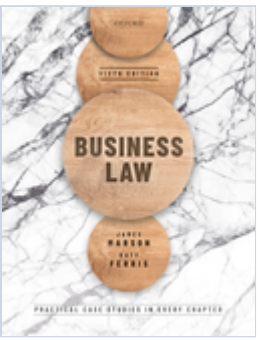

Business Law (6th edn)
James Marson and Katy Ferris

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4. Dispute Resolution for Businesses

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Abstract

This chapter identifies courts and tribunals as the place where the laws discussed in the previous chapters are interpreted and utilized in the legal system. The jurisdiction of the courts and the personnel within them are described and a comparison is drawn between these forums for the administration of justice. It is important for those in business to be aware of the work of at least one tribunal—the Employment Tribunal, as many employment-related disputes ultimately end up here. Also, the courts in the English legal system, and the increasing use of alternative dispute resolution mechanisms, are relevant to businesses as they are used either to settle disputes or to avoid them altogether. Because the term ‘court’ is difficult to define in any practical sense, the chapter uses a description of what a court does.

Keywords: courts, tribunals, legal system, employment tribunal, alternative dispute resolution

The courts in the English legal system, and the increasing use of alternative dispute resolution mechanisms, are relevant to businesses as they are used either to settle disputes or for dispute avoidance. Businesses will, at least occasionally, become involved in disputes with suppliers, customers, or their workforce, and the following chapter outlines the mechanisms for seeking an outcome to such disputes. Knowing the appropriate court, or the mechanisms for non-legal action that exist to offer a settlement to disputes, may enable a more speedy resolution to business problems. Not all disputes will have a justiciable remedy or perhaps even require recourse to the courts, but the courts’ position in the application of legal rules and administration of justice necessitates their discussion.

Business Scenario 4

Usman has worked in the accounts department of ABC Industries plc for five years. He is a Pakistani national who has a good understanding of the English language but can sometimes make mistakes, particularly when idioms are used. Usman's ex-girlfriend (Bea) also works for ABC Industries plc in another department and recently they had an argument at work. Usman was alleged to have threatened her, which other members of staff heard. However, Usman claims that whilst he accepts there was a heated exchange between the two, it was a misunderstanding and was not a threat. It seems that Bea and the other staff thought Usman used the expression 'I will cut your face' in the argument when he claims to have said 'I will shut your face'.

Following an investigation and gathering of all the relevant facts (which includes acceptance of Usman's level of spoken English and some evidence pointing towards Bea goading Usman into the argument) the employer has the choice of dismissing Usman or using other disciplinary measures.

Learning Outcomes

- Identify the judiciary in the courts in both civil and criminal jurisdictions (**4.2.2–4.2.3.1**)
- Explain the hierarchy of the court structure and its jurisdiction (**4.2.1–4.2.10.2**)
- Critique the creation of tribunals and contrast their role with the courts (**4.3–4.3.4**)
- Identify examples of alternative mechanisms to dispute resolution and where they may be most appropriately used (**4.4–4.4.4.3**).

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4.1 Introduction

This chapter concludes the section on the English legal system with consideration of the court structure and the hierarchy of the courts. Having described the constitution and the sources of laws in the United Kingdom in the previous chapters, this chapter identifies where these laws are interpreted and utilized in the legal system—courts and tribunals. The jurisdiction of the courts and the personnel within them are described and a comparison is drawn between these forums for the administration of justice. It is important for those in business to be aware of the work of at least one tribunal—the Employment Tribunal, as many employment-related disputes ultimately progress here.

4.2 The court system and appointment process

It should be understood that the term 'court' is rather difficult to accurately define in any practical sense due to the variety of courts that exist in the English legal system, and those administered by the State and other non-State-administered bodies (e.g. Jewish law has the Beth Din and Muslim law has the UK Islamic Shari'a

Council). What is easier to achieve is a description of the work undertaken by the courts (and for the purposes of this text the discussion is limited to the State-administered courts) and the role of the personnel within them.

4.2.1 An Overview of the Courts

Parliament provides the rules under which the various courts and tribunals in the legal system must work. This identifies the powers and jurisdiction of the court, and the role of judges/arbitrators in this process. Courts are a forum for disputes to be heard and judgments to be provided. They exist for disputes between parties to be considered (in civil law) and determine a defendant's guilt or innocence (in criminal cases).

The passage into law of the Legal Services Act 2007 has had a significant impact on the legal profession and opportunities for greater access to courts through, *inter alia*, increased rights of audience of lawyers. It also aimed to assist individuals in their relationship with providers of legal services (e.g. consumer legal complaints), through the creation of the Office for Legal Complaints. Given the word constraints of this text, the online resources include additional materials on this topic.

Some courts may hear both civil and criminal cases under their jurisdiction (such as the Court of Appeal and the **Supreme Court**, which both hear criminal and civil cases, but there is a clear demarcation between the two jurisdictions). The courts also exist under a hierarchical system where a decision of the higher court is binding as a precedent on those courts below it. These decisions are not (always) binding on the court that has provided the judgment (it can reverse the judgment in some later case) or on any court(s) above it. **Figure 4.1** demonstrates the structure of the civil court system and the arrows demonstrate how precedents bind lower courts.

