

# Legal Writing



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## CHAPTER 3

### APPROACHING, STRUCTURING AND WRITING YOUR PROBLEM QUESTION ANSWER

Problem questions are vignettes – scenes set out for you jump into and legal problems for you to diagnose. They are a form of role-play and can be quite fun if you approach them in the correct way. They are similar to essay answers in some ways. However, they are designed to test different skills. Problem questions focus on a student's ability to diagnose the legal problem, to apply the law to the facts in the problem and to provide accurate advice on the likely chances of success if a case were to be taken further. They also test the ability to argue competing precedents, by arguing cases for and against the case for the party to be advised. They consider how well a student can provide alternative courses of action to the client and to identify issues that may need further investigation before full advice can be given. This chapter will take a scenario that is public law based, and follow it through the process.

#### STAGE 1: READ THE SCENARIO CAREFULLY

Read the scenario carefully.

Reread it.

Make a list of facts and put them in chronological order.

We will work through the problem question set out in Chapter 1, to consider how best to approach writing an answer to a factual scenario. There are many ways to approach problem question answers; this is by no means the only way to diagnose the legal problem and to write an opinion on the legal options open to the party to be advised. However, if you are unsure about how to approach problem questions, this may be a good way to start the process.

The scenario is as follows:

Parliament has introduced a new licensing scheme to make sure that all individuals who want to work as art dealers must hold a licence. Parliament passes the Art Dealers' Licensing Act 2004 and the Act states that the new Licensing Authority is responsible for administering the Art Dealers' licensing scheme. Section 2 states that 'The Licensing Authority may issue a licence to an individual to act as an art dealer if the individual has not been convicted of a serious criminal offence and if the individual has a recognised qualification in an art-related subject'. The Act further states that a degree in art or art history from a UK university will automatically be recognised for the purposes of the Act. Interim arrangements exist which require current art dealers to apply for a licence within six months of entry into force of the Act.

The following events occur:

Ruth works for an art dealer in London. Ruth is not sure whether she needs a licence as she currently does not sell art; she only values it. She has no criminal convictions and has a degree in art history from a UK university. She applies to

the Licensing Authority for a licence just in case she needs to have one. Her application is refused. The Authority writes to tell her that she must stop her work immediately as she does not have the required qualification and she is not a fit and proper person to be an art dealer. In the letter the Authority tells her that the decision is final and cannot be challenged in any court whatsoever. Ruth telephones the Licensing Authority to see whether she really needs a licence and speaks to John, the decision-maker. He tells her that he considers that women do not make good art dealers or valuers. Ruth seeks legal advice from you.

The professional publication for art dealers runs an article in their journal about Ruth's situation. A reader of the publication, Phillip, hears of the problem and approaches Ruth to let her know that he would be willing to challenge the decision on her behalf.

Advise Ruth about her case and Phillip's suggestion to her about his role in bringing an action on her behalf.

Problem questions are relatively easy to approach, although the law that you need to apply may be complicated. First, read the scenario – obvious yes, but it is tempting to jump in when you recognise something that you think you can write about. Next, read it again. You will not pick up on all the facts and the importance of the facts on the first reading. You may find it useful to write a list of events in chronological order, or, if you prefer, to draw a diagram showing who did what to whom, when and apparently why:

- 1 Ruth works for an art dealer but is not currently an art dealer herself; she is an art valuer.
- 2 The Art Dealers' Licensing Scheme is introduced requiring all art dealers to have a licence in order to practise as art dealers.
- 3 Ruth applies to the Licensing Authority for a licence under the Art Dealers' Licensing Scheme.
- 4 Ruth applies on the basis that she has a degree in art history from a recognised university and she has no criminal convictions, in keeping with the requirements of the Act. She appears to have met the requirements for a licence.
- 5 The Authority refuses Ruth's licence.
- 6 Ruth is told that she must stop working in her current job as she does not have a licence. She is told that the decision is final.
- 7 Ruth telephones the Authority and the decision-maker tells her that he does not believe women make good art dealers or valuers.
- 8 Ruth wants to challenge the decision.
- 9 Phillip reads about Ruth's situation in the trade press and wants to challenge the decision on her behalf through the courts.
- 10 I have been asked to provide legal advice for Ruth and for Phillip.

Hopefully by now you will have a good factual basis from which to work. Make sure that you identify for whom you are working, in other words, who is the client seeking advice. This will be important once you come to write up your opinion and it may also help you to bear this in mind when you are trying to work out the legal basis of the case. This is the factual analysis of the problem.

