Costs Appeals

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Introduction

1 This paper addresses the many issues that practitioners must be alive to when considering whether to embark on an appeal from a costs order. To set it in context it is helpful to define the different types of orders that may be the subject of an appeal:

(i) an order for costs (such as whether a party should recover all their costs);

(ii) a preliminary decision arising from a costs assessment (this is a decision that will effect the overall recovery of costs, such as proportionality, the enforceability of a CFA, or whether there has been misconduct);

(iii) a quantum decision (such as the applicable hourly rate, the level of success fee, or the amount of time to have spent dealing with a particular issue).

2 Costs appeals are, generally speaking, difficult to sustain; Judges have a wide discretion when determining both the incidence and quantum of costs. There is however perhaps more scope for successful challenges where the decision being appealed is concerned with the interpretation of a CFA or a statutory provision.

Grounds on which an appeal will be allowed

3 For all first instance costs decisions (save for appeals against the decision of an authorised costs officer – see below), the mechanism for appealing is set out in CPR 52. Appeals against costs orders can proceed by way of review of the first instance decision, or by way of a complete re-hearing. The former is very much the norm unless the decision being appealed is that of a costs officer.1

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1 Costs officers are dealt with below.
The test on review

4 CPR 52.11(3) provides that the appeal will be allowed where the decision of the lower court is (a) wrong, or (b) unjust because of some serious procedural or other irregularity in the proceedings.

5 A decision is ‘wrong’ where the court at first instance either (i) erred in law or (ii) erred in fact or (iii) erred (to the appropriate extent) in the exercise of its discretion. Appeal courts approach these three grounds differently:

(i) Errors of law: An appeal court will be in just as good a position as the court at first instance to interpret and apply the law, accordingly little deference is afforded to the first instance decision maker on appeals of this kind.

(ii) Errors of fact: Deference is awarded to the Judge at first instance by the appeal court when it comes to findings of fact. The degree of deference will depend upon the nature and circumstances of the particular case. Thus where the Judge has heard oral evidence the degree of deference will be greater than in a case that was decided on submissions. The appeal court will not interfere with the decision of the court below to prefer the evidence of one witness to another unless it is clearly wrong, but will display somewhat less reluctance to interfere with an inference from primary facts.

(iii) Exercise of a discretion: The Court of Appeal in the case of Tanfern Ltd v MacDonald [2000] 1 W.L.R. 1311 approved the speech of Lord Fraster in G v G (Minor: Custody Appeal) [1985] 1 W.L.R. 647 as to the test the appeal court should apply when considering whether to interfere with the exercise of a Judge’s discretion:

‘...the appellate court should only interfere when they consider that the judge of first instance has not merely preferred an imperfect solution which is different from an alternative imperfect solution which the Court of Appeal might or would have adopted, but has exceeded the generous ambit within which a reasonable disagreement is possible.’
The appellate court must appreciate that there is range of decisions open to a costs judge as no two judges would assess a matter in precisely the same way. If the decision being appealed comes within that range, the appeal court should not interfere.2

In analysing what this means in practice it is useful to consider the three different types of cost orders:

(i) **An order for costs:** When a Judge who has just heard a substantive trial or application and makes an order as to where the costs lie, he/she is exercising a discretion.3 Appeal courts will seldom be as well placed as the trial Judge to exercise this discretion, thus an appellate court will be slow to interfere in its exercise - *English v Emery Reimbold* [2002] 3 All ER 385. This is perhaps self-evident. The trial/application judge will have seen the way in which the case is run, he may even have seen witnesses give evidence. An appeal court does not have this first hand experience.

(ii) **Preliminary and quantum decisions:** Appeal courts are more likely to interfere with a decision of principle where these involve the application of a legal test or a matter of construction. Where however the decision is one of discretion, or arises out of findings of primary fact, then the appeal court will be more reticent about interfering, and will award the costs judge a greater deference.

(iii) The proper approach for an appeal court to take in relation to decisions arising out of an assessment was considered by Buckley J in *Mealing McLoed v Common Professional Examination Board* [2000] 2 Costs LR 223:

> Broadly speaking a Judge will allow an appeal such as this if satisfied that the decision of the Costs Judge was wrong. This is easy to apply to matters of principle or construction. However, where the appeal includes challenges to the details of the assessment, such as hours

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2 *Attack v Lee* para 38  
3 CPR 44.3
allowed in respect of a particular item, the task in hand is one of assessment or judgment rather than principle.

... But since the appeal is not a re-hearing, I would regard it as inappropriate for the Judge on appeal to be drawn into an exercise calculated to add a little here or knock off a little there. If the Judge’s attention is drawn to items which with the advice of his Assessors he feels should, in fairness, be altered, doubtless he will act. This is a matter for his good judgment. Permission to appeal should not be granted simply to allow yet another trawl through the Bill, in the absence of some sensible and significant complaint. If an appeal turns out to be more than such an exercise the sanction of costs may be used.