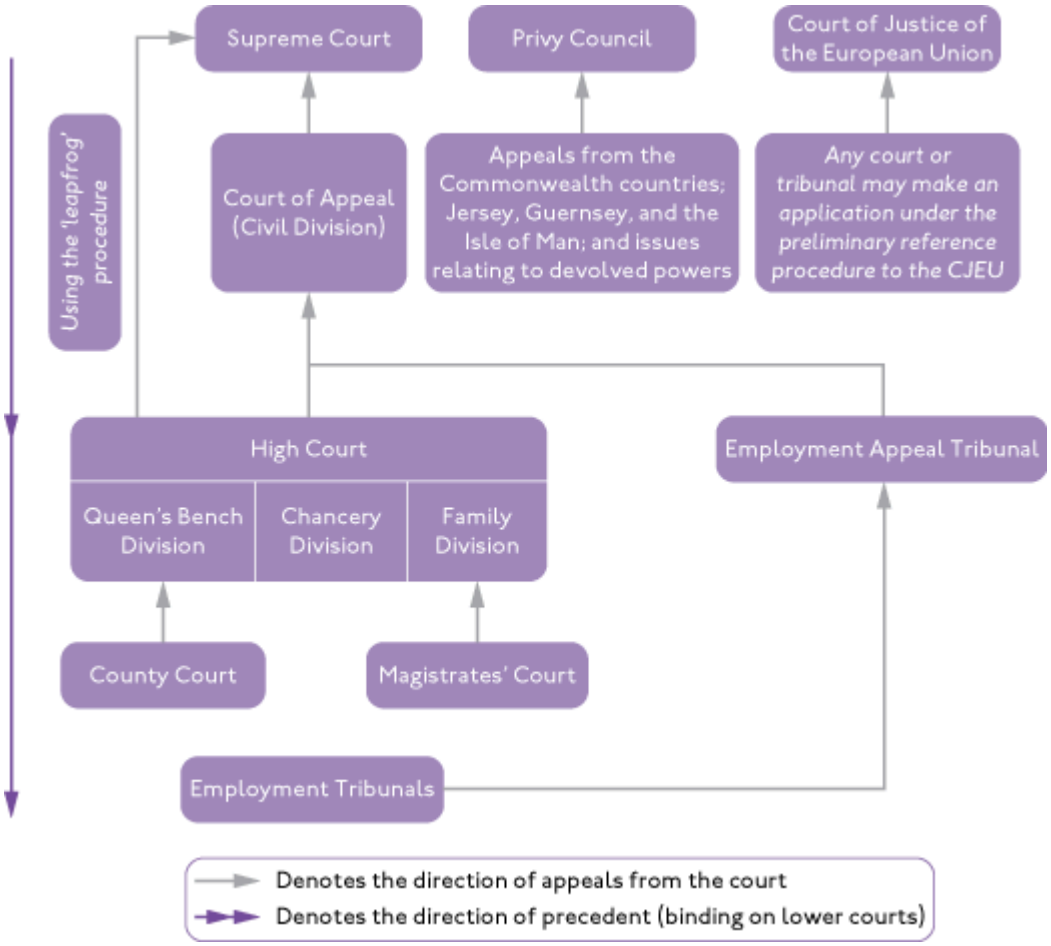

Figure 4.1 The court structure in the Civil Division

As is evident from this diagram, the courts at the top are the superior courts and deal with appeals and/or the most complex and important cases (and they consider points of law applied in the case rather than the facts). The courts at the lower end hear the more simple cases or those that are just beginning and may need to be referred higher. As shown in **Figure 4.1**, tribunals sit at the bottom, yet it should be noted that whilst some are
p. 69 still referred to as tribunals, they are in fact courts and are specialists in that jurisdiction of ↵ law. Such an example is the Employment Appeal Tribunal, where appeals from decisions of an Employment Tribunal are heard.

4.2.2 Judiciary

The judiciary refers to the judges who preside over the cases heard in the courts in the civil and criminal jurisdictions. There are a variety of judges, established on a hierarchical basis, who sit in the courts in the English legal system. The most senior of these is the Lord Chief Justice (the head of the Court of Appeal (Criminal Division) and the Queen's Bench Division of the High Court), whose responsibilities include representing the judiciary as a body to Parliament; the second most senior judge is the Master of the Rolls (the head of the Court of Appeal (Civil Division)); then there is the President of the Family Division and the Vice-Chancellor (Head of the Chancery Division of the High Court).

Next in the hierarchy are the Lord Justices, who, along with the Lord Chief Justice and the Master of the Rolls, sit in the Court of Appeal.

The next level of the judiciary involves Circuit Judges and District Judges. District Judges in the Magistrates' Court support the lay magistrates in the Court and consider the full range of cases before the Court, either sitting with the lay magistrates or sitting alone.

p. 70 ↵ Justices of the peace (lay magistrates) are the volunteers who sit in the Magistrates' Court and are appointed by the Lord Chancellor on behalf of the monarch (with the exception of Greater Manchester, Merseyside, and Lancashire, where the appointments are made by the Chancellor to the Duchy of Lancaster). In the Magistrates' Court they sit in a bench of three, and when sitting in the Youth Court or Family Proceedings Court, there must be at least one man and one woman. When in the Crown Court, the justices sit with a judge to hear appeals and cases committed from the Magistrates' Court, for sentence.

4.2.3 Appointment Proceedings

Given the disproportionately small number of judges representing the various ethnic minority groups in the country; few appointments were made of those with disabilities; and judges were frequently ridiculed as being out of touch with society, the system of appointments was updated with the creation of the Judicial Appointments Commission.

4.2.3.1 The Judicial Appointments Commission

The Commission is composed, in accordance with the Constitutional Reform Act 2005, and as amended by the Judicial Appointments Regulations 2013, of 15 members. This includes a chairperson, five 'lay' members, five members acting from a judicial capacity, two legal professionals, a tribunal member, and a lay magistrate (Sch. 12). The role of the Commission is to select the judges on the basis of the merits of their application, in discussion with the panel, with the need for accountability and transparency to remain a focus of the appointment process. The Commission also has a requirement to consider the current composition of the judiciary and have regard to increasing its diversity (Constitutional Reform Act 2005, ss. 63–64).

The judges to the Supreme Court are required to possess sufficient knowledge and practical experience of the law. The initial members of the Court were the 12 Law Lords (s. 27(8)). When a vacancy arises, the Lord Chancellor formulates a selection panel, which includes a member of the Commission, to select a person from the candidates and report this to the Lord Chancellor who may accept the decision, reject it, or require the panel to reconsider its decision. The Lord Chancellor then passes the information of the successful candidate to the Prime Minister, who makes the recommendation to the monarch for the appointment to the Supreme Court. For judges to the lower courts (High Court Judge, District Judge, and so on) the Commission makes the recommendation to the Lord Chancellor, who in turn makes the recommendation to the monarch.

4.2.4 The Supreme Court

The Supreme Court replaced the judicial function of the House of Lords from 1 October 2009. It is located in the old Middlesex Guildhall in Parliament Square, which is intended to provide the Justices of the Supreme Court (the new name of the 'Law Lords') with greater space to undertake their functions (than was available in the House of Lords).

The Supreme Court is the final court of appeal in civil cases for the courts of the UK, and is the final court of appeal for criminal cases for the courts of England, Wales, and Northern Ireland. The Supreme Court hears cases involving matters of general importance. It uses the case law and precedents developed by the House of Lords, and the Court is required to ensure its independence from the executive is maintained (Constitutional Reform Act 2005, s. 3).

p. 71 ↵ The qualifications required for appointment to the Supreme Court are governed by the Constitutional Reform Act 2005, ss. 25–31 (as amended by ss. 50–52 of the Tribunals and Enforcement Act 2007):

1. They must have held 'high judicial office' (which includes High Court Judges of England and Wales, and Northern Ireland; Court of Appeal Judges of England and Wales, and Northern Ireland; and Judges of the Court of Session in Scotland) for two years; or
2. They must possess a 15-year Superior Court qualification/or have been a qualifying practitioner for the 15-year duration.

4.2.5 The Court of Appeal

The Court of Appeal hears civil and criminal cases in its two divisions and forms part of the Senior Courts of England and Wales with the High Court and Crown Court (under Supreme Court Act 1981, s. 1(1) (which, following the Constitutional Reform Act 2005, was renamed the Senior Courts Act 1981)). The Court of Appeal is composed of up to 38 'ordinary judges' (known as Lord (or Lady) Justice of Appeal), and judges including those from the Lords, the Lord Chancellor, the president of the Queen's Bench of the High Court, and similar qualified judges (Senior Courts Act 1981, s. 2(1) and (2)). To qualify for appointment to the Court of Appeal, they must have held a 10-year High Court qualification or have been a High Court Judge (Courts and Legal Services Act 1990, s. 71).

