

Lecture one outline

Law, Common Law



LECTURE ONE — OUTLINE 1. The Sources of English Law What we are concerned about in this regard is the JUSTIFICATION for the decisions reached by our various courts of law, and the principles of law applied by lawyers in relation to commercial and business practices. Laws are created by lawyers, commercial and business law is created by commercial lawyers, but it is business men and women who must abide by, apply and work within it. There are a number of sources of English law, and this is markedly different from some other jurisdictions, eg China and parts of continental Europe. In the UK, the legal system is a COMMON LAW LEGAL SYSTEM, as opposed to a CIVIL LAW SYSTEM. It is perhaps easier to define a civil law system first, in that a civil law system is a written and accessible set of laws that cover all aspects of activity through codified legal principles and rules. These codified rules are usually created through the political apparatus, the court system is usually inquisitorial, not bound by precedent, and the law is administered by a specially trained judiciary with a limited authority. The judicial role is to INTERPRET the law. Roman law was one of the first major civil law systems, and the Germanic codes that had developed from the 6th and 7th centuries in Germany were adopted by developing Asian nations from the 19th century onwards. The German Civil Code became the basis for the legal systems of countries such as Japan and South Korea, and in China, the German Civil Code was introduced in the later years of the Qing Dynasty and formed the basis of the law of the Republic of China. So in China, in simplistic terms, the law is created by the Legislative Branch of government, the National Peoples Congress and is applied and interpreted by the Judicial Branch of government, the Supreme People's Court being at the top of this

hierarchy, and Basic People's Court at the bottom. In the Common Law legal system of the UK there are a number of primary sources: (i) Common Law (ii) Statute (iii) European Legislation (i) Common Law Sometimes also referred to as CASE LAW, this is judge-made law, a body of legal principles that are made by our judges on a case by case basis. This practice has developed over the centuries in England from the time of the Norman Conquest (1066). Local customary law was gradually brought together as the government and administration of the various parts of England and Wales was centralised in London in one parliament and one supreme court. Knights originally, then judges would travel around the country from London, hearing cases and recording their decisions so establishing a set of PRECEDENTS and a unified system of law. This became known as the COMMON LAW — a law that was common to all, applied to all men in all parts of the country. An area of law that still to this day remains based in principles of common law is the law of contract, and this will be one area of law we will be considering in our studies this semester. While there is some statute law in the law of contract, most of the fundamental principles of how we create interpret and administer contracts at law in England, are to be found in common law, judge-made case law. For example, it is a rule in the law of contract that, in general, only the parties to a contract can sue for breach of contract. A third party, C, cannot sue for a breach of a contract made between A and B. This is known as the COMMON LAW DOCTRINE OF PRIVACY, and as discussed in the case of *Tweddle v Atkinson* (1861). In this case, the father of the bride and the bridegroom entered into an agreement to pay the groom certain sums when he had married the daughter. On the marriage, one father refused to pay the

groom and the court decided that the groom could not sue for breach of contract because he was not a party to the contract - even though he was obviously mentioned in it and had benefits under it. (ii) Statute Law or Legislation As judges are making laws in the court room, so our Parliament makes law by way of statute, or Act of Parliament. More and more our law is developed in this codified form, particularly in areas where the principles are complicated and complex eg company law, social security law and tax law. As these fields developed rapidly, it was not feasible to wait for a particular point to be raised by parties to an action in a courtroom, and for clarity and certainty, particularly in the commercial field, rules needed to be established and applied to keep pace with developments. So, for example, as business resorted more and more to conducting commercial ventures through the corporation, it became clear that we needed regulation in codified form to govern the incorporation and ongoing operations of that entity. Hence, most of our company law is contained in statutory form, under the Companies Act 2006. It is the biggest piece of legislation ever passed by a UK parliament and has over 1300 sections. It took 10 years to draft and introduce, and only fully came into force in 2009. Cases on the points of law in the Act are only just now starting to take place in the companies courts. So, in semester 2, in the module Commercial Law, we will be concentrating our focus on statute law, unlike this semester's focus on the common law, as it contains the fundamentals of the law relating to contracts in England. Finally, it should be noted here that if there is a conflict between the common law and statute law, STATUTE WILL PREVAIL. (iii) European law On Britain's entry into the European Community in 1972, our parliament enacted a piece of legislation

