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Litigation Committee response to the Civil Procedure Rule Committee's consultation paper entitled *Appeals to the Court of Appeal: proposed amendments to Civil Procedure Rules and Practice Direction*

The City of London Law Society ("CLLS") represents approximately 17,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients, from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues.

The CLLS's professional work is conducted through nineteen specialist committees drawn from the CLLS's membership, who meet regularly to discuss pending legislation, law reform and practice issues in their fields. This response has been prepared by the CLLS Litigation Committee (the "Committee") and addresses issues raised by the Civil Procedure Rules Committee's Consultation Paper entitled *Appeals to the Court of Appeal: proposed amendments to Civil Procedure Rules and Practice Direction*, dated 19 May 2016. The membership of the Committee is set out in the Schedule to this paper.

Introduction

1. In this response, the Committee focuses on the two principal proposals in the Consultation Paper, namely that the test for granting permission to appeal should be changed from a "real" prospect of success to a "substantial" prospect of success and that the right to renew orally an application for permission to appeal refused on paper should be removed. The Committee also makes alternative suggestions to alleviate the pressure on the Court of Appeal and expresses concerns about the conduct of this consultation.

General comments

2. The Committee sympathises with the pressures faced by the Court of Appeal but feels strongly that neither of the two principal proposals in the

Consultation Paper represents an appropriate response to those pressures. The Committee is sceptical as to whether these proposals will in fact achieve their aims but, more significantly, it considers that the proposals will fundamentally change the nature of the appeal process, reducing to an unacceptable degree the standard of justice that litigants in England and Wales have a right to expect.

3. The Committee takes this view because it regards appeals as an essential feature of any system of justice, not as a luxury that can be dispensed with or diminished for administrative convenience. Judges sometimes make mistakes, they sometimes misunderstand arguments and they sometimes misapply the law. All judicial systems require robust appellate arrangements in order to correct these mistakes if possible. The Court of Appeal lies at the core of the appellate system in England & Wales, and to reduce access to it further than is the case now will undermine both the delivery of justice and confidence in the judicial system.

4. The question of what routes of appeal should be available cannot be addressed only by reference to the interests of the judicial system in general and the appellate courts in particular. Appeals exist in order to ensure, so far as possible, that justice is done in individual cases. Contrary to the argument in paragraph 33 of the Annex to the Consultation Paper, the Committee considers that litigants do suffer injustice if they are denied the opportunity to present an appeal that would have succeeded - an injured person may be denied compensation to which he or she is entitled or a business may be forced to pay sums that it does not owe. Outcomes matter to litigants, rightly.

5. In this regard, Appendix 6 to the Consultation Paper shows that, in the year to 7 March 2016, 124 applications for permission to appeal were granted at an oral hearing having been refused on paper. Of these 124 cases, 26 appeals were allowed by the court or by consent, and a further three cases were remitted to the lower court.[1] This represents a success rate of 23% for cases that were refused permission to appeal on the papers but then secured permission orally. This is a very high proportion, and indicates firmly the inadequacy of paper-only applications. It would be impossible to convince any of these 29 litigants that, if their cases had not proceeded beyond the refusal of permission to appeal on paper, the outcome of the case would have been just because the civil justice system had granted them a "fair opportunity to have access to judicial resources within the system to present their case" (paragraph 58 of the Annex to the Consultation Paper). The decisions in their

[1] The source of the figure of 19, rather than 29, allowed appeals given in paragraph 58 of the Annex to the Consultation Paper is not clear. Even if the correct figure is 19, it is still very high.

cases would still have been wrong. Tolerance of mistakes, particularly on this scale, would undermine trust in the judicial system.