In the civil division, the Court hears appeals from the High Court and the County Courts, although it is possible for the appeal to 'leapfrog' the Court of Appeal and move straight to the Supreme Court (Administration of Justice Act 1969, ss. 12–15). The Court consists, usually, of three judges, or cases may be heard by two judges in cases appealed from the High Court that could have been brought in a County Court. The law prevents a judge in the Court of Appeal from hearing an appeal from his/her own decisions, in the interests of natural justice and to give the public confidence in an appeals process (Senior Courts Act 1981, s. 56).

4.2.6 The Privy Council

The Privy Council holds two positions in the constitution: a legislative role, and a role as a court of appeal. Its historic roots date back to when the Privy Council would assist the monarch in matters of State. However, as with other institutions, it has evolved as the country evolved. The Privy Council consists of the Cabinet Ministers (the Right Honourable Members of Parliament) and a number of junior Ministers, who meet every month. Its role is predominantly concerned with the affairs of chartered bodies (those companies and charities incorporated by Royal Charter).

In its judicial role, the Privy Council (the Judicial Committee) consists of the Lord Chancellor (and previous Lord Chancellors), the Lords of Appeal in Ordinary, other Privy Council members who hold or have held high judicial office, and other judges in superior courts in other Commonwealth countries. It is the final court of appeal for UK overseas territories and the Commonwealth countries that have opted to retain appeals to the UK (Her Majesty in Council). It also has jurisdiction to hear appeals from Jersey, Guernsey, and the Isle of Man; from the Disciplinary Committee of the Royal College of Veterinary Surgeons; from certain Schemes of the Church Commissioners under the Pastoral Measure 1983; and it hears and determines issues relating to the
p. 72 powers and functions of the ↵ legislative and executive authorities established under the various devolution Acts for Scotland and Northern Ireland, and the competence and functions of the Assembly for Wales. The Judicial Committee hears 55–65 appeals per year, and sits in chambers of five judges for Commonwealth cases, usually with three judges for other matters. In civil cases, leave to appeal is usually obtained as of right, as it is in cases involving constitutional interpretation.

4.2.7 The High Court

The High Court is separated into three jurisdictions with specific areas of expertise: the Queen's Bench Division, the Chancery Division, and the Family Division. The trial will normally take place before a High Court Judge (or Deputy High Court Judge), who will also hear any pre-trial reviews or other interim applications. Generally, one judge hears each case, and appeals from the Court (that require permission) are heard by the Court of Appeal, with further appeals to the Supreme Court. Where a Master hears the case, an appeal is first heard by a High Court Judge, and then it may proceed as any other appeal.

The Divisional Court of the Queen's Bench hears the appeals from the County Court, and has jurisdiction to hear appeals from the criminal jurisdiction from cases started in the Magistrates' Court and those appealed from the Crown Court. These criminal issues are relevant in a business scenario due to the criminal liability imposed by legislation, including the Consumer Protection Act 1987 and the Consumer Protection from Unfair Trading Regulations 2008. When handling the criminal cases, the Court sits with two or three High Court Judges (one of whom will be the Lord Chief Justice or a Lord Justice of Appeal) and they have the power to uphold the decision, reverse it, amend it, or to send the case back to the referring court. An appeal from the Divisional Court is heard by the Supreme Court.

4.2.7.1 The Queen's Bench

The Queen's Bench is the division that considers cases involving contract (breach of contract), torts (personal injury, negligence, libel, and slander), non-payment of debts, and possession of land or property. The President of the Queen's Bench is the Lord Chief Justice and a Lord Justice of Appeal has been appointed as the Vice-President, along with the High Court Judges who preside over the cases. A judge is appointed to handle the Jury List, and another is in charge of the Trial List. Masters (junior judges) hear less serious cases.

The Division is further subdivided into the specialist courts of the Admiralty Court, the Technology and Construction Court, and the Commercial Court. Due to the specialism of each Court, they publish their own Guide or Practice Direction that modifies in certain circumstances the Civil Procedure Rules (CPR) 1999.

4.2.7.2 Chancery Division

The Chancery Division is based in the Thomas Moore Building in the Royal Courts of Justice and is subdivided into the Chancery Chambers and Bankruptcy and Companies Court. The Division considers claims including trusts, probate (when this is contested), companies, company liquidation, land, claims for the dissolution of partnerships, commercial disputes, revenue issues (such as appeals against taxation under VAT or Income Tax), and intellectual property issues in the Patents Court.

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4.2.7.3 Family Division

The Family Division considers all matrimonial issues under the Children Act 1989, the Child Abduction and Custody Act 1985, and matters arising from Part IV of the Family Law Act 1996. It deals with cases involving family matters of a broad jurisdiction, and can include issues of domestic violence, wardship and adoption, and divorce and annulments. It is, however, of little significance in the study of business law.

Consider

If Usman is dismissed from his employment, he has the right to claim the dismissal is in breach of his contract (a wrongful dismissal). In certain circumstances, the claim will be heard in the County Court. The issue of court costs should form part of Usman's decision to proceed on this route.

4.2.8 The County Court

The County Court is the 'lowest' of the courts, but this does not reflect its significance in the English legal system or indeed its contribution to the administration of justice. The Court hears many cases with a business emphasis, and as such, it follows the High Court in possessing unlimited jurisdiction to hear contract and torts claims. The main distinction in whether the case is heard in the County Court or the High Court is the expected value of the claim (the figure that the claimant may reasonably expect to be awarded by the court). In

the absence of a claim including personal injury, if the value of the claim is less than £25,000 then it will generally be heard in the County Court. If the claim involves a value of over £50,000 then it will generally be heard in the High Court.

The majority of the cases heard in the Court are undertaken by Circuit Judges, Recorders, District Judges, and Deputy District Judges. When reference is made to the 'small claims court' it is in reality the County Court using the 'Small Claims Track'.

The Court hears claims including breach of contract, faulty goods, goods not supplied, claims for bad workmanship, and personal injury. It will deal with many of the claims between a **consumer** and a **trader** and there exist mechanisms to assist in reaching a speedy resolution to a dispute. Cases in the County Court are heard by a District Judge when the issue is straightforward or the matter is uncontested. Where the issue is more complex, a Circuit Judge will hear the case, and appeals from the County Court will proceed to the High Court.

Judgments of the Court will be entered into the Registry of County Court Judgments, which is a public document and is often used by credit agencies prior to an offer of a loan or where goods are to be paid for over a period of time. Having settled the judgment, the party's name is removed from the Register. If this is completed within one month of the judgment, the name is removed immediately, but if it is completed after one month, the name will be held on the Registry and removed following a period of six years. This is very important for individuals and businesses who may wish to obtain credit in the future, and for those who would have to make such a declaration to a potential business partner under the duty of 'good faith'. Simply doing nothing when an action is initiated is not wise and seeking advice from legal and non-legal sources is always to be recommended.

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4.2.9 The Tracking System

Having established that a dispute between businesses or within a business cannot be resolved informally and amicably, the 'last resort' of resolving the dispute may be to have a court determine the issue. When a claim is initiated, the courts will assign it to one of the following claims tracks—the small claims, fast, or multi-track, which has implications for costs, the value of the claim, the privacy available to the parties, and the time allowed (or considered necessary) to dispense with the claim.

