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The Administration of Law

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1.1 The Nature of Law

The law is a set of rules that define the rights and obligations of those under its jurisdiction. This book is predominantly concerned with laws that govern the built environment, which includes, at its most fundamental, land and buildings. As law is jurisdiction-specific, the law of England and Wales will be the primary focus of this book; however, comparisons may be made with Scotland and Northern Ireland, along with rights and obligations under international law. The aim of this first chapter is to provide an overview of the English and Welsh legal system, establishing a foundation for the areas of law considered in later chapters.

1.1.1 Why Regulate the Built Environment?

The importance of the built environment on society was articulated by a Government Select Committee in 2016:

> The built environment affects us all. The planning, design, management and maintenance of the built environment, and its interaction with the natural environment, have a long-term impact upon people and communities. The quality of life, prosperity, health, wellbeing and happiness of an individual is heavily influenced by the place in which they live or work and, in this way, place shapes us.[1]

1 Select Committee on National Policy for the Built Environment, Building better places, ch1, para 1.

Regulation of the built environment takes place through a combination of national and local policies and decisions, with national government providing broad frameworks and local government implementing them within their administrative boundaries. Law is integral to the overall functioning of the built environment, providing a structure under which national and local policies can be implemented.

1.2 Divisions of Law

The English and Welsh legal system distinguishes between two main types of law: criminal law and civil law.

1.2.1 Criminal Law

Criminal law is primarily enforced by the state through the Police and the Crown Prosecution Service, with proceedings brought in the name of the Crown (*R v*) against a defendant (for example, *R v St George*). The aims of criminal law are centred on the responsibility of the state to prevent and punish certain acts, alongside its obligation to protect individuals and/or society as a whole. Penalties imposed for a breach of criminal law range from community sentences to imprisonment. Although criminal law is often thought of in the context of violent offences, drug offences, offences of theft, etc., it also includes public law, which is concerned with areas governed by the state. These include health and safety regulations, environmental protections and building requirements.

1.2.2 Civil Law

Civil law governs rights and obligations between individuals, which can include businesses, companies and other forms of organisations as well as individuals. Civil law is enforced through individuals or organisations bringing actions against other individuals or organisations in order to resolve disputes (also termed private law). This is in contrast to criminal law, where the case is brought by the state, not the victim themselves. Civil law seeks to provide a recourse to those who have suffered injury or loss as a result of a breach of civil law, with remedies predominantly (but not exclusively) centred on financial compensation. In a civil case, a claimant brings a case against a defendant. As a general rule, any area of law which isn't covered under criminal law is civil law.

1.2.3 Overlaps in Criminal and Civil Law

On occasions, one set of events can give rise to both civil and criminal proceedings, and liability may be established in both. For example, a prosecution under the criminal law may be brought by the state against the driver of a vehicle under the Road Traffic Act 1988, while the question of compensation will be determined in a separate action brought by the claimant using civil law. A similar situation could arise where an employer has been negligent with regard to the health and safety of an employee, resulting in an injury at work.

The employee may bring a case under civil law against their employer, and the employer may be prosecuted under the criminal law for breaches of, or failure to comply with, the Health and Safety at Work etc. Act 1974. Where this situation arises, the two sets of proceedings are kept separate, and the matters are dealt with by different courts.

Whether a case is a criminal or civil matter, an appeal may be made to a higher court against the decision of a lower court. There must be proper grounds for appeal, and there are strict time limits within which an appeal must be made. In such circumstances, the person bringing the appeal is known as the appellant, and those against whom the appeal is brought are known as the respondents.

The law of England and Wales also governs a number of procedures, providing a legal framework under which they have to be carried out (even though there is no dispute or any matter which is contentious). The transfer of a house, making of a will or drafting of a contract are all examples. These non-contentious matters are governed by rules developed by the civil law, although there is no conflict between parties.

1.2.4 Evidence

Whether a dispute is a civil or a criminal matter, the action will not succeed unless there is sufficient evidence to support the case. In civil cases, it is for the claimant to prove the case and not for the defendant to disprove it. In criminal cases, it is for the state to prove the case, not to the defendant to disprove it. This obligation is known as the burden of proof. For criminal law, the burden sits with the state, and in civil cases, it sits with the claimant. Where either party appeals, the burden of proof sits with whoever brings the appeal. The extent to which the party bringing the action must prove their case is called the standard of proof. In a civil case, the claimant must prove their case on the balance of probabilities. In a criminal case, the standard of proof is higher, and the case must be proved beyond reasonable doubt.

An established method of pursuing or defending a case is through the use of witnesses giving evidence on oath. This is in addition to any documentary evidence which may be available, or real evidence (such as a mechanical device or a photograph of a building site where an accident has taken place). Evidence is given by a sworn statement, made on oath, known as an affidavit. Hearsay evidence is evidence which is not perceived by the witness but stated by some other person and repeated by the witness. Following the Civil Evidence Act 1995, hearsay evidence is generally admissible in civil proceedings. In criminal law proceedings, the law regarding the admission of hearsay is found in S114–136 Criminal Justice Act 2003.

1.2.5 The Common Law

Most legal systems in Europe are based on Roman law and operate under what is known as a civil law system. In contrast, the law in England and Wales operates under a common law system. The term civil law here is not concerned with the type of law (civil or criminal) but with the type of legal system.

The term common law has several meanings:

- It is used to describe the English and Welsh legal system along with other legal systems, such as those of Australia or the United States of America;
- It is used to describe the law made by judges through judgments using precedent in courts of law as opposed to law through an Act of Parliament; and
- It describes the body of law which became common or uniform to the whole of England and Wales after 1066.

Up until 1066, the laws of England and Wales varied from area to area, meaning there was no unified legal system. Each court operated in isolation, and there were no centralised institutions exercising either administrative or judicial control over the legal system as a whole. This changed with the Norman Conquest in 1066. An objective of the Normans was to establish a national system of law which would apply to all persons, regardless of where they were based geographically or their societal status (hence, the common law, common to all).

1.2.6 Equity

By the end of the reign of Edward I (1272–1307), the shortcomings of the common law were becoming apparent. Technicalities dominated common law procedures, and these had become very complex, with actions potentially failing because of minor errors in the preparation of documents required to start a case. There was also a lack of appropriate remedies to fit each set of circumstances. Claimants who were dissatisfied with the common law began to petition the King in an attempt to redress their grievances. By the end of the fourteenth century, there were so many petitions that the King began referring them to the Lord Chancellor. From this process, the courts of equity emerged, presided over by the Lord Chancellor. The Chancellor granted remedies which they thought were just and equitable depending on the circumstances of the case. This process became so popular that additional judges needed to be appointed. These Chancellor's Courts, or Courts of Chancery as they became known, provided an alternative set of courts to those of the common law.

Equity offered new remedies as alternatives to a claim for damages. Initially, the Chancellor was able to grant any remedy which they thought appropriate to the circumstances of the case. Eventually, the Courts of Equity became as formalised as the common law, with the availability of certain, specific remedies available with guidance from previous cases. Equity offered new remedies such as specific performance (a court order to compel the performance of the contract), an injunction (an order requiring a person to stop doing something or requiring them to do something) and rescission (the right to withdraw from a contract). The basis upon which equitable remedies operate is and always has been different from the availability of damages (monetary compensation) as a remedy in the common law courts. Equity is not a complete system of law, instead, it acts in conjunction with the common law by filling in any gaps. Equitable remedies are discretionary and not automatically granted even if the claimant has proved the case. In contrast, at common law, once the case is proved, the claimant is automatically entitled to claim damages irrespective of any other aspects of the case. In addition, if an equitable remedy is sought, the 'Maxims of Equity' are applicable. These are a set of rules that regulate the basis upon which remedies are granted. The conduct of the claimant, in particular, is very important where an equitable remedy is claimed.

Examples of the maxims include:

Equity Follows the Law: This reflects the notion that equity operates to mitigate the harshness of the common law. It does not deny common law rules and will only depart from common law rules where there is a good, compelling reason to do so.

Those Who Seek Equity Must Do Equity: When considering whether to grant equitable relief, the court will consider the conduct of both parties, and oftentimes requires both parties to act equitably. For example, specific performance of a contract will usually apply to both parties, not just the defendant.

Those Who Come to Equity Must Come with Clean Hands: This relates to the maximum above, and those who seek an equitable remedy from the courts must not have engaged in disreputable or dishonest conduct with regard to the issue at hand.

Delay Defeats Equity: Time limits with regard to cases brought in law are provided by statute, for example, claims relating to the quality of work in the construction of buildings are to be brought within 15 years of the fault becoming apparent.[2] Time limits for breach of contract regarding construction remain at 6 years,[3] which is the same for actions brought under the law of tort.[4] No such formal time limits exist in equity, however, equitable relief will often be denied where claimants do not act quickly. If an unreasonable, significant and/or inexcusable delay occurs, the court may determine that it is unjust to grant equitable relief.

In the nineteenth century, a number of reforms were made to the legal system, culminating in the Judicature Acts 1873–1875. To a large extent, these Acts established the system of courts as they are today. Existing court structures were reorganised, and it was established that matters governed by the common law and equity could be dealt with in the same court. Today, a court will first consider the common law position before then assessing whether equity affects the position. Although the common law and equity were fused for administrative purposes, they still retained their own individual characteristics and both aspects are present today.

1.3 Sources of Law

Most continental European countries have a legal system in which the majority of their law is in written codes which are amended as need arises (civil law systems). The Code Napoléon in France is a good example. In contrast, English and Welsh law have developed from a number of sources, each arising as the situation required, as exampled above with equity. The majority of new law is produced through an Act of Parliament (statute); however, a large part has developed from rules and principles pronounced in the decisions of courts

2 S14B Latent Damage Act 1986.
3 S14A (4) Latent Damage Act 1986.
4 S2 Limitation Act 1980.

throughout the centuries (called common law/case law). In addition to common law and statute, another source of domestic law is that of custom. Historically this was a source of law of great importance and is from where the common law originated. Its practical importance nowadays is slight, but on those occasions when a case does come to court questioning the legal validity of a custom, it tends to concern rights over land or buildings, so it is appropriate to consider it here.

1.3.1 Custom

A custom is a right or duty that has come to exist through the consent of the population. A person who wishes to prove the existence of a custom which hasn't previously been recognised by the courts must satisfy four requirements relating to the alleged right: time immemorial; continuity; peaceable enjoyment; and reasonableness and certainty.