6. The need for a proper appeal system is demonstrated by the comparative study in Appendix 5 to the Consultation Paper. This shows that most other countries already afford more generous rights of appeal than are even now available in England and Wales, commonly without any need to obtain permission. From a domestic and an international perspective, litigants look to the justice system as a whole, not merely to the first instance judge regardless of whether he or she is right or wrong. Restricting further the possibility of appeal will render the English court system less attractive to all litigants, which is contrary to the Ministry of Justice's policy of encouraging international parties to litigate in England. The Committee accepts that appellate delays are also damaging to the reputation of the English courts but considers that cutting the duration of appeals in cases that are given permission to appeal by reducing the number of those cases is not the right answer. It is always worth bearing in mind that the civil justice system is self-financing – indeed, following the Ministry of Justice's most recent fee increases, the civil justice system subsidises the family courts.

7. As a final introductory point, the Committee notes that, in various places in the consultation documents, the Court of Appeal is likened to the Supreme Court (eg paragraph 6 of the Consultation Paper and paragraphs 15, 31 and 51 of the Annex). The Committee considers this to be a false analogy. The Court of Appeal is the engine room of the civil justice system, whose role, whether as a first appellate court from the High Court or the second appellate court from lower courts, is to ensure, so far as it can, that justice is done in individual cases. It is not and should not be confined to providing guidance for lower courts and the public on issues of law, but should be focused on securing for litigants the correct outcome in law. This is not, of course, to deny the Court of Appeal's important role in clarifying, even changing, the law, but its role in this regard is far removed from that of the Supreme Court, which hears many fewer cases and is concerned only to determine points of law of general importance.

A "real" or a "substantial" prospect of success

8. The Committee views any debate about whether there is a distinction between a "real" prospect of success and a "substantial" prospect of success as somewhat sterile and semantic. Neither test is capable of application with any semblance of precision. The test, however expressed, is largely impressionistic rather than analytical. This is confirmed, to the extent that confirmation is necessary, by paragraph 33 of the Annex to the Consultation Paper, which notes that where an oral application succeeds after a paper

application has failed it is because "the later LJ simply forms a different impression on the arguability of an appeal". (It would, indeed, be interesting if judges were asked to identify cases that they considered would have a real prospect of success but not a substantial one.)

9. That said, the Committee recognises that the Consultation Paper intends the "substantial" test to be stricter than the current "real" test in order to reduce the number of substantive appeals heard by the Court of Appeal. The Committee considers this to be the wrong approach for four main reasons.

10. First, there is no principled reason why a first appeal that must be made to the Court of Appeal should have to pass a higher threshold in order to secure permission to appeal than a first appeal to any other court. Those who commence proceedings in, for example, the High Court should not suffer the discrimination of having more restricted rights of appeal than parties who start proceedings in other courts. All first appeals, whether to the Court of Appeal or elsewhere, should be required to meet the same threshold for the grant of permission to appeal.

11. Secondly, statistics released by the Ministry of Justice on 2 June 2016 show that, between 2003 and 2015, 14,879 final appeals were disposed of by the Court of Appeal, of which 5,553 were allowed.[2] 37.3% of final appeals to the Court of Appeal were therefore successful over this period. This does not, in the Committee's view, suggest that the Court of Appeal is hearing too many substantive appeals: if anything, it suggests the reverse. Any reduction in the numbers of appeals as a result of the imposition of a higher threshold for permission to appeal will lead to injustice. The Consultation Paper reports that there is already a large, and worrying, number of cases in which permission to appeal is refused on paper but which ultimately succeed (see paragraph 5 above). This proposal will worsen this injustice.

12. Thirdly, Appendix 1 to the Consultation Paper indicates that while the number of applications for permission to appeal has increased over the last decade, the number of substantive appeals has been largely static. There is no reason to assume that the proportion of unmeritorious applications for permission to appeal will have increased in that period, which would indicate that the Court of Appeal is already in practice applying a stricter test for permission to appeal. Making the test stricter still, when there is no

[2] Table 3.9 of *The Royal Courts of Justice tables; 2015* in *Civil Justice Statistics Quarterly, January to March 2016, and The Royal Courts of Justice 2015*, at https://www.gov.uk/government/statistics/civil-justice-statistics-quarterly-january-to-march-2016-and-the-royal-courts-of-justice-2015. Other cases, in addition to the 5,553 in which appeals succeeded, were remitted to the lower court. Remission is at least a partial success, but the statistics do not reveal the numbers in this category.

suggestion that the volume of litigation will decline, risks depriving parties of access to justice and causing injustice.