called the European Communities Act 1972, under which Britain made an undertaking to be bound by COMMUNITY LAW, that is, laws made by the European Parliament. Section 3 of the ECA 1972 binds our courts to accept the supremacy of community law. It is not however strictly correct to say that EU law automatically applies in the UK and that domestic UK law is therefore redundant. Rather, if there is conflict between the two, in a given area, then EU law is paramount in this instance. Where there is a gap in the UK law, and there is EU law on that point, then again, EU law will apply, to create a certain right or an obligation. A very significant case on the issue of EU supremacy was *Factorame Ltd v Secretary of State for Transport (No 2)* [1991]. In this case, the EU had made laws to govern the accessibility of all member states of the EU to fish each others waters, setting limits and restrictions on this, but nevertheless granting equal rights to all members to fish each other's waters. To fish in UK waters and in this manner, a ship had to be registered under the merchant shipping regulations of the state in whose waters it intends to fish. In response to this, the UK passed an Act of Parliament which required that registration would only be granted if there was a 'genuine and substantial connection with the UK'. As a result of this, a Spanish vessel, the *Factorame*, could not gain the necessary registration to fish in British waters, and legally challenged the provisions of the Merchant Shipping Act 1988 on the basis that it was incompatible with EU law, and that it had been discriminated against on the grounds of nationality. After protracted court battles, eventually, our highest court at the time, the House of Lords, ruled that indeed that these provisions of the Merchant Shipping Act should be suspended (and in due course amended) as it was

incompatible with the EU provisions. In the UK, a DUALIST approach is taken which means that certain types of EU law do not generally become part of the UK law, until they have been brought into effect through the passing of a piece of UK legislation, through the British parliament. This type of law is often brought into effect as an EU DIRECTIVE. Some types of EU law do however have direct effect and do not need domestic national enactment. These are commonly referred to as EU REGULATIONS, made by the EU Commission and the Council of Ministers. Finally, another important provision of EU law in the UK, is based in the European Convention on Human Rights. The UK passed an Act of Parliament, the Human Rights Act 1988, which allows UK courts to declare a provision of statutory law incompatible, if it violates the Convention on Human Rights.

2. The Courts and the Doctrine of Precedent (i) The Courts Today A basic distinction must be made between the CRIMINAL LAW, and the CIVIL LAW. The criminal law is accusatorial, and is applied through the trial mechanism, between the community, here in the UK this is the Queen, and the person accused of the crime, the accused. The case is brought on behalf of the Queen, as the representative of the community, and so this party is referred to as “ R”, and the other party is referred to by name. So for example a case will be cited as R v Brown, and will be followed by the date in brackets (1993). There is also then a citation as to where and in what law report the case can be found. The civil law is concerned with disputes between individuals. The claimant commences proceedings against another, the defendant, who defends the claim, and may also counter-claim against the claimant. So, for example, as we will see, a civil claim may be brought for a breach of contract between the parties to

that contract. An example would be the case of Mitchell Ltd v George Finney Lock Seeds Ltd (1983). We will discuss the facts. We will now look in brief at the court systems with reference to the text, Smith and Keenan, at pages 19 and 20. The Courts today have the Supreme Court at the top of the hierarchy, which under the Constitutional Reform Act 2005, creates a new independent Supreme Court of the United Kingdom. Previously, the highest court in the legal hierarchy was the House of Lords, and it enjoyed the jurisdiction as the final court of appellate jurisdiction. But again we must remember that in relation to a point in European law, the European Court of Justice has supremacy, and any court may, and in the case of the Supreme Court, must, seek a preliminary ruling on a relevant point of European law from the ECJ. We should also mention the European Court of Human Rights, which sits in Strasbourg. It was set up by the Convention for the Protection of Human Rights and Fundamental Freedoms, to ensure that those of the member states that choose to engage, observe the terms of their engagement. The UK is one of the states which have accepted the court's jurisdiction. The ECHR can now be approached directly by the person alleging a human rights violation, by bringing an action against the state responsible. So, for example in the case of Lustig-Prean and Beckett v United Kingdom (1999), the court decided that certain members of the UK armed forces who were discharged because of their homosexuality had been subjected to a violation of their human rights under the European Convention. The decision of the court meant that the armed forces had to revise their policy on homosexuality, but the case has no binding effect on private business, because it only relates to the state, in this case the UK. (ii)