1.3.1.1 Time Immemorial

The custom must have existed since time immemorial, which is fixed as 1189. In most cases, it is impossible for those claiming the custom to irrefutably show that it existed in 1189, so this requirement is satisfied by evidence that the custom has existed within living memory, or at least without interruption for 20 years. This was confirmed in *Mercer v Denne*,[5] where it was established that fishermen had the right to dry nets on a privately owned beach where the land had been added to by accretion. The court confirmed that 'Custom, it is argued, is a local law, which must have existed from time immemorial – that is, from the beginning of the reign of Richard I', and held that despite the accretion, the beach 'existed in and long prior to the reign of Richard I, in substantially the same condition as it does at present'.[6] The owner of the beach was prevented from building on it because to do so would interfere with the customary right to dry nets. If the custom could not have been exercised at some point since 1189, the claim will fail. In *Simpson v Wells*,[7] the appellant claimed that the obstruction of a highway with a stall set up to provide refreshments at statute sessions for the hiring of servants was a custom. However, the court held that as statute sessions were first introduced in the fourteenth century, there could be no such claim of obstructing the highway for such sessions before this time, so it was not custom by immemorial usage.[8]

1.3.1.2 Continuity

The custom must have been continuously in operation, although it need not have been exercised throughout the period, as long as the right existed. It seems a customary right cannot be lost by disuse once it is established, but failure to exercise the right may make it more difficult to prove. In *Wyld v Silver*,[9] the defendant bought a piece of land and sought to build five homes on it. The claimants brought an action to prevent the build by arguing that a custom existed allowing an annual fair to be held on the land now owned by

5 *Mercer v Denne* [1904] 2 Ch 534.
6 Cozens-Hardy LJ, Ibid.
7 *Simpson v Wells* (1872) LR 7 QB 214.
8 See case overview, judgment date 24/01/1872; *Simpson v Wells* (1872) LR 7 QB 214.
9 *Wyld v Silver* [1962] 3 All ER 309.

the defendant. The fair had not been held in living memory, and the last recorded occasion of it was 1875. Despite this, the court held that the claimants were able to prevent the landowner from building on the land owing to the fair being established as a custom. Likewise in *New Windsor Corporation v Mellor*,[10] a custom was proven which prevented a local authority from using land upon which it was established that, for many centuries, had been used for recreational purposes by the local inhabitants (even though such rights had not been exercised in recent times).

1.3.1.3 Peaceable Enjoyment

The basis of a custom is that it is exercised by common consent. If it is exercised by force or in secret, there can be no custom (Latin maxim: *nec per vim nec clam nec precario*). Similarly, if it is exercised by permission, it cannot be as of right, and, therefore it is impossible to establish it as a custom. In *Mills v Colchester Corporation*,[11] the claim of a custom entitling the claimant to an annual licence to fish for oysters failed, as the very existence of the licence prevented the fishing from being as of right.

1.3.1.4 Reasonableness and Certainty

The courts will not recognise a custom which is deemed unreasonable. In *Newcastle-Under-Lyme Corporation v Wolstanton*,[12] an attempt to claim the existence of a customary right enabling the Lord of the Manor to excavate on land without paying compensation for the damage to the owners of buildings on the land was deemed to be unreasonable.

The custom must also be certain, and those who are to benefit from a customary right must be capable of proper identification. In *Wilson v Wiles*,[13] a claim to a local custom to take turf failed because the extent of the right could not be identified. The custom must be consistent with previously established customs and must not conflict with statute or any basic principle of the common law.

1.3.2 Case Law

In a common law jurisdiction, when a judge decides on a particular aspect of the law the decision is recorded, and judges in lower courts are obliged to follow the decision in subsequent cases. This is called *stare decisis* or the doctrine of precedent. When a judge is considering the facts of a case and applying the law to the facts, it is necessary for them to look back at previous cases which have involved similar facts in the same area of law to see how those cases have been dealt with.

1.3.3 Law Reporting

The importance of case law as a source of law is dependent upon the existence of law reports, as this is where cases that establish new principles of law are published. The report

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10 *New Windsor v Mellor* [1975] 3 All ER 44.
11 *Mills v Colchester Corporation* (1868) L.R. 3 C.P. 575.
12 *Newcastle-Under-Lyme Corporation v Wolstanton Ltd* [1947] 1 All ER 218.
13 *Wilson v Wiles* (1806) 7 East's Term Reports 12.

contains details of the facts of the case along with the decision of the judge (known as the judgment) and reasoning for their decision. However, not all cases of interest are reported, and the majority of decisions are unreported. Despite this, an unreported case may be taken into account by a judge when reaching a decision in a later case.

1.3.3.1 The History

The history of law reports goes back to the Year Books, which were manuscripts referring to cases that had been dealt with in a particular locality. After the demise of Year Books, a number of private reports were separately published. These were compiled primarily by lawyers for their own personal use, and their standard and quality varied greatly. Good examples include those of Coke, Dyer and Burrow, all of whom established a reputation for reporting cases accurately. The available reports of the private reporters have been reprinted in what is known as the English Reports.

1.3.3.2 Modern Law Reporting

Modern law reporting dates from the creation of the Council of Law Reporting in 1865. The 'Law Reports' comprise four series of reports: Appeal Cases (AC), King's Bench (KB) (Queen's Bench from 1952 to 2022, QB), Chancery (Ch) and Family (Fam). These reports are now supplemented by the Weekly Law Reports (WLR), which contain a report of all the decisions which will eventually appear in the more official reports. In addition to these reports there are other transcripts which are published commercially. The best known of these are the All England Law Reports (All ER), which are a general series of reports published weekly that appear in three or four volumes each year. The Times newspaper carries daily reports of leading cases, while periodicals such as the Estates Gazette and The Journal of Planning and Environmental Law publish reports of interest to their readers. Many cases are recorded in various reports and reference is made to them in a cross-section of journals. When a case is reported, after the names of the parties involved and the year it was decided, the name of the report is included along with the page where the case is to be found. For example, *Murphy v Brentwood District Council* [1991] 1 AC 398 indicates that the first volume of the AC reports for 1991 must be consulted, on page 398.

As part of the modernisation of law reporting, in 2001, a system of neutral citation of judgments was introduced. A neutral citation is a unique reference given to a judgment by the court or tribunal itself. Table 1.1 summarises some of the most common examples.

If a judgment has been reported in more than one series of law reports, the neutral citation must be given first. A good source of guidance on the use of neutral citation (as well as the citing of case law in general) is to be found in The Oxford Standard for Citation of Legal Authorities (OSCOLA).

The majority of reported cases are available through databases such as LexisNexis, Westlaw UK and Lawtel. Justis stores all unreported judgments of the Court of Appeal, Civil Division, delivered since 1980. These databases are available by subscription, but many courts and some reporting services have web pages where cases can be accessed free of charge. House of Lords opinions from 1996 are published on the House of Lords website, and many other courts make full text judgments available online (for example, the European Court of Justice and the Employment Appeal Tribunal).

Table 1.1 Example citations.

Neutral citation	Court	Example
UKPC	Privy Council	*Marr v Collie* [2017] UKPC 17
UKSC	Supreme Court	*FirstPort Property Services Ltd v Settlers Court RTM Company and others* [2022] UKSC 1
UKHL	House of Lords	*Jameel v Wall Street Journal* [2006] UKHL 44
EWCA Civ	England and Wales Court of Appeal (Civil Division)	*Wodzicki v Wodzicki* [2017] EWCA Civ 44
EWCA Crim	England and Wales Court of Appeal (Criminal Division)	*Turner v R* [2022] EWCA Crim 617
EWHC (Ch)	England and Wales High Court (Chancery Division)	*EMI Group Ltd v The Prudential Assurance Co Ltd* [2020] EWHC 2061 (Ch)
EWHC (KB)	England and Wales High Court (Kings Bench Division)	*Mathieu v Hinds and Anor* [2022] EWHC 924 (QB)

1.3.4 Judicial Precedent

Judicial precedent is an integral aspect of case law. Under the doctrine of *stare decisis* (to stand by decisions), a judge reaches a decision on a particular point through the application of rules of law contained in previous decisions (precedent) which deal with similar issues. Not every decision sets precedent, as not every case is important enough to make new law and it depends on the court giving judgment, as lower courts are bound by the decisions of higher courts. A distinction is made between the principle forming the decision, called the *ratio decidendi*, and other comments made by a judge which are not strictly relevant to the decision, known as the *obiter dicta*.

1.3.4.1 Court Hierarchy

Lower courts are bound by the decisions of higher courts. As explained by Lord Neuberger in *Willers v Joyce*:[14]

> On issues of law, (i) Circuit Judges are bound by decisions of High Court Judges, the Court of Appeal and the Supreme Court, (ii) High Court Judges are bound by decisions of the Court of Appeal and the Supreme Court, and (iii) the Court of Appeal is bound by decisions of the Supreme Court.

The court structure is discussed in greater detail at Section 1.4; however, in summary, the courts at the bottom of the court hierarchy (the Magistrates Court (primarily criminal) and County Court (civil)) are bound by decisions made in the courts above them but are not bound by their own decisions. The High Court (civil) and Crown Court (criminal) are

14 *Willers v Joyce* [2016] UKSC 44.

bound by courts above them, but not those below, and the Court of Appeal (hears both criminal and civil cases) is bound by the only court above it, the Supreme Court (which also hears both criminal and civil cases). Decisions of the Supreme Court are binding on all lower courts.

Prior to October 2009, the House of Lords was the highest appeal court, comprising of the 12 most senior judges called Lords of Appeal in Ordinary. The House of Lords was located in the legislature (the House of Lords) and could be involved in Parliamentary debate concerning Government legislation. To enable a greater separation of powers, the Constitutional Reform Act 2005 made provision for the establishment of a Supreme Court, to be situated outside of the House of Parliament. The Supreme Court is now the highest appeal court; however, House of Lords judgments made pre-2009 remain binding on lower courts unless the decision is departed from by the Supreme Court.[15] The House of Lords was confirmed as entitled to depart from its previous decisions from 1996,[16] and this right continues in the Supreme Court (although instances are rare).[17] The Supreme Court (and the previous House of Lords) is the highest appeal court for all of the UK. The position of the Privy Council in the court hierarchy is discussed at Section 1.4.3.10.

1.3.4.2 Interpretation of Judicial Precedent

Despite the importance of precedent in common law legal systems, a court will, on occasions, refuse to follow an earlier decision. It is the *ratio decidendi* of a case which is binding on subsequent courts, subject to the hierarchy rules. Before precedent has a binding effect, it must be shown to be a decision of a court within the hierarchy. *Obiter dicta* of a court, particularly the House of Lords or Supreme Court, carry weight but need not be followed by a court in subsequent cases. Similar considerations apply to the decisions of Scottish, Irish and particularly Commonwealth cases, which in recent years have been frequently cited in building disputes. Decisions of the Privy Council (see Section 1.4.3.10) also come into this category. If there are grounds for distinguishing a case from an earlier decision, then the previous decision does not have to be followed. A court may overrule a legal rule in a decision that it considers to be obviously wrong, while the decision of a lower court may be reversed on appeal if the higher court disapproves of the previous case.

1.3.4.3 Advantages and Disadvantages

There are advantages and disadvantages to the doctrine of precedent, which are summarised in Table 1.2.

1.3.5 Legislation

A statute, also called an Act of Parliament, is the quickest and clearest method of creating new law or amending existing law to meet current requirements. An Act of Parliament

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15 Schedule 9 Constitutional Reform Act 2005.

16 Practice Statement (Judicial Precedent) [1966] 1 WLR 1234, which emphasised that, while the Law Lords would regard their earlier decisions as 'normally binding', they would depart from them 'when it appears right to do so'.

17 *Murphy v Brentwood DC* [1991] 1 AC 398.

Table 1.2 Advantages and disadvantages to the doctrine of precedent.

