

1

The Administration of Law

1.1 The nature of law

Any system of law is basically a method of trying to enforce order and a reasonable standard of fair play. In any community, rules will develop to control the relationships between individual members. The law acts as a set of rules that protects the rights of individuals and organisations while at the same time imposing obligations on the community at large. There must be some method of enforcing these rules and ensuring that the system is flexible enough to respond to the need for change where and when it is necessary. This book is concerned primarily with rights and duties that affect those in the landed and building professions. These are areas of life that have long had to comply with legal formalities and requirements. As society has evolved and become more complex, the laws governing such activities have increased in number and become more sophisticated. The aspects of law to be considered in this book have application in England and Wales. Some of the principles apply in Scotland and Northern Ireland as well, but in areas such as the organisation of the court system and the methods of transferring land, there are significant differences. This first chapter looks at the English legal system and outlines just how the law is made and applied. This provides an essential foundation for the areas of law that are considered in later chapters.

1.2 Divisions of law

1.2.1 *Civil and criminal law*

A fundamental distinction is made in the English legal system between the criminal law and the civil law. *Criminal Law* is the body of law made by the state to preserve society and uphold law and order. Its object is to punish conduct of which the state disapproves and to act as a deterrent. The punishment may take the form of a fine, imprisonment or some other form of penalty. A person or organisation who infringes these laws commits a criminal offence for which the consequence can be prosecution by the state. Criminal cases are initiated by the state, normally via the police and the Crown Prosecution Service, although occasionally private citizens

bring such cases. The state (the *prosecution*) is responsible for bringing a case against the person alleged to be responsible for committing the criminal act (the *defendant* or *accused*). As the United Kingdom is a monarchy, proceedings are brought in the name of the Crown. Consequently, in England and Wales a criminal case is described in the following manner:

Regina (latin for Queen) versus the person or organisation alleged to have carried out the criminal offence (for example, *Regina v David Cameron*). If the monarch is a king, the case will be described as *Rex* (latin for King) versus the person alleged to have committed the criminal offence (for example, *Rex v Wayne Rooney*). In order to shorten the description of the case it may appear as *R v David Cameron* or *R v Wayne Rooney*, as appropriate, when a record of the case is made.

Where the state is a major participant in the legal process, as in criminal cases, or the government is at the centre of such matters, the appropriate law is known as *Public Law*. Those who work in the professions relating to construction and the management of land and buildings may well encounter the operation of the criminal law in the course of their work. For example, a property developer who disobeys the rules relating to obtaining planning permission for a new building, or who contravenes regulations relating to building activities or environmental protection, can commit a criminal offence. Similarly, a builder who allows an unsafe system of work to continue or disregards the law relating to health and safety may be the subject of a criminal prosecution. Other aspects of public law are frequently encountered by those involved in matters relating to land and buildings and these are dealt with in Chapter 6.

The *Civil Law* governs rights and obligations between individuals. Individuals may include a business, trade union, company or other form of organisation. Private individuals and organisations initiate such cases because they have a dispute with another person or organisation. The civil law attempts to resolve disputes and to give a remedy to the person or organisation that has been wronged (the *injured party*). Money is the essence of civil cases. Such cases are initiated with the intention of compensating the injured party who has suffered some form of financial or physical loss because of the actions of the other person. The civil law does not insist that the case be brought and the person bringing it may discontinue the process at any time. In a civil action the *claimant* brings the action against the *defendant*. For example: *Cameron v Rooney* would describe a civil case brought by Mr Cameron against Mr Rooney while if British Steel Corporation brought a case against Cleveland Bridge & Engineering Co Ltd, it would be described as *British Steel Corporation v Cleveland Bridge & Engineering Co Ltd*¹. Because this area of law is concerned with relationships between citizens and organisations and disputes personal to them it is known as *Private Law*. This is because, in the main, such disputes only affect the individuals involved in the proceedings. As a general rule, any area of law that does not come within the scope of the criminal law is categorised as being part of the civil law. Most civil law relates to the law of contract and the law of tort. Many different subject areas fall within the civil law. Property

¹ [1984] 1 All ER 504

law, company law, commercial law and employment law provide some examples of areas of civil law.

Sometimes the same events give rise to both criminal and civil proceedings. A prosecution in a criminal court may well be brought against the driver of a vehicle under the Road Traffic Acts while the compensation aspects will be determined in a separate action brought by the claimant in a civil court. A similar situation could arise where an employer has been negligent in looking after the safety of an employee and as a result there has been injury. The employee may wish to bring a claim for compensation (*damages*) against the employer, while out of the same set of facts the employer may be prosecuted for breaches of or non-compliance with the Health and Safety at Work etc. Act 1974 (see Chapter 6, paragraph 6.10). Where this situation arises, the two sets of proceedings are kept separate and the matters are dealt with in different courts. There are numerous other situations where this dual liability arises. Whether a case is a criminal or civil matter, an appeal may be made to a higher court against the decision of the original court. In such circumstances the person bringing the appeal is known as the *appellant* and the person against whom the appeal is brought is known as the *respondent*. It is common for legal systems to govern particular procedures which have to be carried out within a legal framework 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 good examples. These *non-contentious* matters are governed by rules developed by the civil law, although there is no conflict between the parties.

1.3 Evidence in civil and criminal cases

Whether a dispute is a civil or a criminal matter, the action will not succeed unless there is sufficient evidence to support the case. Generally it is for the prosecution or the claimant, as appropriate, to substantiate the case and not for the defendant to disprove it. This obligation is known as the burden of proof. When a case is heard in a court of law, the judge must determine the correct facts of the case and then, if necessary, apply the law to those facts. The legal principles can be straightforward or complex. Often, it can be more difficult to ascertain what the correct facts are than to apply the relevant law. In a criminal case the standard of proof which is required is that the prosecution must put forward sufficient evidence to show that the accused committed the crime beyond all reasonable doubt. In a civil action the claimant must prove the facts relied upon and is required to prove the issues on the balance of probabilities. This means that it is likely, after reviewing the evidence, that the defendant did commit the act complained of. The outcome tends to reflect which party's evidence the judge believes to be true. The vast majority of civil actions are settled between the parties at some time before the judge's final decision. In a civil case there are a number of methods by which the facts may be proved. The claimant has to put forward sufficient evidence for all the relevant facts necessary for the case unless the other party has accepted the appropriate evidence. An established method of pursuing or defending a case is through the use of witnesses giving oral evidence at first hand 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. In civil cases, evidence is given by a sworn statement, made on oath, known as an *affidavit*. A witness must not give an opinion on the facts at issue unless he is an expert witness (see paragraph 1.18.6). Hearsay evidence is evidence which is not perceived by the witness but stated by some other person. Following the Civil Evidence Act 1995 hearsay evidence is generally admissible in civil proceedings. However, there are restrictions upon allowing hearsay evidence in criminal cases.

1.4 The common law

Most legal systems in Europe are based upon Roman law but England and Wales are subject to the so-called *Common Law*. This expression is used to describe English law and the other legal systems, such as those of Australia or the United States of America, which adopted the type of law to be found in England. The expression *Common Law* can also be used to describe the law made by judges in courts of law as opposed to that made by Act of Parliament. A third interpretation is that it means the body of law which became common or uniform to the whole of England and Wales after 1066. Up to that date, the laws of England and Wales varied from area to area as there was no unified legal system. Each court operated in isolation. There were no centralised institutions exercising either administrative or judicial control over the legal system. This changed with the Norman Conquest in 1066 when William the Conqueror (William I) proclaimed himself King of England, replacing the Saxon kings. The object of the Normans was to establish a national system of law, which would apply to all persons alike, wherever they were situated geographically and whatever their status in society. This law became based on the law which they brought with them from France and on those English customs which were found to be widespread after the conquest.

One consequence of the Norman Conquest was the introduction of the King's Council or *Curia Regis*. This was the central government of the Kingdom which exercised administrative (*executive*), law-making (*legislative*) and judge-like (*judicial*) functions without distinction. In the period immediately after the conquest, the common law developed on an *ad hoc* basis with each problem being settled as it arose. The Normans developed a strong central government and gradually the old local customs began to disappear, with their place being taken by the King's Council. From this court, special courts were instituted to deal with particular types of cases in which the King's justice was sought. As new courts developed, the *Curia Regis* diminished in importance. Three major common law courts administered the new common law:

1. The Court of King's Bench.
2. The Court of Exchequer.
3. The Court of Common Pleas.

These courts were able to compel the attendance of parties involved in the disputes, and also of witnesses. The process began whereby judges, appointed by the King, acted as Royal Commissioners throughout the country. These judges dealt with

civil and criminal matters wherever they arose. This process continued during the reign of Henry II (1154–89) and eventually it led to the development of the assize system, whereby judges toured the country on regular circuits in an attempt to deal with civil and criminal disputes in the regions. This process existed until 1971 and in a modified form still exists today. From the reign of Henry II, civil actions in the common law courts had to be started by writ. This royal command had to be obtained from the King's Chancellor. For every civil case there had to be a separate writ, and the claimant had to select the particular writ which fitted the facts of the case. These original writs were simply documents containing an order from the King addressed to the defendant, the County Sheriff or the Lord of the Manor, requiring the defendant's attendance at court to answer allegations against him. The different types of writ were said to give rise to different forms of action. This meant that the method of trial and the procedural rules which were applicable depended upon the nature of the writ used to start the case. Much of the civil law was built up through defining the circumstances in which the various writs could be brought.

1.5 Equity

By the end of the reign of Edward I (1272–1307) the shortcomings of the common law were becoming apparent. The writ system had become very formalised. Writs were not available to cover every set of circumstances and the rule was that, unless there was an appropriate writ, there was no remedy. No action could succeed unless the correct court was chosen. Technicalities dominated common law procedures. These had become very complex and an action might fail because of a slight error in the preparation of the documents required to start off a case. Another problem was the lack of appropriate remedies to fit every set of circumstances. A successful claimant in the common law courts had only the remedy of damages. Claimants who were dissatisfied with the common law, if they needed to go to 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 referred them to the Lord Chancellor. From this process, the courts of equity emerged, presided over by the Lord Chancellor. The Chancellor granted remedies which he thought were just and equitable depending on the circumstances of the case. This process became so popular that eventually other 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 was thought appropriate to fit the circumstances of the case. Eventually, the Courts of Equity became as formalised as the common law, with the availability only of certain specific remedies with guidance from previous cases. Equity offered new remedies such as *specific performance* (a court order to compel the performance of the contract), *injunction* (an order requiring a person to stop doing something they should not be doing in the first place or requiring a particular action) and *rescission* (the right to withdraw from a contract) (see Chapter 2, paragraph 2.12). The basis upon

which equitable remedies operate has always been different from the availability of damages as a remedy in the common law courts. Equity has never been a complete system of law. Instead, it has acted as a gloss on the common law by filling in gaps. Equitable remedies are discretionary and are not automatically granted even if the claimant has proved the case in issue. At common law, once the case is proved the claimant is automatically entitled to damages irrespective of any other aspects of the case. If an equitable remedy is sought, the so-called *Maxims of Equity* are applicable. These are a set of rules which regulate the basis upon which remedies are granted. The conduct of the plaintiff, in particular, is very important where an equitable remedy is claimed.

In the nineteenth century a number of reforms were made to the legal system, resulting in the Judicature Acts 1873–75. These Acts set up, to a large extent, the system of courts as it is today. Existing court structures were reorganised and at the same time it was established that matters governed by the common law and equity could be dealt with in the same court. In most modern day cases, a court will have to consider the common law position initially and then see if equity affects the position in any way. The Acts ordained that where the rules of common law and equity conflict, the rules of equity will prevail (Supreme Court Act 1981 s49). Although the common law and equity were fused for administrative purposes, they still retained their own individual characteristics and both aspects are present today in the same system.

1.6 The sources of law

Before the common law system can be properly understood it is necessary to consider the ways in which English law developed and to find out where the law actually comes from. Most continental European countries have a legal system whereby much of their law is contained in written codes which are amended as the need arises. The *Code Napoleon* in France is a good example. English law has been developed from a number of sources, each arising as the situation required. Although most new law is produced by Act of Parliament to meet the complex requirements of contemporary society, a large part of English law has developed from the rules and principles pronounced in the decisions of courts throughout the centuries. The other major domestic source of law which is referred to is *custom*. This was originally a source of law of great importance and is 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.

1.6.1 Custom

A custom is a right or duty that has come to exist through the consent of the population. Traditionally, a custom could either be general (applicable to the whole country) or local (applicable to a particular area). Nowadays, only local customs are of any importance, as general customs have either fallen into disuse or

have become incorporated into the law. Such rights are exercisable by members of a particular community such as a parish² or a town³. A person who wishes to prove the existence of a custom, never previously recognised by the courts, must satisfy a number of tests relating to the alleged right.

