marriage and civil partnership is defined at EqA 2010 s.8. A person has the protected characteristic if s/he is married or is a civil partner. Persons who are not married or in a civil partnership are not protected.

**Race.** Race is defined at EqA 2010 s.9, which provides:

- “(1) Race includes—
- (a) colour;

- (b) nationality;
- (c) ethnic or national origins.”

The use of the word “includes” at s.9(1) suggests a broader definition than the exhaustive definition that existed under the Race Relations Act 1976 (RRA 1976).<sup>7</sup> The fact that a racial group comprises two or more distinct racial groups does not prevent it from constituting a particular racial group.<sup>8</sup> So, “black Britons” would be protected as a racial group. A claimant bringing a claim of race discrimination should plead his race in his claim form.<sup>9</sup> Where his race may be expressed in more than one way, it should be pleaded in the alternative, e.g.: “For the purposes of the Equality Act 2010, s.9, the Claimant is black and of Nigerian nationality...”

**Religion or belief.** Religion or belief are defined at EqA 2010 s.10, and include both a lack of religion and a lack of belief. Belief means “any religious or philosophical belief”: EqA 2010 s.10(2). The Explanatory Notes and the Code suggest that a belief must satisfy various criteria in order to amount to a “philosophical belief” for the purposes of s.10. It must: be genuinely held; not simply be an opinion or viewpoint based on information currently available; concern a weighty and substantial aspect of human life and behaviour; attain a certain level of cogency, seriousness, cohesion and importance; be worthy of respect in a democratic society; and be compatible with human dignity and not conflict with the rights of others.<sup>10</sup>

**Sex.** Sex, which is defined at EqA 2010 s.11, is defined as a man or a woman.

**Sexual orientation.** Sexual orientation is defined at EqA 2010 s.12, as meaning a person’s sexual orientation towards persons of the same sex, persons of the opposite sex or persons of either sex.

**Forms of Discrimination.** In the following sections, we summarise the law relating to all forms of discrimination in employment except harassment (which is dealt with at Section 55). 44-04

**Direct Discrimination.** Direct discrimination is defined at EqA 2010 s.13. The primary definition is: 44-05

- “(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.”

This definition retains the need for a real or hypothetical comparator to whom the relevant protected characteristic does not apply. Under EqA 2010 s.23(1), “there must be no material difference between the circumstances relating to each case”. It is good practice for a claimant to plead the identity of any actual comparator (if known – frequently, the identity of an actual comparator only emerges via disclosure) and/or the material characteristics of a hypothetical comparator. It is also good practice to plead a hypothetical comparator in the alternative even where an apparently suitable actual comparator is relied upon.<sup>11</sup> The purpose of a comparator with like circumstances, whether real or actual, is to focus attention on the reason why the claimant was treated in the manner alleged (and, in particular, whether the reason for treatment was because of a protected characteristic).

Although the definition of direct discrimination departs from the pre-EqA 2010 legislation in that the causative test is stated to be “because of” a protected characteristic rather

<sup>7</sup> Under the RRA 1976 “racial grounds” were defined exclusively in terms of colour, race, nationality or ethnic or national origins.

<sup>8</sup> EqA 2010 s.9(4).

<sup>9</sup> See for example Precedent 7 para.1.

<sup>10</sup> See *Grainger Plc v Nicholson* [2010] I.C.R. 360, in which the Employment Appeal Tribunal upheld an employment tribunal decision to the effect that belief in man-made climate change was a “philosophical belief” under the Employment Equality (Religion or Belief) Regulations 2003 (which were in all material respects identical to the EqA 2010).

<sup>11</sup> For guidance upon the operation of comparators, see *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] I.C.R. 337 HL.

<sup>1</sup> EqA 2010 Sch.1, para.6.

<sup>2</sup> For a detailed treatment see Karon Monaghan, *Equality Law* (Oxford University Press, 2007).

<sup>3</sup> See for example Precedent 11, para.1.

<sup>4</sup> See for example Precedent 12, para.5.

<sup>5</sup> See for example Precedent 13.

<sup>6</sup> See for example Precedent 13.

than “on grounds of” a protected characteristic, that is not thought to be of any significance.<sup>12</sup>

One of the key innovations of the EqA 2010 is to provide a clear statutory basis for complaints of direct discrimination based on the complainant’s association with someone who has a protected characteristic or where the complainant is wrongly perceived to have such a characteristic.<sup>13</sup> All the protected characteristics except marital or civil partnership status are covered by these new forms of prohibited conduct. Thus, claims of so-called “associative discrimination” or “perception discrimination”<sup>14</sup> are possible because less favourable treatment is because of a protected characteristic, and not because of a particular person’s protected characteristic. One area of uncertainty is how perception discrimination operates in the case of disability discrimination and, in particular, what a complainant would have to show in terms of the discriminator’s perception.