	Advantages		Disadvantages
Certainty:	Precedent gives a degree of certainty and consistency to the law, which enables the likely outcome of a case to be predicted.	Rigidity:	The process gives little scope for manoeuvre and change only occurs once a case is brought and travels through the appeal courts. Parliament can, however, bring in legislation to change an unsatisfactory feature of the common law.
Detail:	Case law has many detailed rules which provide full information relating to decided cases, and a written code of law does not enable the same level of detail and precision.	Technicalities:	The methods used by the courts to avoid a precedent can confuse the law and produce a degree of uncertainty.
Practicality:	It is more convenient to have precedent than to argue a case on each occasion when a legal issue arises.	Bulk:	Owing to the volume of cases, it can be difficult to refer to every appropriate authority. In addition, many cases are unreported, but they remain as precedents.
Flexibility:	If necessary and appropriate, using the doctrine of precedent, a court can still avoid an unsatisfactory precedent by distinguishing or overruling a decision.	Time:	Associated with the disadvantage of rigidity, with the need to wait until a case arises that has the capacity to overrule another or for Parliament to legislate, the doctrine of precedent can enable a decision to remain good law despite criticism.

overrules any existing custom, case law or earlier Act of Parliament with which it conflicts. The supremacy of legislation over other sources of law is termed the Sovereignty of Parliament. The effect of this Sovereignty is that Parliament, comprising the House of Commons and the House of Lords, together with the reigning monarch, is sovereign and the legality of Parliament to make a specific law cannot be challenged. The courts must apply an Act once it becomes law, although it is a matter for the judges to interpret the contents of the Act (termed 'Statutory Interpretation', discussed at Section 1.3.5.3).

1.3.5.1 The Making of a Statute

In the UK, Parliament consists of two different legislative institutions: the House of Commons and the House of Lords. Ideas for new laws can be brought by both the government in power and by private members of Parliament (although the vast majority are brought by the government). Prior to coming into force, whilst in the drafting stage, the law is constructed into a bill, which is prepared by parliamentary draftspersons. Bills can be introduced by the government in either of the two Houses of Parliament; however, the majority are introduced in the House of Commons. A bill has to pass through several stages in both the Commons and the Lords before it receives the Royal Assent (the King's approval) and becomes an Act. Once a bill becomes an Act, it will remain law unless it is repealed. It is presumed not to be retrospective (back-dated) in effect, having application only following its entry into force. In the main, a statute does not expire or become obsolete simply by the passing of time, meaning there are many Acts which are antiquated and of no practical use. To prevent this, the Statute Law (Repeals) Acts repeals obsolete enactments on a regular basis. Occasionally an Act is only operative for a limited period, but as a general rule a statute ceases to have effect only once it is repealed by another statute.

1.3.5.2 Types of Legislation

1.3.5.2.1 Public Acts

Public Acts are the most common types of Acts of Parliament. They affect society as a whole.

1.3.5.2.2 Private Acts

These do not alter the general law but confer special or local powers.

1.3.5.2.3 Consolidating Acts

A statute which gathers together several Acts on one area of the law and re-enacts them so that all the statute law on a particular topic can be found in the same Act. This is periodically done with, for example, tax legislation and town planning.

1.3.5.2.4 Codifying Acts

Codification takes place when all of the law on a particular topic is enacted in one statute. It includes all previous case law, customs and legislation. The law in the majority of continental European countries is codified (for example, Code Pénal in France) but in common law countries, there is little codification. The classic example of codification in English law is the Sale of Goods Act 1893 (now 1979), which reduced all the law on the subject into a single Act.

1.3.5.2.5 Delegated Legislation

Parliament frequently passes the responsibility of enacting legislation to others. The framework of an Act is laid down by Parliament (through enabling legislation), while the delegated body can fill in the detail required (through subordinate legislation). This subordinate legislation appears in the form of rules, regulations and orders, while the legislators range from the government (the King in Council) to local authorities. Much of the law relating to building matters and the transfer of land is to be found in this form. Examples include building regulations, and many aspects of planning law and health and safety legislation. Delegated legislation is made by ministerial orders known as statutory instruments, which since 1946 have had to be published or 'laid' before Parliament before they become effective. A statutory instrument can be recognised by instead of having the word Act at the end of the name of the instrument (document), the order, rules or regulations will be cited (recorded) by reference to year and number with the letters SI indicating its status. For example, Higher-Risk Buildings (Descriptions and Supplementary Provisions) Regulations SI 2023, which was enabled by the Building Act 1984 and the Building Safety Act 2022. Two other forms of delegated legislation are by-laws and the regulations of professional bodies and trade unions. By-laws are local laws which regulate aspects of life. So-called autonomic legislation regulates the conduct of the members of professional associations such as the Royal Institution of Chartered Surveyors and The Royal Institute of British Architects and provides for sanctions where appropriate. Control over delegated legislation is exercised by Parliament and the courts.

Parliament: Committees of the House of Commons review statutory instruments and decide which of them should be brought to the attention of Parliament. The enabling Act (the individual Act which grants power to make particular regulations) sometimes itself requires that the instrument be brought to the notice of Parliament. Appropriate government ministers are answerable to Parliament in respect of regulations made by their own departments, while by-laws must be confirmed by a government department before they become law. Parliament also has the overall safeguard in that it may withdraw the delegated power if it so wishes.

The Courts: Although the courts cannot challenge the validity of an Act of Parliament, they can challenge delegated legislation on the basis that the sub-legislator has exceeded the powers which Parliament has conferred upon them. In this case, the statutory instrument will be held to be ultra vires (beyond the power) and the rules rendered void. Many statutes, those dealing with compulsory purchase of land and planning law, for example, contain provisions whereby delegated legislation can be challenged on the basis that it is ultra vires. Before certain types of delegated legislation are affected, a public enquiry is held so that the views of the public may be made known on the particular issues (see Table 1.3).

1.3.5.3 Statutory Interpretation

Although Parliamentary Sovereignty denies the courts the opportunity of challenging the supremacy of Parliament, it is for the courts to determine the meaning of a particular section of an Act or statutory instrument. In doing so, courts are attempting to discover Parliament's intentions (also termed the will of Parliament) from the language used in the provision. It is the responsibility of the courts to 'interpret the will of Parliament' as expressed in the statute. Judges must not imply words into a statute, instead they must interpret the provision from what the enactment says. Many Acts contain an interpretation section dealing with the words and phrases used within it. A good example of this is section 205 of the Law of Property Act 1925:

> 205 General definitions.
>
> In this Act unless the context otherwise requires, the following expressions have the meanings hereby assigned to them respectively, that is to say –
>
> **i.** 'Bankruptcy' includes liquidation by arrangement; also in relation to a corporation means the winding up thereof;

Table 1.3 Advantages and disadvantages of delegated legislation.

Advantages		**Disadvantages**	
Efficiency:	Delegation enables delegated legislation to be passed quicker by the relevant body as opposed to sole reliance on Parliament.	Bulk:	A result of the increase in efficiency and speed is that approximately 3,500 SI's come into force each year.[18]
Technicality:	Experts in a field are able to construct delegated legislation using their expertise.	Drafting:	In moving responsibility from Parliament to delegated bodies, the process of law-making is moved from elected representatives (MPs) to unelected civil servants.
Volume:	Delegation reduces the volume of work for Parliament by requiring Parliament to deal with general aspects of policy and delegating the detail to the sub-legislators.	Publicity and Consultation:	Out of the approximately 3,500 SI's which come into force, only around 1,000 need to be considered by Parliament.[19] Delegated legislation is therefore not created by elected persons and is not subject to the same publicity and consultation as Acts of Parliament.
Flexibility:	The rules can be quickly altered and amended as necessary.	—	—

ii. 'Conveyance' includes a mortgage, charge, lease, assent, vesting declaration, vesting instrument, disclaimer, release and every other assurance of property or of an interest therein by any instrument, except a will; 'convey' has a corresponding meaning; and 'disposition' includes a conveyance and also a devise, bequest, or an appointment of property contained in a will; and 'dispose of' has a corresponding meaning;

iii. 'Building purposes' include the erecting and improving of, and the adding to, and the repairing of buildings; and a 'building lease' is a lease for building purposes or purposes connected therewith; (...)

Parliament has also sought to assist the courts by passing the Interpretation Act 1978, which defines many expressions used in legislation unless a contrary intention is apparent. Schedule 1 defines words and expressions, and includes, for example:

> 'Land' includes building and other structures, land covered with water, and any estate, interest, easement, servitude or right in or over land. [1st January 1979].

18 UK Parliament, 2023.
19 Ibid.

> ‘Writing’ includes typing, printing, lithography, photography and other modes of representing or reproducing words in a visible form, and expressions referring to writing are construed accordingly.
>
> ‘Month’ means calendar month. [1850]
>
> ‘Building regulations’, in relation to England and Wales, has the meaning given by section 122 Building Act 1984.

To further assist judges in interpreting the will of Parliament, the courts have developed a number of rules. It is for the judge in each case to determine which is the appropriate rule to apply.

1.3.5.3.1 The Literal Rule

Where the words of the statute are clear and unambiguous, they are to be applied as they stand.

1.3.5.3.2 The Golden Rule

Where application of the literal rule results in an absurdity or inconsistency, the meaning to be given is that which expresses best the intention of Parliament from reading the Act in full.

1.3.5.3.3 The Mischief Rule

Here the court attempts to find out the mischief that the Act is attempting to remedy and interprets the Act accordingly.

In civil law systems (as opposed to common law) the overall intention or purpose of the legislation is paramount, and the background to the legislation is considered an essential part of the process. Legislation must be interpreted purposively (by looking at its purpose) to give effect to the broad intentions of Parliament.

1.3.6 Law Reform and the Law Commission

Reviewing and updating are vital aspects of a legal system, ensuring that law and its principles do not become out-dated and remain relevant. Whilst the vehicle for change is Parliament through the enactment of statute, there are numerous groups and individuals who inquire into the current presentation of the law and make proposals for amendment. One such example is campaigner, Gina Martin, who lobbied the Government for 2 years to criminalise ‘upskirting’, the result of which was the Voyeurism (Offences) Act 2019. Professional bodies such as the Law Society and the Bar Council, and external associations such as the National Council for Civil Liberties and lawyers’ political groups (for instance, the Society of Labour Lawyers and its Conservative equivalent) seek to influence the present state of the legal system. There are also a number of standing committees of lawyers who advise on matters of law reform. At times (although fairly infrequently) the government appoints a Royal Commission to research a particular topic. The House of Lords Reform Commission is one example, which took place in 1999 and was the catalyst for the House of Lords Act 1999. The Act brought about many changes to the House of Lords, including the removal of hereditary peers and a significant reduction in the number of Lords. From research conducted in 2020, 33 Royal Commissions have been appointed since 1945.[20]

An important organisation which influences law reform is the Law Commission, established by the Law Commission Act 1965. It is a permanent organisation consisting of full time Commissioners, who are lawyers appointed by the Lord Chancellor and the Secretary of State for Justice. Their role is to recommend changes which should be made to the law, acting as an advisory body with the task of modernising the legal system. Its recommendations only become law if they are adopted by Parliament. In 2020–2021, the Law Commission published eight reports, covering, amongst others, leasehold reform, consumer sales contracts and modernisation of the communications. With regard to leasehold reform, reports covered leasehold enfranchisement, commonhold and the right to manage.