(A) *Time immemorial*

The custom must have existed since *time immemorial*. This is historically fixed as 1189. In most cases it is impossible for those claiming the custom to show conclusively 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 twenty years. This was shown in *Mercer v Denne*⁴, where it was established that fishermen had the right to dry nets on a privately owned beach. The owner of the beach was restrained from building on the beach because to do so would interfere with the customary rights. If the custom could not have been exercised at some time since 1189, the claim will fail, as in *Simpson v Wells*⁵, where the holding of a stall on a highway was shown not to have been authorised before the fourteenth century.

(B) *Continuity*

The custom must have been continuously in operation but it need not have been exercised throughout the required period as long as the right actually existed. It seems that 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 the first place. In *Wyld v Silver*⁶, the rights of people in a parish to hold an annual fair on a specific piece of land were recognised as a custom, even though no such fair had been held within living memory. Consequently, they were able to prevent the landowner from building on the land. Likewise in *New Windsor Corporation v Mellor*⁷, mentioned previously, a local authority was prevented from utilising land where it was proved that for many centuries the land had been used for recreational purposes by the local inhabitants, even though such rights had not been exercised in recent times.

(C) *Peaceable enjoyment*

The basis of a custom is that it is exercised by common consent. If it is exercised with force or in secret there can be no custom (*nec per vim nec clam nec precario*). If the so-called custom is exercised by permission it cannot be as of right, and,

² *Brocklebank v Thomson* [1903] 2 Ch 344

³ *New Windsor Corporation v Mellor* [1975] Ch 380

⁴ [1905] 2 Ch 538

⁵ (1871-2) LR 7 QB 214

⁶ [1963] Ch 243

⁷ [1975] Ch 380

therefore, it is impossible to establish as a local custom. In *Mills v Colchester Corporation*⁸, a claim to a custom entitling the claimant to an annual licence to fish for oysters failed, as the existence of the licence prevented the fishing from being as of right.

(D) Reasonableness and certainty

The courts will not recognise any custom which is unreasonable. On that basis, 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 that land was deemed to be unreasonable⁹. The custom must also be certain. Those who are to benefit from a customary right must be capable of proper identification. In *Wilson v Wiles*¹⁰, a claim to a local custom to take turf failed because the extent of the *right* could not be identified. The law is reluctant to recognise new customs which have not been previously established. The custom must be consistent with previously established customs and must not conflict with statute law or any basic principle of the common law.

1.6.2 Case law

Case law is the essence of the common law. The greater part of English law consists of rules and principles laid down by judges in courts of law, the more important of which are written down in law reports for future reference. When a judge makes a decision on a particular aspect of the law this will be recorded, and other judges are obliged to follow this decision in subsequent cases. When a judge is considering the facts of a case and applying the relevant law to the facts, it is necessary to look back to previous cases which have involved similar facts in the same area of law to see how those cases have been dealt with.

(A) Law reporting

The importance of case law as a source of law depends upon the existence of law reports. Important cases which establish new principles of law are published in the law reports. The report contains details of the facts of the case together with the decision of the judge (known as the judgment) and the reasons for that decision. By no means are all cases of interest reported. There is no official law report and most court decisions are left unreported. Even so, an unreported case may be taken into account by a judge when coming to a decision in a later case. There is an element of chance as to whether a case is reported or not. The history of law reports goes back to the Year Books. These were manuscripts that referred to cases which had been dealt with in a particular locality. After the demise of the Year Books, the practice grew up in the first part of the sixteenth century, whereby a number of private

⁸ [1867] LR 2 CP 567

⁹ *Wolstanton Ltd v Newcastle Under -Lyme Corp* [1940] AC 860

¹⁰ [1806] 7 East's Term Reports 12

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, who all established a reputation for reporting cases accurately. All the available reports of the private reporters have been reprinted in what is known as the *English Reports*. These are sometimes referred to by judges in the course of their decisions. There is an index in the *English Reports* showing in which volume the reports of individual reporters are contained.

Modern law reporting dates from 1865 with the creation of the Council of Law Reporting. In 1870 the Council was incorporated as the Incorporated Council of Law Reporting for England and Wales. The 'Law Reports' comprise four series of reports: Appeal Cases (AC), Queen's Bench (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 now appear in three or four volumes each year. Although the courts have traditionally preferred to use the more official reports, the importance of the commercially produced reports has increased in recent years. In construction matters and disputes concerning land and buildings it is common to encounter the Local Government Reports (LGR), Property and Compensation Reports (PCR), Building Law Reports (BLR), Housing Law Reports (HLR) and Rydes Rating Cases (RRC) among others. *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 stated and 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 Appeal Cases reports for 1991 must be consulted, and on page 398 details of the case are reported.

As part of the modernisation of law reporting, a system of neutral citation of judgments in the Court of Appeal and the Administrative Court was established by two Practice Directions in 2001 and 2002. The House of Lords and the Privy Council also adopted the new system of citation in 2001. Each case is assigned a unique number. There is no page numbering, only sequential paragraph numbering. Referring to part of the judgment of Lord Walker in the House of Lords case of *Stack v Dowden*, the neutral citation would read: *Stack v Dowden* [2007] UKHL 17 at [20]. This was the 17th case heard in the House of Lords in 2007 and the particular part of the judgment cited is in paragraph number 20. Cases in the Court of Appeal are cited as EWCA Civ (Civil Division) and EWCA Crim (Criminal Division); and in the High Court EWHC 1 (Ch) for Chancery Division and EWHC 1 (QB) for Queen's Bench Division (Fam) or (Admin) are substituted to indicate cases heard in the Family Division or the Administrative Court. 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)¹¹.

Over recent years developments in information communication technology have led to the introduction of a number of computerised databases that give access to a wide range of cases and law reports. Most reported cases are available through databases such as LexisNexis (a division of Reed Elsevier [UK] Ltd), Westlaw UK and Lawtel (from the legal publishers, Sweet & Maxwell Ltd) or Justis (operated by Justis Publishing Ltd) LexisNexis also 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 (very often on the day of release). Many other courts also make full text judgments available online (for example, the European Court of Justice and the Employment Appeal Tribunal).

(B) *Judicial precedent*

After the reorganisation of the courts implemented by the Judicature Acts (1873–75) and the emergence of good law reporting in the latter part of the nineteenth century, judicial precedent became an integral aspect of case law. By this doctrine of *stare decisis* (to stand upon decisions), whenever a judge reaches a decision on a particular point the rules of law contained in previous decisions which deal with similar issues must be applied. Not every judicial decision makes a precedent, as some courts are more important than others and not every case is important enough to make new law. 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*. The *ratio* is the binding precedent which must be followed in future cases. The *dicta*, which is not material to the case, or does not form the basis of the decision, need not be followed in subsequent cases. Even so, *dicta* of an appellate court may carry considerable weight. The doctrine is applied on a hierarchal basis. The rule is that the lower courts are bound by decisions of the higher courts. The County Court and the Magistrates Court, at the bottom of the court hierarchy (inferior courts), are bound by the decisions of the courts above them (superior courts) but are not themselves bound by their own decisions. The High Court is bound by a decision of the Court of Appeal and the House of Lords, while the Court of Appeal is bound by a decision of the House of Lords which is the supreme appeal court in the United Kingdom (including Scotland and Northern Ireland) in both civil and criminal matters. Decisions of this court are binding on all lower courts. Since 1966, the House of Lords has been able to depart from its previous decisions. Instances of this have been rare. The decision in *Murphy v Brentwood DC*¹² is a good example of this process, where the Law Lords overruled the previous decision in *Anns v Merton London Borough Council*¹³. The European Court of Justice (ECJ) (see paragraph

¹¹ <http://denning.law.ox.ac.uk/published/oscola.shtml>

¹² [1991] 1 AC 398

¹³ [1978] AC 728

1.7.1.E.a), whose major jurisdiction is concerned with the Treaties and institutions of the European Union, is not bound by its previous decisions. Questions on the interpretation of European Community Law can be referred by any UK court or tribunal to the ECJ for clarification.

(C) Interpretation of judicial precedent

The importance of a precedent tends to grow with age, but that does not mean that a precedent must be followed regardless of the consequences. Despite the importance of precedent in English law, a court will sometimes 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 the precedent has a binding effect it must be shown to be a decision of a court in the English hierarchy. *Obiter dicta* of a court, particularly the House of Lords, is of 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 paragraph 1.10) 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 which 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.

(D) The merits of the system

The following are considered to be *advantages* of the system of judicial precedent.

(a) Certainty

It is suggested that precedent gives at least some degree of certainty and consistency to the law so that the probable outcome of a case can be predicted.

(b) Detail

Case law has many detailed rules. The law reports provide full information relating to decided cases and it is argued that a code could never furnish similar precision.

(c) Practical aspects

It is more useful to have a precedent than to argue a case on each occasion that a legal issue arises.

(d) Flexibility

Where appropriate, a court is able to avoid an unsatisfactory precedent by distinguishing or overruling a decision, although the opportunities for this are limited.

The following are put forward as *disadvantages* of the system.

(a) Rigidity

The process gives little scope for manoeuvre (at least in theory). Parliament can, however, bring in legislation to change an unsatisfactory feature of the common law.

(b) Technicalities

The sophisticated methods of avoiding a precedent tend to confuse the law and produce a degree of uncertainty.

(c) Bulk

Because of the volume of cases it is increasingly difficult to refer to every appropriate authority. Sometimes cases go unreported but they still remain as precedents.

1.6.3 Legislation

Although much of English law is derived from case law, governed by the system of judicial precedent, the supremacy of legislation over all other sources of law means that law made by Parliament, or derived from it, is the most important source of law in the United Kingdom today. A statute, or Act of Parliament, is the quickest and clearest method of adding to the law or changing it to meet current social requirements. Such an Act overrules any existing custom, case law or earlier Act with which it is in conflict, and the only external factor which can affect this parliament-made law is a decision of the European Community (see paragraph 1.7). This supremacy of legislation over other sources of law is known as the Sovereignty of Parliament. The effect of this 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 the Act once it becomes law, although it is a matter for the judges to ascertain what the Acts actually mean.

(A) *The making of a statute*

In the United Kingdom, Parliament consists of two different legislative institutions known as the House of Commons and the House of Lords. Ideas for new laws are put forward by both the government in power and by private members of Parliament. The former are far more numerous and the latter stand little chance of success unless they are adopted by the government. The idea is put into technical language in a bill. Government bills are prepared by lawyers known as parliamentary draftsmen and they can be introduced by the government in either House of Parliament. The normal practice is to introduce bills 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 Queen'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. A statute does not become obsolete simply by the passing of time. There are many Acts on the statute book which are antiquated and of no practical use. As a consequence there are now Statute Law (Repeals) Acts which repeal 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 when it is repealed by another statute.

(B) Types of legislation

(a) Public Acts

These are Acts which affect the community generally. They are the most common types of Acts which are promulgated (brought into effect).

(b) Private Acts

These do not alter the general law but confer special or local powers. They are often promoted by local authorities.

(c) Consolidating Acts

Such an Act is 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 tax legislation and town planning Acts.

(d) Codifying Acts

A codification takes place when the whole of the law on a particular topic is enacted in one statute. It includes all previous case law, established customs and legislation. The law of most continental European countries is codified but in the United Kingdom and other common law countries there is little codification. The classic example of codification in English law is the *Sale of Goods Act 1893* (now 1979) (see Chapter 2, paragraph 2.5.2.B), which reduced all the law on the subject into a single code.

(C) Delegated legislation

Parliament frequently passes on responsibility for enacting legislation to others. In this way the framework of an Act can be laid down while the delegated body can fill in the detail required. This subordinate legislation appears in the form of rules, regulations and orders, while the legislators range from the government (the Queen 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 in that 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, e.g. The Home Improvement (Number 2) Regulations, 2007 (SI 2007/1667). 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.

(D) Control of delegated legislation

Control over delegated legislation is exercised by Parliament and the courts.

(a) 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.

(b) 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 him. 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*. Also, before certain types of delegated legislation are effected, a public enquiry is held so that the views of the public may be made known on the particular issues.

(E) The advantages of delegated legislation

(a) Speed

In an emergency, Parliament may not have time to deal with every problem which arises.

(b) Volume

It reduces the volume of work for Parliament if it deals with general aspects of policy and then delegates the detail to the sub-legislators.

(c) Flexibility

A flexible legislative process confers obvious advantages. The rules can be quickly altered and amended as necessary.

(d) Technicality

Modern day statute law, such as environmental and safety legislation, is highly technical in nature and better dealt with by experts than by members of Parliament.

(F) The disadvantages of delegated legislation**(a) Bulk**

Over 3000 statutory instruments come into force each year, creating new law.

(b) Consultation and control

With the widespread use of delegated legislation, law-making moves out of the control of elected representatives of the people and more into the hands of civil servants. Because this type of legislation need not be mentioned in Parliament, there is a danger of insufficient publicity and consultation with interested parties.