There is a justification defence available to respondents facing claims of direct age discrimination. Section 13(2) provides:

“If the protected characteristic is age, A does not discriminate against B if A can show A’s treatment of B to be a proportionate means of achieving a legitimate aim.”<sup>15</sup>

There is no justification defence in the case of any other protected characteristic. However, there is a general defence of “occupational requirements” where it is an occupational requirement to have a particular protected characteristic and the application of the requirement is a proportionate means of achieving a legitimate aim.<sup>16</sup> There are also particular exceptions relating to sex, gender reassignment, marital status and sexual orientation in the context of employment for the purposes of organised religion.<sup>17</sup>

**44-06 Gender reassignment – absence from work.** Section 16 of the EqA 2010 makes special provision for absences because of gender reassignment. Where a person is absent from work because of gender reassignment (i.e. because he is proposing to undergo, is undergoing or has undergone all or part of a process of reassigning his sex by changing the physiological or other attributes of sex), it will be an act of discrimination for a person to treat him less favourably in relation to that absence than he would have been treated if the absence was because of sickness or injury or for some other reason and it is not reasonable for him to be treated less favourably.<sup>18</sup>

**44-07 Pregnancy and maternity discrimination.** Section 18 provides that a person discriminates against a woman if he treats her unfavourably:

- (a) because of the pregnancy or an illness resulting from it<sup>19</sup>;
- (b) because she is on compulsory maternity leave<sup>20</sup>; or

<sup>12</sup> See *Amnesty International v Ahmed* [2009] I.C.R. 1450, a pre-EqA authority in which Underhill P. expressed the view that there could be no objection to tribunals using “because of” as a synonym for “on grounds of” under the old statutory provisions on direct discrimination.

<sup>13</sup> See *Coleman v Attridge Law* [2008] I.C.R. 1128 ECJ, for an explanation of why associative discrimination is prohibited by the EU Equal Treatment Framework Directive (No.2000/78).

<sup>14</sup> There is no universally accepted phrase to denote “discrimination because of a perception that an individual has a particular protected characteristic”. The phrase “perceptive discrimination” has been used, but this is liable to cause confusion.

<sup>15</sup> The phrase “proportionate means of achieving a legitimate aim” differs from the wording found in the EU Equal Treatment Framework Directive (No.2000/78). In order for less favourable treatment to be justified for the purposes of Article 6(1) of the Directive, the difference in treatment must be “objectively and reasonably justified by a legitimate aim” and the means of achieving that aim must be “appropriate and necessary”.

<sup>16</sup> EqA 2010 Sch.9, Pt 1, para.1.

<sup>17</sup> EqA 2010 Sch. 9, Pt 1, para.2. See also para.3.

<sup>18</sup> EqA 2010 ss.16(3) and 7(1).

<sup>19</sup> EqA 2010 s.18(2).

<sup>20</sup> EqA 2010 s.18(3).

(c) because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.<sup>21</sup>

In the case of (a) above, the treatment must take place during the “protected period” of the woman’s pregnancy and statutory maternity leave and must be in relation to her pregnancy. The prohibition of “unfavourabl[e]” treatment is a linguistic innovation but probably does not involve any meaningful departure from the previous provision in the Sex Discrimination Act 1975 s.3A (as amended). In particular, the use of the word “unfavourable” merely reflects the well-established authority that comparators are unnecessary in pregnancy cases.<sup>22</sup>

Whilst it has long been established that there is an overlap between cases of sex discrimination and cases of discrimination on the grounds of pregnancy or maternity leave, that has now been addressed by EqA 2010 s.18(7), whose effect is to preclude claims based on direct sex discrimination provisions where they can be just as well based on the pregnancy and maternity discrimination provisions in s.18.

**Indirect Discrimination.** Section 19 provides:

“(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B’s.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B’s if—

- (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
- (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
- (c) it puts, or would put, B at that disadvantage, and
- (d) A cannot show it to be a proportionate means of achieving a legitimate aim.”

This reflects the definition of indirect discrimination that previously applied in most employment cases.