1.3.7 European Union Law

The UK officially left the European Union on 31 January 2020, although the Brexit transition period continued until 11 p.m. 31 December 2020. The withdrawal from the European Union came following a referendum held in 2016, which asked 'Should the UK remain a member of the European Union or leave the European Union?' The responses available were: 1) Remain a member of the European Union; 2) Leave the European Union. The UK population voted by 52–48% in favour of leaving the European Union.

Following the result of the referendum, from 31 December 2020, EU law ceased to apply in the UK. However, as EU law had a significant effect on the development of law in the UK since 1973, it was impractical for all to be repealed at the end of the transition period, the result of which would have been significant gaps in the legal framework of the UK.

To avoid such gaps, a statute was created which enabled withdrawal from the EU with certain safeguards in place. The European Union (Withdrawal) Act 2018 repealed the European Communities Act 1972 (S1) but retained the effect of EU-derived domestic legislation (S2 (1)) and EU regulations (S3). The Act determined that a court or tribunal in the UK would no longer be bound by any principles laid or decisions made by the European Court, nor could courts or tribunals refer any matters to the European Court (S6 (1)), and the Supreme Court would no longer be bound by any retained EU case authorities (S6 (4)). With regard to precedent, the Act determined that judgments of the European Court made on or before 11 p.m. on 31 December 2020 (the end of the transition period) would continue to be binding on UK courts, and those made after would not. However, UK courts are free to have regard to them where they are relevant to a matter before the courts (S6). Initially, the UK government envisaged that only the Supreme Court would be able to depart from pre-31 December 2020 judgments, however, in October 2020, it decided to extend the power to include the Court of Appeal and its equivalents in Scotland and

20 See https://researchbriefings.files.parliament.uk/documents/LLN-2020-0094/Royal-commissions-appointed-since-1945.pdf.

Northern Ireland. The test for departure from EU judgments is 'where it appears right to do so', which gives the courts a wide level of discretion. A UK-wide network of academics and researchers, coordinated from King's College London, publish a quarterly UK-EU regulatory divergence tracker. In the first quarter of 2024, January–March, the following developments were reported:

- 5 cases of active divergence (where the UK, or some part of it, changes its rules);
- 15 cases of passive divergence (where the EU changes its rules and the UK, or some part of it, does not follow);
- 1 case of 'NI divergence' (a new category covering cases where action is taken on the potential application of new or updated EU legislation in Northern Ireland);
- 1 case of procedural divergence (where new processes are introduced to change how pre-existing divergence is managed); and
- 3 cases of active alignment (where the UK takes steps to align more closely with EU rules, systems or programmes).[21]

1.4 The Court System in England and Wales

1.4.1 History

The operation of justice in England and Wales can be traced back to Anglo-Saxon times, when a combination of local courts and the King's court were used. Trial by ordeal was used until the twelfth century (when innocence or guilt was determined by reaction to an ordeal) and trial by combat until 1818. A version of the current day jury was introduced by Henry II in the twelfth century, using 12 local knights to settle disputes over land. The KB developed during this time; a term which continues to be used today. The first Magistrates' courts came into being in 1285, which saw 'good and lawful men' commissioned to keep the King's peace.[22] The fifteenth and sixteenth centuries saw the gradual introduction of a separation between the judiciary and government, with judges' salaries paid out of public funds and their removal from office only by 'due cause of law', as opposed to unfavourable judgments. This was codified in the Act of Settlement 1701. County Courts, holding responsibility for civil cases, were created under the County Courts Act 1846, and the Judicature Acts 1873–1875 (which merged common law and equity) laid the foundations for the operation of the courts today.

1.4.2 The Criminal Court Structure

1.4.2.1 Magistrates' Courts

The vast majority of criminal cases start off in Magistrates' courts and over 90% finish there.[23] Most towns have at least one Magistrates' court, and there are over 150 in England and Wales. The bench, the composition of judges, is either two or three magistrates, or a

21 J Reland, UK-EU Divergence Tracker Q1 2024 (London: UK in a Changing Europe, 2024).
22 See Courts and Tribunals Judiciary, Overview of the Judiciary.
23 See https://www.magistrates-association.org.uk/about-magistrates/jurisdictions/adult-court.

district judge. Where the bench has two or three magistrates, all have equal decision-making power. Magistrates are all volunteers (the role is unpaid), and they are lay persons, meaning they are not formally trained in the law. In court, they are supported by a legal adviser who sits in front of their bench. There is no jury in a Magistrates court.

The majority of criminal offences are categorised as either summary offences or indictable offences. For summary offences, Magistrates (or district judges in the Magistrates court) determine the verdict and the sentence. These are typically considered less serious offences, and include low-level motoring offences, disorderly behaviour and common assault. Indictable offences may only be tried on indictment, which means by the Crown Court before a judge and jury (see the following text). These are typically more serious offences, including murder, rape and grievous bodily harm.

On occasions, the Magistrates court will determine the case and pass it up to the Crown Court for sentencing. There are also a number of offences which are triable either way, meaning they can be heard either summarily or on indictment. Offences are categorised as such because they can vary significantly in their seriousness (the Sentencing Guidelines website examples theft, which could be of a chocolate bar, or could be of a priceless antique). For such offences, Magistrates can determine whether the case should be heard in the Crown Court and pass it up, or whether it should stay in the Magistrates court. If they decide it should stay in the Magistrates court, final decision sits with the defendant, who can either support remaining in the Magistrates, or choose the Crown Court instead.

1.4.2.2 Appeals from the Magistrates' Court

Appeals can be made against conviction or against the sentence passed, and can be heard by the Crown Court or the Divisional Court of the Kings Bench Division (KB).

1.4.2.3 The Crown Court

The Crown Court deals with the most serious criminal offences (indictable offences), alongside those triable either way passed up to them and appeals from the Magistrates court. There are around 70 Crown Courts located in towns and cities across England and Wales. The most famous of these is the Central Criminal Court, the Crown Court for the City of London (commonly known as the Old Bailey). Cases in the Crown Court may be overseen by Circuit judges, Recorders or High Court judges, alongside a 12-person jury comprised of members of the public. The jury determines whether a defendant is guilty or not guilty, whilst the judge is responsible for ensuring the trial is fair, providing the jury with legal directions, determining any legal issues which arise and imposing sentence.

1.4.2.4 Appeals from the Crown Court

A defendant may appeal against a sentence or conviction passed in the Crown Court to the Court of Appeal (Criminal Division) or the Divisional Court of the KB Division.

1.4.3 The Civil Courts

1.4.3.1 Magistrates' Courts

In addition to its function within the criminal justice system, the Magistrates court also holds civil jurisdiction, in particular with regard to proceedings in family law and civic financial liabilities. Family proceedings include applications for custody of children, maintenance orders and separation and adoption matters. The public is excluded from the proceedings; there are rules as to the composition of the 'bench' and strict limitations are imposed on press reporting. Other civil proceedings include council tax and appeals against the decisions of other bodies, such as licensing decisions against a local council.

1.4.3.2 Appeals from the Magistrates' Court

In certain cases, such as licencing and debt collection matters, appeals may be made from the Magistrates court to the Crown Court. As with their criminal jurisdiction, the Divisional Court of the KB Division can also hear appeals from the Magistrates, and for cases concerning family law proceedings, the Divisional Court of the Family Division hears appeals.

1.4.3.3 County Courts

The jurisdiction of the County Court is exclusively civil, meaning it can deal with matters including law of torts, contract law and recovery of land. Some can also deal with bankruptcy, insolvency and wills and trusts. A number of different judges sit in the County Court, including Circuit judges, District judges, Deputy District judges, Deputy Circuit judges and Recorders. The majority of civil cases do not have a jury (libel and slander trials being the primary exception), and it is the role of the judge to hear a case and make a determination based on the finding of facts and application of law. Judgment is passed and may include an entitlement of one party to damages (a financial amount), an injunction (preventing acts or actions, or requiring acts or actions) or a declaration (declaring a situation to be, such as determining a disputed boundary).

1.4.3.3.1 Appeals from the County Courts

Appeals from the County Court can be made be made in a number of ways:

- There is a right of appeal against the finding of a District Judge to a Circuit Judge;
- Either party can appeal against a County Court decision directly to the Court of Appeal;
- Where the County Court has bankruptcy jurisdiction, appeal can be made to a High Court judge in the Divisional Court of the Chancery Division.

1.4.3.4 The High Court of Justice

The work of the High Court is divided into three divisions, each of which has separate jurisdiction. The High Court deals with all high value and/or high importance civil law cases, as well as having supervisory jurisdiction over lower courts and tribunals (although there are a few statutory exceptions). The court is staffed by High Court Judges; its jurisdiction is principally civil in nature and is virtually unlimited.

1.4.3.4.1 The King's Bench Division

The KB Division is the largest of the three divisions and has the most varied jurisdiction, owing to its responsibility for dealing with all matters not covered by the other divisions. It is presided over by a President and staffed by High Court Judges. The KB Division deals with civil claims, including contract and tort cases, which, by reason of cost and/or complexity, are unsuitable for the County Court. Within the KB Division there are also a number of specialist courts, including:

- Admiralty Court: The oldest specialist court concerned with the consequences of maritime civil wrongs, including those in contracts and torts
- Commercial Court: Concerned primarily with banking and trade
- Planning Court: Deals with all challenges and reviews concerning planning matters
- Technology and Construction Court (TCC): Disputes arising from construction, engineering and technology disputes
- Administrative Court: Oversight of decisions of lower courts and tribunals and includes the Planning Court

One increasingly important aspect of the jurisdiction of the KB Division is its supervisory jurisdiction through the Administrative Court. This is a process whereby the court has the power to declare unlawful the decision of an inferior court, tribunal or other public body such as a local authority (if it is acting in a judicial manner). Where an individual, company or organisation challenges the lawfulness of the decision of a person or public body under public law, this is called judicial review. Judicial review concerning planning decisions is heard in the Planning Court.

Planning Court: Urban planning is integral to the built environment, and by association, its regulation through law. The primary responsibility for urban planning lies with local planning authorities (LPAs), who are local government bodies responsible for administering the majority of the planning system. The Planning Court deals with all judicial reviews and challenges involving planning matters, including (but not limited to):

- planning permission, other development consents, the enforcement of planning control and the enforcement of other statutory schemes;
- highways and other rights of way;
- compulsory purchase orders;
- village greens.[24]

To ensure planning matters are dealt with in a timely manner, cases concerning planning have strict limits to be applied (for example, determination of judicial review applications within 3 weeks) and those deemed 'substantial or difficult' are allocated to a judge with expertise in the issue at hand.[25] The Planning Court can sit in London, or one of five regional courts outside of London.[26]

1.4.3.4.2 Chancery Division

The Chancery division holds jurisdiction over seven specialist areas, divided into lists:

- The Business List
- The Financial List

24 See Court and Tribunals Judiciary for a full list, and Civil Procedure Rules 54.21 to 54.24.
25 Ibid.
26 Birmingham, Cardiff, Manchester, Leeds or Bristol.

- The Competition List
- The Insolvency and Companies List
- The Intellectual Property List
- The Property Trusts and Probate List
- The Revenue List

Their workload is varied and cases which reach the Chancery division are often complex and/or concern substantial amounts of money.