4.2.9.1 The small claims track

The courts and the parties may decide that the case is most appropriately conducted under the small claims track. When a case is initiated, the parties are sent a questionnaire (called an 'allocation questionnaire') that identifies the most cost-effective and just method of dispensing with the case. If the claim involves a dispute with an amount of less than £10,000; if it involves a situation such as consumer claims (faulty goods, poor workmanship, problems with the sale or supply of goods and services, and so on), accident claims, and disputes between landlords and tenants; and it will involve minimal preparation, then it may be suitable for this track. Such claims will not normally involve many witnesses or any difficult or complex points of law,

otherwise a different track may be more appropriate. The major benefits to a claim under this track are that legal costs are not generally awarded against the losing party and cases are dealt with much quicker than other types of claim.

4.2.9.2 The fast track and multi-track

The court will ask the parties for their views on the most appropriate track to use in the case, but will use the fast track if the claim involves a claim in excess of £10,000 but less than £25,000, and if the case will take no longer than 30 weeks to prepare and take no more than one day in court (assessed at five hours). If the case involves either a claim of more than £25,000 or will take longer than 30 weeks then the judge may allocate the case to the multi-track, where each case is allocated on the basis of its circumstances. In these cases, the party that wins the case will expect to recover some (or all) of the costs involved in their case from the losing party. When this involves the legal fees, and of course the losing party will have to pay their own expenses and legal fees, court action is something not to be entered into lightly.

Again, the parties complete an allocation questionnaire and it is expected that both parties cooperate and return the questionnaire to the court within 14 days of receiving it. The cooperation will involve the parties agreeing on the most appropriate track to use, the length of time the parties believe the trial will take, the time needed for preparation, and whether experts will be needed.

4.2.10 Criminal Courts

As stated earlier, the Supreme Court, Court of Appeal, Privy Council, and High Court have jurisdiction over criminal law matters in addition to their civil law responsibilities. The remaining courts specific to the criminal law are the Crown Court and the Magistrates' Court. The Magistrates' Court will refer a case to the Crown Court (usually) where the maximum possible sentence for imprisonment it has the power to impose is
p. 75 likely to be exceeded following conviction of the defendant, or where the maximum fine that may be
↵ imposed (£5,000) is insufficient. The power of imprisonment is limited to six months—however, note that the Magistrates' Court can impose two consecutive six-month prison sentences (hence a 12-month sentence) for offences triable 'either way'. If, following the trial the defendant is acquitted, insofar as no other offences are pending, they are free to leave court.

4.2.10.1 The Crown Court

The Crown Court handles the following types of cases:

- the more serious criminal offences, and these are tried before a judge and jury;
- appeals from the Magistrates' Court, and these are tried before a judge and at least two magistrates;
- defendants who have been convicted in the Magistrates' Court and are referred to the Crown Court for sentencing.

Offences heard by the Crown Court are divided into three categories of seriousness. Class 1 offences are the most serious and as such include murder, genocide, manslaughter, piracy, and so on. Class 2 offences include rape, and various other sexual offences. Class 3 includes all other offences not included in the first two classes. A Circuit Judge will generally hear cases at the Crown Court (such as class 3 offences). However, in cases of significance or complexity (such as in class 1 and 2 offences), the case will be heard by a High Court Judge. The cases involving a jury trial will involve the judge assessing the evidence, the application of the rules of the court, and so on, whilst the role of the jury is to consider the facts and the weight to be placed on the evidence heard. The jury will then decide whether they consider the defendant guilty or not guilty, and having found the defendant guilty, the judge passes sentence. Appeals on the basis of the conviction or sentence are possible from the Crown Court (see **Figure 4.2**) and these are heard by the Court of Appeal (Criminal Division).

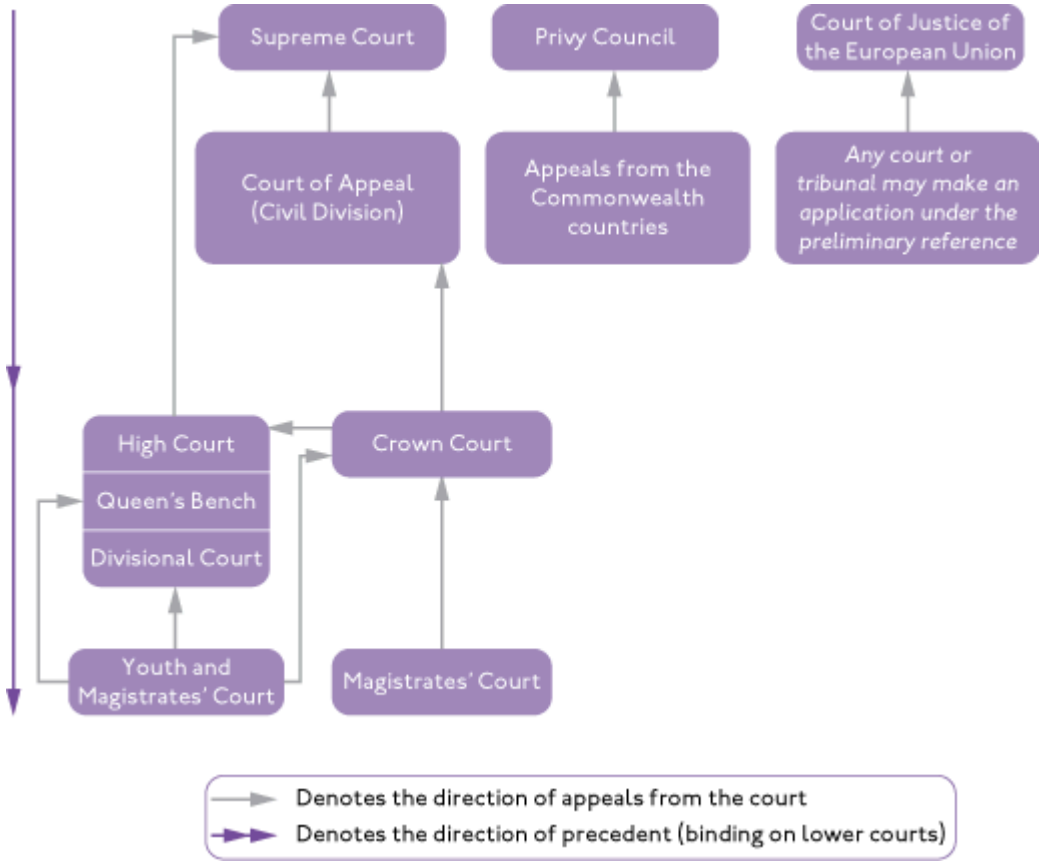

Figure 4.2 The court structure in the Criminal Division

4.2.10.2 The Magistrates' Court

The Magistrates' Court plays a key role in the administration of the criminal justice system, as the vast majority of cases begin at the Magistrates' Court and most are concluded there. There is a single head of the Court (the Senior District Judge—the Chief Magistrate) who has responsibility for the administration of the bench.

