**CIVIL PROCEDURE RULE COMMITTEE**

**Appeals to the Court of Appeal: proposed amendments to Civil Procedure Rules and Practice Direction**

**Questionnaire**

**About you**

| | |
|---|---|
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| Date | 24 June 2016 |

## List of questions for response

The Civil Procedure Rule Committee would welcome responses to the following questions set out in this consultation paper. You can respond to this consultation in the following ways.

Online at: https://consult.justice.gov.uk/digital-communications/appeals-to-the-court-of-appeal

Email to: CPRCconsultation@justice.gsi.gov.uk

Post to: Jane Wright, Secretary to the Civil Procedure Rule Committee, Post Point 3.32, Ministry of Justice, 102 Petty France, London SW1H 9AJ

Please feel free to use additional sheets for your response if necessary.

**Amendment of CPR Part 52.3(6)(a) to create a test of "a substantial prospect of success" for permission to appeal to the Court of Appeal in a first appeal, in place of the current test of "a real prospect of success"**

**Question A**: Do you agree that the threshold for permission to appeal to the Court of Appeal should be raised to "a substantial prospect of success"?

☐ Yes ☒ No

Please give reasons:

As is apparent from Appendix 5 to the Consultation Paper, in the vast majority of the representative jurisdictions identified appeal is either as of right or it is of as of right in all cases save for a few where (a) the sums involved are small and/or (b) or where the matter relates to the exercise of a discretion as to costs and/or (c) the decision is not final (e.g. a refusal to strike out a claim). This appears to be the case in civil law as well as common law jurisdictions with very different social circumstances and histories (including legal histories). The starting point must be that this broad consensus of approach must have some merit to it. This approach has clearly been reached as representing the most just approach and one that enables the Appeal system to play its proper role of (a) (subject to further appeal) laying down, making coherent and rationalising the law and legal principle and (b) correcting errors made at first instance. As a concomitant of this point it should also be recognised that any justice system is there as much for the loser as the winner and that it exists to make the loser, as well as the winner, feel that they have had substantive justice. If the test for permission to appeal is raised, then there is a risk of real injustice.

Reducing the workload of the Court of Appeal
The proposed test for leave to appeal is said to be necessary to reduce the workload of the Court of Appeal, There are three points of significance here.

First, the premise is that there is no further funding to increase the number of Judges to deal with (a) the increased judicial work and (b) the increasing "administrative and leadership" work, estimated currently to take up about 17% of LJ's time and which is said to be set to increase. This premise is apparently based upon the Government's confirmation there is no further funding available. However, a significant change to the right to appeal is a constitutional issue. There is apparently to be no political debate about this. Rather than the judiciary and the lawyers making out a case for change (and on one view not being experienced politicians used to making appropriate "bids" to the Treasury nor appropriately having the political role to argue for an increase in the judicial budget compared with that of other government departments) and the matter being the subject of political debate the Government's refusal to offer to make money available when requested is apparently simply to be accepted on the basis that the Judiciary will then promulgate a system that will reduce the need for extra judges whatever the effect on litigants. This in itself is a worrying constitutional development whereby the Senior Judiciary are in effect acting as responsible for overseeing a justice system in which they simply accept without public debate whatever budget the government decides is appropriate and then promulgate as entirely laudatory, changes to make the justice system meet that budget. Thus the consultation itself is of concern as promoting the changes proposed with no or hardly any consideration of any injustices or downsides that may flow from the changes. It is of concern that the only actual or potential injustice identified is that of current delay and that the consultation paper barely

suggests that the change in the test will have any downside at all.