1.4.3.4.3 Family Division

The Family Division of the High Court hears predominantly complex cases, such as those concerning international child abduction, female genital mutilation and forced marriage. The Family Division also has an 'inherent jurisdiction', which is where a child who is the subject of legal proceedings must be protected (the most common example is where a child is made a ward of the court).

1.4.3.5 Appeals from the High Court

Either party may appeal against a High Court decision to the Court of Appeal (Civil Division). In exceptional cases, civil matters may be appealed directly to the Supreme Court from the High Court or one of the Divisional Courts. These appeals are called leapfrog appeals and are only permissible if a number of conditions are fulfilled, which include a certificate from the High Court, permission from the Supreme Court, satisfaction of 'relevant conditions'[27] and consent given by all parties.

1.4.3.6 The Court of Appeal

The Court of Appeal hears appeals from the Crown Court, the High Court and the County Court on questions of law or fact. The court is divided into a criminal and a civil division and is staffed by Lords Justices and Lady Justices of Appeal. The President of the civil division is the Master of the Rolls, and the President of the criminal division is the Lord Chief Justice. Most appeals are heard by three judges. The Court of Appeal can sit anywhere in England and Wales, but primarily it sits in London.

1.4.3.7 Appeals from the Court of Appeal

Either party to a case may appeal to the Supreme Court on a point of law of general public importance. This must be certified by the Court of Appeal and the Supreme Court must grant leave to appeal.

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27 The 'relevant conditions' set out in section 12(3) Administration of Justice Act 1969 are that a point of general public importance is involved and that it either: '(a) relates wholly or mainly to the construction of an enactment or of a statutory instrument, and has been fully argued in the proceedings and fully considered in the judgment of the judge in the proceedings, or (b) is one in respect of which the judge is bound by a decision of the Court of Appeal or of The Supreme Court in previous proceedings, and was fully considered in the judgments given by the Court of Appeal or The Supreme Court (as the case may be) in those previous proceedings'.

1.4.3.8 The Supreme Court

In 2009, the Supreme Court became the highest court in the UK, replacing the House of Lords (in its role as final appeal court). Its focus is on appeals deemed to be of public and constitutional importance. The Supreme Court is a UK body, which means it is legally separate from the courts of England and Wales. It is the final appeal court for all cases in England and Wales and Northern Ireland and for civil cases in Scotland. The Court has 12 judges, called Justices of the Supreme Court, and it is headed by a President and a Deputy President. The Supreme Court sits in panels of an uneven number with a minimum of three judges, although cases are ordinarily heard by five judges. It is located in London, in the former Middlesex Guildhall on Parliament Square, separating judicial power from the Houses of Parliament, where the House of Lords historically sat.

As well as its appellate jurisdiction, the Supreme Court has devolution jurisdiction enabling it to hear cases on devolution matters under the Scotland Act 1998, the Northern Ireland Act 1998 and the Government of Wales Act 2006. This devolution jurisdiction was transferred to the Supreme Court from the Judicial Committee of the Privy Council. For an appeal to be heard by the Supreme Court, leave (permission) must be given by either the Court of Appeal or the Supreme Court itself.

The Supreme Court hears appeals from a limited number of courts:

- England and Wales: Court of Appeal (civil and criminal division) and, in limited cases, the High Court (leapfrog appeals)
- Scotland: The Court of Session
- Northern Ireland: The Court of Appeal in Northern Ireland and, in limited cases, the High Court (leapfrog appeals)

1.4.3.9 The Technology and Construction Court

The Technology and Construction Court (TCC) is a specialist group of courts, which includes both the High Court and the County Court. The TCC is led by a High Court judge and staffed by Circuit judges. The TCC deals predominantly with cases concerning buildings, engineering and surveying, service provision by professionals in the sector (such as surveyors and architects), local authority conduct with regard to land and buildings, environmental claims, including pollution and challenging the decisions of arbitrators. As a general rule, the claim value needs to be or exceed £250,000 to be considered by the TCC. Exceptions to this are permitted for 'good reason', which has in the past included international cases, a new point of law or a complex case.

1.4.3.10 The Judicial Committee of the Privy Council

The Judicial Committee of the Privy Council, (JCPC or Privy Council), originated as the highest court of appeal for both civil and criminal matters for the British Empire. Its jurisdiction was founded in the notion that 'the King is the fountain of all justice throughout his Dominions, and exercises jurisdiction in his Council, which act in an advisory capacity to the Crown'.[28] Its current presentation was established through the Judicial Committee Act 1833. In 1900, the Privy Council exercised jurisdiction as the final court of appeal over

28 F. Safford and G. Wheeler, *The Practice of the Privy Council in Judicial Matters* (1901), 699–707.

one-fifth of the globe and one-quarter of the world's population.[29] It remains the final court of appeal for a number of Commonwealth countries, UK overseas territories, Crown dependencies and military sovereign base areas:

- Crown dependencies including Jersey, Guernsey and the Isle of Man
- Commonwealth countries including The Bahamas, Antigua and Barbuda, Cook Islands and Tuvalu
- Overseas territories including Bermuda, Montserrat, Gibraltar and Falkland Islands
- Sovereign base areas in Akrotiri and Dhekelia in Cyprus

It comprises 'members' of the Privy Council, who are senior members of the judiciary in either the UK or certain Commonwealth countries. The Judicial Committee moved away from its base in Downing Street in 2009 and now shares a building with the Supreme Court in the former Middlesex Guildhall on Parliament Square. The bench is ordinarily composed of five judges to hear Commonwealth appeals and three judges for all other matters. As well as its overseas appellate jurisdiction, the Privy Council also hears appeals from the Disciplinary Committee of the Royal College of Veterinary Surgeons and certain schemes of the Church Commissioners. Instead of delivering a judgment, it tenders advice to the Sovereign.

The 2016 Supreme Court case *Willers v Joyce*[30] confirmed the status of decisions of the Privy Council in England and Wales. The case concerned two competing precedents: one from the House of Lords which when applied to the facts would lead to one conclusion, and another more recent Privy Council decision which would lead to a different conclusion. The question was whether a first instance judge was bound to follow the House of Lords decision or the newer Privy Council decision. The Supreme Court held:

> There is no doubt that, unless there is a decision of a superior court to the contrary effect, a court in England and Wales can normally be expected to follow a decision of the JCPC, but there is no question of it being bound to do so as a matter of precedent. There is also no doubt that a court should not, at least normally, follow a decision of the JCPC, if it is inconsistent with the decision of a court which is binding[31]

1.4.3.11 The European Court of Human Rights (ECHR), the Human Rights Act and the UK Courts

The ECHR is an international court which was established in 1959. Its jurisdiction is centred in hearing cases brought by individuals or states alleging violations of the European Convention on Human Rights. It is not an institution of the European Union, and therefore was not directly included in the 2016 referendum held in the UK. The European Convention on Human Rights is an international treaty which guarantees fundamental civil and political rights, such as right to life, protection of property and right to a fair hearing. The Human Rights Act 1998 is the domestic legislation which incorporated the European Convention on Human Rights into UK law, converting it from an international treaty to one with effect

29 Q.C. Clayton, *UK Constitutional Law Association*, 2021.
30 *Willers v Joyce* [2016] UKSC 44.
31 Para 16.

domestically. The Human Rights Act enabled all UK courts to determine whether public bodies have acted in a way compatible with the European Convention on Human Rights. It imposed on UK courts a duty to interpret legislation, as far as possible, in a way compatible with the European Convention on Human Rights and required all UK courts to take into account decisions of the ECHR (though they are not bound by them).

Despite political rhetoric in the UK discussing repeal of the Human Rights Act, as of 2024, this has not occurred. The Political Declaration accompanying the 2018 Withdrawal Agreement committed the UK to remaining a party to the European Convention on Human Rights, and in the EU-UK Trade Agreement, article 524 expressly commits parties to an 'obligation to respect fundamental rights and legal principles as reflected, in particular, in the European Convention on Human Rights'. Therefore, the relationship between UK courts, the European Convention on Human Rights and the ECHR has not changed following the UK's exit from the European Union.

1.4.3.12 Tribunals

Tribunals are judicial bodies which enable experts to deal with specialist areas of law. They are tasked with determining disputes in their particular area of law, and mostly see individuals bringing actions against government departments or agencies. The exception to this is the Employment Tribunal, which determines disputes between employees and employers. From April 2020 to March 2021, over 300,000 disputes were heard by tribunals.

Some tribunals are UK-wide, others are jurisdiction specific. A unified tribunals system was established by the Tribunals, Courts and Enforcement Act 2007, which has jurisdiction across the UK. These operate under a two-tier system, where the first-tier tribunal hears cases at first instance and the upper tribunal hears appeals from the first. The upper tribunal is equivalent to the High Court in the court hierarchy.

The first tier has seven chambers, each dealing with their own area of speciality:

- Property Chamber
- Tax Chamber
- Immigration and Asylum Chamber
- Social Entitlement Chamber
- War Pensions and Armed Forces Compensation Chamber
- General Regulatory Chamber
- Health, Education and Social Care Chamber

In the upper tier, the number of chambers is reduced to four:

- Administrative Appeals Chamber
- Immigration and Asylum Chamber
- Lands Chamber
- Tax and Chancery Chamber

1.4.3.13 Focus: First Tier Property Chamber

The Property Chamber is responsible for hearing disputes over property and land. The disputes are broadly divided into three categories:

- Residential property
- Land registration; and
- Agricultural land and drainage

Example residential property disputes include leasehold disputes, refusal of right to buy a council home and rent increases. Example land registration disputes include those concerning the land registry and registered land documentation, and agricultural and drainage include disputes between agricultural landlord and tenants and neighbours.

1.4.3.14 Focus: Lands Chamber

The Lands Chamber is one of four chambers in the upper tier. It hears appeals against decisions of the Property Chamber, along with the Welsh Residential Property Tribunal and Welsh Leasehold Valuation Tribunal. Alongside appeals, the Lands Chamber also hears cases on certain subjects at first instance, including disputes concerning compulsory purchase compensation, valuation disputes regarding business rates and disputes over valuations for capital gains tax or inheritance tax.

Tribunals ordinarily sit as a panel, with a judge and panel members holding specific subject-matter expertise. The judge is legally qualified, whereas the members are subject-specialist non-legal members of the panel. The type of tribunal will determine the powers held by the panel, for example leave or refusal to remain in the UK, provision of special educational assistance or compensation and costs.

Both tiers of the tribunal system can review and set aside their own decisions. The majority of the first tier tribunal can be appealed to the upper tribunal, and appeals from the upper tier tribunal may be made to the relevant Court of Appeal for each jurisdiction (England and Wales, Scotland or Northern Ireland).

1.5 Alternative Dispute Resolution

Alternative dispute resolution, commonly referred to as ADR, is a blanket term for dispute settlement outside of the court structure. Its use in England is documented from as early as 1066, where citizens held their own informal court sessions to resolve disputes, often presided over by respected (male) members of the community.[32] The most common forms of dispute resolution, which typically fall under the term ADR are: Negotiation, Mediation and Arbitration.

The current day use of ADR in civil disputes stems from the Woolf Reforms, which were a series of recommendations made by Lord Woolf in 1996, the aims of which were to rectify a system deemed 'too expensive, slow, adversarial, fragmented and uncertain'.[33] These recommendations culminated in the Civil Procedure Rules (see Section 1.7.1.1), which introduced a duty to consider ADR, cost implications for failing to do so and the active

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32 M. McManus and B. Silverstein, 'Brief History of Alternative Dispute Resolution in the USA,' *Cadmus: Promoting Leadership in Thought That Leads to Action* (2011): 1 (3) 100–105.