Other Courts and Tribunals Sometimes disputes arise between individuals and the state and there is an obvious danger in any system which takes away from the citizen, in his dealings with the state, the government and other officials, the protection of the law. These disputes can arise from both sides, eg people may be claiming social security benefits to which the state suggests they are not entitled, or on the other hand, landowners may be aggrieved by the compulsory purchase of their land by the state for a railway or a motorway for instance. So a number of tribunals have been established to deal with such disputes, in a cheaper, more efficient and less formal setting than a court of law. There are many types of tribunal, but examples of the more important ones are the Social Security Tribunals, the Employment Tribunals and the Alternative Dispute Resolution Tribunal. The other advantages of this tribunal system is that specialist areas of expertise are established, in what is often a complex area, eg social security entitlement. The Employment Appeals Tribunal will consider the complex laws relating to disputes arising out of the contract of employment or unfair dismissal, redundancy, equal pay and sex, race and disability discrimination. We will consider some of these aspects of employment law in semester 2.

(iii) The Law Making Process: UK Legislation and the Common Law/Case Law

We must first consider the methods by which laws are made by the Westminster parliament and then the way they are interpreted by the judiciary. We will then consider the common law, case law where the judiciary involves itself directly in the law-making process. (a) Statute and Legislation There is within the UK two parliaments and two assemblies — the English parliament, the Scottish parliament, and the assemblies of Northern

Ireland and Wales. For our purposes we are concerned with the laws of England and Wales. Our parliament has 2 chambers, the House of Commons, which consists of about 650 elected members, called Members of Parliament, MPs. The other is the House of Lords, a non-elected body of life peers (appointed for their lifetime), law lords (full time professional judges) and elected hereditary peers. The right of hereditary peers to sit and vote in the House of Lords was abolished in 1999 but an amendment was passed which enabled the 92 existing hereditary members to remain as such until the next stage of reform. An Act of Parliament starts its life as a Bill — which is read and debated and passed through BOTH houses. When it has been passed, it receives Royal Assent and becomes an Act. So statute law, legislation, openly creates new law. A judge would say, in relation to case law, that they are not 'creating' new law, rather they are selecting existing rules which they apply on a case by case basis. Others would disagree and view this as much a law-making process as the passing of legislation in our Parliament. The judiciary also has a part to play in the legislative lawmaking process too however, as they are frequently called upon to settle disputes as to the meaning of words or clauses in a statute, and the effect of that on the case in question. So there is also a body of case law that gathers around the Act of Parliament, because often wording is obscure and turns out to be not fit for the purpose for which it was enacted. The rights of parties often depends upon the exact meaning of a section of the statute in question, and the judge may be required to decide the meaning of the section, so even statute law, legislation is not entirely free from judicial influence. Judges have certain recognised aids to interpretation, there may be interpretation or definition

sections in the Act itself, and there is a general statute, the Interpretation Act 1978, defines commonly used terms. There are also a number of rules of interpretation that have developed over time. So, for example, the Mischief Rule suggests the judge look at the mischief in the common law that the Act was designed to put right, whereas the Literal Rule requires the judge to simply apply the literal grammatical meaning to the word(s) in question, whatever the result. If the result is to create absurdity, the judge may elect to apply the Golden Rule, which is an extension of the Literal Rule, in that the ordinary grammatical meaning shall apply unless the result would create an absurdity, eg *Re Sigsworth* [1935]. There has been a more recent approach which recommends that more emphasis be placed on the importance of interpreting the statute in the light of the general purposes behind it and the intentions of Parliament in enacting it. This is referred to as purposive interpretation. See for example, the case of *Knowles v Liverpool City Council* [1933].