The second point of concern is that it is wholly unclear what effect the change in the threshold test for leave to appeal is supposed to achieve. We are far from persuaded that it itself will reduce the number of applications for leave to appeal and it is apparently at that end that the CA workload has greatly expanded. Furthermore, given the higher hurdle that would have to be met it is quite possible that the workload would increase as more time and care might be needed to apply the new test. So far as the reduction in number of full appeals is concerned, this proposed change is apparently one of the "other reforms" which are said to "offer the prospect of far more modest time savings, most of which cannot be statistically measured". Surprisingly the "Annex: Background information" barely discusses this proposal other than to say it is recommended on the basis that it will "limit the number of full appeals which the CA has to deal with (so as to reduce delays overall) and to focus its resources upon those cases which most merit review on appeal." However, there is no identification of how this will occur or the relevant numbers likely to be involved compared with the current position. Also unevidenced, unexplained and unsupported is the basis for the assumption that the current test (especially after the other reforms regarding routes of appeal is dealt with) now does and will continue to result in the Court dealing with full appeals which are (implicitly) asserted by the consultation to be undeserving of review. If it is being said that the test has this effect and needs to be changed to ensure that the CA only hears cases "where it really matters" then there should be empirical evidence and proper description of such cases so that an informed view can be taken as to the number of such cases and whether or not they justify a review. It is accepted by the consultation paper that the actual number of full appeals that need to be heard has only increased "modestly" over the last 5 years. This suggests that despite a huge increase in applications for permission to appeal the current test is working well. However, although the number of full appeals required to be heard has not of itself significantly increased it is asserted that it is "probable" that appeals are taking longer because they are more complex- but accepted that there is no available statistical information to back up this assertion. Complexity may be a feature of modern legal life. Because matters are more complex does not mean that they are less deserving of being heard. The table at Appendix 1 is unclear as to whether it is referring to appeals heard or appeals that need to be heard. Assuming the former the fact that the number of appeals over the last 10 years has fluctuated at about the 1200 mark would suggest that the CA has been disposing of about the same number of appeals each year over the last 10 years which calls into question the suggestion implicit in the consultation that the number of appeals heard has significantly dropped because appeals are more complex and take longer to hear.

The third point is that the anticipated savings in LJ hours from the other reforms seem more than enough to cover the annual shortfall and to start to cut into the overall existing backlog. The annual shortfall is identified as being 9,482 hours. However, other reforms are said to result in savings of (2,056 + 3,347 + 2,929 + (at the least) 2,310 + 774) hours which is 11,414. While this may not make much of an immediate impact on the existing backlog of 46,000 hours it at least starts to reverse that backlog, which may also be capable of being reversed by other matters such as the use of High Court Judges to assist on appeals. There is, as already said, no statistical backing to identify what sort of savings may be made by changing the test for permission to appeal and this is but one of a number of changes which it is said will together result in "far more modest time savings".

The test itself

Turning to the proposed test itself, there are four main concerns.

The first is the formulation of the test. It is said that the test for permission to appeal should change to one of whether there is a "substantial prospect of success" rather than "a real prospect of success". These two tests are, as so articulated, opaque. How "substantial" is "substantial"? The Consultation suggests that the new test is one of "seriously arguable" as contrasted with "arguable such that it is not fanciful". If "seriously arguable" is to be the test then it is suggested that those are the words that should be used. However, it might be said that an argument is either arguable or it is not and introducing degrees of arguability into the test is unhelpful. "Substantial" may suggest a test closer to 50% or perhaps even 50%. However, how in practice the test of "seriously arguable" will be applied is another matter. One person's "seriously arguable" may be another person's "arguable and not fanciful".

The second concern is that any test is inevitably going to filter out cases that ought to be heard

because no decision maker is perfect. With the proposal to limit the actual process of decision making for permission to appeal, the risk of error becomes greater (even if the test is unchanged).

The third concern is that the higher the test for permission to appeal, the greater the risk that cases that should go to full appeal do not pass the filter. There is currently no statistical evidence to identify which appeals would fail the new permission to appeal test and whether this reflects the cases where full appeals currently fail. In short, without empirical evidence to suggest that most of the current appeals that succeed would also have met the higher threshold at the permission stage, or that appeals that currently fail at full appeal, despite being granted permission, would be filtered out by the new test, there is a risk of significant injustice and/or pointlessness in changing to the new test. Any filter is a summary test on incomplete consideration and inevitably raises the risk that injustice is done. It is unclear why the injustice of delay should trump the injustice of exclusion from a right to make a successful appeal.

The fourth concern is that appeals on points of law that ought to be dealt with will not pass the filter and thereby undermine the function of the CA in this respect. It should be noted that although the alternative test of "some other compelling reason" remains it is clear from the Notes to the White Book that the scope for the application of this test is unclear.

Conclusion
The proposed change to the test for permission to appeal is said to be necessary to reduce the number of full appeals. It is unclear that there is such a need. It is unclear that the test will have such an effect. It is unclear why the injustice of delay should trump the injustice of being denied the right to appeal. This matter should be reconsidered with proper consultation and evidence once the other proposed reforms have bedded down and worked through.

**Question B**: Do you think that amendment of CPR Part 52.3(6)(a) will assist in reducing delays in determination of appeals in the Court of Appeal?