## STAGE 2: FACTUAL ANALYSIS

Consider which of the facts are agreed.

Consider which facts are disputed.

Are there any facts that you need but have not been given?

Consider which of the facts are agreed. In other words, which facts can you rely on as both sides share the same view of what happened? Which facts are disputed? In other words, where is there a difference of opinion about the facts? These will need to be argued in your answer. Are there any facts that you need but have not been given? You will need to say this in your answer to show that the solicitor will need to investigate these areas further, before you can provide a final opinion:

- 1 Ruth works for an art dealer but is not currently an art dealer herself; she is an art valuer – not sure whether the Licensing Authority agrees that she is a valuer rather than a dealer.
- 2 The Art Dealers' Licensing Scheme is introduced requiring all art dealers to have a licence in order to practise as art dealers – agreed.
- 3 Ruth applies to the local authority for a licence under the Art Dealers' Licensing Scheme – agreed.
- 4 Ruth applies on the basis that she has a degree in art history from a recognised university and she has no criminal convictions, in keeping with the requirements of the Act – disagreement. She believes she meets the requirement. The Authority appears to believe she does not.
- 5 The Authority refuses Ruth's licence – agreed.
- 6 Ruth is told that she must stop working in current job as she does not have a licence. She is told that the decision is final – agreed, factually, but Ruth believes that the decision is wrong and should be capable of challenge.
- 7 Ruth telephones the Licensing Authority and the decision-maker tells her that he does not believe women make good art dealers or valuers – not sure whether this is agreed with the authority. The decision-maker may dispute this comment.
- 8 Ruth wants to challenge the decision – current position.
- 9 Phillip reads about Ruth's situation in the trade press and wants to challenge the decision on her behalf through the courts – current position.
- 10 I have been asked to provide legal advice for Ruth and for Ruth about Phillip who wishes to bring a challenge on her behalf – current position.

## STAGE 3: LEGAL ANALYSIS

Consider which area of law is the subject of the problem.

Look at the key concepts for that area of law and consider which may apply to the clients' situations.

List any tests that have to be considered for each of the concepts. Plan your answer.

The next step is to work out the legal areas relevant to the case. First, pinpoint the subject area. You will probably have been given the problem question in a particular subject, for example, public law. Next, try to work out the topic areas that are relevant to the problem. What do the facts suggest? Look back through your notes if you are not sure; the chances are that you have been lectured on the area already, or you will have been assigned reading to do in preparation for the problem. Once you have decided upon the topics that are relevant, reread your notes and then reread the problem. Finally, extract the relevant issues from the notes you have from your lectures, tutorials and reading.

A broad outline of the legal area would look something like this:<sup>1</sup>

Area of Law – public law case – judicial review according to Civil Procedure Rules Part 54.

Necessary requirements for a judicial review to be sought:

- 1 Decision-maker is a public body as it is set up by statute. Public functions test? See *ex parte Datafin* (1987) and refer to rule 54.1(2) of the Civil Procedure Rules.
- 2 Clients must have standing – sufficient interest test s 31(3) of the Supreme Court Act 1981. Do Ruth and Phillip have standing under the sufficient interest test?
- 3 Judicial review must be brought within the time limit – no suggestion that out of time.
- 4 Is there an ouster clause? See *Anisminic* to consider whether the error of law overrides the ouster clause, if it exists.
- 5 Client's advocate must be able to argue at least one ground for judicial review – illegality, irrationality, and procedural impropriety including the rules of natural justice. Illegality and irrationality. Does not appear to be a procedural impropriety.
- 6 Client is seeking a remedy through judicial review.
- 7 Conclude by stating Ruth's chances of success and possible remedies and Phillip's chance of being permitted to bring the action on behalf of Ruth.

You may now begin to plan your answer in a similar way to the way that you would plan an essay. You should plan your answer by splitting up the issues in the same way as you would for an essay; in other words, to assign one

<sup>1</sup> These legal points are an illustration of points that could be made in respect of these facts; however, they may be given greater or lesser prominence depending on the focus of the particular public law module. Other legal issues, such as a human rights focus, may be raised in some public law modules.

paragraph to each issue and to plan each paragraph individually. Each paragraph should begin by explaining the issue to be discussed. The middle section of the paragraph should contain a development of the issue, with evidence to back up the points being made. The paragraph should conclude by explaining clearly what the legal issue means as regards the client's case; in this instance, for Ruth and for Phillip.