(b) Case law or Judicial Precedent Case law still provides the bulk of the law of the country, but as we have discussed, Parliament is becoming much more active in making new laws, and where there is a conflict between case law, or common law, and statute, then statute will prevail. Some case law is concerned with the interpretation of statutes, as we have seen, but some makes law in its own right. Case law is built up out of precedents, and a precedent is a previous decision of a court which may, in certain circumstances, be binding on another court, deciding a similar case. About the doctrine of precedence, as Chief Justice Park said in the case of *Mirehouse v Rennell* (1833), 'Precedent must be adhered to for the sake of developing the law as a science', and the practical reality of this doctrine, is

that without it, no lawyer could safely advise his or her client safely with any confidence as to what the possible outcomes of a lawsuit would be. From the early times and the development of the common law, the judges who went out from London on circuit adopted what was known then as the doctrine of stare decisis (abiding by precedent), and this doctrine has been gradually developed into its present form, which states that a precedent binds, and must be followed in similar cases, subject to the main exception, which gives the judge the power to distinguish cases on the facts, and so not be bound by the earlier decision. There are other exceptions to the doctrine of precedence, but the most commonly used is that of distinguishing the case on its facts. There are two things necessary to support the modern doctrine of precedence. These are first, good law reporting, and secondly, a settled judicial hierarchy. This is why it is important to have some understanding of the hierarchy of the courts, see pages 19 and 20 of Smith and Keenan to refresh your understanding of this. There are two kinds of judicial precedent: 1. Binding Precedents 2. Persuasive Precedents But first, we must consider what is a precedent and where it is to be found in the case. The answer is — in the law reports, that is the report of the case as it was argued and decided in the courtroom. Even in early times, the decisions of the itinerant judges were written down, for future reference, but since 1865 law reports have been published under the control of the Council of Law Reporting for England and Wales. These are known as simply the Law Reports. In addition there are a number of private reports which are published, and of these the All England Law Reports (All ER), published weekly since 1936, are the most general purpose of the private law reports. There are others that are more

specialist, for example, Butterworth's Company Law Cases (BCLC), Law Reports Family Division (Fam), Simon's Tax Cases (STC) etc. The Times newspaper publishes summarised reports of certain cases of interest to it, as do other papers, eg FT, Guardian. Decided cases are usually referred to as follows: Smith v Jones, 1959. This means that in the court of first instance, Smith was the claimant, Jones was the defendant, and the case was reported in 1959. This is a short citation and the longer citation will tell you where the case is reported, and might read: Smith v Jones [1959]1 All ER at p 24. If Jones were to appeal a decision made against him, the case would be referred to as Jones v Smith, where Jones is the appellant and Smith the respondent. The whole of the case is reported, all of the facts, the arguments of counsel, things the judge might have said, and of course the judgements. There may have been more than one judge, who came to different findings. The part of the reported case that we take as the precedent is the ratio decidendi. The ratio is defined as the principle of law, used by the judge to arrive at his decision, together with his reasons for doing so. The complicating thing is, that the judge does not usually identify, when deciding a case, what is the ratio. He does not distinguish the ratio decidendi from the other things said in passing ie the obiter dicta. But it is only the ratio that is binding, the obiter dicta has no binding force — it may however have persuasive power, particularly the dicta of cases heard in the higher courts, or from high profile judges. A judge does sometimes indicate that his remarks are obiter. The formula is complicated. The ratio could be said to be 'the abstraction of the legal principle from the material facts of the case and the decision of the judge made thereon, together with his reasons for so