13. Fourthly, the issue for the Court of Appeal is not the number of substantive appeals it hears, which has not changed materially, but applications for permission to appeal. Seeking to reduce the number of substantive appeals in order to give more time to deal with applications for permission to appeal is not, therefore, addressing the real issue and, for the reasons given, is not an appropriate response to that issue.

14. The Committee would, however, accept that a higher threshold might be appropriate for second appeals to the Court of Appeal provided that both lower judgments are in favour of the same party. If the putative appellant has already lost twice, requiring the appellant to show that it has a substantial prospect of success notwithstanding those two earlier contrary judgments, might be justifiable. The appellant must in any event show that the case raises an important point or principle or practice (CPR 52.13(2)(a)).

Oral renewal

15. The Committee considers that the right to present oral submissions to a judge is a fundamental aspect of the English legal system, and one that makes the English legal system attractive to international litigants. The Annex to the Consultation Paper extols, at paragraph 54, the "considerable value" of oral submissions in substantive appeals. In the Committee's opinion, the same is true for applications for permission to appeal. As mentioned above, judges do misunderstand arguments and do make mistakes. To deprive litigants of the opportunity, albeit a brief one, to persuade a judge that the initial consideration on the papers reached the wrong conclusion will lead to injustice, as the figures referred to in paragraph 5 above show.

16. The statistics in the Consultation Paper about the time taken by judges on paper and oral applications for permission to appeal also have concerning features. Judges take an average of 1.14 hours to deal with a paper application for permission to appeal. However, if there is an oral application, judges take an average of 2.45 hours considering the papers, followed by another 0.83 hours in the hearing. Judges therefore take over twice as long to consider the papers when there is an oral application than when there is not. As paragraph 57 of the Annex to the Consultation Paper suggests, this might indicate that at least some judges currently take a rather cursory approach to paper applications, doubtless in the knowledge that, if they wrongly refuse permission, the error will be corrected at oral renewal. In these circumstances, if the right to an oral renewal is removed, it is likely to have one of two consequences. First, judges will take longer to consider

paper applications because the safety net of an oral renewal has been taken away, with the result that the proposal will not save judicial time and may, in fact, require extra time. The statistics suggest that far longer than the 10% (or less than seven minutes) extra assumed in Appendix 4 is likely to be required for judges to deal properly with paper-only applications. Alternatively, and of greater concern, it may be that some judges will continue to deal with paper applications in the same cursory manner that they do now. This will lead to injustice.

17. The Committee is also concerned about the compatibility of this proposal with the requirement for open justice in England and Wales. Under the proposal, an application for permission to appeal would be determined behind closed doors, with no reasons given for refusal and with no possibility of any further review or appeal. A litigant will have lost at first instance, will have put forward reasons as to why the first instance judgment was wrong, but will have no explanation as to why those reasons are not considered sufficiently arguable to merit an appeal. The only satisfactory means of ensuring that the process is genuinely open is for judges who determine applications for permission to appeal to give reasons, even if very briefly, for their decisions. That would, however, undermine the purpose of the reform. The position of the Court of Appeal in this regard differs from that of the Supreme Court, not least because the criteria for permission to appeal to the Court of Appeal concern the merits of the particular case in question, not whether there is an arguable point of law of general public importance.

18. Oral hearings do not have to be long (the average for applications for permission to appeal is currently only 50 minutes), and they could be expressly limited in time. However, the Committee considers that the right to renew orally an application for permission to appeal should be retained because of the central role of oral argument in the English legal system.

Suggestions

19. The Committee has a number of suggestions that could help to alleviate such work pressures as there may be on the Court of Appeal.