33 D. De Girolamo and D. Spenser Underhill, 'Alternative Dispute Resolution and the Civil Courts: A Very British Type of Justice—The Legacy of the Woolf Reforms in 2022,' *Amicus Curiae* (2022): 4 (1) 129–154 (131).

encouragement of disputes being settled without litigation where possible.[34] Case authorities have repeatedly acknowledged the benefits of ADR, in particular mediation.[35]

An important distinction between the three forms of ADR is whether they are binding or non-binding. Negotiation and mediation alone are non-binding, which means either party to the dispute can pursue litigation through traditional legal channels should they be unhappy with the decision reached. Instead of relying on the formalised enforceability of decisions, non-binding ADR relies on the parties, having been active in the decision-making process, to respect the determination and enforce it themselves. In contrast, for binding ADR, which includes arbitration, the outcome is final and enforceable, with limited recourse to appeal.

In the case of *Cable & Wireless Plc v IBM United Kingdom Ltd*,[36] it was held that an agreement to use ADR is binding and enforceable by the courts. The claimant argued that an agreement to refer disputes to ADR was simply an agreement to negotiate. The court rejected this argument and recognised no distinction between an agreement to refer disputes to ADR and an agreement to arbitrate.

1.5.1 Negotiation

Negotiation is the most informal type of ADR, with parties seeking to reach an agreement without the involvement of a third party. They ordinarily proceed on a 'without-prejudice' basis, which means that statements made in an attempt to reach agreement are prevented from being used as evidence in future court proceedings. This is designed to encourage the parties to settle their dispute out of court, speaking openly without fear of that said being included later down the line should the negotiations fail. The informal nature of negotiation allows it to take place at any time and continue throughout a dispute, including during court preparations.

1.5.2 Mediation

Mediation involves the parties attempting to reach an agreement with the assistance of an independent third party. There are various forms of mediation, including:

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34 Pre-action Protocol: 8. Litigation should be a last resort. As part of a relevant pre-action protocol or this Practice Direction, the parties should consider whether negotiation or some other form of ADR might enable them to settle their dispute without commencing proceedings; 10: 10. Parties may negotiate to settle a dispute or may use a form of ADR including – (a) mediation, a third party facilitating a resolution; (b) arbitration, a third party deciding the dispute; (c) early neutral evaluation, a third party giving an informed opinion on the dispute; and (d) Ombudsmen schemes; 11: If proceedings are issued, the parties may be required by the court to provide evidence that ADR has been considered. A party's silence in response to an invitation to participate or a refusal to participate in ADR might be considered unreasonable by the court and could lead to the court ordering that party to pay additional court costs.

35 See *Hurst v Leeming* [2002] EWCH 1051 (Ch); *Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR 3002; *Jarrom v Sellars* [2007] EWHC 1366 (Ch); *Rolf v de Guerin* [2011] E In the case of Cable & Wireless Plc v IBM United Kingdom Ltd, it was held that an agreement to use ADR is binding and enforceable by the courts. The claimant argued that an agreement to refer disputes to ADR was simply an agreement to negotiate. The court, however, rejected this argument and recognized no distinction between an agreement to refer to ADR and an agreement to arbitrate. WCA Civ 78; *Northrop Grumman v BAE Systems* (*Al Diriyah C41*) [2014] EWCH 3148 (TCC); *DSN v Blackpool Football Club* [2020] EWHC 670 (QB).

36 All ER (Comm) 1041.

- Facilitative: The mediator facilitates the parties reaching an agreement as opposed to making a determination
- Evaluative: The mediator evaluates the strengths and weaknesses of a case
- Transformative: The mediator focuses on parties recognising each other's needs and interests to resolve their conflict[37]
- E-mediation: E-mediation takes place online, enabling those who are geographically distanced, or owing to circumstances of the conflict cannot/do not wish to be in the same physical space. It can be entirely automated, partly automated or facilitated by an independent third-party utilising video conferencing platforms.

The potential benefits of mediation have been explicitly discussed by the courts. In *Dunnett v Riltrack plc*[38] the Court of Appeal stated:

> Skilled mediators are now able to achieve results satisfactory to both parties in many cases which are quite beyond the power of lawyers and courts to achieve (…) when the parties are brought together on neutral soil with a skilled mediator to help them resolve their differences, it may very well be that the mediator is able to achieve a result by which the parties shake hands at the end and feel that they have gone away having settled the dispute on terms with which they are happy to live. A mediator may be able to provide solutions that are beyond the powers of the court to provide.[39]

1.5.3 Arbitration

In contrast to mediation and negotiation, arbitration is a more formal mode of ADR, regulated by the Arbitration Act 1996. All parties must consent to its use, ordinarily via a contractual agreement. An independent arbitrator with relevant expertise in the contested area will consider both facts and law before making an award. Their award is final and binding on the parties. The steps for arbitration commonly include:

- Agreeing to arbitrate
- Selecting an arbitrator
- Preparing for the hearing
- Parties presenting their cases
- Arbitrator making an award
- Enforcement of the award

There are advantages and disadvantages to each form of ADR, which are summarised in Table 1.4.

Which type of ADR is appropriate for a dispute will depend on the parties, their dispute, their relationship and their preferences.

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37 See R. Bush, *The Promise of Mediation* (1994, Jossey-Bass).
38 *Dunnett v Riltrack plc* [2002] EWCA Civ 303.
39 Para 14.

Table 1.4 Advantages and disadvantages of types of ADR.

Form	Advantages	Disadvantages
Negotiation	Informal, saving time and costs, continue throughout, without prejudice to encourage openness	Potentially less effective in complex/high value cases, lack of third-party involvement if relationship degraded
Mediation	Various forms dependent on circumstances, third-party assistance	Non-binding, cannot compel evidence or documents
Arbitration	Flexibility, proceedings in private and expertise in arbitrator	Costs, limited scope for appeal, lack of binding precedent

1.6 Legal Professionals

It is likely that those involved in property and construction will, during the course of their professional careers, have to work with members of the legal profession. A legal professional is someone with a recognised level of legal knowledge, obtained through experience, qualifications or a combination of both.

1.6.1 Solicitors

For many, a solicitor is their first port of call when legal advice or services are needed. This can range from a duty solicitor provided when an individual is arrested, a family law specialist for a contentious (or non-contentious) divorce, a firm advising multinational corporations on competition law or guiding private equity firms on mergers and acquisitions to a solicitor facilitating commercial land procurement or a residential house purchase. Solicitors provide a range of services, including advice, drafting of documents, negotiating, regulatory compliance work and conducting litigation on behalf of their clients.

From September 2021, the Solicitors Qualifying Exam (SQE) became the centralised assessment required for qualification as a solicitor, replacing the Legal Practice Course. Qualification now consists of four stages:

- A degree (or equivalent) in any subject
- Passing SQE1 and SQE2 assessments
- A minimum of 2 years qualifying work experience
- Satisfactory character and suitability

Solicitors are traditionally salaried and work within a firm. There are various structures and sizes of firms available – they can range in size from multinational firms with over 600 solicitors to a sole practitioner working on their own. Regarding structure, some are LLPs (limited liability partnerships), others traditional partnerships and some limited liability companies listed on the stock market (although this is rare). There are five solicitors' firms head-quartered in London known as Magic Circle firms. They consist of Allen & Overy, Clifford Chance, Freshfields Bruckhaus Deringer, Linklaters and Slaughter and May. All are multinational firms, renowned for their expertise and involvement in high-profile and complex cases, with each broadly specialising in banking, capital market and corporate work.

Solicitors have the right to represent their clients in court, termed 'rights of audience', in courts to which they are admitted or registered. However, they are required to complete additional assessments in order to exercise such rights in higher courts.

Solicitors are regulated by the Solicitors Regulation Authority (SRA), with which all solicitors must register. Once admitted to the Roll of Solicitors, they become members of the Law Society, an independent professional body for solicitors. The SRA sets standards for behaviour and professional performance, which are contained in a Code of Practice. It has the authority to investigate and intervene in cases of professional misconduct and has certain disciplinary powers. The SRA can also refer cases of professional misconduct to the Solicitors Disciplinary Tribunal. Where appropriate, a solicitor's name may be struck off the Roll of Solicitors, and they can be liable to their clients if they act negligently in the conduct of a case.

1.6.2 Barristers

Barristers (also called counsel) act as both legal advisers and courtroom advocates. They draft the pleadings, which indicate the manner in which a case is to be brought and give their legal opinion when so required. Their knowledge is specialist, and their areas of practice are often more streamlined than that of solicitors.

Historically, the only route to instructing a barrister was through a solicitor, who would then instruct counsel on their client's behalf. In July 2004, public access rules were introduced which allowed clients to instruct a direct/public access barrister (one which has undertaken mandatory training) without the need for a solicitor. Despite this change, most instructions received by counsel arrive via solicitors.

To practise as a barrister, a person must have been called to the Bar by one of the Inns of Court (Lincoln's Inn, Gray's Inn, The Middle Temple or The Inner Temple). After satisfying the educational requirements, a newly called barrister who wishes to practise must undergo a period of pupillage for 12 months. During this time, an experienced barrister (known as a pupil master) supervises the pupil's work. Once qualified, barristers work on one of six circuits in England and Wales and, unless working primarily in London, will appear in cases across their circuit area.

All barristers are subject to the cab rank rule. The rule dictates that barristers receiving instructions through a solicitor, provided they are appropriate to their expertise and experience, must accept them, regardless of:

- the identity of the client,
- nature of the case,
- source of funding (public or private) or
- opinions regarding character, innocence or guilt, etc.

The rule has been traced back to the eighteenth century (potentially earlier),[40] and is designed to ensure access to justice, irrespective of counsel bias, thought or opinion.

40 A. Watson, 'The Origins and Development of the Cab Rank Rule for Barristers in England and Wales,' *Journal on European History of Law* (2022): 13 (1) 12–20.

Barristers are self-employed, however, for convenience, they often share offices, commonly called chambers, with each counsel contributing towards overheads. Most chambers are administered by a clerk, who is responsible for providing administrative and business support to the barristers.

Following a successful period of practice, barristers who have demonstrated 'excellence in advocacy in difficult cases in higher courts of England and Wales'[41] may apply to receive 'silk', becoming King's Counsel (KC). If successful, they are entitled to wear a silk gown in court, use KC post nominally (e.g. Juniper Jones KC) and their work becomes limited to serious and/or complex cases.

Barristers are individually regulated by the Bar Standards Board, which sets and enforces the standards of behaviour and conduct required.