The Magistrates' Court hears both civil and criminal cases. Examples of the criminal aspects handled by the Court have been identified earlier, and the civil element includes licensing, betting and gaming, family issues, civil debts, complaints regarding council tax, and so on. The Court also has a division called the Youth Court, where three specifically trained magistrates hear cases involved with young people between 10 and 17 years of age. If the case involves an allegation of a particularly serious offence (in which an adult would be subject to imprisonment for a term of 14 years or more) then the Magistrates' Court can commit the accused for trial in the Crown Court. Appeals are available from a conviction at the Magistrates' Court, or against the imposition of a sentence, and appeals in criminal law are somewhat 'easier' than those in the civil law, but it must be considered that the Crown Court, upon the appeal (where the case is retried), may increase the sentence
p. 76 issued, although they may not exceed the maximum sentence that is available in the Magistrates' Court. ↵

Consider

If the employer wishes to dismiss Usman but he feels this has been unfair given the circumstances or if he feels the investigation has been flawed, his case may be presented to an employment tribunal. What are the advantages of the tribunal system above the court system (which may be used if he claimed wrongful dismissal)?

4.3 Tribunals

4.3.1 Introduction

Tribunals were established as an alternative to the traditional court system, with an emphasis on greater informality. Tribunals were created on a regional basis, with areas of local knowledge and expertise in matters such as welfare, immigration, and employment. Tribunals were so called because of the three members: a legally qualified chairperson, along with two independent wing (lay) members with expertise/experience in the area (in Employment Tribunals these offer expertise from an employer's perspective (e.g. from the Confederation of British Industry) and from an employee's perspective (e.g. from a trade union or Trades Union Congress)). From 1 December 2007, chairpersons of the Employment Tribunals are referred to as Employment Judges (Tribunals, Courts and Enforcement Act 2007, Sch. 8, para. 36). The tribunal does not
p. 77 provide a judgment but rather makes an ↵ award, and as the binding force of precedent moves downwards the tribunal is not bound by decisions made in other cases heard in tribunals, although they frequently look to such decisions when considering a case. If an appeal has to be made, then the case will progress to the High Court (although in employment matters this is to the Employment Appeal Tribunal). Appeals are established on the basis of a point of law, or that the tribunal came to a conclusion which no reasonable tribunal could have reached. This is a particularly difficult test to prove, and it operates on a similar basis to natural justice.

4.3.2 The Advantages of the Tribunal System

The following elements can be identified as the advantages that tribunals are supposed to have over courts:

- *Speed of cases:* Tribunals enable an effective balance to be established between the legality of the hearings and the formalities to which any 'real' hearing must adhere. To this effect, the chairperson of the tribunal is legally qualified and works within the rules established for each tribunal, and they have the ability to assist claimants in presenting their case if they attend unrepresented. The decisions of the tribunals are also provided more quickly than in the courts, with awards frequently being made within the day of the hearing.
- *Reduction in costs:* Tribunals were created to eliminate the necessity for legal representation, removing this very expensive aspect of the legal system. The less formalistic rules and procedures in tribunals removed the necessity (in theory at least) for lawyers.
- *Expert knowledge in jurisdiction and locality:* Employment Tribunals were established to hear claims on disputes between employers and employees. They would therefore begin to establish a body of expertise in these specific areas and this would assist in deciding future cases more expeditiously. A further benefit would be that as tribunals were regionally based, they would be able to establish an understanding and expertise of practices in the local region.
- *Informality:* There are various tribunals, and each has its own jurisdiction and methods of work. However, they are generally less formal and therefore, it is hoped, less intimidating than courts.
- *Reducing the workload of courts:* As cases such as disputes in employment are heard by Employment Tribunals, the courts would be free to hear other claims with the perceived result that it would assist in speeding up the judicial system by reducing their workload.
- *Reasoned hearings:* Tribunals are presided by a legally qualified chairperson (e.g. an Employment Judge), and work within the rules established by law. Therefore, when decisions are made, these are based on the rule of law and the parties can have confidence that justice was seen to be done. There is also an appeals procedure.

4.3.3 The Disadvantages of Tribunals

Given the advantages identified for the adoption and justification of the tribunal system, the disadvantages and limitations to the system must be considered.

- *Increased formality:* Tribunals were designed to be informal systems. However, they have increasingly become legalistic and barristers have begun to specialize in certain jurisdictions (such as employment law). The increasing competence of tribunals in legal jurisdictions, and the technical rules governing claims and the formalities of procedure, have lessened this distinct advantage.

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- *Limitation in legal assistance:* Legal aid (a source of free legal advice and representation) has been governed since April 2013 by The Legal Aid Sentencing and Punishment of Offenders Act 2012. This assistance is not available for individuals in the presentation of claims at tribunal.

- *The complexity of the tribunal system:* The perception of the system of tribunals as being less formal and legalistic than courts is now increasingly unrealistic. Employment Tribunals are a very good example of this increasingly complexity. When they were first established (and known as industrial tribunals) their jurisdiction was unfair dismissal legislation. However, there are now well over 60 different jurisdictions.
- *No precedent in tribunals:* Tribunals are not bound by the decisions of other tribunals, and with reference to Employment Tribunals, as many of the decisions are determined with a strong emphasis on the facts of the case, then decisions can be made that appear to contradict cases with similar facts. This can be seen most clearly in Part 7 of this book.
- *Costs in Employment Tribunals:* Applications to Employment Tribunals are free of charge and legal costs against the losing side are not generally awarded. However, at the sifting stage of the claim, an Employment Tribunal can warn the claimant that their claim has little prospect of success and if they lose, costs may be awarded against them (this is quite rare however). Employment Tribunals also have the discretionary power to order employers that lose a tribunal case to pay a financial penalty where they have breached an individual's rights.

4.3.4 Employment Tribunals

As Employment Tribunals, above other tribunals, are likely to be of most interest to employers and businesses, they are selected for a brief description. These tribunals hear disputes between employers and employees/workers, and also claims based on EU laws (*Impact v Minister for Agriculture and Food (Ireland)*). Cases must be lodged on an approved form (ET1 or ET1A) available from the Employment Tribunals Service (ETS), and once this has been accepted by the ETS (as being on the correct form, within the correct time limits, and so on) the employer to whom the claim relates is provided with a response form (ET3) that must be completed and returned within 28 days (unless an extension is requested and supported with reasons for the request). As of April 2012, in cases of unfair dismissal, judges may sit alone—without the use of the two wing members (Employment Tribunals Act 1996 (Tribunal Composition) Order 2012, S.I. 2012/988).

McCafferty v Royal Mail Group Ltd (2012)

Facts:

The claimant was a postman who refused on several occasions to attend work on his day off. He claimed this was due to problems in getting in to work. The employer then provided him with access to an account to charge taxi fares to enable him to attend work. The employer claimed McCafferty began to abuse this system and after it was discovered, McCafferty was dismissed.