(G) Statutory interpretation

Although the courts are denied the opportunity of challenging the supremacy of Parliament, because of the concept of parliamentary sovereignty, it is a matter for the courts to determine the meaning of a particular section of an Act or statutory instrument and to attempt to discover Parliament's intentions from the language used in the provision. The rule is that judges must not imply words into a statute but must interpret the provision from what the enactment says. It is not possible, as in the case of most systems of law in Europe, to look at extrinsic material such as debates in Parliament to help interpret the provision. Rules have been formulated to deal with the interpretation of statutes by the courts. Many Acts contain an interpretation section dealing with the words and phrases used in it. A good example of this is section 205 of the Law of Property Act 1925. Parliament has also helped the courts, to some extent, by passing the Interpretation Act 1978 which defines many expressions used in legislation unless a contrary intention is apparent. The task of the courts is to 'interpret the will of Parliament' as expressed in the statute. To help the judges in that task of interpretation the courts have developed a number of rules. It is for the judge to decide which is the appropriate rule in a particular case.

(a) The literal rule

The basis of this rule is that if the words of the statute are clear and unambiguous they will be applied as they stand.

(b) The golden rule

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

(c) The mischief rule

Here the court attempts to find out the mischief that the Act is attempting to remedy and interprets the Act accordingly¹⁴.

These issues do not tend to arise in continental European systems of law or in the interpretation of European Union legislation (see paragraph 1.7). In Civil systems of law the overall intention or purpose of the legislation is paramount. The background to the legislation is considered as an essential part of the process. Legislation must be interpreted *purposively* (in other words, looking at its purpose) to give effect to the broad intentions of Parliament¹⁵.

1.6.4 Law reform and the Law Commission

It is important that any legal system should be continually assessed in order that its principles do not become out of date. Statute law is the principal method by which the law is changed, but there are also pressure groups who inquire into the state of the law and where appropriate make proposals for amendment. In addition to professional bodies such as the Law Society and the Bar Council, external associations such as the National Council for Civil Liberties and the 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 the Government appoints a Royal Commission to research a particular topic. The Beeching Commission¹⁶, which led to the Courts Act 1971 bringing about a fundamental change in the system of courts, is a good example.

The Law Commission Act 1965 established the Law Commission. This is a permanent organisation consisting of full time Commissioners, who are lawyers appointed by the Lord Chancellor and the Secretary of State for Justice to recommend changes which should be made to the law. It is an advisory body given the task of modernising the legal system. Its recommendations only become

¹⁴ *Heydon's Case* (1584) 3 Co Rep 7a; *Gorris v Scott* (1873-74) LR Ex 125

¹⁵ *Litster v Forth Dry Dock & Engineering Co Ltd* [1990] AC 546; *H P Bulmer Ltd v J Bollinger SA* (No 2) [1974] FSR 263; *Pickstone v Freemans Plc* [1987] 3 WLR 811

¹⁶ The Report of the Royal Commission on Assizes and Quarter Sessions (The Beeching Committee Report), Cmnd 4153, 1969

law if they are adopted by Parliament. It can claim considerable success in bringing about law reform, particularly changes in the criminal law. A good example of the Law Commission's work is the Latent Defects Act 1985, which attempts to clarify the law on limitation periods (the length of time a claimant has in which to bring a case against a defendant). In 1993, Sir Michael Latham was commissioned by the Department of the Environment and other bodies connected with the construction industry to suggest a number of mechanisms for improving co-operation and productivity. The Housing Grants, Construction and Regeneration Act 1996 (see Chapter 2, paragraph 2.14.10) was passed as a result of the Latham Report 'Constructing the Team'¹⁷. This Act, which provides for a new system of dispute adjudication and the outlawing of 'pay when paid' contracts, is a good example of a report leading to the enactment of legislation.

1.7 European Community law

The European Economic Community (EEC) was set up by the first Treaty of Rome in 1957. Its aim was to merge the interests of its member states into a common market of Europe whereby persons, goods, capital and services could circulate freely in order to create stability among its members and improve standards of living. After the merger of the EEC with the European Coal and Steel Community (ECSC) and the European Atomic Energy Authority (EURATOM) these three bodies became known as the European Community or 'EC'. The Treaty of Rome was concerned with attempting to harmonise the economic policies of the member states through common policies in matters such as employment, fair competition, transport, social issues, agriculture and fisheries. In 1973, the United Kingdom became a full member of the Community, thereby agreeing to dilute its sovereign powers. Since then, many other countries have joined the Community and this process is continuing. The original three treaties have been supplemented over the years by the Single European Act, the Treaty on European Union (the Maastricht Treaty), the Treaty of Amsterdam and some provisions of the Treaty of Nice and the Treaty of Athens. The most recent revision was made by the Treaty of Lisbon, which amended the EC Treaty (now named the Treaty on the Functioning of the European Union) and the Treaty on European Union and renamed the Community as the Union. These latter two instruments now constitute the Treaties on which the Union is founded. The Treaties are directly applicable in the United Kingdom, with no need for further legislation by Parliament. This is achieved by way of the European Communities Act 1972, s.2 (1).

1.7.1 *Union institutions*

There are now seven institutions that provide the Union with its institutional framework. These include those listed below in addition to the European Central Bank.

¹⁷ Constructing the team – 'The Latham Report': Final report of the government/industry review of procurement and contractual arrangements in the UK construction industry, 1994, HMSO

(A) The Commission

This is the executive body of the Union. It initiates and drafts Union legislation. It also acts as the guardian of the Treaties and has a duty to investigate any infringements of EU law. Currently each member state is represented on the Commission. Commissioners must act independently of their national status. The President holds office for a renewable term of two years.

(B) The European Council

This body was formally recognized as a Union institution by amendments made in the Treaty of Lisbon. Its role is a political one and it does not have a legislative function. There is an elected president for a term of two and a half years (renewable once). The President cannot hold a national office at the same time.

(C) The Council

The Council is made up of representatives from the governments of each member state. It meets in different configurations depending on the subject matter under consideration. All configurations, other than the Foreign Affairs Council, will be presided over by one of the Council's Member State representatives, on the basis of a system of equal rotation, determined by the European Council. The Council is a political body which reflects the national interests of member states in legislative matters. Although the final decision on any legislative proposal rests with the Council (often in a joint decision-making procedure with the European Parliament), it usually acts on proposals put forward by the Commission.

(D) The Parliament

Originally referred to as the Assembly, this body is based in Strasbourg in France. Since 1979, members have been elected from member states (MEPs). Representation varies depending upon the size of the member state. Members vote on a personal basis and do not receive any voting mandate from their home state. Parliament has three main roles. It has significant powers over the EU budget, it exercises a supervisory role over the Commission and it has a legislative function. In most Treaty areas, it acts with the Council in a joint legislative procedure.

(E) The Court of Justice of the European Union

(a) The Court of Justice (ECJ)

Based in Luxembourg, and not to be confused with the European Court of Human Rights (see paragraph 1.11), the Court of Justice is charged with ensuring that Union law is enforced and to provide a forum for the resolution of disputes between member states and the EC. It is also concerned with disputes between the

institutions of the Union and protecting rights of the individual. Judges are appointed from member states and one of them acts as President for a three-year term. The judges are assisted by Advocate Generals whose role is to help the court by presenting reasoned submissions on the facts and also recommendations for a decision. These are purely objective in nature and are not binding on the judges. Procedures are derived from continental European systems of law, with much greater emphasis on written submissions and pleadings. The Court does not operate a formal doctrine of precedent but it does normally follow its own previous decisions. Dissenting judgments are not expressed and there is no right of appeal.

(b) The General Court

In 1989, a court of first instance (CFI) was established to ease the workload of the Court of Justice. The work of the CFI was originally limited to disputes between the EC and its staff, competition issues and certain matters relating to the ECSM and EURATOM. Since 1993, the CFI has heard all cases brought by individuals or undertakings and under the Treaty of Nice it was given jurisdiction to hear certain other cases at first instance. The Treaty of Lisbon renamed the court of first instance the General Court. There is a right of appeal to the ECJ.

(F) The Court of Auditors

This court was established in 1975 and became a full institution under the Treaty of Maastricht. It carries out audits of all revenue and expenditure of the Union. It has to provide the Council and the Parliament with a statement that transactions have been legally made and that the accounts are accurate.

1.7.2 The sources of European Community Law

(A) The Treaties

A Treaty is a written agreement concluded between two or more states. In a way it is like a Public Act of Parliament made between nation states, but instead of having effect in one particular country it applies to all the parties to the treaty. Treaties are the primary source of EU law and take priority over subsidiary treaties and provisions contained in secondary legislation. Major examples include the two Treaties of Rome (1957), the Single European Act 1986, the Maastricht Treaty (Treaty of European Union 1992), The Treaty of Amsterdam, the Treaty of Nice and the Treaty of Lisbon. Subsidiary treaties or conventions may also be a source of EU law. Trading agreements between the Union and other states come into this category.

(B) Union legislation

Article 288 of the Treaty on the Functioning of the European Union gives the Council and the Commission powers to make secondary legislation in the following forms:

(a) Regulations

These are of general application in all member states. They are binding and directly applicable, and take effect without further enactment.

(b) Decisions

A decision is addressed either to a specific state or individual and is legally binding on the addressee.

(c) Directives

Directives may be addressed to one or more member states. They are binding upon member states as to the objectives to be achieved. Member states have a discretion as to how to achieve the objectives. Normally national provisions are put into place to implement a directive.

1.7.3 Direct applicability and direct effect

If a provision is directly applicable it means that it can take effect in the legal system of a member state without any further enactment. As mentioned above, regulations are directly applicable.

Other provisions of primary (Treaty) law and secondary legislation can have 'direct effect' in certain circumstances. This means that individuals can rely on the provisions of EU law in their national courts, whether or not they have been implemented into national law by the particular member state. In the United Kingdom, this is made possible by s.2 of the European Communities Act 1972. A provision of EU law is capable of having direct effect so long as it is clear and unambiguous, is unconditional in nature and able to take effect without further action by the EU or member states. In the early case of *Van Gend En Loos*¹⁸, a private firm sought to rely on EU law against the Netherlands customs authorities in proceedings before a Netherlands tribunal. The Court of Justice held that the appropriate provision (Article 12 of the Treaty prohibiting member states from introducing new customs duties between themselves) was directly effective and could be relied upon before the Netherlands courts.

Regulations, directives and decisions are also capable of being directly effective if the conditions outlined above are satisfied. In the case of *Van Duyn v Home Office*¹⁹ a Netherlands national who was refused entry to the United Kingdom to take up a job with the Church of Scientology was entitled to rely on a directive even though the UK had not implemented it, in circumstances where the ECJ was satisfied that the time for implementation had passed. A distinction is made between horizontal and vertical direct effect. The ECJ has held²⁰ that *directives* are only capable of

¹⁸ 26/62 [1963] ECR 1

¹⁹ 41/74 [1975] ECR 1337

²⁰ *Marshall v Southampton and South West Hampshire Area Health Authority* 152/84 [1986] QB 401

having vertical direct effect. That is, they can only be relied upon against the state and organs of the state and not against specific individuals. In cases before the ECJ it has been held that the concept of direct effect can be relied upon where the claim is against an organisation or body providing a public service which is subject to the control and authority of the state. This has included The Royal Ulster Constabulary²¹ and British Gas²².

1.7.4 State liability

The rule that directives have vertical but not horizontal direct effect can lead to injustice. A claimant against a private sector defendant is in a less favourable position than one against a public sector one. The ECJ sought to eliminate this injustice by developing what has become known as the *Francovich* doctrine, the principle of state liability for failing to implement directives. The cases of *Francovich and Bonfazi v Italy*²³ arose out of Italy's failure to implement Directive 80/987 on the protection of workers on the insolvency of their employer. *Francovich* and *Bonfazi* brought claims for their losses against the Italian government. The ECJ held that a state would be liable in damages for failure to implement a directive if three conditions were met; the directive must confer rights on individuals, the content of those rights must be identifiable from the directive and there must be a causal link between failure to implement and the loss suffered by the claimant. In subsequent decisions, the ECJ has also added the condition that the breach of EC law must be 'sufficiently serious'²⁴.

1.7.5 Conflicts between EU law and UK law

In areas of law in which the EU has competence, EU law prevails over UK law if there is a conflict between the two. The *Factortame* series of cases made this clear. The dispute in *R v Secretary of State for Transport, ex parte Factortame*²⁵ (Factor-tame 1) arose out of the introduction by the UK government of the Merchant Shipping Act 1988. The statute imposed restrictions on companies operating fishing vessels in British waters, contrary to EU law. Ultimately, the ECJ ruled that national courts are under a duty to give effect to EU law even if this is in conflict with national law and that a national law should be set aside where it prevents the granting of interim relief in a dispute governed by EU law. The House of Lords took the unprecedented step of issuing an injunction which suspended the effect of the offending Act.