☐ Yes ☒ No

Please give reasons:

See answer to Q 1. Although on the face of things, less matters should go to full appeal and thus there should be time-savings the position is more complicated.

**Question C**: Do you think that these changes will adversely or positively affect any appellants or respondents more than others and if so, why?

☒ Yes ☐ No

Please give reasons:

Those more adversely affected seem likely to be:
(a) litigants in person who may be less well able to formulate grounds for permission in a way as to demonstrate substantial prospect of success in a case of genuine merit;
(b) appellants who wish to make arguments which move the law forwards in substantial ways e.g. by establishing a new duty of care or demonstrating a fallacy in the law which has arisen and grown barnacles;
(c) appellants seeking to appeal inferences to be drawn from facts;
(d) appellants seeking to appeal costs or discretionary matters.

**Question D**: Do you have any other suggestions for assisting the Court of Appeal to reduce delays in the hearing of appeals?

(a) appointing more judges
(b) use of the Totally Without Merit filter (or equivalent) more robustly;
(c) partial removal of the oral renewal with case management option (as proposed in this review);
(d) reducing the time allowed for oral permission applications combined with a requirement that, on such a renewal, the applicant is obliged to first provide a written note which focuses on "best point";
(e) greater use of 2 person courts for hearing appeals;
(f) more robust case management of the preparation of bundles and skeleton arguments;
(g) time limited submissions on hearing of appeals;
(h) more robust management by CA judges of appeal hearings and a greater willingness to indicate if they are broadly "with" a party on points or require more assistance on others;
(h) a proper analysis and indeed cutting back of the LJ's "administrtaive and leadership" roles.
(i) in specialist cases ensuring at least one member of the panel has particular experience of the area of law concerned.

**Amendment of CPR Part 52.3 to remove a right of oral renewal for an application for permission to appeal to the Court of Appeal, but with a power in the single LJ reviewing the application on the documents to call the application in for an oral hearing**

**Question E**: Do you agree that the right of oral renewal for an application for permission to appeal should be removed and replaced by a system allowing for determination of such an application by a single LJ on the documents coupled with a case-management power to call the application in for an oral hearing if it assessed to be appropriate to do so? If not, why not?

☒ Yes ☐ No

Please give reasons:

Subject to the overarching comments made above, given the statisics provided, the proposal to amend CPR Pt 52.3 appears justified, albeit that it is unfortunate this step has to be taken: it would be preferable if the necessary time savings could be made by the other methods set out in the above answer to Question D.

We note that the number of cases that have a positive outcome for the appellant (appeal granted, remited or by consent) who obtained permission at oral renewal is not statistically insignificant. We would hope that these would be cases which were likely to be granted permission (either with or without the oral hearing) under the amended CPR Pt 52.3.

We anticipate the process under the amended CPR Pt 52.3 will be reviewed against the current statistics, in order to assess its performance and its outcomes (for example to assess if and how successfully the power to call cases in for oral hearing was being exercised). If the proposed change proceeds, we would support that type of review after 2-3 years of its implementation.

**Question F**: Do you think that amendment of CPR Part 52.3(4) and (4A) will assist in reducing delays in determination of appeals in the Court of Appeal?

☒ Yes ☐ No

Please give reasons:

For the reasons set out in the report, although we would anticipate that this change would result in the submission of fuller written skeleton arguments (verging into written submissions).

**Question G**: Do you agree that CPR Part 52.15(1A) and Part 52.15A(2) should be amended as proposed? If not, why not?

☒ Yes ☐ No

Please give reasons:

It is assumed that this is proposed in order to standardise the rules. We support the change in order to bring consistency to the rules and the treatment of cases before the court.

It is assumed that few cases already marked totally without merit will, in fact, be called for oral hearing.

**Question H**: Do you think that these changes will adversely or positively affect any appellants or respondents more than others and if so, why?

☒ Yes ☐ No

Please give reasons:

If the proposed amendment is in practice a more restrictive process for assessing permission to appeal (as opposed to its current potential of being a more streamlined and better process to allow judges to accurately select those cases suitable for appeal) then those applicants who obtained permission on oral renewal and were then successful on appeal will be adversely affected by the removal.

We would anticipate that those who are poor at articulating their case in writing (such as litigants in person) risk being adversely affected. However, this risk may be militated against, if the power to call cases in for oral hearing is used as a positive tool for judicial exploration of the merits of the appeal.

**Question I**: Do you have any other proposals as to how the procedure for considering applications for permission to appeal could be made more efficient or effective?