All of the protected characteristics in EqA 2010 Pt 2, Chapter 1, may found a claim for indirect discrimination with the sole exception of pregnancy and maternity.<sup>23</sup>

A claim of indirect discrimination should clearly set out the claimant’s factual case on each limb of the tort.<sup>24</sup> In particular, the claim should identify: (a) the provision, criterion or practice; (b) the particular disadvantage to which the claimant’s group is put; and (c) the particular pool relied upon to show disparate impact.<sup>25</sup>

A respondent should likewise plead in detail to: (a) the provision, criterion or practice relied upon by the claimant; (b) the particular disadvantage claimed by the claimant; and (c) any justification defence upon which the respondent relies, explaining how and why the application of the provision, criterion or practice is a proportionate means of achieving a legitimate aim.<sup>26</sup>

**Victimisation.** Section 27 provides:

“(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

- (a) B does a protected act, or
- (b) A believes that B has done, or may do, a protected act.

<sup>21</sup> EqA 2010 s.18(4).

<sup>22</sup> *Webb v EMO Air Cargo (UK) Ltd* [1992] I.C.R. 445 ECJ.

<sup>23</sup> Indirect discrimination claims based on disability and gender reassignment could not be brought pre-EqA, although it is doubtful, particularly in the case of disability, whether there is any claim of indirect discrimination that would not be capable of being brought under another head.

<sup>24</sup> See for example Precedent 7.

<sup>25</sup> *Barry v Midland Bank Plc* [1998] I.R.L.R. 138.

<sup>26</sup> See for example Precedent 8.

- (2) Each of the following is a protected act—
- bringing proceedings under this Act;
  - giving evidence or information in connection with proceedings under this Act;
  - doing any other thing for the purposes of or in connection with this Act;
  - making an allegation (whether or not express) that A or another person has contravened this Act.
- (3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.”

A claim of victimisation does not require the complainant to show that the employer treated him less favourably than he treated other persons in the same circumstances, thereby marking a departure from the pre-EqA 2010 law. However, comparison with the treatment afforded to an appropriate comparator will often be a good way of proving (or disproving) victimisation.

A claim of victimisation should clearly identify each protected act relied upon, as well as each allegation of detriment.<sup>27</sup> The respondent should identify whether he accepts each protected act, and if not, why not.<sup>28</sup>

#### 44-10 Discrimination arising from disability. Section 15 of the EqA 2010 provides:

- “(1) A person (A) discriminates against a disabled person (B) if—
- A treats B unfavourably because of something arising in consequence of B’s disability, and
  - A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
- (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.”

Section 15 of the EqA 2010 is one of the major innovations of the new statutory framework. The Disability Discrimination Act 1995 established the tort of disability-related discrimination, but in *Lewisham v Malcolm LBC* [2008] 1 A.C. 1399, the House of Lords held that the appropriate comparator in such cases was a non-disabled person who was otherwise in the same circumstances as the disabled claimant. The effect of this comparison was, inevitably, a finding that the disabled person was treated in the same way by the employer as the non-disabled person would have been. It was widely recognised that the tort of disability-related discrimination was thereby deprived of all effect. Critically, the new provision in s.15 of the EqA 2010 does not require the disabled person to establish that his or her treatment is less favourable than that experienced by a comparator, thereby avoiding the principal difficulty arising from *Malcolm*, namely the identity of the comparator. According to the Explanatory Notes, s.15 of the EqA 2010 is “aimed at re-establishing an appropriate balance between enabling a disabled person to make out a case of experiencing a detriment which arises because of his or her disability, and providing an opportunity for an employer or other person to defend the treatment”.<sup>29</sup> The Explanatory Notes give the example of a visually-impaired employee who is unable to complete as much work as a non-disabled colleague and who is therefore dismissed. This would potentially amount to discrimination arising from disability, although if the employer was able to demonstrate that the dismissal was a proportionate means of achieving a legitimate aim, the discrimination would be justified.

A key area for jurisprudential development is the ambit of the phrase “arising from disability”. There are no statutory limits to what appears to be a broad provision, but it is likely that Employment Tribunals will pay closer regard to direct or proximate consequences of a disability than those which are more remote. The Code of Practice states: “The consequences of a disability include anything which is the result, effect or outcome of a disabled person’s disability. The consequences will be varied, and will depend on the

<sup>27</sup> See for example Precedent 9.

<sup>28</sup> See for example Precedent 10.

<sup>29</sup> Equality Act, Explanatory Notes, para.70.

individual effect upon a disabled person of their disability. Some consequences may be obvious, such as an inability to walk unaided or inability to use certain work equipment. Others may not be obvious, for example having to follow a restricted diet.”<sup>30</sup> It will be good practice for a claimant to identify with as much precision as possible how a given effect, which caused the unfavourable treatment, arose from the disability.