²¹ *Johnston v Chief Constable of the Royal Ulster Constabulary* 222/84 [1986] ECR 1651

²² *Foster v British Gas* 188/89 [1990] ECR I – 3313

²³ 6,9/90 [1991] ECR I – 5357

²⁴ *Brasserie du Pecheur v Federal Republic of Germany* and *R v Secretary of State for Transport, ex parte Factortame* (Factor-tame 4) 46/93 and 48/93 [1996] ECR I – 1029; *R v Minister of Fisheries and Food, ex parte Hedley Lomas* 5/94 [1996] ECR I – 2553

²⁵ 213/89 [1990] ECR I – 2433

1.8 The court system in England and Wales

The court system in England is still based on that which was put into place by the Judicature Acts 1873–75 although, of necessity, changes have been made since in an attempt to reflect contemporary needs. Although some courts have both civil and criminal jurisdiction, it is better to consider the jurisdictions separately. The system is essentially a hierarchical one and as a rule it is possible to appeal from a lower court to a higher court.

1.8.1 *The Criminal Courts*

(A) Magistrates' Courts

The vast majority of criminal cases start off in Magistrates' Courts and over ninety-five per cent finish there as well. Every town of any size has at least one Magistrates' Court and there are approximately 600 such courts in England and Wales. The court is comprised of Lay Magistrates, sometimes known as Justices of the Peace (JP). These are part-time judges, not formally trained in the law, who in criminal matters decide the innocence or guilt of the defendant on the facts put before them. Such judges are unpaid but receive an attendance allowance and payment for loss of earnings. There are about 30 000 Lay Magistrates. Following the Constitutional Reform Act 2005, Local Advisory Committees make recommendations for appointment of magistrates, which go to the Lord Chief Justice for approval. The Lord Chancellor makes the appointment after consultation. All newly appointed magistrates have to undergo some initial training. On matters of law, procedure and sentencing, they are advised by the Clerk to the Magistrates who is legally qualified. The retiring age is seventy. In London, and some of the larger cities in the provinces, 139 District Judges (Magistrates' Courts) supplement the work of Justices. These are paid full-time magistrates, being either solicitors or barristers, who have had considerable experience of practising as lawyers in the criminal courts. They are allocated to the busier courts where the volume of work is greater and more complex. A Magistrates' Court is comprised of three Lay Magistrates although two justices will sometimes suffice. A District Judge (Magistrates' Courts) sits alone and has the powers equivalent to a bench of Lay Magistrates. In court a magistrate is addressed as 'your worship'.

Criminal offences fall into two main categories. These are classified as either summary or indictable offences. In the case of summary offences the magistrates decide the verdict and the sentence. This will also be the case if an offence is triable either summarily or on indictment and the defendant consents to it being heard in the Magistrates' Court. The maximum fine where a case is dealt with summarily is £5000 although higher fines of up to £20 000 are available in cases relating to health and safety and pollution. The maximum custodial sentence which magistrates may impose for any offence is in most cases twelve months' imprisonment. This can be slightly extended if the defendant has been convicted of two or more offences at the same time. The Magistrates' Court can, in certain circumstances, commit defendants to the Crown Court for sentence if, in their opinion, the offence or

offences are so serious that the Crown Court should have the power to pass sentence. Indictable offences are so called because they may only be tried *on indictment*, which means by the Crown Court before judge and jury (see below). In such cases the court must proceed with transfer for trial proceedings to remove the case to the Crown Court.

Special conditions apply where the accused is under the age of eighteen. For this purpose the magistrates sit as a Youth Court. Proceedings must take place separately from the adult court and the public are not admitted. Reporting restrictions are also enforced. Magistrates dealing with these cases must have had training in dealing with young offenders and the panel must include at least one woman.

In addition to the actual hearing of cases, the preliminaries relating to them and sentencing, magistrates have extensive powers in respect of granting bail to the defendant or remanding to prison to await trial. Where a defendant is not represented by a lawyer, local solicitors attend on a rota basis to advise the accused. This is known as the duty solicitor system. Since the enactment of the Police and Criminal Evidence Act 1984, persons held in custody at a police station have an automatic right of access to legal advice.

Appeals from the Magistrates' Court

- (i) *The Crown Court*: The accused may appeal against sentence or conviction as appropriate.
- (ii) *The Divisional Court of the Queen's Bench Division*: Any party to the proceedings (including the prosecution) may appeal on a point of law by way of 'case stated'. The Divisional Court also deals with applications for Judicial Review (see Chapter 6, paragraph 6.2) where there is a defect in the decision which the court has reached.

(B) The Crown Court

The Courts Act 1971 abolished the Courts of Assize and Quarter Sessions and established the Crown Court as the single first instance criminal court above the Magistrates Court. The Central Criminal Court (The 'Old Bailey') is where the Crown Court sits in the City of London area. Although most cities and large towns are near to a Crown Court centre, they are not all of the same importance. There are three levels of courts. The first-tier courts deal with the most important criminal offences. The judges in first-tier courts are High Court Judges, sometimes known as Puisne Judges, and also Circuit Judges (see paragraph 1.15). The first-tier courts act also as regional centres for dealing with High Court civil actions as well as criminal cases. The second- and third-tier courts deal only with criminal cases. Circuit Judges or Recorders (part-time judges) hear cases in these courts but High Court Judges can hear cases in the second-tier courts. In addition to the classification of courts, Crown Court offences are also categorised into three groups according to the seriousness of the offence, indicating the level of judge who may try the particular case. Lay Magistrates are entitled to sit with the judge in the Crown Court. In fact they must form part of the Crown Court where

it hears appeals from the Magistrates' Court and when sentencing defendants who have pleaded guilty in the Magistrates' Court and have come to the Crown Court for sentence.

Appeals from the Crown Court

- (i) *The Court of Appeal (Criminal Division)*: the accused may appeal against sentence or conviction where appropriate.
- (ii) *The Divisional Court of the Queen's Bench Division*: an appeal by way of 'case stated' may be made from the Crown Court to this court.

(C) The Court of Appeal (Criminal Divisions)

This court will be considered with The Court of Appeal (Civil Division) – see paragraph 1.8.2.E.

1.8.2 The Civil Courts

(A) Magistrates' Courts

Although essentially a criminal court, this court has some civil jurisdiction, primarily in family proceedings. This includes applications for custody of children, maintenance orders, and separation and adoption matters. As in the case of Youth Courts, the public is excluded from the proceedings, there are rules as to the composition of the 'bench' and strict limitations are imposed on press reports. There is no power to hear divorce cases. Magistrates are responsible for the granting or refusal of licences required for businesses which sell alcohol to the public, and those for betting shops and casinos where these are still required. There is also jurisdiction to recover unpaid council tax from debtors.

Appeals from the Magistrates' Court

- (i) *The Crown Court*: this is appropriate in licensing and debt collecting matters.
- (ii) *The Divisional Court of the Queen's Bench Division*: where appropriate, the 'case stated' procedure will apply on a point of law.
- (iii) *The Divisional Court of the Family Division*: this will apply in the case of family proceedings.

(B) County Courts

County courts were established in 1846 to deal with minor civil matters cheaply and on a local basis. County courts are the major first-instance courts in civil matters and their jurisdiction is exclusively civil. In recent years claimants have been encouraged to use these courts when initiating proceedings, in an attempt to cut costs. County courts are presided over by Circuit Judges who are either

solicitors or barristers. In the major cities more than one judge is allocated to each court. Where appropriate, deputy Circuit Judges may be appointed to reduce delays in the system. Much of the routine work involved in the county courts is undertaken by District Judges. Like Circuit Judges, they are appointed after selection by the Judicial Appointments Commission. There are around 220 county courts across England and Wales. They deal with the lower value and/or less complex civil cases. In practice, this will consist of all small claims track cases, most fast track cases and straightforward multi-track cases (see paragraph 1.18.5.A).

(a) Jurisdiction

The jurisdiction of the county courts is laid down in statute. The general jurisdiction of the county courts is set out in the County Courts Act 1984 (as amended) but there are many other statutes that also confer jurisdiction upon the county courts. The County Courts Act gives general jurisdiction for claims founded on contract or tort, or for money due under a statute. The allocation of business between the county courts and the High Court is subject to change by government. Currently, claims that include a claim for damages for personal injuries (contract and tort) are commenced in a county court if the value of the claim is less than £50 000. Claims over this value can be transferred from the High Court to a county court if this is a more suitable place of trial. County courts cannot hear claims for the tort of defamation (libel or slander) unless the parties agree and the High Court transfers the case.

(b) Appeals from the county courts

- (i) *The Circuit Judge*: There is a right of appeal against the finding of a District Judge to the Circuit Judge.
- (ii) *The Court of Appeal*: Either party can appeal against a county court decision directly to the Court of Appeal.
- (iii) *The Divisional Court of the Chancery Division*: where the county court has bankruptcy jurisdiction, appeal lies to a High Court judge.

(C) The High Court of Justice

The High Court was established by the Judicature Acts 1873–75, replacing the Common Law and Chancery Courts that existed previously. The work of the High Court is divided into three divisions, each of which has a separate jurisdiction. The court is staffed by High Court Judges and their role is to try civil cases which involve some complexity and/or considerable sums of money. High Court Judges are selected by the Judicial Appointments Commission in consultation with the Lord Chancellor and appointments are made by the Queen on their recommendation. Administrative matters in the High Court are dealt with by officials known as Masters who carry out the same types of tasks as District Judges in the county courts. In London, cases are dealt with at the Royal Courts of Justice situated in the Strand. High Court civil cases in the provinces are heard at first-tier Crown Court centres. The majority of chancery matters are dealt with in London,

but there are eight other regional centres where such matters can be dealt with. High Court civil cases can be started off in the provinces without the need to go to London. This is done by filing the appropriate documents at District Registries which exist in the larger cities in England and Wales (often in premises used primarily as county courts). When this takes place, the District Judges are given the powers of Masters of the High Court. The jurisdiction of the High Court is principally civil in nature and is virtually unlimited.

(a) The Queen's Bench Division

This is by far the largest of the three divisions and it has the residual task of dealing with all matters not covered by the other divisions. It is presided over by a President and staffed by High Court Judges. A large number of judges are required because the division also staffs the Crown Courts at those first-tier centres where serious criminal cases and High Court civil cases are heard. The majority of actions brought are claims in contract and tort outside the limits of the county courts. The judge generally hears the case alone without a jury. Where a person's character is in dispute, a jury is empanelled (formed) to sit with the judge. Two highly regarded specialist courts, The Commercial Court and the Admiralty Court, sit within this division. The Queen's Bench Division also administers the Technology and Construction Court, which deals with disputes relating to building matters (see paragraph 1.9).

One increasingly important aspect of the jurisdiction of the Queen's Bench Division is its supervisory jurisdiction. This is a process whereby the court has powers 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. This process is known as Judicial Review and is concerned only with the way in which the original decision of the court or public body was made and not the actual substantive merits of the case (see Chapter 6, paragraph 6.2).

(b) Chancery Division

This is the successor to the Court of Chancery, which dealt with the administration of equity and is the smallest of the three divisions. The President of the Chancery Division is the Chancellor of the High Court. The President is assisted by a number of other High Court Judges. Most Chancery cases are heard in London, but High Court Chancery proceedings can also be dealt with in the major cities of the provinces. As well as dealing with matters previously dealt with by the Court of Chancery, the jurisdiction of the Chancery Division covers all causes and matters relating to the sale of land, mortgages, trusts, wills, bankruptcy and company law matters.

(c) Family Division

Established in 1970, this is the most modern of the three divisions and deals with all aspects of family law. The division is headed by the President of the Family Division (also Head of Family Justice). The President is assisted by a number of High Court

Judges. The jurisdiction of the division includes all defended divorce petitions, family property disputes, matters relating to children, adoption, gender recognition and civil partnerships.

(d) Appeals from the High Court

Either party can appeal against a High Court decision to the Court of Appeal (Civil Division). If there is a point of law of general public importance, either party can appeal directly to the House of Lords if the decision is on an appeal by way of case stated from the Magistrates' Court or Crown Court (see above) or by using the 'leapfrog procedure'. For an appeal to go directly to the House of Lords, the parties must agree, the court must certify that the case is appropriate and the House of Lords has to grant leave to appeal.

(D) Divisional Courts

Each of the three divisions of the High Court have Divisional Courts which hear appeals from inferior courts. In the Queen's Bench Division, historically the court heard 'case stated' appeals on points of law from the Magistrates' Court or Crown Court, applications for a writ of habeas corpus and contempt of court applications, together with exercising supervisory jurisdiction over tribunals and inferior courts. However, these functions are these days mostly carried out by a single judge and claims for judicial review are now dealt with in the Administrative Court. In the Chancery Division, the Divisional Court hears bankruptcy appeals from county courts, while in the Family Division the Divisional Court hears appeals from Magistrates' Courts in family proceedings.