1.6.3 CILEX Practitioner/Chartered Legal Executive/Chartered Lawyer

Chartered legal executives, also called CILEX Lawyers, conduct very similar work to solicitors, including taking direct instruction from clients, providing legal advice and negotiating on behalf of their clients. They are regulated by CILEX, the Chartered Institute for Legal Executives (this may change to the SRA) and their route to qualification differs from solicitors. CILEX Lawyers currently have two routes to choose from for qualification, either the CILEX professional qualifications (CPQ) or Level 6 Chartered Legal Executive apprenticeship. In contrast to solicitors, CILEX Lawyers train in and specialise in one area of law, ordinarily in one of the following:

- Family law
- Civil litigation
- Conveyancing
- Probate
- Commercial
- Employment
- Criminal litigation
- Public law

CILEX Lawyers have parity with solicitors in their area of specialism.[42] Once qualified, additional training is available for CILEX Lawyers to become a CILEX advocate, and/or a CILEX coroner and/or a CILEX judge.

1.6.4 Licensed Conveyancers (CLC Lawyers)

The Administration of Justice Act 1985 created licensed conveyancers, extending those entitled to offer conveyancing services beyond solicitors. The Act defines conveyancing services as 'the preparation of transfers, conveyances, contracts and other documents in

41 KC appointments https://kcappointments.org.

42 'CILEX Lawyers are able to undertake one or more of the reserved/regulated legal activities without supervision as a result of holding independent practice rights in their specialist area. It is this authorisation that establishes CILEX Lawyers as having parity with solicitors' CILEX, FAQs.

connection with, and other services ancillary to, the disposition or acquisition of estates or interests in land'.[43] Their work is restricted by statute to conveyancing services, within which they have the authority to do the same as a solicitor.

Licensed Conveyancers do not need a law degree; to qualify they must complete two conveyancing law and practice specific diplomas, combined with 1,200 hours practical experience. Upon successful completion, they receive a licence to practise. Once qualified, they can offer conveyancing services in a variety of settings. The Council for Licenced Conveyancers (CLC) examples solicitors' firms, housing associations, Local Authorities, banks and building societies, property development companies, railways and airports.[44] Licensed conveyancers are regulated by the CLC, hence their alternative title as CLC Lawyers. Established alongside licensed conveyancers in the Administration of Justice Act 1985, their regulatory responsibilities include, amongst others:

- Maintaining a register of all licensed conveyancers,
- Investigating alleged misconduct and taking disciplinary action, and
- Setting educational and training standards for those wishing to qualify as licensed conveyancers.

1.7 Court Procedure

The procedure to be followed once a case reaches court depends on whether the dispute is criminal or civil (see Table 1.5).

As a common law jurisdiction, both the criminal and civil court systems in England and Wales follow an adversarial system. This places primary responsibility for establishing the

Table 1.5 Comparison of civil and criminal courts.

	Criminal Court	**Civil Court**
Type of court	Dependant on whether the offence is summary, indictable or triable either way	Dependant on value and complexity of case
Burden of proof	Prosecution Appellant (in appeals)	Claimant Appellant (in appeals)
Parties	Crown (*R*) (Prosecution – on behalf of the State) Defendant Director of Public Prosecutions	Claimant Defendant
Standard of proof	Beyond reasonable doubt	Balance of probabilities
Jury	Crown Court	None

43 S11 (3) (a) Administration of Justice Act 1985.
44 See https://www.clc-uk.org/trainees/become-a-clc-lawyer/licensed-conveyancer.

facts as alleged be presented through evidence by those bringing the case (claimant in civil or prosecution in criminal) and disputing such evidence with the defendant. The judge is not responsible for investigating the facts as presented; instead, they are responsible for overseeing the case and ensuring legal rules and procedures are adhered to and directing a jury where necessary. This is contrasted with an inquisitorial system, as found in civil law jurisdictions (common across the continent of Europe). In an inquisitorial system, the judge searches for facts, listens to witnesses, examines documents and orders that evidence be taken, after which they make further investigations as/where necessary.

1.7.1 Procedure for Civil Cases

In 1998, following widespread criticism of the costs and delays encountered in civil justice, Lord Woolf produced a report recommending wide-spread changes. Lord Woolf's final report[45] proposed a new landscape for civil justice with the following features:

- Avoidance of litigation wherever possible.
- Less adversarial and more co-operative litigation.
- Less complex litigation.
- Shorter and more certain timescales for litigation.
- More affordable litigation.
- Equality between disputants.
- A court structure which meets the needs of litigants.
- Case management by judges rather than by the litigants' legal advisors.

The interim report[46] foresaw a formal role for ADR as an integral part of the new civil justice system. In this respect, it recommended:

- that courts should encourage the use of ADR.
- that parties should acknowledge at case management conferences and pre-trial reviews whether or not the parties had discussed the issue of ADR.
- that judges should consider a litigant's unreasonable refusal to attempt ADR when considering the future conduct of a case.

1.7.1.1 The Civil Procedure Rules (CPR)

The proposals included in Lord Woolf's report were incorporated in the government's 1998 white paper on the future of the legal system.[47] The first stage of the reforms was implemented with the introduction of the new CPR 1998, which came into force in 1999, and regulate the procedures of the High Court and County Courts in England and Wales. The CPR is also colloquially known as 'the White Book'.

45 Access to Justice: Final Report to the Lord Chancellor on the civil justice system in England and Wales, Lord Chancellor's Department, July 1996.
46 Access to Justice: Interim Report to the Lord Chancellor on the civil justice system in England and Wales, Lord Chancellor's Department, July 1995.
47 Modernising Justice: The Government's plans for reforming legal services and the courts (1998) Cm 4155.

The CPR and associated practice directions serve to 'govern the procedure for the initiation and progress of civil claims before the County Court, High Court and Court of Appeal (Civil Division) in England and Wales'.[48] They provide a structure under which civil claims must adhere, with defined rules and practice directions to be followed. This includes guidelines on behaviour prior to proceedings being issued, called pre-action protocols.

1.7.1.1.1 Overriding Objective

Part 1 CPR provides an overriding objective, the overall aim of the rules: To enable 'the court to deal with cases justly and at proportionate cost'.

Justly and proportionate includes (so far as is practicable):

- **a.** ensuring that the parties are on an equal footing and can participate fully in proceedings, and that parties and witnesses can give their best evidence;
- **b.** saving expense;
- **c.** dealing with the case in ways which are proportionate –
  - **i.** to the amount of money involved;
  - **ii.** to the importance of the case;
  - **iii.** to the complexity of the issues; and
  - **iv.** to the financial position of each party;
- **d.** ensuring that it is dealt with expeditiously and fairly;
- **e.** allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and
- **f.** enforcing compliance with rules, practice directions and orders.[49]

The court must seek to give effect to the overriding objective, and the parties are required to assist the court in doing so.[50]

1.7.1.1.2 Alternative Dispute Resolution and the Civil Procedure Rules

Courts are required to further the overriding objective by 'actively managing cases'. This includes a number of practical activities affecting the ongoing progress of the case through the courts, and in the context of ADR it specifically includes:[51]

- encouraging the parties to co-operate with each other in the conduct of the proceedings.
- encouraging the parties to use ADR, and facilitating the use of such procedure, if the court considers it appropriate.
- helping the parties to settle the whole or part of their case.

Ordinarily, in civil matters (although at the discretion of the judge) an unsuccessful party will be ordered to pay the costs incurred by the successful party. However, such is the importance placed on the use of ADR, that the court may refuse a successful party costs if

48 As described by the Government Judiciary website: https://www.judiciary.uk/courts-and-tribunals/court-of-appeal-home/procedure-rules-for-the-court-of-appeal.
49 CPR 1.1.
50 CPR 1.2; 1.3.
51 CPR 1.4.

they have unreasonably refused to engage with ADR. The case of *Dunnett v Railtrack Plc*[52] provides the first example of costs penalties being imposed on a successful litigant because of their unreasonable refusal to mediate. The case concerned horses wandering onto a railway line and being hit by a train. Dunnett (the horse owner) failed in their claim for the value of the horses and nervous shock (post-traumatic stress disorder) in the first instance and applied for leave to appeal to the Court of Appeal. Leave was granted but the court recommended that the parties explore the possibilities of resolving the dispute through ADR. Dunnett contacted Railtrack suggesting that the matter be referred to ADR. Railtrack refused and instead made an offer in full and final settlement of the claim. The case proceeded to the Court of Appeal and Dunnett's appeal was dismissed. Dunnett, the unsuccessful party, would ordinarily be required to pay Railtrack's costs. However, the Court of Appeal noted the duty of the parties under the CPR to fully consider ADR, especially, as in the present case, where the court had suggested it. It was held that costs would not be awarded to Railtrack, given their refusal to contemplate ADR, leaving each party responsible for their own costs. Subsequent case law has explored what is and is not reasonable in this context and laid down guidance.[53]

1.7.2 Civil Proceedings: A Brief Overview

1.7.2.1 Pre-action

The CPR govern behaviour both during and prior to a claim being initiated. Pre-action protocols provide a framework for behaviour expected prior to the commencement of a claim, which includes parties providing the other with as much information as possible in relation to their claims and defences. Separate pre-action protocols exist for specific types of disputes, including construction and engineering and professional negligence claims. As with failure to engage with ADR, courts have the discretion to order costs against a party who has failed to comply with the relevant pre-action protocol, and/or has acted unreasonably prior to the commencement of proceedings.

1.7.2.2 Commencing Proceedings

Proceedings are commenced when the claimant issues a Claim Form. The Claim Form details the nature of the claim and is served on the defendant, with a copy held by the court. Service is ordinarily by post if the defendant is in England and Wales. The Claim Form may contain within it, or be served 14 days after, a Particulars of Claim. The Particulars of Claim set out the claimant's case, including specific facts relied upon. The defendant then has 14 days to respond with one of the following options:

1. Defend: If they wish to defend themselves against the claim, the defendant must do so within 14 days of receiving the Claim Form and Particulars of Claim (Part 15, CPR).
2. Admit: The defendant may admit all or part of the claim. If accepted, the claimant then requests judgment from the court (Part 14, CPR).

52 *Dunnett v Railtrack Plc* [2002] EWCA Civ 303.
53 *Halsey v Milton Keynes NHS Trust; Steel v Joy and Halliday* [2004] EWCA Civ 576.

3. No response: Defendant may fail to respond to the claim, either intentionally or accidentally. In most cases of a failure to respond, the claimant can apply to the court for a default judgment (judgment passed by the court without a trial) (Part 12, CPR).
4. Contest jurisdiction: The defendant may reply to the court acknowledging receipt of the Claim Form and associated documents and give notice of an intention to either dispute the jurisdiction of the court or argue that the court should not exercise its jurisdiction (Part 11, CPR).

In addition to the above responses, the defendant may feel that they have a claim against the claimant and make a counterclaim. They are able to do so without the court's permission if they file it with their defence but require permission if it is made at any other time (Part 20, CPR).

1.7.2.3 Case Management

As noted at Section 1.7.1, the court is under a duty to actively manage the case. This promotes a greater level of judicial control over the progression of the case, enabling the court to manage cost implications, encourage ADR and hopefully reduce potential delays.

An important element of this active management is the allocation of the case to the relevant track. There are three tracks which a case can be allocated: small claims track, fast track and multi-track. Each has its own rules and timetables. To which track a case is allocated will depend primarily (although not exclusively) on its financial value.

Small claims track: Ordinarily reserved for claims with a financial value of less than £10,000, with cases heard by a District judge in the County Court.

Fast track: Ordinarily reserved for claims with a financial value exceeding £10,000 but less than £25,000, where the trial is expected to last no more than one day. Cases are ordinarily heard in the County Court.