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Authority for:

The tribunal members agreed that there had been a reasonable investigation into the circumstances before the decision to dismiss. However, the employment judge disagreed with the wing members of the tribunal regarding whether this allowed the employer to hold a reasonable belief in McCafferty's

misconduct. Tribunal decisions were at this stage a group decision (now these cases are generally heard by the employment judge sitting alone). Therefore, the judge was outvoted by the two wing lay members of the tribunal.

At appeal, Lady Smith observed: 'It will not have escaped notice that this case is an example of the lay members of an Employment Tribunal reaching a different conclusion on the facts of the case—drawing in part on their valuable "common sense" and knowledge of what any employee could be expected to know—from that of the Employment Judge. Had this claim been one to which the new [employment laws] applied, it seems likely that it would have been heard and determined by an Employment Judge sitting alone, in which case the result would evidently have been rather different. Some may consider that to be a sobering thought.'

The judge will decide whether they wish to convene a pre-hearing review, and this decision may be made if either party requests the hearing. Typically, such reviews are used to determine whether the claim should be struck out at that stage. They may be used to determine entitlements to initiate or defend the claim; and they may be used to consider whether a deposit should be paid where a case is particularly weak. If the case passes this pre-hearing, it continues on to the full hearing. Costs for legal fees incurred are not normally awarded against the losing party in tribunal cases, however, the judge has the option to award up to £10,000 against a party that was legally represented where their claim had no reasonable prospect of success, or they behaved unreasonably or were abusive/disruptive in the proceedings.

4.4 Alternative dispute resolution

This chapter has identified the courts and tribunals in the English legal system. The text also discusses the law and its application in jurisdictions including company, competition, contract, employment, and torts laws. This includes a description of the relevant statutes and a discussion of the cases heard before the courts and tribunals. The courts and tribunals are often the forums for disputes to be adjudicated, and they too have been subject to the need for more effective means of resolving disputes. Further, other methods are being introduced that move away from the adversarial system of law that is necessary in the courts, to a more conciliatory means of dispute resolution.

Consider

Rather than dismiss Usman, the employer could choose to preserve the employment relationship and attempt some form of alternative dispute resolution. When reading through this section, consider which form would be of most use to the parties and how its use could be beneficial to all sides.

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4.4.1 The Need for Alternative Dispute Resolution

ADR has several benefits for the parties, including some of the following features:

- *Cooperation v adversarial approaches:* Traditional court cases are based on an adversarial system where the parties attempt to 'win' rather than work cooperatively to establish a mutually acceptable resolution. For those in business, when such a system is applied internally (e.g. between the directors of a firm, or between management and the staff), the ramifications for a dispute that leads to court action could ultimately result in the firm being dissolved, or its adverse effects may impact on employee relations affecting morale, productivity, sales, and outputs. In all situations it is likely to be discordant between members of the business. It is disruptive and can exacerbate relatively minor issues into much larger, and unnecessary, problems.
- *Speed of resolution:* ADR reduces the congestion of the courts by removing disputes between parties to be heard through mediation or arbitration.
- *Costs:* The rationale for a perception of cost-savings in ADR as opposed to legal action is that many initiatives are being established by the courts, businesses, and organizations outside the court structure that offer cost-effective, or free, services to the parties. Although for businesses a mediator or arbitrator may have to be paid to provide the ADR service, this is typically much cheaper than hiring a solicitor, or retaining legal counsel.
- *Expertise in resolution:* Disputes between businesses may involve a disagreement based on a technical difficulty or a dispute that requires expertise and knowledge of the industry and its practice. The courts do not always have this knowledge, but through ADR the dispute may be heard by an arbitrator with expertise in the industry, or who has specific knowledge of the area, and can facilitate a more speedy resolution.
- *Informality:* Even though lawyers may still be involved in the process, ADR is a more informal and less intimidating forum than the courts, and this encourages effective dispute resolution through a structured mechanism.
- *Compliance:* A legal judgment may be provided against the party having 'lost' a case, but actually enforcing the judgment may be more difficult. There is a higher success rate of compliance with orders when ADR is used.
- *Privacy:* Whilst most court cases are available to the public to attend and can lead, in some cases, to high-profile judgments, ADR is more confidential and allows a level of privacy not readily available in court. For parties that would rather have disputes dealt with in a more discreet environment, ADR offers significant improvements over court action.

4.4.2 Disadvantages of ADR

There are several advantages to parties using ADR to resolve their disputes, but these are context-specific, and may not be advantageous in all circumstances. Further, it should not be underestimated that some claimants want 'their day in court' and do not want to mediate a resolution.

- *Legal protection:* The courts are based on specific rules outlined in legislation regarding the choice of judge and the powers of the court. These are general protections that are lost when ADR is chosen, and to ensure that it is a valid means of resolving disputes, the decisions made in ADR may be binding on the parties.

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- *Duplication of fees:* It is possible that ADR cannot resolve the dispute between the parties. In this scenario, there will have been costs in the ADR process, and then legal fees will also have to be paid to resolve the dispute in the courts.

Saigol v Thorney Ltd (2014)

Facts:

A minor dispute involving claim and counter-claim leading to awards to the parties (respectively) of £745 and £375, could not be resolved through mediation. It went to court and led to legal costs for both parties of £67,000 and £77,000—a total of £144,000.

Authority for:

As neither party made seemingly genuine and reasonable attempts to settle the claim, they were each liable for their own costs. Parties should be reminded to enter into ADR with a positive and proportionate attitude, and to enter into litigation with caution and having made sensible attempts to settle claims.

- *Legal expertise:* Whilst the mediators and arbitrators in ADR may be available to offer expertise in technical or industrial matters, they are not experts in law or legal procedures. Therefore, in the absence of judges hearing evidence, important points of law or statutory protections may be missed or not considered in the resolution process.
- *Lack of use:* In spite of the numerous advantages of ADR over the courts in resolving disputes, there is a proportionately low take-up rate.
- *Imbalance of power relations:* Mediation and negotiation may be successful if the parties are of even powers and may be able to negotiate on similar terms. However, in reality the parties do not have the same powers. For example, in employment disputes, frequently the employer will not mediate where they feel their position is strong, and individuals will often settle claims with a lesser settlement than may have been provided if the issue had gone to court/tribunal.

The use of ADR has to be carefully considered and its implications understood before it is used as a method for resolving disputes. It should not be viewed as a solution for all dispute resolutions.

4.4.3 Dispute Resolution in the Courts

There had been a growing desire from within and outside the judiciary and legal professions to establish a means for disputes to adopt some of the principles of ADR. Following the Woolf Report (1986), the emphasis was on settling disputes before they came before the courts. These are used more by parties involved in civil and family disputes, rather than between businesses, but they are still relevant to individuals' disputes (such as the sole trader and their client, and consumers).