It may well be that the further removed the consequence from the original disability, the easier it will be for a respondent to justify unfavourable treatment. For this reason, it will be good practice for a respondent to plead his case in such a way as to elongate the chain between the disability and the relevant consequence.<sup>31</sup> As with cases of indirect discrimination, it is also good practice for the respondent to provide as many details as possible to justify the impugned act.<sup>32</sup>

Section 15(2) provides a further defence to a respondent who did not know and could not reasonably have been expected to know that the claimant had a disability. The EqA 2010 does not impose a duty upon an employer to enquire about a person’s possible or suspected disability. Where a respondent did not know, at the time that he performed the impugned act, that the claimant was disabled and/or had the particular disability relied on, he should include that information in his response. One open question is whether an employer who knew that the employee was disabled, but did not know that the disability had the consequence which gave rise to the impugned act, is able to rely on the s.15(2) defence. Such an employer is more likely to be able to defend the claim by reference to justification rather than his knowledge. The Code of Practice suggests that where there are indicia of deteriorating performance by an employee, it will be good practice to make discreet enquiries as to whether the employee has an underlying disability.<sup>33</sup>

**Reasonable Adjustments.** The duty to make reasonable adjustments arises under EqA 2010 s.20, which establishes three different obligations (or “requirements”) upon persons to take positive action to remove or reduce substantial disadvantages to disabled persons. Section 20(3) provides:

“The first requirement is a requirement, where a provision, criterion or practice of A’s [A being the person on whom the duty is imposed] puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.”

The second requirement relates to physical features of premises (s.20(4)). The third requirement relates to the provision of an auxiliary aid (s.20(5)). They operate in substantially the same manner as section 20(3) i.e. the duty to make reasonable adjustments arises only where a physical feature of premises/lack of an auxiliary aid puts the disabled person at a substantial disadvantage. A “substantial disadvantage” is one that is “more than minor or trivial”: EqA 2010 s.212(1).

Once the duty to make adjustments is engaged, the employer has to take such steps as are reasonable. Under the Disability Discrimination Act 1995 (DDA 1995), the test of reasonableness was an objective one. Further, there was a non-exhaustive list of factors set out in s.18B(1) of the DDA 1995 which an Employment Tribunal was obliged to take into account in determining whether the given step was reasonable:

- the extent to which taking the step would prevent the effect in question;
- the extent to which the step was practicable;
- the financial and other costs that would be incurred and the extent to which the person’s activities would be disrupted;

<sup>30</sup> Employment Code of Practice, para.5.9.

<sup>31</sup> See for example Precedent 14.

<sup>32</sup> It should be noted that test of justification under s.15 of the EqA 2010 is an objective test. It is a departure from the previous subjective or “range of reasonable responses” test applicable in cases of disability-related discrimination: see *Post Office v Jones* [2001] I.C.R. 805. Even before the decision in *Malcolm*, few disability-related discrimination claims succeeded, because of the relative ease of proving justification. This new and more rigorous test of justification is likely to herald more successful claims.

<sup>33</sup> Employment Code of Practice, para.5.17.

so long as the defence makes clear that every allegation of fact in the particulars of claim is denied (*John Lancaster Radiators Ltd v General Motors Radiators Co Ltd* [1946] All E.R. 685, CA), or the defendants may serve separate defences or join in a common defence and deal separately with the allegations made against each of them individually. Plainly it is advisable to deal specifically with the allegations if this can be done.

It is for the claimant to establish that the defendants conspired together with the object or purpose of injuring or causing damage to him and that he has thereby suffered loss (see *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* [1942] A.C. 435).

If the defendants desire to contend, not only that this was not their object or purpose, but that the purpose of the combination between them was bona fide to promote or forward or defend their own interests or the interests of those they represent, each ground of justification or lawful excuse should be expressly pleaded, and the facts and matters relied on should be fully set out. However, such a defence of justification is not available in the case of an "unlawful means" conspiracy (type (1) above): *Lonrho v Fayed* [1992] 1 A.C. 448; *Crofter v Veitch*, above.

