English for lawyers

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English for lawyers

Introduction

This course provides a short introduction to legal English. That necessarily involves understanding the meaning of relevant English words, technical or other. But a good comprehension of legal English has to go beyond the ability simply to translate a given English legal term into its Italian equivalent. (Glossaries and thesauruses can provide that kind of assistance: e.g. EuroVoc, the ‘Multilingual Thesaurus of the European Union’: <http://eurovoc.europa.eu/drupal/>). On the other hand, a perfect understanding of the nuances of legal English would require a detailed knowledge of English law. The main aim of this short course lies somewhere between these extremes: to examine the special kind of language used in case law and statute in the United Kingdom. After a general introduction, the course will examine these kinds of issues in relation to contract law, with particular reference to a leading case and statutes drawn from the area of contract law.

After a general introduction to the legal system, we begin by looking at the language used in case law. The language of judgments of the courts does not usually differ markedly from ordinary English. By comparison with the style of judgments typical of civil-law systems, the judgments of UK courts are often rather discursive. Where courts are made up of more than one judge, there is also room for disagreement: if judges disagree on the result, there will be a dissenting judgment or judgments; if they agree, there may nonetheless be judgments which arrive at the same result by different routes.

**A very brief introduction to the legal systems of the UK**

*(1) A note on the structure of the courts*

*UK*

For all parts of the UK the highest court is the UK Supreme Court. There are 12 judges (known as ‘Justices’) of the court. Most cases are heard by a panel of 5 justices. The court was established in October 2009. Prior to that the House of Lords was the highest court.

Below the Supreme Court the hierarchy is as follows:

*England*

* Court of Appeal (3 judges)
* High Court (1 judge)
* Crown Court and County Court (1 judge)
* Magistrates court (1 judge)

*Scotland*

Civil cases:

* Court of Session (Inner House: 3 or more judges)
* Court of Session (Outer House: 1 judge)
* Sheriff court

Criminal cases:

* High Court of Justiciary (appeal court: 3 or more judges)
* High Court of Justiciary (trial court: 1 judge)
* Sheriff Court (1 judge)
* District Court (1 judge)

The UK does not have a career judiciary. Those who are appointed judges have already had many years’ experience in legal practice.

Two kinds of lawyer practise in the UK, barristers (known as advocates in Scotland) and solicitors. In the USA and most other countries this distinction is not made (and there a lawyer is often known as an attorney).

*(2) Divisions of the law*

In the UK we divide the law into just two main areas, criminal and civil.

* Criminal law: the law that punishes acts against the person or against property. The state prosecutes these cases.
* Civil law: the law concerning the rights and duties of private individuals and legal persons.

Unlike many continental systems, we do not have a separate system of law or courts for public or administrative law. Although there are special procedures for some of these cases, they are dealt with by the ordinary civil courts.

*(3) Making a claim or raising an action*

In a dispute with another person, it is sometimes necessary to resolve the matter in court. We have various terms for making a claim, which all mean the same thing: raising an action, filing a claim, issuing a claim, starting proceedings. The word prosecute is used only in criminal law.

The person who makes the claim is known in England as the claimant (until 1999 the expression plaintiff was used instead). In Scotland, we use the expression pursuer. The person or entity who responds is called the defendant (in England) or the defender (in Scotland). Together the claimant and defendant are the parties to an action.

*(4) Case law and precedent*

Both English and Scottish law are made up of statute on the one hand and decided cases on the other. (We discuss statute later on.) The law as established by decided cases is the common law. It develops in accordance with the doctrine of precedent. That means that a judge in a lower court is bound to follow a judgment given by a higher court and decide in accordance with it.

But this applies only if the earlier decision is ‘in point’, that is, it actually decides the same issue as arises in the later case. In order to decide whether the earlier case actually is in point, it is necessary to analyse it and decide what the true basis of the decision is (its *ratio decidendi*). This is the only part of the decision that is binding as a matter of precedent. Other parts of a judgment, which are go beyond the basis on which the decision was made, are described as *obiter dicta*.

The UK Supreme Court (and, previously, the House of Lords) are not bound to follow their own decisions. If they think one of their earlier decisions may need to be reconsidered, normal practice is for a larger panel of judges to hear the case.

*(5) Some key terms*

(a) in relation to parties

* advocate
* barrister
* claimant (formerly plaintiff)
* defendant
* defender
* party to a case
* pursuer
* solicitor

(b) in relation to remedies

* accounts/account of profits
* damages
* declaration
* delivery
* injunction (in Scotland: interdict) –often ‘interlocutory’ (or in Scotland ‘interim’)
* judicial review
* payment
* specific performance (or implement)

**Contract**

*The elements of a contract*

A contract is formed by means of an offer followed by an acceptance, provided these are exchanged with the intention to create legal relations. ‘Consideration’, a doctrine of English but not Scottish law, is the main test which English law employs to decide whether there was intention to create legal relations.