Under the CPR 1999, courts are required to undertake case management including 'encouraging the parties to use an alternative dispute resolution procedure if the court considers it appropriate and facilitating the use of such procedure' (Rule 1.4(2)(e)). The courts ↵ are further empowered to stay (halt) the proceedings when the parties request or if the court identifies this as appropriate to enable a settlement through ADR (Rule 26.4). The courts may also make an order for costs against a party that has failed to utilize ADR when this would have been appropriate (Rule 44.5), but the parties cannot be compelled to use this method of dispute resolution (in *Halsey v Milton Keynes General NHS Trust* the Court of Appeal held that to impose ADR could amount to a breach of Art. 6 of the Convention). However, in *PGF II SA v OMFS Company 1 Ltd*, the Court of Appeal held that ADR (and not simply restricted to mediation) is a valuable mechanism to parties in dispute. A complete and unreasonable refusal to engage in the process by a party (as in this case) will lead to a sanction through the award of subsequent court costs incurred by the opposing party (similar to the *Saigol* judgment, see **4.4.2**).

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4.4.4 Alternative Forms of Dispute Resolution

There are many approaches to ADR including internal dispute resolution techniques, negotiations, and the ombudsman scheme. Internal techniques may not involve third parties, utilize any procedures for the use of arguments or evidence in the dispute, or indeed produce enforceable solutions. However, they are informal and may produce a mutually acceptable resolution. They are also being increasingly used in employment disputes to prevent resort to tribunal. The ombudsman scheme is used in banking, public services, and central and local government. The process for using ADR will begin with some form of negotiation, then, unless there is an arbitration agreement in the contract (as often included in construction cases), the parties may attempt some form of mediation, and then possibly move towards conciliation and then arbitration in the event that the dispute cannot be resolved. This is a very broad topic and it is beyond the scope of this text to include all the facets of this form of dispute resolution; however, the most commonly used mechanisms include arbitration, mediation, and conciliation.

4.4.4.1 Arbitration

This is a voluntary system of ADR and involves the parties relying on the services of an arbitrator who is an independent, fair, and impartial third party (Arbitration Act 1996, s. 33(a)), and is often legally trained or is an expert in the subject matter of the dispute (a list of appropriate arbitrators is available from the Institute of Arbitration). The arbitrator and their employees or agents, are immune from liability unless they can be shown to have acted in bad faith (or had failed to act at all)—Arbitration Act 1996, s. 29. The process has the benefit of privacy and the arbitrator will decide the case on the basis of the evidence, with the application of

the law, and the decision is legally binding upon the parties. The Arbitration Act 1996 provides for the dispute to be resolved according to rules of procedure similar to those used in the High Court, and as such, due to the 'legal' nature of this method of ADR, it may not prove to be less expensive than traditional court action, particularly as 'legal aid' is unavailable in arbitration. Section 1 identifies that the objective of arbitration is to produce a fair resolution of disputes by an independent tribunal without unnecessary delay or expense; and that the parties should be free to agree how their disputes are resolved.

Arbitration may be selected as a means of dispute resolution by the parties, the parties may be referred to it by the court, or an Act of Parliament may require it. The parties may apply to the court hearing the case to stay the proceedings if the matter involves an aspect of the dispute that they had agreed to be dealt with under arbitration (s. 9). Arbitration may also involve the entire case, or it may be selected as appropriate for one
p. 83 aspect of the ↵ dispute. As such, it has flexibility in approach. When it is selected, the parties should do everything in their power to ensure compliance with procedural and evidential matters, and to limit any delays in the proceedings (s. 44). The arbitrator provides their decision (an award) and this is binding on the parties, although an appeal process exists (to, and with the permission of the High Court) on a point of law, or with the permission of each party. Such appeals are, however, not commonplace. Whilst the hearings under arbitration are conducted in a judicial manner and are subject to the rules of natural justice, they have the benefit of being private and hence in business, a firm's actions, or its contractual dealings, financial records, and so on, are not subject to public scrutiny.

4.4.4.2 Mediation

Mediation may be 'evaluative' (where an assessment is made of the 'legal' issues of the subject forming the dispute) or it can involve a 'facilitative approach' (where the emphasis is on assisting the parties to resolve their differences in a mutually acceptable way). The parties appoint the mediator (as opposed to an independent body as is the case with arbitration or litigation) and where the process is successful in establishing a resolution, this may form the basis of a legally binding agreement between the parties, unless there is a provision between the parties that such agreements are not to be binding. The mediator will establish a set of 'ground rules' by which the dispute will be assessed, and they will gather information from each of the parties. This is where a specific concern of mediation has been identified. The gathering, and sharing, of information may be undertaken not to reach a settlement or compromise, but may rather be used surreptitiously to obtain information regarding the strength or weaknesses of the other party's claim. This form of ADR is a significant mechanism in attempting to resolve disputes and indeed is a feature considered by the European Union in a Directive transposed into domestic legislation on 20 May 2011 (Directive 2008/52/EC and The Cross-Border Mediation (EU Directive) Regulations 2011, S.I. 2011/1133).

Consider

Let us assume that the employer believes Usman's version of events and, after considering his length of service and good character during this time, decides to use an outside agency to resolve the dispute between him, them and Bea. How might the organization ACAS help? (Read Chapter 21 for a broader

consideration of the role of ACAS in employment disputes).

4.4.4.3 Conciliation

This process is somewhat similar to mediation, and indeed is often considered to be interchangeable with mediation. However, the conciliator adopts a more proactive role. Their role is to offer solutions and identify strategies for the successful resolution of the dispute. A very common example of the use of conciliation is in employment disputes, where ACAS intervenes with the parties to reach a settlement without recourse to the Employment Tribunal. The conciliation officer speaks with the parties and identifies their concerns, sharing evidence and identifying the likely success of any claims. This raises similar concerns regarding the use of
p. 84 this information as in mediation (see **4.4.4.2**). ↵

Conclusion

The chapter has identified the courts and their hierarchy in the civil and criminal jurisdictions, the judges who sit in the various courts and their authority, and the forms of ADR available to the parties and how they may facilitate more effective dispute resolution. This chapter has concluded the specific examination of the English legal system, although the following two chapters consider the impact and effect of the UK's membership of the EU on the constitution, individuals, and businesses. This is of supreme importance to an understanding of the legal system, and has many practical implications for businesses that must be understood.

Summary of main points

The court system/tribunals

- The courts in the civil jurisdiction administer justice and seek to resolve disputes between parties.
- The courts in the criminal jurisdiction administer justice and consider charges made by the State against a defendant for breaches of the law (although some have civil functions).
- Whilst some courts have a dual role of hearing criminal and civil cases in their different divisions, there are courts that deal predominately with either civil disputes or criminal matters.
- The courts exist on a hierarchical basis, with the Supreme Court holding the position as being the 'highest' court in the country. This has implications for the system of precedent in case law/common law.
- The Supreme Court and Court of Appeal are singularly appellate courts, with the other courts hearing cases and providing judgments on the facts of a case.
- Tribunals specialize in many areas of law including immigration, employment, and data protection.

- There are many perceived advantages to tribunals over the traditional court structure, including the speed at which cases are heard and resolved, a reduction in costs, expertise in the nature of the claim, and increased informality. They also reduce the workload of the courts.
- The disadvantages to the tribunal system include the increasing use of law and formal procedures so that tribunals may be more akin to specialist courts, limitation in the availability of free legal assistance, the procedures in tribunals being increasingly complex, and there being no system of precedent in the tribunals (although precedent established in higher courts is applicable to tribunals).