For two or more persons to agree together to induce others not to enter into any contracts with the claimant is not an actionable tort when such advice is given justifiably and bona fide for the good of the persons advised (see *South Wales Miners' Federation v Glamorgan Coal Co* [1905] A.C. 239 at 245, 251), or from motives of self interest in fair trade competition (*Mogul Steamship Co v McGregor* [1892] A.C. 25), or where the predominant purpose of the combination was the legitimate promotion of the interests of the persons combining (*Crofter Hand Woven Harris Tweed Co Ltd v Veitch*, above; *Scala Ballroom (Wolverhampton) Ltd v Ratcliffe* [1958] 1 W.L.R. 1057, CA).

Trade union objectives may be a legitimate justification. In *Crofter Hand Woven Harris Tweed Co Ltd v Veitch*, above, Lord Wright said (at 469) that "The true contrast is, I think, between the case where the object is the legitimate benefit of the combiners and the case where the object is deliberate damage without any such just cause".

The following agreements have been held to be justified:

- a campaign against a colour bar in a club: *Scala Ballroom (Wolverhampton) Ltd*, above;
- the enforcement of a closed shop: *Reynolds v Shipping Federation* [1924] 1 Ch. 28;
- attempts to force an employer to refuse to employ trade unionists: *D C Thomson & Co v Deakin* [1952] Ch. 646.

#### Conspiracy to defraud/injure by unlawful means (unlawful means: breach of fiduciary duty, secret profits, dishonest assistance)

##### 59-01 1. At all material times:

- The Claimant, a company incorporated in England, carried on business as [ ] .
- From [date] to [date], the First Defendant was a Director of the Claimant, employed as its managing director.
- From [date] to [date] the Second Defendant was a director of the Claimant, employed as its finance director.
- The Third Defendant carried on business from offices at [address], providing legal, financial and administrative services to individuals and companies including the First and Second Defendants and the Fourth Defendant. In relation to the matters pleaded at 9(2) and 9(3) below the Third Defendant acted and continues to act as agent for and on behalf of the First, Second and Fourth Defendants.
- The Fourth Defendant was a company incorporated in [ ]

which was beneficially owned by the First and/or Second Defendants. The beneficial ownership of the Fourth Defendant by the First and/or Second Defendants was concealed by a structure whereby the shares of the Fourth Defendant were held by a further company administered by the Third Defendant, [ ] Ltd, for and on behalf of the First and/or Second Defendants.

2. In their capacities as its directors, the First and Second Defendants and each of them owed the Claimant the general duties specified in ss.171 to 175 of the Companies Act 2006 including fiduciary duties to:

- only exercise his powers for the purposes for which they were conferred;
- act in the way he considered in good faith would be most likely to promote the success of the Claimant for the benefit of its members as a whole;
- avoid a situation in which he had or could have a direct or indirect interest that conflicted or possibly may have conflicted with the interest of the Claimant;
- not accept a benefit from a third party conferred by reason of his being a director or his doing or not doing anything as a director.

3. Further or alternatively, the First and Second Defendants as directors of the Claimant were trustees of such of the Claimant's assets and property as were in their possession or control.

4. Further or alternatively, as employees of the Claimant the First and Second Defendants owed the following duties to the Claimant:

- an equitable duty and a contractual duty (implied as a matter of law) of fidelity to act faithfully in the best interests of the Claimant;
- express contractual duties, including:
  - [Set out any duties contained in the contract of employment.]

5. On about [date] the Claimant acting by the First Defendant entered into a contract with K Co, a company manufacturing [ ] equipment, for the purchase of [ ] equipment by the Claimant from K Co ("the equipment contract") at a price of £2,000,000.

6. On [date] pursuant to the terms of the equipment contract K Co delivered to the Claimant the [ ] equipment. On the same day K Co invoiced the Claimant for the sum of £2,000,000.

7. By a fax dated [date] the Second Defendant instructed the Claimant's bankers, [ ] Ltd, to pay to K Co £2,000,000 from the Claimant's account number [number] in respect of the equipment contract. However, by an administrative error, £4,000,000 was paid from the Claimant's account to K Co on [date].

8. Thereafter, on or before [date], the First, Second, Third, and Fourth Defendants (or any two or more together) wrongfully and with intent to injure the Claimant by unlawful means conspired and combined together to defraud the Claimant and to conceal such fraud and the proceeds of such fraud from the Claimant.