20. First, judges below the Court of Appeal could be encouraged to approach more realistically than is the case now applications for permission to appeal made to them. The Committee's experience is that, at present, lower judges feel obliged, save in clear cases, to refuse permission to appeal, leaving it to the Court of Appeal to decide what cases it wishes to hear. Lower judges should be urged to consider more seriously whether they have found their decision difficult and, accordingly, whether permission to appeal should be

granted. This would remove the need for the judges of the Court of Appeal to consider many applications where permission should properly be granted.

21. Secondly, the time currently taken in dealing with paper applications and oral renewals as reported in paragraph 36 of the Annex to the Consultation Paper (six months for each) is manifestly unacceptable. For so long as there is a requirement for permission to appeal, dealing with applications for permission should be regarded as a key part of the judges' work, not as something to be squeezed in between the judges' "real work" on substantive appeals. For example, the Court of Appeal could devote one day a week, perhaps Fridays, to dealing with applications for permission to appeal. If permission is refused on paper by a judge, the parties could be informed immediately and, if the appellant wished to renew the application orally, the court could be notified within three working days and the application heard by the same judge on, if practicable, the Friday immediately following or the Friday after that in order to reduce judicial (and party) preparation time.

22. The Committee sees no objection to the oral renewal being heard by the judge who reached the initial decision on the papers, as recommended in the Bowman Report. The discussion on oral renewal in paragraphs 48ff of the Annex to the Consultation Paper blurs the question of whether there should be a right to renew orally an application for permission to appeal with the question of whether there should be a right to have the oral renewal heard by a different judge. These questions raise distinct issues. The Committee considers that it is important to retain the right to oral renewal, but accepts that the renewal can, perhaps should, be determined by the judge who addressed the matter on paper.

23. Thirdly, the Committee has no objection to procedural issues arising in the course of an appeal being determined on paper with no right of oral renewal. Procedural issues of this sort are more suitable for determination on paper than substantive appeals.

24. Fourthly, the Committee also has no objection to a greater use of two person courts or courts with two Court of Appeal judges and a third party.

25. Fifthly, 17% of judicial time, or 19,872 hours annually (paragraph 10 of the Annex to the Consultation Paper), is taken up by so-called "leadership roles" (a "constant haemorrhaging of judicial time": paragraph 25 of the Annex). Depending on the length of the judicial working year, this could be the equivalent of some nine judges working full time in these leadership roles but, in any event, it represents a significant demand on judges' time. A study is required to understand what these roles involve and whether the work required is most efficiently handled by Court of Appeal judges.

26. Sixthly, the Court should consider whether current court hours and vacations remain appropriate.

27. Seventhly, the Court could make more robust use of its power to certify an application for permission to appeal as totally without merit under CPR 52.3(4A)(a).

28. Eighthly, the Court could consider increasing the support for judges through judicial assistants. Law firms already second trainees and qualified lawyers for this purpose, and it may be that this scheme could be enlarged.

Concerns about the consultation

29. The Committee is also concerned about the way in which the consultation in respect of these significant proposals has been conducted. These reasons for this concern include the following.

30. First, Lord Dyson's Foreword to the Consultation Paper says that the proposals were presented to and debated by judges in March 2016, that the proposals have the unanimous support of the Court, and that the Court considers the proposals' adoption to be "critical" in order to tackle the problems facing the Court. This, coupled with public comments made by Lord Justice Briggs in meetings regarding his court structure review, could be taken to suggest that this is a consultation in form only because the Court of Appeal has already decided that the proposals will be implemented regardless of responses to the Consultation Paper. The Committee hopes that this interpretation is incorrect - it would, of course, be unacceptable if it were correct - but it is, at the least, unfortunate that this impression may have been given.

31. Secondly, the time period for the consultation is unacceptably brief. Five weeks to consider far-reaching proposals, backed by complex statistics, is too short, and could be regarded as reinforcing the suggestion identified in paragraph 30 above that this is a consultation in form only.