*The basic terminology*

The basic vocabulary in relation to formation of a contract is this:

contract: a legal agreement made between one or more parties

parties: the people who have entered into a contract

offer: a proposal to enter into a contract

offeror: a person who makes an offer.

offeree: the person who receives the offer

acceptance: an unconditional agreement to what is proposed by the other party

If offer and acceptance match, there is agreement (*consensus in idem*).

*Some key words in the law of contract*

This is simply a list of important words, many of which will be discussed more fully later:

* acceptance – express or implied
* assignment (or assignation)
* breach
* capacity
* clause
* consideration
* discharge
* duress
* duty
* enforceability
* execution
* frustration
* indemnity
* liability
* licence
* material breach
* obligation
* offer
* term
* termination
* third party
* validity
* void/avoid
* voidable
* warranty
* rescission

*Capacity*

Both parties to the contract must have legal capacity; otherwise they cannot validly give their consent. They must be of full legal age; and they must have the necessary mental capacity. If they do not, the contract is void.

*Consent*

Parties must enter into the contract voluntarily: they must enter it freely and not (for example) under duress or induced by fraud. If consent was not freely given, the contract will be voidable.

*Intention to create legal relations*

The agreement must be intended to have legal effect (as opposed, for example, to being no more than a social or informal arrangement). In this context the need for ‘consideration’ is a principle of English contract law: it is what one party promises to give to, or to do for, the other party. Both parties need to provide consideration to make the contract valid. It is usually something of value passing from one person to the other, such as additional rights or release from existing liability. This is a way of testing whether parties mean to enter into a contract or not.

*Formalities/execution*

Contracts may be in writing or oral. Certain kinds of transaction require a written contract, sometimes with special formalities of execution.

*Content of a contract*

A valid contract comprises a series of contractual terms (or provisions). There are express terms and implied terms:

* express term: a stipulation or provision which is stated in the contract
* implied term: many contracts are subject to implied terms.
	+ Sometimes terms are implied by statute, e.g. in contracts for the sale of goods, there is an implied term that the thing sold is of reasonable quality and fit for the purpose for which it is sold.
	+ Sometimes, in order for the contract to make commercial sense, a term which is not stated has to be applied. The basic rule is that this can only be done if the implied term is necessary in order to give the contract ‘business efficacy’. An example, where the contract does not state when performance is to be made, would be an implied term to perform the contractual obligation within a reasonable time.
	+ The ‘business efficacy’ rule requires essentially that the term should be
		- reasonable
		- necessary, in the sense that the contract does not work without it
		- so obvious that it ‘goes without saying’
		- clear; and
		- it must not contradict any express term of the contract.

[Note that the word ‘term’ is sometimes also used to refer to the duration of a contract, e.g. the term of a contract might be one year from the date of execution].

Most contracts drafted by lawyers set out the contractual terms in a standard order, along the following lines:

* definitions/interpretation
* parties to the contract
* duties of parties
* breach of contract
* exemption
* indemnity
* termination
* breach/remedies for breach/liquidate damages
* assignment/third party rights
* applicable law
* arbitration
* jurisdiction

Terms about (e.g.) confidentiality/non-disclosure or intellectual property rights are also common.

Where the parties are in dispute about the meaning of contractual terms, the court needs to interpret or construe them.

*Performance*

Performance is what a party to a contract does to comply with his or her obligations (e.g. deliver an object; pay the price). Failure to perform in terms of the contract will be a breach of contract.

*Termination*

The contract may come to an end in a number of different ways and for a number of different reasons:

* Fixed term: it may be for a fixed period or term and so end (unless extended by agreement) when that time comes. Or it may be for an indefinite period and be terminable (e.g.) on a particular period of notice
* Breach of contract: it may end earlier if one party is in breach of contract (sometimes known as ‘discharge by breach’). See below.
* Frustration: it may –very rarely– end by frustration (cf. Latin *frustra*). If, for example, an event takes place (or ‘supervenes’) which could not have been anticipated by the parties at the time they entered the contract, and its effect is to change the whole basis of the contract or make it impossible to perform, the contract is discharged by frustration. A good example is a contract to sell arms to a foreign state, and after the execution of the contract war is declared between the two states.
* Avoidance: it may end if a party to the contract succeeds in having the contract ‘avoided’ (=declared void). This might be if one party did not have capacity or was tricked/forced into entering the contract or there was an error in some respect which vitiated the contract.

*Assignment or Assignation*

This is where one party assigns his or her rights to another person who takes the place of the original party.

Contracts frequently provide that they are not assignable or only assignable on certain conditions and/or with the consent of the other party.