9. Pursuant to and in furtherance of the conspiracy pleaded in paragraph [8] above the First, Second, Third and Fourth Defendants carried out the following unlawful acts and means by which the Claimant was injured:

- (1) On or about [date], the First and Second Defendants instructed K Co to make a payment of £2,000,000, purportedly by way of reimbursement to the Claimant of the Claimant's mistaken overpayment in respect of the equipment contract. However, in breach of their fiduciary, equitable and contractual duties set out in paragraphs 2 to 4 above the First and Second Defendants procured that this payment was not made to the Claimant (which they knew to be the party entitled to it) but to the Fourth Defendant.
  - (2) The Fourth Defendant received the sum of £2,000,000 from K Co on about [date], knowing (by its agent the Third Defendant) that the sum had been paid to it in breach of the First and Second Defendant's fiduciary duties to the Claimant.
  - (3) On about [date], the Third Defendant instructed the Fourth Defendant's bank to make two payments each of £1,000,000 from the account of the Fourth Defendant to the First Defendant at his account at [ ] and the Second Defendant at his account at [ ]. In doing so the Third Defendant acted dishonestly and in the knowledge that the sum of £2,000,000 had been paid to the Fourth Defendant in breach of the First and Second Defendant's duties to the Claimant as set out above.
  - (4) The First and Second Defendants received the payments of £1,000,000 each in further breach of their fiduciary, equitable and contractual duties set out in paragraphs 2 to 4 above and in fraud of the Claimant.
  - (5) Throughout, the First, Second, Third and Fourth Defendants have concealed and continue to conceal the matters set out in this paragraph and the fact of and the whereabouts of the proceeds of their fraud from the Claimant.
10. As a result of the matters set out in paragraphs 8 and 9 above the Claimant has suffered loss and damage in the sum of £2,000,000.
11. By reason of the conspiracy to defraud and injure the Claimant and by reason of the unlawful means as pleaded in paragraphs 8 and 9 above:
- (1) The First and Second Defendants:
    - (a) are each liable to compensate the Claimant in equity for their breaches of fiduciary duty and breach of their equitable duty of fidelity;
    - (b) are each liable to account to the Claimant for the sums misappropriated by them and paid away by them or at their direction from the Claimant;
    - (c) are each liable to account to the Claimant for the sums received by them and/or the Fourth Defendant which were secret profits received in fraud of the Claimant;
    - (d) are liable to the Claimant in damages for breach of contract.
  - (2) The Third Defendant is liable to account to the Claimant as a constructive trustee on the ground of dishonest assistance in the breach of fiduciary duty by the First and Second Defendants.
  - (3) The First, Second, Third and Fourth Defendants are jointly and severally liable to the Claimant in damages for conspiracy.

12. Further, the Claimant claims and is entitled to interest, whether or not compounded, on all sums found to be due to it at such rates as the Court shall deem just pursuant to the Court's equitable jurisdiction and/or s.35A of the Senior Courts Act 1981.

AND the Claimant claims:

(1) Against the First and Second Defendants:

- (i) An order that the First and Second Defendants each compensate the Claimant in equity under paragraph 11(1)(a) above.
- (ii) An account of all sums misappropriated by the First and Second Defendants and each of them and paid away by them or at their direction from the Claimant under paragraph 11(1)(b) above and an order for payment to the Claimant of all sums found due on the taking of the account.
- (iii) An account of all sums received by the First and Second Defendants and each of them and/or the Fourth Defendant which were secret profits received in fraud of the Claimant under paragraph 11(1)(c) above and an order for payment to the Claimant of all sums found due on the taking of the account.
- (iv) Damages for breach of contract under paragraph 11(1)(d) above.

(2) Against the Third Defendant a declaration under paragraph 11(2)(a) above that the Third Defendant is liable to account to the Claimant as constructive trustee on the ground of dishonest assistance in the breach of fiduciary duty by the First and Second Defendants and an order that he pay those sums found due on the taking of the account to the Claimant.

(3) Against all the Defendants:

- (i) Damages for conspiracy;
- (ii) Interest under paragraph 12 above.

#### Claim for conspiracy to injure

1. The Claimant owns and occupies shop premises at [ ] from 59-02 where he conducts a business as a newsagent and grocer ("the shop").
2. The Defendants live at various addresses within a one mile radius of the shop.
3. On or before [date], the Defendants (or any two or more together) conspired and combined together wrongfully and with the sole or predominant intention of injuring the Claimant and/or of causing loss to the Claimant by damaging or destroying his business. The motivation of the Defendants was a wholly unreasonable and unjustified victimisation and hatred of the Claimant.
4. Pursuant to and in furtherance of the conspiracy pleaded in paragraph 3 above the Defendants (or one or more of them) on numerous occasions between [dates] did the following by which the Claimant was injured:
  - (1) insulted and cold-shouldered the Claimant, his wife and children and customers approaching and entering the shop;