(E) The Court of Appeal

Appeals from the Crown Court, the High Court and the county courts are heard in this court. The appeal may be on a question of law or fact from a lower court and certain tribunals. The court is divided into a criminal and a civil division. It is staffed by Lords Justices and Lady Justices of Appeal (see paragraph 1.15.11). The president of the civil division is the Master of the Rolls, while the head of the criminal division is the Lord Chief Justice (see paragraph 1.15). In practice, most appeals are heard by three judges. The Court of Appeal can sit anywhere in England and Wales, but generally it sits in London.

(a) Appeals from the Court of Appeal

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

(F) The Supreme Court

In 2009, The Supreme Court became the highest court in the UK. It took over the role and functions of the Appellate Committee of the House of Lords. The Supreme Court is the final appeal court for England and Wales and Northern Ireland in civil and criminal cases and for Scotland in civil cases. The Court has twelve judges, known as '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. Cases are normally heard by five judges. As well as its appellate jurisdiction, the Supreme Court also has devolution jurisdiction. It has the power in this latter respect to determine whether the devolved executive and legislative authorities in Scotland, Wales and Northern Ireland have acted within their powers or failed to comply with any duty imposed on them. The Supreme Court hears appeals from the Court of Appeal (civil and criminal divisions), the Court of Session in Scotland and the Court of Appeal in Northern Ireland. In some limited cases it also hears appeals from the High Court (see above). Most appeals come from the Court of Appeal in England. In order for an appeal to come to the Supreme Court, leave must be given by either the Court of Appeal or the Supreme Court itself. In criminal cases, there is the additional requirement that a point of law of general public importance must be involved.

1.9 The Technology and Construction Court (TCC)

The TCC is a specialist court, led by a High Court Judge and staffed by Circuit Judges. The Court deals mainly with technology and construction disputes. These include building or other construction disputes, claims for the enforcement of the decisions of adjudicators under the Housing Grants, Construction and Regeneration Act 1996, claims by and against engineers, architects, surveyors and other specialised advisers, claims by and against local authorities relating to their statutory duties concerning the development of land or the construction of buildings and claims between landlord and tenant for breach of a repairing covenant. The TCC also hears challenges to the decisions of arbitrators in construction and engineering disputes. The court is based in London, but also operates from a number of regional court centres, some of which have full time TCC judges.

1.10 The Judicial Committee of the Privy Council

This is the final court of appeal for the UK overseas territories and Crown dependencies and for the Commonwealth countries that have retained their right of appeal to the UK. It is composed of members of the Privy Council who are senior members of the judiciary. The Judicial Committee sits in London with a minimum number of three judges. As well as its overseas appellate jurisdiction, the Judicial Committee of the Privy Council also hears appeals from a number of disciplinary

committees of the professions. Instead of delivering a judgment it tenders advice to the Sovereign. The Committee is not bound by its previous decisions.

1.11 The European Court of Human Rights

This court (not to be confused with the European Court of Justice – see paragraph 1.7) was established in 1959 and is based in Strasbourg. The court is concerned with the interpretation and application of the European Convention on Human Rights and Fundamental Freedoms (ECHR). The United Kingdom is one of the contracting states and has accepted the court's jurisdiction. Individuals can approach the court directly in respect of an allegation of violation of convention rights. Rulings are delivered by a chamber of seven judges with an appeal to a grand chamber of seventeen judges.

1.12 Tribunals

A major characteristic of the English legal system since the end of the second world war has been the growth in importance of tribunals. A noticeable defect of the traditional court system is that it is unsuitable for dealing with the settlement of every type of dispute. Disputes dealing with specialist topics can often be better dealt with by experts instead of by judges. The increasing role of government in economic and social matters has brought about a proliferation of disputes between private individuals and government departments. Acts of Parliament have set up tribunals in an attempt to provide a speedy and cheap method of settling disputes as a supplement to the court system. The areas dealt with by tribunals vary from immigration appeals and employment matters to disputes concerning tenanted farms.

Procedure in the various tribunals and the routes of appeal were very different and the Tribunals Courts and Enforcement Act 2007 brought in a radical reform of the tribunal system. The Act created an Upper Tribunal, a superior court of record, the primary function of which is to deal with administrative appeals and a First Tier Tribunal. The pre-existing Employment Tribunal, Employment Appeals Tribunal and Asylum and Immigration Tribunal all remain in place. The First Tier Tribunal and the Upper Tribunal are both divided into a number of chambers. The composition of the new tribunals will be similar to that of existing tribunals in that legally qualified members will sit alongside 'other' members (experts in the field, such as qualified surveyors for valuation matters). However, the legally qualified members of the two new tribunals will be called 'judges'. There is a Senior President of Tribunals presiding over all five tribunals and each chamber also has a president. There is a new Tribunal Procedure Committee responsible for the production of common tribunal procedure rules and an Administrative Justice and Tribunals Council to oversee the system.

Both tiers of the new tribunal system can review and set aside their own decisions. Most decisions of the First Tier Tribunal can be appealed to the Upper

Tribunal and decisions of the Upper Tribunal, on points of law, can be appealed to a court of law.

1.12.1 The Lands Tribunal

This tribunal was established by The Lands Tribunal Act 1949 to settle certain disputes concerning the valuation of land. In 2009, the Lands Tribunal became part of the new two-tier tribunal system as a chamber of the Upper Tribunal. The Tribunal has a Chamber President, a number of judges, specialist members who are chartered surveyors and two registrars (responsible for case management). The Lands Tribunal is based in London but hearings can be carried out anywhere in England and Wales. The Lands Tribunal hears appeals from Valuation Tribunals, Leasehold Valuation Tribunals and Residential Property Tribunals. It also determines disputed compensation in compulsory purchase and certain other types of land compensation cases. The Tribunal hears applications to discharge or modify restrictive covenants on land (see Chapter 4, paragraph 4.9.6.C) and deals with a range of other types of cases under various different Acts of Parliament and statutory instruments, including applications for a certificate to support an application to register a light obstruction notice under the Rights of Light Act 1959.

1.12.2 The Agricultural Land Tribunals

The eight Agricultural Land Tribunals are organised on a regional basis. Each tribunal is staffed by a legally qualified Chairman and two lay members nominated by the Chairman. Agricultural Land Tribunals became courts of first instance under the Agriculture Act 1958. These tribunals nowadays act mainly under the Agricultural Holdings Act 1986 in determining disputes between landlords and tenants, particularly in relation to succession to tenancies. They also have a role under the Land Drainage Act 1991 in settling drainage disputes between neighbours. At the time of writing, the tribunals are expected to be brought into the new tribunal system in 2010.

1.13 Arbitration

Arbitration is a private process for the resolution of disputes between parties to an arbitration agreement. The dispute is referred to an impartial third party or parties (the *arbitrator* or *arbitral tribunal*), which decides the dispute in a judicial manner on the basis of evidence submitted. An award is then published that is legally binding on the parties. The arbitration process is governed by the terms of the arbitration agreement between the parties, the Arbitration Act 1996 (if the agreement is in writing) and the Common Law.

1.13.1 The Arbitration Act 1996

Section 1.1 of the Act requires that its provisions should all be construed according to the following principles:

- The object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense.
- The parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest.
- The court should not intervene except as provided by this [Act].

There is also a general duty of the tribunal laid out in Section 33 (1) that requires it to:

- Act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting their case and dealing with that of his opponent.
- Adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.

An arbitrator (or his employee or agent) is not liable for anything done or omitted whilst performing his role unless the act or omission is shown to have been in bad faith²⁶.

1.13.2 The arbitration agreement

Because arbitration is a consensual process there must be a valid agreement by the parties (an arbitration agreement) to refer their dispute to arbitration. In the absence of such an agreement there is no legal basis for the arbitration. Arbitration agreements that are subject to the Arbitration Act 1996 must be in writing²⁷. An agreement can be to submit either present or future disputes to arbitration. An arbitration clause within a contract constitutes an arbitration agreement and this kind of clause can still be a valid arbitration agreement even if the contract is found to be invalid.

The arbitration agreement usually defines the categories of disputes that can be referred to arbitration and establishes the composition and method of appointment of the arbitral tribunal. It may also specify the way in which arbitration proceedings are to be commenced (normally by service of a notice of arbitration on the other party) and the procedure to be followed by the tribunal.

An arbitration agreement is a contract to refer disputes to arbitration. Therefore, if a party commences litigation instead of referring the dispute to arbitration, they are in breach of contract. If, however, proceedings are commenced, then a party can apply to the court for a stay of those proceedings. The court must grant such a stay unless it is satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.

1.13.3 Arbitration procedures

After appointment of the arbitrator, but before the parties set out their respective cases, a preliminary meeting will normally be called. This meeting enables the

²⁶ Section 29

²⁷ Section 5

arbitrator to satisfy himself/herself that he/she has jurisdiction to deal with the dispute, to determine any outstanding issues on procedures and timetable and issue an order for directions setting out the timetable and tasks to be completed by each of the parties. The parties are under a duty to comply without delay with any order or directions of the tribunal²⁸.

An *interlocutory stage* follows the preliminary meeting and during this stage the parties carry out a number of procedural steps laid down in the arbitrator's order for directions. They will exchange details of their case to each other in the forms of *statements of case*, which will generally consist of:

- Statement of Case.
- Statement of Defence and Counterclaim.
- Statement of Reply and Defence to Counterclaim.
- Statement of Reply to Defence to Counterclaim.

Disclosure and *inspection* will follow, whereby each party compiles a list of all the documents that are or may become relevant to the dispute and the other party is then entitled to inspect and obtain copies of all documents that are still in the other party's possession (as long as they are not protected by legal privilege).

The arbitrator has a wide discretion to decide on how the tribunal should establish the facts of the case, including whether strict rules of evidence should be applied and how evidence should be presented. This includes the discretion as to how best to deal with expert evidence. The arbitrator has the power to appoint his own expert or he may permit the parties to use their own experts. Procedural and evidential matters will often be determined in the arbitration agreement but if they are not, it is up to the arbitrator to decide whether to hold a hearing and, if so, the form that it should take. There are three different procedures:

- Full Procedure.
- Short Hearing Procedure.
- Documents Only Procedure.

1.13.4 Arbitration award

The arbitral tribunal decides the dispute by publishing its award. The parties can agree on the form of the award, but, to the extent that there is no agreement, it must be in writing and signed by the arbitrator, or by the parties if it is an agreed award. It should contain reasons (unless it is an agreed award) and be served on the parties without delay once it has been made. An arbitration award may, with the leave of the court, be enforced in the same way as a judgment or order of the court to the same effect.

²⁸ Section 40 (2)

The award can be challenged on three grounds:

- Tribunal's lack of jurisdiction²⁹.
- Serious irregularity affecting the tribunal, the proceedings or the award³⁰.
- Error of law³¹.

The parties have an absolute right to challenge the award due to lack of jurisdiction or serious irregularity, but the right to challenge due to an error of law may be excluded by agreement of the parties. A challenge must be brought within twenty-eight days and cannot be commenced unless any process of appeal provided by the arbitration agreement has first been exhausted.

1.14 Personnel of the law

It is likely that those involved in property and construction matters, during the course of their professional careers, will have to work together with members of the legal profession. Although solicitors now have the potential of playing more of a role in advocacy in the courts, the legal profession still retains a traditional division into two branches with different functions. Generally speaking, solicitors give advice on legal problems to the general public and conduct legal proceedings on their behalf, whereas the primary function of a barrister is to act as an advocate and give advice to solicitors when requested. The expression *lawyer* can be used to denote either a solicitor or a barrister. Apart from working in general practice and as salaried *in house* lawyers, both solicitors and barristers are to be found in commerce, industry, the civil service and educational institutions.

1.14.1 Solicitors

The Law Society is the organisation responsible for the control of the solicitors' profession. In order to practise as such, a person must have been admitted as a solicitor and possess a current practising certificate. This can only be obtained by passing the professional examinations of the Law Society and completing a period of training with an established solicitor. Once qualified, if the solicitor enters general practice, he or she may deal with a wide range of legal work. This may involve giving general advice, conveyancing (transferring the ownership of land), preparing wills, appearing in the Magistrates' Court, county courts or higher courts, dealing with matrimonial disputes or preparing cases for trial. On the other hand, the solicitor may quickly become a specialist dealing only with cases involving one or two areas of law, such as taxation, town planning or construction law. Much depends on the type of practice and its locality. Some solicitors prefer to practise on their own, while others work in partnerships of varying sizes. The Administration of Justice Act 1985 allows solicitors to form incorporated practices. Traditionally, much of the work of solicitors has been involved with property

²⁹ Section 67

³⁰ Section 68

³¹ Section 69

transactions. At one time, only solicitors could undertake the transfer of land/buildings. This is no longer the case (see paragraph 1.14.3 below).