Even when nothing is said about assignability, there are instances in which a court would infer that the contract was meant to be non-assignable –this is where there is something particular to the contracting party which means that it must be inferred that the intention was that that party and no other should render the contractual performance (*delectus personae*). An obvious instance is a contract with an artist to paint a picture.

*Third parties*

In Roman law, the general rule was that a contract affected only the parties to the contract and not third parties (‘privity of contract’). This was true of English law too, until the enactment of the Contracts (Rights of Third Parties) Act 1999. In Scotland in certain circumstances third parties can acquire enforceable rights under contracts made between other persons.

*Breach of contract*

If one party is in breach of the contract, the other has certain remedies depending on the seriousness or ‘materiality’ of the breach:

* Any breach (other than a trivial one) entitles the ‘innocent’ party to withhold further performance of the contract
* A material breach of contract also entitles (though does not require) the innocent party to ‘rescind’ the contract, that is to declare that owing to the breach of contract, the contract is now at an end
* The innocent party can then make a claim for damages against the contract-breaker for loss caused by the breach of contract.

The usual remedy in most cases of breach of contract is damages to reflect the loss caused by the breach. But there are exceptions:

* specific performance (or implement) is an order requiring a party to the contract to do something other than pay money
* there is a difference here between the laws of England and Scotland: in England the primary remedy is damages, with the consequence that the court will need to be persuaded why payment of damages is an insufficient remedy and it should order performance; in Scotland, the courts are more willing to order performance, simply on the grounds that that is what a party had undertaken to do
* many of the recent cases concern ‘anchor tenants’ in shopping malls, i.e. the largest tenants, who are most important for attracting customers to the mall (in Italy, think of a store like Rinascente): if the tenant decides that continuing the tenancy is not profitable and closes down its store before the end of the lease, the issue will arise whether the landlord is entitled only to damages for the tenant’s breach or whether the court will order the tenant to remain in occupation until the end of the lease. These contractual clauses are described as ‘keep open’ clauses and are standard in commercial leases.
* injunction (called interdict in Scotland): this is effectively the opposite of specific performance: it is a court order on a party not to do something which amounts to a breach of contract.

**Case study on the law of contract**

We will study in detail one case which raises numerous points about the law and language of contract: *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749.

*(1) Facts and language*

This is a decision of the House of Lords (the equivalent court is now the Supreme Court) and is a 5-judge decision. It was argued in one day; the decision was issued 4 months later. (While the Supreme Court issues ‘judgments’, technically the decisions given by judges in the House of Lords are described as ‘speeches’.)

*Basic terminology of a reported decision*

* appellant
* respondent
* rubric
* headnote

*Some key terms that appear in this case*

* lease
* fixed term
* demised = leased
* determine the lease = terminate the lease
* provision to determine =contractual term governing how the lease can be terminated
* notice to determine
* break clause =contractual term entitling a party to terminate early [e.g. in a 25-year lease there might be breaks every 5 years]

The essential facts are:

* the landlord and the tenant entered into two leases of office premises for a term of 10 years from and including 13 January 1992
* a break clause permitted the tenant to determine the lease provided that not less than six months’ notice in writing was given to the landlord or its solicitors to expire on the third anniversary of the commencement date of the lease
* the tenant sent two letters more than six months before the third anniversary of the lease giving notice to the landlord to determine the leases on 12 January 1995
* the third anniversary was 13 rather than 12 January so the notices contained the wrong date
* on appeal a majority of the House of Lords allowed the appeal and held that the notices had been effective

The majority view was that

* even if notices contained errors, they should be regarded as valid if they were sufficiently clear and unambiguous so as to leave a reasonable recipient in no reasonable doubt about how they were intended to operate
* here it would have been obvious to the landlord as a reasonable recipient with knowledge of the terms of the lease and the date of the third anniversary that the tenant wished to determine the lease on the third anniversary date but had made an immaterial error in wrongly describing the date as 12 instead of 13 January.

*(2) Majority legal analysis*

The difference between the 3 judges in the majority and the 2 in the minority is one about how to interpret or construe contractual documents. It is the difference between (i) literal interpretation of the words and (ii) interpretation aimed at identifying the intention of the contractual document. The Roman jurists describe essentially the same distinction by using the words *verba* and *voluntas*.

In this case the notices refer to the wrong date. On a literal view, they do not comply with the requirements set out in the contract and so are ineffective. On a broader view, which looks at the underlying intention, they may not be regarded as ineffective if it is obvious that there is simply a technical error and it is clear that the intention was to end the lease on the date provided in the contract.

The judge at first instance concluded that the notices were valid. On appeal to the Court of Appeal the notices were held to be ineffective. (Although the House of Lords is free simply to disregard the opinions expressed in the lower courts, if they disagree with them, they generally prefer to explain why.)