The judiciary

- Judges and lay people play a significant role in the administration of justice, and there exists a hierarchy of judges, with the most senior having positions of heads of offices and/or sitting in the Supreme Court and Court of Appeal.
- The Government attempted to make the appointment of the judiciary more transparent through the creation of the Judicial Appointments Commission.

Assigning the case to a track

- The civil law cases are assigned to a 'track' depending upon the wishes of the parties and the views of the judge, the value of the claim, issues of privacy, and the time assessed for disposal of the case.

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- The courts expect the parties to have considered the use of ADR rather than simply having decided to take their dispute to court. Any party having unreasonably refused to consider this may have to pay costs.

Alternative dispute resolution (ADR)

- ADR is a mechanism increasingly used in the court process to avoid courts having to resolve disputes that could be dispensed with in some other manner.
- It focuses on cooperation rather than the adversarial approach adopted in court cases, and can, in some cases, reduce costs and speed up the resolution of disputes.
- It does have disadvantages, including the possible duplication of fees if the ADR process does not resolve the dispute, and the legal protection afforded by the court process may be lost.
- The forms of dispute resolution include arbitration, mediation, and conciliation.

Summary questions

Essay questions

1. ‘Courts are intimidating, daunting and expensive ways of resolving disputes.’

Critically assess the above statement with specific reference to the benefits provided by tribunals in the administration of justice.

2. ‘There are various ways of looking at (the Supreme Court): as a change of place and name which was of major constitutional importance; as an interesting social experiment, which left it to the Justices to create a new set of rules and conventions to replace those that regulated their conduct in the House of Lords; as an ill-judged political exercise, which has cost a great deal of money and exposed the Court to pressures on its budget imposed by the Executive which the Lords of Appeal in Ordinary never encountered while they were in Parliament.’ Lord Hope, Barnard’s Inn Reading, 24 June 2010.

Critically assess the above statement. Specifically comment on the rationale for the development of the Supreme Court and the perceived advantages its introduction has had over the judicial branch of the House of Lords.

Problem questions

1. Janet was recently shopping in a retail outlet of All Bright Consumables (ABC) Ltd She asked the sales assistant to recommend a Personal Computer (PC) for her to purchase having given him the information he asked for. Janet was very clear that whilst she had little experience of computing, she required a computer to surf the Internet, run word processing, and have a camera for video chats. Finally, for entertainment she wanted to make sure it had a blu-ray disc player, and she had been told to ensure it had at least 4GB of RAM. Having received this information, the sales assistant obtained a PC from the store and Janet purchased it.

When Janet’s friend set up the computer at home, Janet was informed that the computer actually only had 2GB of RAM, it had a DVD disc player not the blu-ray as requested, and it did not have a video camera. Janet immediately returned to the store to complain and asked for a refund. The store manager refused as he said as soon as the PC was
p. 86 opened there could be no returns unless the PC was faulty (which it was not), and he did not believe ↵ that the sales assistant would get her order wrong. Rather, the manager suggests Janet was not clear about her requirements and could not obtain a refund just because she ‘had second-thoughts’ about the purchase.

Using your knowledge of the court system, explain to Janet which court(s) would hear any claim she made for a refund. Explain to her the tracking system used and how this would impact on her legal action for compensation.

2. ABC Ltd has experienced the following problem with one of its major customers and requires appropriate advice to ensure an effective resolution. ABC has a significant corporate customer, BigByte Ltd, which regularly places very large orders for PC components. However, while ABC provides BigByte with a standard trade credit period of ‘full payment within 30 days’, BigByte has got into the habit of paying late (sometimes as late as 90 days). ABC’s concern is that if other trade customers get to know that they are relaxed about enforcing payment

according to the terms of its trade credit agreement, the other customers may ask for similar extended credit periods. ABC has considered increasing the price of goods sold to BigByte so as to 'charge' the company for the additional credit but fear that any increase in price will merely result in this valued customer going elsewhere.

Advise ABC about alternative forms of dispute resolution (ADR) that could be used to resolve this situation. Specifically identify the advantages ADR may provide compared with traditional court action in relation to business relationships.

You can find guidance on how to answer these questions **here** *<https://oup-arc.com/access/content/marson6e-student-resources/marson6e-chapter-4-indicative-answers-to-end-of-chapter-questions?options=name>*.

Further reading

Books and articles

Adams, L., Moore, A., Gore, K., and Browne, J. (2009) 'Research into Enforcement of Employment Tribunal Awards in England and Wales' Ministry of Justice, Research Series 9/09.

Goldsmith, J. C., Ingen-Housz, A., and Pointon, G. (2006) 'ADR in Business: Practice and Issues Across Countries and Cultures' Aspen Publishing: New York.

Lord Mance (2006) 'Constitutional Reforms, the Supreme Court and the Law Lords' *Civil Justice Quarterly*, Vol. 25, p. 155.

Websites and Twitter links

http://www.cedr.com *<http://www.cedr.com>*

The Centre for Effective Dispute Resolution, a non-profit organization that manages and facilitates dispute resolution services.

http://www.judiciary.gov.uk *<http://www.judiciary.gov.uk>*

@JudiciaryUK

The official website and Twitter account of the judiciary of England and Wales. They provide information including statistics, details of the roles of different judges, and various speeches given by higher members of the judiciary.

http://www.justice.gov.uk/tribunals/employment *<http://www.justice.gov.uk/tribunals/employment>*

Details the Tribunal Service that provides information, assistance, and online claims forms for employment actions.

 ↵ http://www.justice.gov.uk/tribunals/employment-appeals *<http://www.justice.gov.uk/tribunals/employment-appeals>*

Details the cases heard by the Employment Appeal Tribunal, the grounds on which appeals may be made, and various publications and reports.

http://www.legalservices.gov.uk/civil.asp *<http://www.legalservices.gov.uk/civil.asp>*

Information from the Legal Aid Agency on topics such as ADR and human rights.

http://www.legislation.gov.uk *<http://www.legislation.gov.uk>*

@legislation

This is the official list of statutes in force. The website is particularly valuable as it clearly indicates where the legislation is no longer in force or has been superseded through amendments or a more recent piece of legislation, and it shows where forthcoming changes (not yet in force) will affect the law being searched.

http://privycouncil.independent.gov.uk *<http://privycouncil.independent.gov.uk>*

The website of the Privy Council—it contains information of both the judicial and legislative branches of the Council.

https://www.supremecourt.uk *<https://www.supremecourt.uk>*

@UKSupremeCourt

http://www.youtube.com/user/UKSupremeCourt *<http://www.youtube.com/user/UKSupremeCourt>*

Information, commentary, and the judgments from the Supreme Court (available from July 2009).

Online Resources

Visit the online resources *<https://oup-arc.com/access/marson6e-student-resources#tag_chapter-04>* for further resources relating to this chapter, including self-test questions, an interactive glossary, and key case flashcards.

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