A solicitor will often instruct a barrister (*brief counsel*) by sending written instructions relating to the representation of a client in legal proceedings. These instructions will include a narrative of the facts, copies of any documents, specifications and, where appropriate, plans. A solicitor may take counsel's opinion, whereby the views of a barrister are obtained on the law which applies to the client's case. Under a provision inserted in the Courts and Legal Services Act 1990 by the Access to Justice Act 1999, solicitors may now acquire wider rights of advocacy before the courts. With appropriate experience or training, solicitors are allowed to appear as advocates in the Crown Court, the High Court, the Court of Appeal and the Supreme Court. Solicitors can now be appointed as Queen's Counsel and to the High Court bench and, in due course, to judicial appointments in the higher courts.

The Law Society is responsible for preserving minimum standards of behaviour for solicitors and it operates a complaints system through the Office for the Supervision of Solicitors. A Legal Services Complaints Commissioner oversees the handling of complaints. The Commissioner has the power to investigate, make recommendations and require the Law Society to produce plans to deal with complaints. The Solicitors' Regulatory Authority was set up in 2007 and is now the independent regulatory body of the Law Society. The Authority sets standards for behaviour and professional performance that are contained in a Code of Practice. It can investigate and intervene in cases of professional misconduct and has certain disciplinary powers. The Solicitors' Regulatory Authority can also refer cases of professional misconduct to the Solicitor's Disciplinary Tribunal. In appropriate cases a solicitor's name may be *struck off* the professional roll. Solicitors may also be liable to their clients if they have acted negligently in the conduct of their case.

1.14.2 Legal Executives

Much of the routine work in solicitors' offices is carried out by unadmitted personnel known as Legal Executives. They carry out a considerable amount of work on behalf of their firms and much conveyancing and litigation is undertaken by them. Training and qualifications are governed by the Institute of Legal Executives. The initial qualification is Associate Membership of the Institute; after a further qualifying period and an examination the Associate may become a Fellow. In turn, a Fellow who completes the legal practice course may become admitted as a solicitor. Under the Courts and Legal Services Act 1990 (as amended by the Access to Justice Act 1999), Legal Executives can now acquire wider rights of audience before the courts and conduct pre-trial litigation work.

1.14.3 Licensed Conveyancers

Until the enactment of The Administration of Justice Act 1985, only qualified solicitors had the legal right to engage in conveyancing (the legal process of buying and selling land/buildings). Since then, members of the Council for Licensed Conveyancers have also been able to engage in conveyancing work for profit.

Members of the Council are required to satisfy educational requirements and practice rules. These rules have been supplemented by the creation of a new body known as the Authorised Conveyancing Practitioners Board, which in its role of developing competition in the provision of legal services, is authorised to supervise the activities of those who legally offer conveyancing services. In particular, there are specific rules dealing with 'tied' arrangements relating to inclusive legal services.

1.14.4 Barristers

The Bar has long been considered the senior branch of the legal profession in England and Wales. The main functions of counsel are to act as advocates in the superior courts, to draft the pleadings which indicate the manner in which the case is to be brought, and to give their legal opinion when so required. In order 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 appropriate educational requirements and *keeping term*, a newly called barrister who wishes to practise must undergo a period of pupillage for twelve months. By this process an experienced barrister (known as a pupil master) will supervise the new entrant's work. A newly qualified practising barrister will join one of six circuits in England and Wales and, unless working primarily in London, will appear in cases in the circuit area. Practising barristers are self-employed. Partnerships are prohibited but for convenience a number of barristers share offices or chambers, each contributing towards the overheads of the establishment. The majority of sets of chambers are administered by a clerk who deals with solicitors' firms and negotiates fees. Some sets now dispense with the need for a clerk while the previous restrictions on barristers advertising have been reversed. In the regions barristers' work is often varied and common law and crime orientated. The majority of specialists, especially in commercial, company and Chancery matters, are to be found in London.

Most barristers are known as junior counsel. After a period of successful practice a junior may apply to become a Queen's Counsel (QC). If successful, the applicant is said to have taken silk, which entitles the QC to wear a silk gown in court. Leading counsel, as these barristers are called, do not draft pleadings. Instead, their work is confined to appearing as advocates in the more important cases or giving opinions. At one time, whenever a Queen's Counsel appeared in court, the QC had to be accompanied by a junior barrister. Leading counsel may now appear alone in court, without assistance. Unlike solicitors, counsel may not sue for their fees. This rule has been modified by the Courts and Legal Services Act 1990, which allows a barrister to enter into a contract with a client for providing services and paying fees. As advocates, it used to be the case that barristers were immune from claims against them based on professional negligence³², but this immunity ended with the decision of the House of Lords in *Arthur JS Hall & Co (a firm) v Simons*³³.

³² *Rondel v Worsley* [1969] 1 AC 191

³³ [2002] 1 AC 615

Although generally a lay person only instructs a barrister through a solicitor, thereby incurring two sets of fees, members of certain professions have direct access to a barrister through arrangements referred to as ‘licensed access’ and may instruct counsel without the requirement of having to contact a solicitor first. Since 2004 it has also been possible for members of the general public to instruct a barrister directly in some areas of work. A barrister is under a duty to pursue his/her case in a proper manner and must inform the court of all relevant statutes and precedents. A barrister must ensure that his/her client has a fair hearing. The *cab-rank* rule requires barristers to act for any client in any field in which they practice.

1.15 Judicial officers

1.15.1 *The Lord Chief Justice*

Following the changes introduced by the Constitutional Reform Act 2005, The Lord Chief Justice holds the highest place in the legal hierarchy. The Lord Chief Justice is the President of the Courts of England and Wales, Head of Criminal Justice and Head of the Judiciary of England and Wales. He/she has the responsibility of training and deploying judges and is responsible for their welfare. The Lord Chief Justice represents the views of the judiciary to ministers and Parliament.

1.15.2 *The Lord Chancellor*

Prior to the Constitutional Reform Act 2005, the Lord Chancellor held the principle legal office in the United Kingdom. The Lord Chancellor had the primary role in the selection and appointment of judges, but this has now mostly been transferred to the Lord Chief Justice. The Lord Chancellor also presided over the Chancery Division of the High Court. A new post has now been created and the Chancellor of the High Court is now the president of the Chancery Division. The Lord Chancellor continues to exercise a formal advisory role on some judicial appointments and has sole responsibility for appointing lay justices following consultation. The Lord Chancellor is a government minister. He/she no longer sits as a judge nor chairs debates in the House of Lords (following the appointment of a *Lord Speaker* to the House).

1.15.3 *The Attorney General*

The Attorney General is the chief law officer of the Crown and head of the English Bar. The appointment is a political one and the holder is a Queen’s Counsel and Member of Parliament. The principal tasks of the office are to advise the government on legal matters and to represent the Crown in civil and criminal proceedings. Certain prosecutions may only be commenced with his/her consent. The Attorney General can also sue on behalf of the public to enforce public rights. Examples of this type of action include stopping a public nuisance (see Chapter 3, paragraph 3.7) or enforcing a charitable trust. The Attorney General can lend his/her name to such an action at the request of a private citizen and these proceedings are known as *relator* proceedings. If he/she refuses to consent to the bringing of an action, his/her refusal cannot be questioned in the courts.

1.15.4 *The Solicitor General*

The Attorney General's deputy is known as the Solicitor General. The holder of the post is a Member of Parliament and a Queen's Counsel. The duties are in general similar to those of the Attorney General. The junior law officer will often become the Attorney General when that post becomes vacant. The law officers are forbidden to engage in private practice but receive a salary inclusive of fees.

1.15.5 *Director of Public Prosecutions and the Crown Prosecution Service*

Abbreviated to DPP, the Director of Public Prosecutions is appointed by the Home Secretary but is responsible to the Attorney General for the exercise of his powers. To a large extent the Director controls the prosecution process and initiates and conducts proceedings in complex cases. The Director is also head of the Crown Prosecution Service (CPS) which has prime responsibility for the conduct of criminal prosecutions in England and Wales. The CPS has regional offices throughout the country and its employees (solicitors or barristers) prosecute in criminal cases.

1.15.6 *Master of the Rolls*

The judge who presides over the Court of Appeal (Civil Division) is known as the Master of the Rolls. He/she decides the composition of the various appellate courts and organises the distribution of work. In addition, he/she admits newly qualified solicitors to the Roll of the Court, thereby enabling them to practise. The Master of the Rolls is also the Head of Civil Justice.

1.15.7 *The Chancellor of the High Court*

This is a new post created under the Constitutional Reform Act 2005. The Chancellor of the High Court is also the President of the Chancery Division, a role previously fulfilled by the Lord Chancellor.

1.15.8 *The President of the Queen's Bench Division*

Another post created in the reforms of 2005, the President of the Queen's Bench Division presides over that division in place of the Lord Chief Justice.

1.15.9 *The President of the Family Division*

The President of the Family Division, as well as presiding over that division, is also the Head of Family Justice.

1.15.10 *Justices of the Supreme Court*

Justices of the Supreme Court replace *Law Lords* as the most senior members of the judiciary. The twelve former Lords of Appeal in Ordinary took up the positions of

Justices on the foundation of the Supreme Court in 2009. They are headed by a President and a Vice President and are senior members of the judiciary, appointed from the Court of Appeal.

1.15.11 Lord and Lady Justices of Appeal

Abbreviated to LJ, these are the titles given to the judges who hear cases in the Court of Appeal. They are appointed from judges of the High Court. On appointment they are made Privy Councillors. As they hear only appeal cases, their work, like that of the Supreme Court, is mainly confined to London.

1.15.12 High Court Judges

Abbreviated to J after the surname of the judge in question, High Court or Puisne Judges are appointed by the Crown on the recommendation of the Lord Chancellor after selection by the Judicial Appointments Commission. Appointments are generally made from the ranks of practising Queen's Counsel although solicitors have been appointed to the High Court by promotion from Circuit Judge and even directly from practice. On appointment the judge will be knighted and assigned to one of the three divisions of the High Court. The Queen's Bench Division accounts for approximately two-thirds of the judges.

1.15.13 Circuit Judges

Circuit Judges are referred to as Judge followed by their surnames. Most trials which are heard in the Crown Court or county courts are dealt with by Circuit Judges. Such judges are appointed by the Crown on the recommendation of the Lord Chancellor after selection by the Judicial Appointments Commission. Circuit judges are normally barristers but it is possible for a suitably experienced solicitor to be appointed directly to the circuit bench. Judges are allocated to one of the circuits and hear cases in a group of centres. In court, Circuit Judges are addressed as *your honour*. Mention should also be made here of the office of Recorder. Recorders are part-time judges who hear cases in the Crown Court to supplement the Circuit Judges. Recorders are under an obligation to make themselves available on a number of occasions to hear cases.

1.15.14 Masters

Procedural matters in the High Court are the responsibility of Masters assigned to the Queen's Bench and Chancery divisions of the court.

1.15.15 District Judges

Referred to previously in connection with county courts (see paragraph 1.8.2.B), District Judges have an extensive range of administrative and judicial roles. District Judges are generally drawn from the solicitors' profession, despite the fact that barristers are also eligible. These judges are responsible for maintaining

the records of the court and ensuring that documents have been served where appropriate. Moreover, they have responsibility for money which has been paid into court. As far as judicial tasks are concerned these judges deal with interlocutory (procedural) matters, taxation of costs and actions involving relatively small amounts of money.

1.16 Juries

One feature of common-law based legal systems is trial by jury. A jury is a body of persons selected to give a verdict in a particular case. Although seldom used in civil actions today (except in defamation cases) they are always used in criminal trials held on indictment at the Crown Court where the accused pleads not guilty. A jury will consist of twelve men or women who have been randomly selected. In general the jury decides facts and it is left to the judge to decide questions of law. Juries have no place in the appeal courts. Any person on the electoral register aged between eighteen and seventy who has been resident in the United Kingdom for at least five years since the age of thirteen is eligible. A person suffering from a mental health disorder may not sit on a jury and there are certain people who are disqualified from jury service by reason of prior conviction of a criminal offence or being subject to bail in criminal proceedings. The deliberations of a jury are held in secret and investigations into their workings are treated as a contempt of court. At one time the verdict of a jury had to be unanimous but, if certain conditions are met, the court will accept a majority verdict where there is a majority of ten.

1.17 Court procedure

This is governed by the nature of the dispute. There is a considerable difference between criminal and civil proceedings. In the criminal courts much depends on whether the accused is being tried on indictment or is subject to summary proceedings. Choice of court on the civil side is determined primarily by the complexity of the issues involved and the sums of money in dispute. One fundamental distinction lies in the obligation of proving facts. This is the so-called burden of proof. In a civil case it is the responsibility of the claimant to prove the factual issues on the balance of probabilities. A more stringent test applies in criminal cases in that the prosecution must prove the facts at issue beyond all reasonable doubt. Another factor characteristic of court proceedings in the UK, and other common law jurisdictions, is the so-called accusatorial or adversarial system. This means that the parties to a dispute or criminal proceedings have primary responsibility for finding and presenting evidence. The judge does not investigate the facts as such but listens to the case as it is presented by each of the adversaries. This is to be contrasted with the inquisitorial system in force in many continental European countries, whereby the judge searches for facts, listens to witnesses, examines documents and orders that evidence be taken, after which he makes further investigations if he considers them necessary.