Lord Steyn

* There are two issues. The point of construction is a point of substance: 767
* (1) The contract did not require the notice to contain specific information: there were no ‘terms of art’ in the contract (i.e. technical terms): see 767G
* (2) the question is not how the actual landlord understood the notice: the question is an objective one: how the reasonable recipient of the notice would have understood it
* A contractual notice to determine (such as here) is a unilateral notice, but there is an analogy with bilateral documents (such as contracts): the question what the notice means is an objective one: 768
* (3) It is necessary to take into account the purpose of a notice under a break clause
* (4) Notices served under break clauses in leases are not in a special category
* (5) The conclusion must be that the notice is valid.

As previously mentioned, the common law is a system of precedent. So the next part of the speech is concerned with considering the earlier cases, especially

* *Hankey v Clavering* [1942] 2 KB 326: 769
* Lord Steyn (a) distinguishes the present case from *Hankey*; (b) points out that the law has moved on: 770D-E
* The choice is between a commercially sensible construction and a rigid and formalistic one: 771
* Conclusion: 773

Lord Hoffmann

* Some wider quasi-philosophical discussion about what we mean when we speak: 774D-F
* Conclusion: 780G

Lord Clyde

780-83

*(3) Minority legal analysis*

Lord Goff

* ‘it was obvious that the tenant was trying to give an effective notice … it must have been obvious to the landlord’: 753 C-D
* the problem is that the notices are inconsistent with what the contracting parties agreed: 753
* a notice should be effective only if it conforms to the contractual clause: 755E - 756A
* should the *Hankey* case be over-ruled? 760F - 761C
* what about retrospective effect? 761D

Lord Jauncey

* 763 F-G
* problems in knowing where to draw the line: 765E -766A

For further reference:

Chitty on *Contracts* (31st ed., 2013)

**Legislation and contract**

The common law is one source of contract law. Another is statute. Nowadays much of modern contract comes from statute (often implementing EU regulations or transposing EU directives).

*Background note on statutes*

A statute passes through three stages

* The House of Commons (the lower but more powerful of the two chambers or Houses of Parliament) made up of elected members.
* The House of Lords. Members are not elected. Its powers are somewhat more limited.
* Royal Assent. A statute becomes law only once approved by the Queen as Head of State. However, nowadays approval is always granted.

What emerges from this procedure is a statute, also known as an Act of Parliament.

*Legislative drafting*

Statutes have their own peculiar style of drafting. It has evolved over the years, but some general points to look out for in statutory language are:

* the passive rather than active voice is frequently used
* compare mandatory language (‘shall’) with discretionary (‘may’)
* sub-sections are typically a single sentence, often with qualifications and cross-references
* repetition and accumulation of terms and concepts
* most statutes contain an interpretation section either at the end of the whole Act or Part of an Act.

*Interpreting legislation*

In the UK a contrast is sometimes drawn between ‘literal’ interpretation on the one hand, and ‘purposive’ interpretation on the other. In the USA the expressions ‘textualism’ and ‘intentionalism’ cover broadly the same ground. In the UK, whatever approach they adopt, the courts maintain that what they are doing in construing a statute is construing the intention of Parliament in an objective sense. The distinction is rather similar to the one we saw in the interpretation of contracts and contractual documents in the *Mannai* case.

*Some key terms relating to statutes*

* interpretation
* long title
* paragraph
* primary legislation
* proviso
* schedule
* section
* subordinate (or secondary) legislation
* subsection

*Case studies on statutory language*

The best way of appreciating the special kind of English used by the parliamentary draftsman is to look at some examples, to see the kind of language and sorts of drafting techniques that are employed. We will look briefly at two examples: the Sale of Goods Act 1979 and the Contracts (Rights of Third Parties) Act 1999.

Much of the Sales of Goods Act 1979 originally appeared in the Sale of Goods Act 1893. It is one of the most clearly and concisely drafted UK statutes. The style of more modern statutory drafting is often (unfortunately) both less clear and less concise.

We will look at (some of) the sections listed below. They are all concerned with issues relating to contract which have been discussed already. The purpose is to see some examples of statutory regulation of the law of contract and also to identify some of the special statutory language or drafting techniques, such as those mentioned above.

Sale of Goods Act 1979

See sections 2-8, 10, 12-14, 16-18, 20

Section 61 is the interpretation section

Contracts (Rights of Third Parties) Act 1999

See sections 1 and 2

For further reference:

Cross on *Statutory Interpretation* (3rd ed. by J. Bell and G. Engle, 1995)

Craies on *Legislation* (10th ed. by D. Greenberg, 2012)

Bennion on *Statutory Interpretation* (6th ed., 2013)

K. Clark & M. Connolly, ‘A guide to reading, interpreting and applying statutes’ at <http://www.law.georgetown.edu/academics/academic-programs/legal-writing-scholarship/writing-center/upload/statutoryinterpretation.pdf> -summarizes the basics from a US perspective.