## STAGE 4: INTRODUCTION

Explain the basic situation briefly, and who you have been asked to advise.  
Set out the issues upon which you will give a legal opinion.

Problem question answers can be difficult to begin to write, because it is difficult to know how to start off your answer. The simplest way to open your answer is to set out who you are advising and the nature of the case. Try to avoid reiterating all the facts in detail, as it will take too long and is unnecessary as the client and the solicitor will already know the facts of the case. An example of an introduction for the problem question set out in the introduction would be as follows:

In order to consider the merits of Ruth's case and to advise her and Phillip accordingly, it is important to establish whether the body that made the decision is a public body, to permit a challenge to be brought through judicial review. In addition, it is necessary to consider whether Ruth and Phillip have standing to bring a judicial review case. The decision will be examined for elements of illegality, irrationality and procedural impropriety. Finally, the clients will be advised on potential remedies.

You should approach your problem question answer in a similar way to the structure set out above for essay answers. However, there are a few differences between essays and problem question answers. Problem answers deal with a set of facts and provide a legal assessment based on those facts. It is important that you know what you need to prove or disprove in order to provide an assessment of Ruth's chances of success, if the case were to go to court. If you are not able to put down the points that you need to establish then you are not yet clear on the law in the area. Return to your notes to work out what must be established in order to show that a contract has been established, or that the offence of theft has been committed or that Ruth is able to challenge a decision through judicial review.

From then on, until your conclusion, each issue should be discussed in turn in a separate paragraph. Look back at your introduction – what issues did you say you had to establish? Assign each issue one paragraph. Then plan the rest of your answer as follows:

## ISSUE 1 ON YOUR LIST

Write down the issue to be discussed.

What do I need to establish that this issue has been proved or disproved?

What evidence do I have to elaborate or to support these points in legal terms? Are there cases that are evidence for the general principles? Are there statutory extracts that are of relevance? Are the quotes or comments from academic texts that assist?

Why is this issue relevant to Ruth and what does this mean in relation to Ruth's case?

All you then need to do is to write up that paragraph. The simplest way to do it is to follow the paragraph plan described in the previous chapter on essay writing. Your first sentence should set out the point you will deal with in your answer. This will be a description of issue 1 you highlighted in your planning stage:

It is important to consider whether Ruth is able to establish that the Licensing Authority that refused Ruth a licence is a public body, because public bodies may be judicially reviewed whereas most private bodies may not.

Or something similar.

Your next few sentences, the middle part of your paragraph, will take the reader through the principles that must be proved in order to establish whether or not, in this instance, the body is a public body. You should have evidence to back up every point you make. Evidence may be in the form of a case that establishes the test for what constitutes a public body – evidence could be a reference to a statute which sets out a test. Your evidence may even be in the form of academic opinion for a book or a journal article. You should be able to point to something that confirms what you are saying and it is important to back up your points otherwise, as a barrister, you are saying to the solicitor, this is true because I say so (which generally is not going to be enough, and certainly could land you in very hot water if your advice is later found to be wrong!):

Ruth must establish that the body in question is a public body in order to mount a challenge to the decision through judicial review. The decision-making body is the Licensing Authority, which is exercising powers that have been conferred on it by statute and is administering a statutory licensing scheme. Its power is public in nature, similar to the power exercised by the Takeover and Mergers Panel in the case of *R v City Panel on Takeovers and Mergers ex parte Datafin Ltd* (1987) in which Lloyd LJ stated 'if a body in question is exercising public law functions, or the exercise of its functions has public law consequences, then that may be sufficient to bring the body within the reach of judicial review'.<sup>2</sup>

<sup>2</sup> Barnett, H, *Constitutional & Administrative Law*, 4th edn (London: Cavendish Publishing, 2002) p 841.

Rule 54.1(2) of the Civil Procedure Rules permits judicial review in instances where a body exercises a public function.<sup>3</sup> However, this is only two-thirds of the paragraph, even though many students move on to the next point at this stage and by doing so lose vital marks. You now need to apply the law to Ruth's situation. So far you have given general advice on the law in the area, but this is not of much use to Ruth who does not want to pay for a law lecture. The next stage, which will push you up to the next level of marks, is to say what the law means to Ruth. This is more straightforward than students think. All you need to do is to quickly reread what you have written, look again at your list or diagram of the facts that you drew up earlier on and write a few sentences on how and why the law as discussed is relevant to Ruth. Does this mean she is in a strong legal position on this point, or a weaker position? Does this mean that she should be advised to take an action if the other side will not agree to her terms, or should she seek a different course of action? Your last sentence, thus, rounds off the point:

Consequently, the Licensing Authority's decision is susceptible to judicial review.