32. Thirdly, the statistics provided are lacking in important details (this is no criticism of the UCL team). For example:

    (a) There are insufficient statistics about the success rates of applications for permission to appeal. No consideration of appeal procedures should focus solely the burdens that the appeal process places on the system and the time spent by judges. As we have said above, outcomes matter, and must feature in any analysis.

(b) Certain of the statistics are hard to follow. For example, paragraph 8(2) of the Annex to the Consultation Paper reports that a "stark example" of the "unacceptable increase" in judicial workload is that 48% of the time spent on writing lead judgments is done "out of hours". So far as the Committee can discern, this figure comes from Table 10 of Appendix 3. Table 10 indicates that 52.4% of the lead judge's time in dealing with an appeal is spent in preparing the judgment, which time is made up of 27% during the standard working day, 13.5% outside these hours and 11.9% during court vacations. These figures of 13.5% and 11.9% together represent 48.47% of total time spent by the lead judge in preparing the judgment,[3] which is presumably the source of the figure in paragraph 8(2). However, it is difficult to analyse whether this really represents a point of concern without knowing what the Court's "standard working day" is, how long the Court's vacation is and whether the fact that the court is on vacation means that judges are not expected to do any work. For example, if the Court's standard working day is seven hours, an increase of 13.5% in that working day is less than one hour extra. This may not be all that judges must do outside the standard working day, but in itself it is not self-evidently unduly burdensome for professional people.

(c) The modeling undertaken as to the time saved by implementation of the proposals in the Consultation Paper assumes that removing the right of oral renewal would not reduce the number of full appeals coming through (paragraph 33 of the Annex to the Consultation Paper). Since the overt aim of the proposals is to cut the number of full appeals, this is a curious assumption. It suggests that there is a risk, if all other assumptions were to be correct, that the proposals could reduce the workload of the Court of Appeal by more than is necessary to remove the Court's backlog. In the round, it may well be that all the projected time savings must be seen as speculative at best.

33. Fourthly, the vast bulk of the time spent by judges in the Court of Appeal remains in dealing with substantive appeals. A proper investigation of judicial workload would require a consideration of whether that time is all productively and sensibly spent, or whether improvements can be made.

34. Fifthly, paragraph 15 of the Annex to the Consultation Paper reports that the Court of Appeal has agreed on "a series of other reforms to improve efficient working in the CA", and paragraph 18 refers to further reforms aimed at

[3] ie ((13.5 + 11.9) ÷ 52.4) x 100 = 48.47%.

reducing the backlog. What are these, and would it be appropriate to wait to see what their effect is before embarking on the fundamental proposals set out in the Consultation Paper, especially given the huge uncertainties over the justification for and effect of these proposals?

Conclusion

35. For the reasons outlined above, the Committee is opposed to the change proposed in the test for the grant of permission to appeal to the Court of Appeal and considers that it is important to retain the right to renew orally an application for permission to appeal that has been refused on paper.

23rd June 2016

Schedule

THE CITY OF LONDON LAW SOCIETY
Litigation Committee

Individuals and firms represented on this Committee are as follows:

Simon James (Chairman)	Clifford Chance LLP
Jan-Jaap Baer	Travers Smith LLP
Duncan Black	Field Fisher Waterhouse LLP
Patrick Boylan	Simmons & Simmons LLP
Tom Coates	Lewis Silkin LLP
Jonathan Cotton	Slaughter & May LLP
Andrew Denny	Allen & Overy LLP
Richard Dickman	Pinsent Masons LLP
Angela Dimsdale Gill	Hogan Lovells International LLP
Geraldine Elliott	Reynolds Porter Chamberlain LLP
Gavin Foggo	Fox Williams LLP
Richard Foss	Kingsley Napley LLP
Tim Hardy	CMS Cameron McKenna LLP
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Gary Milner-Moore	Herbert Smith Freehills LLP
Hardeep Nahal	McGuireWoods LLP
Stefan Paciorek	DWF LLP
Kevin Perry	Cooley (UK) LLP
Patrick Swain	Freshfields Bruckhaus Deringer LLP