doing' (see Smith and Keenan, page 196) Whether a precedent is binding depends on the level in the hierarchy of the court in which it was reached (refer to diagrams pages 19 and 29 Smith and Keenan). The Supreme Court (formerly the House of Lords) The Supreme Court took over from the HL as the final court of appeal in 2009, and so the rules regarding precedent that applied to the HL now apply to the SC. The HL was bound by its own previous decisions (*London Street Tramways v London County Council* [1898]) unless the decision had been made *per incuriam*, that it an important case or statute had not been argued in the court where the previous decision was made. But in 1966, the rule was abolished on the basis that 'too rigid adherence to precedent may lead to injustice... and also unduly restrict the proper development of the law'. There have however been few instances of the court departing from its previous decisions. One of the few examples is the case of *Rv Howe*[1987], where the HL overruled its previous decision in *DPP for Northern Ireland v Lynch* [1975] where it was decided that duress could be a defence to murder. The case of *Rv Howe* removes the defence of duress altogether in relation to murder. The Court of Appeal Next in the hierarchy is the CA and this is bound by its previous decisions, as well as by those of the HL (*Young v Bristol Aeroplane Co* [1944]). There are however 2 main exceptions to the rule: 1. If there are 2 conflicting decisions, the court may choose which one to follow 2. The CA will not follow a decision of its own that is inconsistent with a decision of the HL In *Davis v Johnson* [1978], Lord Denning took the view that the CA should be able to take the approach of the HL and be able to depart from its own decision where that decision was clearly wrong. This was never formalised however. The Divisional Court

There are procedural exceptions, which are somewhat complicated, but for present purposes we note that divisional courts are for the most part bound by the decisions of the HL, the CA and their own previous decisions. The decisions of the DC are binding on judges sitting in the High Court. The High Court The HC is bound by the decisions of the HL and the CA, but not generally by the decisions of another HC judge. Nevertheless, a HC judge will treat the decision of another fellow HC judge as of strong persuasive authority. The Crown Court A judge in the CC is bound by the decisions of the HL and the CA, but not by the Divisional Court of the High Court, Queen's Bench Division, or its own previous decisions. The Magistrates Court This court is bound by all higher court decisions, and their decisions have no binding force on other courts. The Employment Appeal Tribunal The EAT is bound by the decisions of the HL and the CA. It is not bound to follow its own previous decisions. The Judicial Committee of the Privy Council The decisions of the JCPC are in general not binding, either on itself or on other English courts, but its decisions may be of persuasive authority. General Exceptions to the Doctrine of Binding Precedence When a court is asked to follow a binding precedent it may refuse to do so on the following grounds: (a) by distinguishing the case on its facts — a case is distinguished when the court considers there are important differences between the facts of the case before it and those of the previous case. An example of cases being distinguished on the facts are the contract law cases of *Phillips v Brooks* (1919), *Ingram v Little* (1961), and *Lewis v Avery* (1971). In all 3 cases the rogue disappeared leaving the claimant to try and get their goods back in court. Discussion of facts and decisions reached. (b) by refusing to follow the

previous case because its ratio is obscure (c) by declaring the previous case to be in conflict with a fundamental principle of law or per incuriam (d) because the previous decision has been overruled by statute (e) because of the effect of the Human Rights Act 1998, or reference to the European Court of Justice Reversing and Overruling On appeal - it often happens that when a case is decided it is appealed to a higher court. The appellate court, eg the Court of Appeal may come to a different conclusion from the judge at first instance, and the court may reverse the decision. So reversal applies to a decision of an appellate court in the same case. On appeal however, it might be that the grounds of appeal are based on the fact that the previous case was decided following a precedent in a previous case, and if the appellate court decides to differ from this decision and grant the appeal, it is said to overrule the case which formed the basis of the precedent. So reversal affects the parties, overruling affects the precedent (and not the parties to the original case). Advantages and Disadvantages of Case Law/ Common Law-making and the Doctrine of Precedent Advantages: 1. Certainty and consistency 2. Power of flexibility and growth — new decisions are constantly being added as new cases come before the court, and this way the law can keep pace with the times rather than wait for parliament to pass a statute 3. Practical character to judicial rulings — real life situations as opposed to hypotheticals 4. Legal rules are only made as the need arises and not in advance on the basis of theory Disadvantages: 1. Jeremy Bentham criticised the principle of 'the law following the event', and applied the term 'dog's law' to the system. 2. Limits judicial discretion, judges are 'forging fetters for their own feet'. 3. Limiting the scope of a decision in order to uphold a precedent

can lead the court to make illogical distinctions so as to not have to follow a previous rule. 4. Number of reported cases is bulky and complex 5.

Precedence relies on parties being prepared to go to the effort and expense of taking a matter to the Supreme Court. Precedence in the European Court - there is no doctrine of binding precedence, though there may be persuasive influence