Once you have completed this stage in the paragraph you are ready to move on to a new paragraph to discuss the next issue on your list in the same terms. Once you have exhausted all the issues on the list, go back to the problem question. Is there anything in there that you have missed? Have you exhausted all the legal issues suggested by the facts? If not, then continue with the paragraph system. Check your notes on the topic to be sure that there are no other issues that could be relevant to Ruth's case or to Phillip, who also wishes to challenge the decision. If so, then you are ready to move onto the conclusion.

Your conclusion should be one paragraph in which you provide your assessment of Ruth's chances of success if the case were to come to court. If you have followed the paragraph system, it should be possible for you to read through the last few lines of each paragraph and, by pulling all of those together, show the strengths and weaknesses of Ruth's case. This determines what advice you would give on whether to go to court or not and, if so, what remedy Ruth could expect to obtain. If your case is one for which the client may be entitled to damages, and you have not dealt with issues of quantum (level of damages) in your classes, then it is unlikely that your tutor will expect you to predict the amount of money the client would win. That said, you should be able to make a judgment on whether the clients have a strong or a weak case and what they would be asking for if there are alternative remedies open to them. In a criminal case, you would be giving an assessment of whether the client is likely to be found guilty, unless you have been asked to advise on other issues such as, for example, defences.

Finally, you need to reread and polish your written work. Further guidance on this stage can be found in Chapter 7.

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3 For detailed public law assistance and examples of excellent public law answers, see Fenwick, H and Phillipson, G, *Q&A Constitutional and Administrative Law*, 4th edn (London: Cavendish Publishing, 2003).



## WHY USE EVIDENCE?

Do not make a statement unless you can back it up with evidence.

Evidence could be (for example):

- judicial opinion from a case;
- sections from a statute;
- views of a commentator: academic or practitioner, or other relevant spokesperson.

### How do I use evidence?

Evidence is just as it sounds – something to back up a point you are making. Evidence is never a point in itself and consequently you should not begin a paragraph by setting out your evidence. Instead, you need to explain what point you are going to make, then provide the evidence to show that what you say is true. You should try to avoid the following, in which a student has put the cart before the horse, the evidence before the point:

In the case of *Anisminic v Foreign Compensation Commission* (1969) the court held that errors of law may be reviewable in circumstances in which an ouster clause would ordinarily oust the jurisdiction of the court.

This could be simply rephrased as follows:

Ruth has to establish that the ouster clause specified in the letter refusing her application for a licence, if it exists, does not oust the jurisdiction of the court in respect of her judicial review of the decision. The case of *Anisminic v Foreign Compensation Commission* (1969) establishes that where there is an imputation of an error of law, the court will see past the ouster clause to consider whether an illegality has been committed by the decision-maker. This will override the ouster clause and permit the judicial review to be heard.

Statutory references should be treated in the same way. They should be used as evidence of what the law is to back up a point you are making. Quotes from academic texts are to be used similarly, as are those from newspaper or other sources.

## CONCLUSION

Pull together all the legal evidence to provide an assessment of the strengths and weaknesses of the client's case.

Provide the options open to the client.

State any further investigation that may need to be undertaken prior to a final opinion being reached (if there are factual gaps or inconsistencies).

The conclusion should summarise the strengths and weaknesses of the client's case and suggest the likely outcome if his or her case were to go to court. In addition, the conclusion may provide an assessment of the ways to settle the case using negotiation, mediation or arbitration. It may also set out any avenues that the solicitor will need to explore, before a final legal opinion may be given, for example any factual inconsistencies that may have a bearing on the case. The conclusion should not leave the solicitor or his or her client with unanswered legal questions.

This chapter has shown that problem questions are relatively straightforward to write as long as you split the process up into small sections. Each paragraph is a self-contained unit, which sets out an issue, discusses the issue with evidence to back up the points that are made, and then concludes with an explanation of the relevance of the issue to the question. By building up the essay or problem question answer through single paragraphs, your answer should be well structured, clear and evidenced.

# SUMMARY

## CHAPTER 3

The following stages may assist in approaching, structuring and writing answers to problem questions.