☒ Yes ☐ No

Please give reasons:

Insofar as delays are caused by poor paperwork or paperwork that does not draw out the relevant matters, a fuller standard form or even full triage system (such as those suggested by Briggs LJ for the lowest court) may both standardise the information (or its presentation) and assist in eliciting the relevant documents.

Otherwise, we would repeat the proposals already set out as the answer to Question D

**Question J**: Do you have any other proposals how the procedure for considering applications for permission to appeal could be changed so as to help reduce delays in the Court of Appeal?

☒ Yes ☐ No

Please give reasons:

As already set out in the answers above

**Proposal to amend CPR Part 52.16 to remove the automatic right to an oral hearing for reconsideration of decisions on other applications made in the course of proceedings in the Court of Appeal, replacing it with a discretion for the court to decide whether to hold a hearing or to determine an application on the documents**

**Question K**: Do you agree that CPR Part 52.16 should be amended as proposed? If not, why not?

☒ Yes ☐ No

Please give reasons:

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**Question L**: Do you think that amendment of CPR Part 52.16 will assist in reducing delays in determination of appeals in the Court of Appeal?

☐ Yes ☒ No

Please give reasons:

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| There is no evidence to suggest that CPR Pt 52.16 as currently drafted causes any delays. However, its amendment is consistent with the proposed amendment of CPR Pt 52.3 |

**Question M**: Do you think that these changes will adversely or positively affect any appellants or respondents more than others and if so, why?

☒ Yes ☐ No

Please give reasons:

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| The current rules provide for reconsideration without oral hearing: the power to determine the matter at an oral hearing may benefit those who express themselves better orally, if they are called in. |

**Question N**: Do you have any other proposals for amending CPR Part 52.16 to make the procedure for consideration of ancillary applications more efficient and effective?

☐ Yes ☒ No

Please give reasons:

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| It is not clear what inefficiency CPR Pt 52.16 currently contains or produces. |

**Question O**: Do you have any other proposals how the procedure for considering ancillary applications in the Court of Appeal could be changed so as to help reduce delays in the Court of Appeal?

☐ Yes ☒ No

Please give reasons:

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| It is not clear what inefficiency CPR Pt 52.16 currently contains or produces. |

**Amendment of Practice Direction 52C**

**Question P**: Do you agree that Practice Direction 52C should be amended as proposed? If not, why not?

☒ Yes ☐ No

Please give reasons:

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**Question Q**: Do you think that amendment of Practice Direction 52C as proposed will make it more user-friendly for litigants and assist in limiting the volume of documentation placed before the Court of Appeal in determining appeals?

☒ Yes ☐ No

Please give reasons:

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| As to whether it makes it more user-friendly, on balance we take the view it is more user-friendly for litigants. The new Practice Direction is more prescriptive, and in that sense, makes it clearer to all litigants the format in which the Court of Appeal would like documentation to be placed before it. The price of that prescriptiveness is a more cumbersome document which is inevitably less easy to follow but we do not think that can easily be avoided and is, in any event, one worth paying.<br><br>As to whether it will assist in limiting the volume of documentation, it seems likely that the restriction of the items that may appear in the core bundle and the cap on the size of the supplementary bundle will reduce the volume of documentation placed before the Court of Appeal. |

**Question R**: Do you think that these changes will adversely or positively affect any appellants or respondents more than others and if so, why?

☒ Yes ☐ No

Please give reasons:

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| For the reasons we set out above in relation to Question Q, we are of the view that the more prescriptive nature of the new Practice Direction is likely to be of more assistance to litigants without the benefit of representation who will necessarily be less sure of the documents the Court of Appeal wish wish to see for the purposes of determining their appeal. The one caveat to that observation is, however, that it will be necessary to ensure that the requirements imposed by these changes are clearly drawn to their attention rather than simply left as part of the Practice Direction. |

**Question S**: Do you have any other proposals for amending Practice Direction 52C to make it more user-friendly for litigants?

☐ Yes ☒ No

Please give reasons:

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| We have no further proposals for the amendment of Practice Direction 52C itself but we would suggest that the requirements imposed by these changes are presented in a clear booklet or document that could be provided to litigants in person. Such a document could usefully include a timeline of the appeal process, perhaps in graphic form, which might make the intricacies of the rules more intelligble to the layman. |

**Question T**: Do you have any other proposals for amending Practice Direction 52C to limit the documentation presented to the Court of Appeal for determination of appeals?

☐ Yes ☒ No

Please give reasons:

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Thank you for responding.