Multi-track: Reserved for cases of a particular level of complexity, and/or claims over £25,000, with cases generally heard in the High Court.

The court will set a timetable for various tasks to be completed, called 'giving directions'. It includes dates for providing witness statements, documentary evidence and, if necessary, the scheduling of any expert witnesses. The courts adopt a strict stance with regard to adhering to timetables. In the case of *Rollinson v Kimberley Clark Ltd*,[54] the defendant sought to alter the timetabled trial date due to the unavailability of one of their expert witnesses. The application was dismissed, and the court held:

> ... if it ever was acceptable ... it is certainly no longer acceptable when a trial date is bound to be fairly imminent, for a solicitor to seek to instruct an expert witness without checking and discovering his availability, or proceed to instruct him when there is no reasonable prospect of his being available for another year. The check having been made and the experts' availability in the near future being in doubt, then a different expert should be instructed.

54 *Rollinson v Kimberley Clark Ltd* [1999] Times Law Reports 22 June, CA; CP Rep 85.

In the case of *Matthews v Tarmac Bricks and Tiles Ltd*,[55] the defendant provided a date bracket during which their expert witnesses were unavailable without providing reasoning. Here is an excerpt of the conversation between judge and counsel:

JUDGE: 'Right, 15 July'.
COUNSEL: 'Neither Dr Calin nor Mr Dunkerley have availability on those dates. We consulted my learned friend earlier, the week not 5th July but the 6th, 7th, 8th and 9th July are available for all the medical experts. I do not know if those are the dates available to the court'.
JUDGE: 'No'.
'Why can't Dr Calin turn up on 15th July?'
COUNSEL: 'He has listed those dates as unavailable between 12th and 16th July'.
JUDGE: 'Why is he unavailable on 15th July?'
COUNSEL: 'I have no instructions as to why, it is simply a list of unavailable dates'.
JUDGE: 'How am I supposed to deal with the matter then? Is he subpoenaed somewhere else? Does he have to be somewhere else all the time? Is he able to give evidence by video link?'

Counsel replied that they had no idea.[56]

Owing to the lack of reasoning, the court set a date for trial within the expert's unavailable date bracket and the defendant appealed. The appeal was dismissed, with Lord Woolf MR stating:

> (...) it is essential that if parties want cases to be fixed for hearing in accordance with the dates which meet their convenience, those dates should be fixed as early as possible. The parties cannot always expect the courts to meet their convenience (...) If there is no agreement as to the dates which are acceptable to the court, the lawyers for the parties must be in a position to give the reasons why certain dates are not convenient to doctors. These cases emphasise the point that the professional expert witness owes an overriding duty to the court and not merely to his/her client and thus experts should be prepared to arrange or rearrange their affairs to meet the court's requirements.[57]

1.7.2.4 Expert Witnesses

The CPR restricts the use of expert evidence to 'that which is reasonably required to resolve the proceedings'.[58] Parties must apply for the court's permission should they wish to call an expert witness, and their request must include an estimate of costs.[59]

The duty of an expert witness, although instructed by a party to a claim, is to the court. Their role is to assist the court on matters within their expertise. This overrides 'any

55 *Matthews v Tarmac Bricks and Tiles Ltd* [1999] CPLR 463.
56 Ibid.
57 Ibid.
58 Part 35.1 Civil Procedure Rules.
59 Part 35.4 Civil Procedure Rules.

obligation to the person from whom experts have received instructions or by whom they are paid'.[60]

The court has the power to direct that expert evidence be given by a single joint expert rather than each party appointing an expert. The single expert is instructed jointly by the parties or appointed by the court if they are unable to agree. The amount of the single expert's fee can be limited by the court and the parties can be ordered to pay this amount into court. Each party may give instructions to the single joint expert, sending a copy to the other party at the same time.[61]

1.7.2.5 Offers to Settle

Part 36 CPR (as with the provisions regarding ADR) is designed to encourage parties to settle disputes without the need for a trial. Under this section of the CPR, both claimants and defendants can inform the other side what they will offer, or what they will accept, in order to resolve the dispute. A Part 36 offer can be made at any point until judgment is given, providing the parties with maximum time during which to make and consider an offer to settle. Offers are made 'without prejudice save as to costs', which means that the court will not be aware of any offers made or rejected until judgment has been passed and they are considering costs. 'Without prejudice' ensures offers made in an attempt to settle cannot then be used as evidence against the party which made them.

Parties are not bound to accept any offers made under Part 36, however, it may have cost implications if the judgment of the court, in favour of the claimant, is either less than that offered (if offer is made by the defendant) or equal to (if made by the claimant).[62]

- If the claimant fails to obtain a more advantageous judgment than a defendant's Part 36 offer (unless it considers it unjust to do so) the court can order the claimant pay both the defendant's costs and interest on costs.
- If the claimant obtains a judgment that is at least as advantageous if not better than the terms of the Part 36 offer, the court may order (unless it considers it unjust to do so) the defendant pay interest on the sum of money awarded, costs, interest on costs and an additional percentage of the sum awarded.

The cost implications can be significant, designed to encourage both parties to think carefully when making or rejecting a Part 36 offer. However, the offer needs to be a 'genuine offer to settle'[63] and if it is not, the court may conclude it unjust to grant any of the cost penalties/benefits provided in the CPR. In *Yieldpoint Stable Value Fund, LP v Kimura Commodity Trade Finance Fund Limited*,[64] the court held that the claimant's offer to accept 99% of the claim value constituted a very high offer, and not a genuine offer to settle. The judge concluded that their decision:

60 Part 35.3 Civil Procedure Rules.
61 Part 35.7 Civil Procedure Rules.
62 See Part 36.17 (1) (a) and (b).
63 *Yieldpoint Stable Value Fund, LP v Kimura Commodity Trade Finance Fund Limited* [2023] EWHC 1512 (Comm) para 27.
64 Ibid.

> should not be taken as any kind of discouragement to claimants making Part 36 offers. It is, if anything, an encouragement to make offers at a level not so perilously close to the full value of the claim in a case of such adversarial intensity.[65]

1.7.2.6 The Trial

The procedure laid down in the CPR has served to limit the number of cases which reach trial stage – the majority are do not end up in court, and those that do often don't progress to trial stage. Instead, they are resolved through ADR or settlements made through Part 36 offers. Those that do reach trial stage are almost all held in open court, which the public is able to attend.

The majority of civil cases do not have a jury, rendering the judge responsible for deciding the case based on fact-finding, evidence presented and application of law to facts. Once the judge has heard all submissions, they deliver their judgment. Judgment may be passed immediately (in more straightforward cases) or (in those more complicated) parties will receive judgment at a later date. Civil judgments, aside for successful allegations of contempt of court, do not involve punishment. Instead, there are a range of financial and non-financial remedies available where a judge finds in favour of a claimant. These include:

- Damages – a sum of money compensating the claimant
- An injunction – prohibiting someone from doing something or requiring someone to do something
- The determination of an issue, for example, defining a boundary

1.7.2.7 Costs

Once judgment has been delivered, the judge must address the question of costs. Costs may include legal professional fees, court fees, lost earnings and expert witness fees. The general rule is that the unsuccessful party will be responsible for the costs of the successful party. However, judges have a wide discretion and can depart from this rule as they deem necessary. Arguments will be made by the parties as to whether the general rule should apply or be departed from, and judges may determine that parties are responsible for their own costs (no costs order), or that the unsuccessful party is only responsible for a portion of the successful parties cost as opposed to all.

1.7.2.8 Enforcing Judgment

Whilst a judgment may award damages and/or costs and set a date by which payment must be made, it does not include enforcement mechanisms to secure the money. When the party fails to make payment, an application must be made to the court to enforce the judgment. This is not automatic – the person owed the money must take enforcement steps. The following terms are used:

> 'judgment creditor' – a person who has obtained or is entitled to enforce a judgment or order;
> 'judgment debtor' – a person against whom a judgment or order was given or made;[66]

65 Ibid para 29.
66 Part 70.1 (2) (a) and (b) Civil Procedure Rules.

Before doing so, it is important to ascertain whether the judgment debtor has sufficient funds and/or assets to fulfil the judgment, as time and money spent pursuing enforcement against one who cannot make payment is futile.

Enforcement mechanisms available include:

Warrant of control: Requesting the court to instruct agents (bailiffs) to collect money owed and identify goods that may be sold to raise funds.

Third party debt order: Freezing the amount owed which is held by a third party, such as a bank, preventing the judgment debtor from accessing the funds. Once an order is obtained, the third party is obliged to make payment to the judgment creditor.

Attachment of earnings order: The judgment debtor is to provide details of their employment to the court. Their employer is then ordered by the court to make deductions from their earnings and pay them to the court.

Charging orders: The judgment debt is secured through a charge placed on any interest held in property (including houses, land, shares, etc.). When the property is sold (assuming there is enough equity left after payment of any prioritised creditors, such as a mortgage provider) payment is made to the judgment creditor.

Insolvency proceedings: A bankruptcy order may be made against an individual or if the debtor is a company, an application made to have it wound up.

Each mechanism has its pros and cons, and determination of the most appropriate will be affected by the value of the judgment, the assets held by the judgment debtor and the costs and time involved in pursing each method of enforcement.

The Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020 came into force in May 2021. It provides legal protection to debtors (including judgment debt) from the actions of creditors during what the legislation terms a moratorium period.[67] The regulations provide for two types of moratoria: a breathing space moratorium and a mental health crisis moratorium. Breathing space provides legal protections from creditor action for up to 60 days and includes pausing contact and enforcement from creditors and freezing interest and charges. A mental health crisis breathing space also provides legal protections from creditor action and is available to those receiving mental health crisis treatment. It lasts as long as the mental health crisis treatment, plus 30 days (regardless of the length of treatment).[68]

1.7.2.9 UK Government Online Platforms

The UK Government, through HM Courts and Tribunals Service, has developed a number of online platforms through which claimants can make claims and defendants can respond. The service available depends on the value of the claim – for example, Money Claim Online is available for claims where:

- The value is less than £100,000;
- There is one claimant and no more than two defendants; and
- The defendant (s) has an address in England and Wales.

67 S7 The Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020 (SI 2020/1311).

68 The Insolvency Service, UK Government, Debt Respite Scheme (Breathing Space) Guidance for Creditors (June 2023).

A new money claim platform is currently being trialled for claims where:

- The value is less than £10,000;
- There is one claimant and one defendant; and
- The defendant has an address in England and Wales.

1.7.3 Role of National and Local Government

The framework of laws, both primary through Acts of Parliament and secondary through delegated legislation, involve both national and local government. For the built environment, local authorities, the administrative body in local government, play a key role in planning, developing and managing the built environment within their administrative boundaries.[69] Their role includes:

- Developing a local plan with planning policies and the allocation of sites for varying types of development
- Development management, including processing planning applications[70]

The work of local government takes place within a framework of national planning policy and guidance (issued by the Secretary of State for Communities and Local Government) and government identified national infrastructure needs. There are also several national government agencies, such as Historic England, Highways England and the Environment Agency, which hold responsibility for their respective areas.[71]

69 There are 317 local authorities in England and 22 in Wales.
70 Select Committee on National Policy for the Built Environment, Building better places, Chapter 2, The built environment: recent trends and emerging challenges.
71 Ibid.