1.18 Procedure in civil actions

Although it is possible for those involved in the construction process or in the landed property professions to incur criminal liability, it is more likely that any legal dispute in which they become involved will be of a civil nature. Where the parties to a civil dispute proceed to litigation rather than subjecting their grievance to one of the forms of alternative dispute resolution, they will either commence proceedings in the county courts or the High Court. The landscape of civil procedure has altered drastically over recent years following the adoption of the 'Woolf Reforms' (see below).

1.18.1 The 'Access to Justice' Reports

In 1994, the Lord Chancellor appointed the then Master of the Rolls, Lord Woolf, to undertake a major review of the entire civil justice system. This followed widespread criticism of procedure in the civil courts, particularly in terms of cost and delay. The review culminated in the publication of the *Access to Justice* or *Woolf* reports, which recommended far-reaching changes to the civil justice system. Many of the changes proposed were designed to provide quicker and cheaper access to justice by breaking down the adversarial nature of the pre-existing system.

Lord Woolf's final report³⁴ 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.

His interim report³⁵ foresaw a formal role for alternative dispute resolution (ADR) as an integral part of the new civil justice system. In this respect, Lord Woolf 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 take into account a litigant's unreasonable refusal to attempt ADR when considering the future conduct of a case.

³⁴ Access to Justice: Final Report to the Lord Chancellor on the civil justice system in England and Wales, Lord Chancellor's Department, July 1996

³⁵ Access to Justice: Interim Report to the Lord Chancellor on the civil justice system in England and Wales, Lord Chancellor's Department, July 1995

Lord Woolf's proposals were incorporated in the government's 1998 white paper on the future of the legal system³⁶ and the first stage of the reforms were implemented with the introduction of the new Civil Procedure Rules (CPR) 1998, which came into force in 1999 and now regulate the procedures of the High Court and county courts in England and Wales.

1.18.2 The Civil Procedure Rules (CPR)

Part 1 of the Rules places an obligation (the overriding objective) on the courts (and on the parties to assist the courts) 'to deal with cases justly'³⁷. In line with the earlier recommendations in the Woolf reports, dealing with cases justly includes³⁸:

- Ensuring that the parties are on an equal footing.
- Saving expense.
- Dealing with cases in a way which is proportionate to their value and complexity.
- Ensuring that cases are dealt with expeditiously and fairly.
- Making efficient use of the court's resources when allocating these to the various cases.

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 includes³⁹:

- 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.

1.18.3 Alternative dispute resolution (ADR)

There are three main alternative procedures to a claim before a court of law. Arbitration has already been discussed (see paragraph 1.13 above). There is also the possibility of a structured settlement procedure (often referred to as a mini-trial). A neutral chairman sits with representatives appointed by the parties. This tribunal considers the submissions of the parties and agrees a solution. The third key alternative to litigation is ADR. This process seeks to resolve disputes by the use of an independent third party. The third party cannot impose a solution upon the parties, rather they must reach their own resolution of the issues in dispute. The ADR procedure is not appropriate when an injunction is being sought, where there

³⁶ Modernising Justice: The Government's plans for reforming legal services and the courts, December 1998, Cm 4155

³⁷ Rules 1.1, 1.2, 1.3

³⁸ Rule 1.2

³⁹ Rule 1.4

is no dispute between the parties (for example in cases of non-payment), nor when there is a point of law that needs to be ruled upon by a court. There can be a contractual agreement to pursue ADR before going to court and this can be tied in with an arbitration clause in the contract. The contract could, for example, provide that ADR be pursued before proceeding to arbitration. In the case of *Cable & Wireless Plc v IBM United Kingdom Ltd*⁴⁰, 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.

(A) Mediation

Mediation is the most commonly used form of ADR. It is also sometimes referred to as conciliation. The parties appoint a third party mediator who receives their written statements. The case is then discussed with each of the parties individually on a confidential basis. The discussions are conducted *without prejudice* and thus cannot be subsequently raised in court. The desired outcome is that the parties reach a mutually satisfactory solution without having recourse to litigation.

(B) Mediation-arbitration

Under this process the parties agree to refer the matter to arbitration if the mediation is unsuccessful.

(C) Costs and unreasonable refusal to submit to ADR

As noted above, the Civil Procedure Rules require that courts actively encourage parties to resolve disputes through ADR. The court may refuse a successful party costs if he/she has unreasonably refused to pursue the ADR route. The case of *Dunnett v Railtrack Plc*⁴¹ saw the first example of costs penalties being imposed on a successful litigant because of unreasonable refusal to mediate. The case concerned horses straying onto a railway line and being hit by a train. Dunnett (the horse owner) failed in her 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 should explore the possibilities of resolving their dispute by ADR. Dunnett contacted Railtrack suggesting that the matter be referred to ADR. Railtrack refused without any consideration 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 normally have had to pay Railtrack's costs. The Court of Appeal drew attention to the duty of the parties under CPR to fully consider ADR, especially where the court had suggested it. To merely flatly turn down the possibility was to risk adverse consequences in costs. It was held that costs should not be awarded to

⁴⁰ [2002] EWHC 2059 (Comm)

⁴¹ [2002] EWCA Civ 303

Railtrack, given their refusal to contemplate ADR at a stage before the costs of the appeal started to flow. Subsequent case law has explored what is and is not reasonable in this context and laid down guidance⁴².

1.18.4 *Commencement of proceedings*

Proceedings are started by the completion of a claim form, which is then lodged at the relevant office of the county courts designated as civil trial centres (fifty-eight across England and Wales) or one of the feeder county courts. Basic details of the claim are required, including its value, in order for the allocation of the case at a later stage and the calculation of the fee payable on the issue of the claim form. Particulars of the claim are to be given on the back of the claim form. This is a brief statement of the facts on which the claimant relies. The particulars conclude with a signed statement of truth by the claimant or his/her solicitor.

The claim form can be served on the defendant or their solicitor either by the court or by the claimant. The defendant will also receive a response pack detailing how the claim form can be dealt with. There are five alternatives:

- Acknowledgement of service – Acknowledgement must be made within fourteen days of service.
- Filing of a defence – If the recipient wants to defend the claim then they must file a defence within fourteen days of service (twenty-eight days if it has been acknowledged as above). The time period for filing a defence can be extended by agreement of both parties. The claimant does not have to respond to the defence, but the usual reply is by way of counterclaim (see below).
- Filing of an admission – This can be for the full amount of the claim or for part of it. If the admission is accepted either for the full or part claim, the claimant asks the court for judgment. Admission or part admission must be made within fourteen days of service.
- No response – If the defendant fails to acknowledge service or to file a defence or an admission within the time limits, in most cases, the claimant can apply to the court for a judgment in default. A defendant can apply to the court to have the default judgment set aside.
- Counterclaim – The defendant may feel that they have a claim against the claimant in which case they can file a counterclaim with the defence. This must be prepared in exactly the same way as a statement of case (see above). A counterclaim can be filed subsequently, but only with the permission of the court. No acknowledgement of the counterclaim is required, but the claimant must file any defence to it within fourteen days (again this can be extended by agreement of the parties).

If further information is required by either party, then they can make a request under Rule 18 of the Civil Procedure Rules, 1998. This is made in writing to the other party. If the information is not received, then a party can apply to the court for an order.

⁴² *Halsey v Milton Keynes NHS Trust; Steel v Joy and Halliday* [2004] EWCA Civ 576

1.18.5 Case management

Designated *civil trial centres* are responsible for case management. These centres are county courts and they also try multi-track cases and some fast track cases (see below). Other county courts act as feeder centres and they refer cases to civil trial centres after allocating a track. Under Rule 3 of the Civil Procedure Rules 1998, it is possible for the court to *strike out* a claim, or a defence, rather than allocate it for trial. This would occur if no reasonable grounds for bringing or defending the claim were revealed.

(A) Case allocation

Where a defendant has filed a defence, the court will decide whether to stay the proceedings (see below) or to allocate the case to one of the following three tracks:

- Small claims track (generally for claims of not more than £5 000). The case will normally be heard in the county courts by a district judge.
- Fast track (generally for claims between £5 000 and £15 000). Cases will normally be heard in the county courts.
- Multi-track (for claims which are not suitable for either the small claims or fast track). Multi-track cases of significant value (a claim of £50 000 or more) will generally be heard in the High Court.

To assist in allocating the case, the court will first require each of the parties to complete and return an allocation questionnaire (or a *case management information sheet* in the Technology and Construction Court). The first section of the questionnaire informs the parties that CPR require them to make every effort to settle their case before a hearing and that the court will want to know what steps they have made in this regard. A series of questions are asked in respect of settlement and ADR and the parties are reminded that the answers will be considered when deciding costs.

(B) Stay to allow for settlement of the case

A party may, when filing the completed allocation questionnaire, make a written request for the proceedings to be stayed while the parties try to settle the case by ADR or other means. This can be done either when all the parties request a stay or where the court considers that a stay would be appropriate. The stay will be for one month or a period considered appropriate by the court. This can be extended by the court.

(C) Case management conference and pre-trial review

In most cases, the court gives directions on case management and sets a pre-trial schedule and a date for the trial. If the case has been allocated to the multi-track, the court can call for a case management conference or a pre-trial review or both. At a

case management conference, questions on disclosure of documents and expert evidence are addressed and a trial date is fixed. If the case is a very complex one, a pre-trial review will be necessary. The judge then looks at cost estimates and sets a budget and a programme for the trial.

(D) Pre-action protocols

Most claims are settled without starting proceedings at all and, even where proceedings are commenced, most cases are settled by negotiation before they come to trial.

The CPR introduced a number of pre-action protocols for particular types of disputes, which aim to assist the parties in the process of settlement. They each describe a procedure and a timetable for the parties to follow before proceedings are issued. In particular they require the parties to exchange information about the case at an early stage so that they have a clear picture of the relative merits of each party's case. This can increase the chances of settlement without the necessity of issuing proceedings. Even where litigation cannot be avoided the early exchange of information ensures that cases coming before the courts are much better prepared.

There are currently pre-action protocols in place for:

- Defamation.
- Personal Injury Claims.
- Resolution of Clinical Disputes.
- Professional Negligence.
- Judicial Review.
- Disease and Illness Claims.
- Housing Disrepair Cases.
- Possession claims based on Rent Arrears.
- Possession claims based on Mortgage or Home Purchase Plan Arrears in Respect of Residential Property.
- Construction and Engineering Disputes.

The pre-action protocol for *Construction and Engineering Disputes* includes professional negligence claims against architects, engineers and quantity surveyors. This protocol requires claimants to send a letter of claim to potential defendants in advance of issuing proceedings. This must set out full details of the claim and provide the names of expert witnesses on whose evidence the claimant wishes to rely. The defendant must then acknowledge receipt within fourteen days and provide a detailed response to the letter of claim within a further fourteen days (twenty-eight days from the letter of claim). The response must fully respond to the letter of claim and provide the names of the defendant's expert witnesses.

Twenty-eight days after the claimant receives the defendant's response, the parties should then meet to discuss the issues between them. Paragraph 5.4 of the protocol contains a requirement that, during this meeting, the parties should consider whether ADR might be more appropriate than litigation. The CPR Practice Direction on Pre-action Protocols (paragraph 4.7) also emphasises the parties' obligation to consider the possibility of ADR.

There is a draft pre-action protocol in place for *Claims for Damages in Relation to the Physical State of Commercial Property at the Termination of a Tenancy* (the Dilapidations Protocol). This has been produced by the Property Litigation Association. The objectives of the protocol are to:

- Encourage the exchange of early and full information about the prospective legal claim.
- Enable parties to avoid litigation by agreeing a settlement of the claim before the commencement of proceedings.
- Support the efficient management of proceedings where litigation cannot be avoided.

This protocol requires that a landlord should generally serve a schedule setting out what he/she consider the breaches to be and the works required to remedy these, together with costings. The tenant must respond to the claim within a reasonable time. The landlord and tenant are encouraged to meet to instigate negotiations and both parties are encouraged to consider ADR.

(E) Timetables

As previously mentioned, the court will set a timetable for the various stages to be completed before trial and a date for the trial (within thirty weeks in fast track cases). The courts have taken a strict view with regards to adhering to timetables. In the case of *Linda Rollinson v Kimberley Clark Ltd*⁴³, the defendant sought to alter the trial date because one of her expert witnesses was not available on the date set in the timetable. The application was dismissed. In the case of *Matthews v Tarmac Bricks and Tiles Ltd*⁴⁴, the defendant failed to give details of when expert witnesses would be available. The trial date was set regardless and the Court of Appeal dismissed a subsequent appeal by the defendant. 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 courts' requirements.

1.18.6 Expert witnesses

Restrictions on the use of expert evidence were introduced by the CPR (Part 35). Such evidence is restricted to that which is reasonably required to resolve the proceedings. Expert witnesses cannot be called without the permission of the court and the court may limit the amount of the expert's fees, which can be recovered from the other party. The duties of an expert witness are also outlined in Part 35. It is the duty of an expert to help the court on the matters within his expertise and this duty overrides any obligation to the person from whom he/she has received instructions or by whom he/she is paid.

⁴³ [2000] CP Rep. 85

⁴⁴ [1999] CPLR 463

The form and content of the expert witness report are set out in a CPR Practice Direction. The report should be addressed to the court (rather than to the instructing party) and the report should contain details of the expert's qualification, state the basis on which the expert has reached his/her opinions and, where there is a range of opinion on matters dealt with in the report, it should summarise the range and give reasons for the expert's own opinion. The report should also contain a summary of the conclusions reached. The report concludes with a statement of truth, a statement with regards to the duty to the court, a declaration regarding the RICS Practice Statement and a declaration regarding relevant facts.

Within twenty-eight days of the service of an expert's report, either party can put written questions to the expert about their report. The expert's answers are treated as part of their report. If an expert fails to answer, the court can order that the expert's evidence is inadmissible or that the expert's fees cannot be recovered from the other party. There is a requirement under the CPR that the parties act reasonably in exchanging information and this extends to expert evidence. A number of the pre-action protocols require meetings between experts. In addition, the court has the power to direct a discussion between experts with a view to identifying relevant issues and, where possible, reaching agreement.

Under CPR, the court now 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.

1.19 The Human Rights Act (HRA)

Following many years of calls for the enactment of a bill of rights in the UK, the Human Rights Act 1998 entered into force in October 2000. The Act does not have the fundamental features of a bill of rights. It does not require special procedures to alter it, nor can measures that contravene its provisions be struck down by the courts. It does not, therefore, jeopardise the supremacy of parliament. The Human Rights Act brought into UK law many of the key provisions of the European Convention of Fundamental Rights and Freedoms (ECHR). It has had a far-reaching impact upon all areas of UK law.

1.19.1 ECHR

The ECHR was based on the Universal Declaration of Human Rights, passed by the UN General Assembly in 1948. It was signed by the members of the Council of Europe (not to be confused with the Council of the European Union) in 1950 and it committed them to protecting a range of human rights. A number of subsequent additions and amendments have been made to the Convention in the form of *Protocols*. The Convention was ratified by the UK in 1951 and came into force in 1953. Until the enactment of the Human Rights Act in 1998, however, none of its provisions were incorporated into UK law. The European Court of

Human Rights (ECtHR) was established in Strasbourg in 1959 to deal with violations of the Convention (see paragraph 1.11). It still remains the case that provided all domestic remedies have been exhausted, a victim of a human rights violation can bring an action against the state in Strasbourg.

1.19.2 *The Provisions of the Human Rights Act*

As well as introducing a range of Convention rights into UK law, the Act makes these rights directly enforceable in the courts. The Convention rights are defined in section 1 of the Act as the rights and fundamental freedoms set out in Articles 2 to 12 and 14 of the Convention, together with those in Articles 1 to 3 of its First Protocol and Articles 1 and 2 of its Sixth Protocol. The full text of these rights is to be found in Schedule 1 of the Act but they can be summarised as follows:

THE CONVENTION RIGHTS (HRA 1998, Schedule 1)

Part I: The Convention Rights and Freedoms

- Article 2 Right to life
- Article 3 Prohibition of torture
- Article 4 Prohibition of slavery and forced labour
- Article 5 Right to liberty and security
- Article 6 Right to a fair trial
- Article 7 No punishment without law
- Article 8 Right to respect for private and family life
- Article 9 Freedom of thought, conscience and religion
- Article 10 Freedom of expression
- Article 11 Freedom of assembly and association
- Article 12 Right to marry
- Article 14 Prohibition of discrimination

Part II: The First Protocol

- Article 1 Protection of property
- Article 2 Right to education
- Article 3 Right to free elections

Part III: The Sixth Protocol

- Article 1 Abolition of the death penalty
- Article 2 Death penalty in time of war

(A) *Compatibility (s.19)*

The minister in charge of a parliamentary bill is required to either make a statement of compatibility with the Convention rights before its second reading stage or, if

he/she is unable to do this, make a statement that the government nevertheless wishes Parliament to proceed with the bill.

(B) Duty of interpretation (s.3)

So far as it is possible to do so, existing legislation must be read and given effect to in a way that is compatible with the Convention rights. This obligation applies to everyone when interpreting statutes (not just courts and tribunals). If it is not possible to interpret a statute in line with the Convention, it continues to have legal effect and the courts must still enforce it.

(C) Declarations of incompatibility (s.4)

If a court (of High Court level and above) is satisfied that a piece of legislation is incompatible with Convention rights, it may make a declaration of incompatibility. This has no effect on the validity of the statutory provision, or on the parties to the case. It simply notifies Parliament that the measure has been found to be incompatible.

(D) Duty on courts and tribunals (s.2)

A court or tribunal, in determining any question relating to a Convention right, must *take into account* the relevant ECtHR case law on the subject. The case law in question is not binding on the UK courts. A tribunal, for the purposes of s.2 is ‘any tribunal in which legal proceedings may be brought’. An adjudicator under the Construction Act has been held not to fall within this definition. (*Austin Hall Building Ltd v Buckland Securities Ltd*⁴⁵).

(E) Duty on public authorities (s.6)

It is unlawful for a public authority to act in a way that is incompatible with Convention rights. A public authority is anyone who performs functions of a public nature. This includes courts and tribunals but excludes both Houses of Parliament. A victim of such an unlawful act may bring proceedings against the public authority in an appropriate court or tribunal. If it is found that the public authority has behaved unlawfully then the court or tribunal can grant such relief or remedy or make such order within its powers as it considers just and appropriate. This includes an order for damages or the payment of compensation (s.8).

⁴⁵ [2001] BLR 272

1.19.3 Case law

There is a growing body of case law flowing from the Human Rights Act. Some examples are given below under the relevant ECHR article number:

(A) Right to Life (Article 2)

In the case of *NHS Trust A v M; NHS Trust B v H*⁴⁶, the court applied a precedent established before the Human Rights Act in the case of *Airedale NHS Trust v Bland*⁴⁷ that lawful withdrawal of treatment to a patient in a permanent vegetative state does not infringe the right to life. In another case heard in the same year, concerning a terminally ill person's wish to end their life, the court held that the right to life does not embrace the right to die⁴⁸.

(B) Torture and Degrading Treatment (Article 3)

There have not been many cases brought in the UK under this Convention right. Those that have generally relate to prison sentences. In *R v Drew*⁴⁹, a life sentence handed down to a mentally ill offender was held not to breach Article 3 because of the danger posed by the offender to the public. The court was of the view that the alternative (a hospital order) would not have offered sufficient protection to the public.

(C) The Right to Liberty (Article 5)

As with Article 3 above, case law on the right to liberty has tended to relate to sentencing. In the case of *R v Offen*⁵⁰, for example, the Court of Appeal held that an automatic life sentence imposed on an offender who had committed two prior serious offences did not infringe Article 5 as the offender was a significant risk to the public.

(D) The Right to a Fair Trial (Article 6)

There has been a good deal of case law generated by this Article. The approach taken by the courts in the UK mirrors that taken by the ECtHR. The courts consider the general fairness of procedure rather than the detail. In the case of *R (Anderson) v Secretary of State for the Home Department*⁵¹, the House of Lords made a declaration under s4, HRA that s29 of the Crime Sentences Act 1997 (which conferred on the Home Secretary control of the release of mandatory life sentence prisoners) was incompatible with Article 6, which requires that a

⁴⁶ [2001] Fam 348

⁴⁷ [1993] AC 789

⁴⁸ *R (Pretty) v DPP* [2001] UKHL 61; (2002) EHRR 1

⁴⁹ [2003] UKHL 25

⁵⁰ [2001] 1 WLR 253

⁵¹ [2002] UKHL 46

sentence is imposed by an independent and impartial tribunal. The decision followed on from similar ECtHR decisions in the cases of *Stafford v UK*⁵² and *Benjamin and Wilson v UK*⁵³.

(E) *Retrospective Application of the Law (Article 7)*

Several cases look at old offences committed many years in the past, but where offenders are subject to a penalty at a later stage when there has been an intervening change in the law. For example, in *R v C*⁵⁴, the defendant had raped his wife in 1970. He was convicted in 2002. The Court held that there was no problem in convicting for an offence that was committed prior to the change of the law on marital rape which had been introduced in 1992 by the House of Lords in the case of *R v R*⁵⁵.

(F) *Right to Privacy (Article 8)*

The case of *R v Secretary of State for the Home Department ex p. Mellor*⁵⁶ concerned the right to privacy and the exercise of conjugal rights. The Court of Appeal ruled that imprisonment was incompatible with the exercise of conjugal rights. The court applied the proportionality test in not allowing the rights to be exercised. It did indicate, however, that exceptional circumstances might lead to a decision the other way.

(G) *Freedom of Religion (Article 9)*

There have been very few cases relating to the Article 9 Convention right in this country. An interesting case was that of *R v Taylor (Paul Simon)*⁵⁷. It was claimed that cannabis was being supplied for use in acts of religious worship (Rastafarianism). The Court held that Article 9 was not violated by the Misuse of Drugs Act 1971, which prohibits the use and supply of cannabis. The House of Lords also ruled that there was no violation of Article 9 in a school's policy that prohibited the wearing of a jilbab⁵⁸. Their Lordships noted that the school was sensitive to the needs of its pupils and provided them with a choice of uniforms.

(H) *Freedom of Expression (Article 10)*

There have been a number of cases relating to the protection of journalistic sources, and the courts in these were required to balance the freedom of the press

⁵² [2002] 35 EHRR 32

⁵³ [2002] ECHR Application No. 28212/95, 25 September 2002

⁵⁴ [2004] EWCA Crim 292

⁵⁵ [1991] 4 All ER 481, HL

⁵⁶ [2001] EWCA Civ 472

⁵⁷ [2000] EWCA Crim 2263

⁵⁸ *R (Shabina Begum) v Denbigh High School* [2006] UKHL 15

(and the protection of sources) and the public interest. In *Ashworth Security Hospital v MGN Ltd*⁵⁹, the *Mirror* newspaper had published information from hospital records about a convicted murderer. The hospital had been unable to find out the identity of the employee who had leaked the information and called for Mirror Group Newspapers (MGN) to disclose the source. MGN argued that this was contrary to Article 10. The Court of Appeal ruled that unless the person was identified and dismissed, further confidential material might be sold. The House of Lords affirmed the decision in *Ashworth* in the case of *Interbrew SA v Financial Times*⁶⁰. In this case it was held that the 'public interest in protecting the source of a leak was not sufficient to withstand the countervailing public interest in letting Interbrew seek justice in the courts against the source'. The leaked documents in the case were partly forged. In other cases the importance of protecting journalistic sources has prevailed. This was so in *Mersey Care NHS Trust v Acroyd*⁶¹. In this case, an opposite conclusion was reached to that in *Ashworth*. The High Court ruled that, in balancing conflicting rights (the right to privacy and the right to freedom of expression), it was necessary to apply the guidelines set out in *Campbell v Mirror Group Newspapers plc*⁶²; this meant looking at the proportionality of disclosure. In the *Mersey Care* case the court held that it would not be proportionate for the hospital to seek redress against the source, given 'the vital public interest in the protection of a journalist's source'.

(I) Freedom of Association (Article 11)

The case of *RSPCA v AG*⁶³ related to the RSPCA's exclusion of current members and denial of membership to those who did not support its policy against hunting with dogs. The court ruled that the Association could exclude members and applicants who they thought (in good faith) would damage their objectives. However, such applicants should have the opportunity to make representations.

(J) The Right to Marry (Article 12)

Following the *Goodwin v UK*⁶⁴ case in the ECtHR, the House of Lords ruled in *Bellinger v Bellinger*⁶⁵ that the English law which prevented transsexuals from entering a valid marriage was incompatible with the Convention. The Court did rule that the marriage was void, but the law was subsequently changed by the Gender Recognition Act 2004.

⁵⁹ [2002] UKHL 29

⁶⁰ [2002] EWCA Civ 274

⁶¹ [2006] EWHC 107 (QB)

⁶² [2005] UKHL 61

⁶³ [2002] 1 WLR 448

⁶⁴ [2002] ECHR Application No 28957/95 11 July 2002

⁶⁵ [2003] 2 AC 467