(iv) Appeals on the issue of proportionality raise slightly different issues. The determination of the two stage test set out in *Lownds v Home Office* [2002] EWCA Civ 365 should not take up more than an hour of the court’s time.⁴ The very rough and ready nature of the court’s assessment makes it difficult to overturn on an appeal. Eady J in the case of *Cox v MGN and Others* [2006] EWHC 1235(QB) held that for an appeal against a determination of proportionality to succeed the Judge would need to find that decision maker in question had taken into account irrelevant factors or excluded relevant material, alternatively that the conclusion reached was outside the range of reasonable decisions open to him. This was described as a ‘high hurdle’.

(v) Decisions on quantum may require the costs judge to apply legal principles (for example when considering the uplift on a CFA, or considering the hourly rate). Clearly the correct tests need to be applied. As long as the Judge has not erred in this respect, the appeal court will defer to a range reasonably available to the Judge. As long as the decision does not fall outside this, the appeal court has no business interfering.⁵

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⁴ *Giambrone v JMC Holidays Ltd* [2003] 1 All E.R. 1982
⁵ See for example paragraph 38 of *Attack v Lee* [2004] EWCA Civ 1712 in respect of success fees and *Cox v MGN* paragraph 48.
Expertise

One of the issues that an appeal court must have regard to when considering the degree of deference to award to the decision maker, is the expertise of that decision maker. Costs Judges are seen as experts in the assessment of bills. This clearly affects the deference afforded to them by the appeal court.

Assessors (usually district judges or masters from the SCCO) now sit regularly with appeal courts in appeals from detailed assessment. The power to appoint assessors comes from section 70 of the Supreme Court Act 1981 and section 63 of the County Court Act 1984 and is set out in CPR 35.15. In appeals from a costs judge to the High Court, the Judge will almost invariably sit with two assessors, one being a different costs judge and the other being either a solicitor from a panel drawn up by the Law Society or a barrister from a Bar Council panel (the choice depending on the nature of the appeal). In assessment appeals to the Court of Appeal it is now common, albeit not invariable, for the Court to sit with a single costs judge assessor.

Assessors can take part in the proceedings to the extent ordered by the court. This can range from preparing reports to the court, to sitting in on the hearing and advising the Judge. The fact that assessors are available to sit on appeals with Judges has, to some degree, counteracted the court’s reluctance to interfere with first instance decisions.

Reasons

The extent to which the lack of adequate reasons provides a fertile ground for a costs appeal is doubtful.

The duty on a costs judge to give reasons varies and depends on the context in which the decision is made and on the nature of the decision:

(i) Where the decision being made is one that goes simply to quantum (say for example the number of letters it was reasonable for the
receiving party to have written to a medical expert), then it is unlikely that there is a duty on the judge to give detailed reasons (although they must of course apply the correct test).

(ii) Where however more substantial issues have arisen (the enforceability of a CFA, or where the costs of a trial should lie) then the Judge may be under a duty to give reasons to allow the parties to understand the basis on which he has arrived at his decision.

(iii) There is less onus on a Judge carrying out a summary assessment to give reasons than a Judge carrying out a detailed assessment. The reasons are two fold. First the summary nature of the hearing. Secondly the fact that summary assessment is not appropriate where there is a substantial dispute between the parties on a point of principle, (ie a decision is required that requires extensive reasons).

12 When it is necessary to give reasons for an order for costs and the approach of the appellate court if reasons have not been expressly given for the Judge's decision, was considered by the court of appeal in the case of English v Emery Reimbold [2002] 3 All ER 385. The court held:

(i) Strasbourg jurisprudence requires the reason for an award of costs to be apparent, either from reasons or by inference from the circumstances in which costs are awarded.

(ii) It is, in general, in the interests of justice that a Judge should be free to dispose of applications as to costs in a speedy and uncomplicated way and even under the CPR this will be possible in many cases. Thus reasons need not be given where they are clearly implicit from the order made. The obvious example is an order that the costs follow the event where neither party has urged the court to reflect any other factor. In such a case it is self-evident why the order was made.

(iii) However, the Civil Procedure Rules sometimes require a more complex approach to costs, and judgments dealing with costs will

6 Section 13.2(3) of the Costs Practice Direction
more often need to identify the provisions of the rules that have been in play and why these have led to the order made.

(iv) Where no express explanation is given for a costs order, an appellate court will approach the material facts on the assumption that the Judge will have had good reason for the award made.

(v) The appellate court will seldom be as well placed as the trial Judge to exercise a discretion in relation to costs. Where it is apparent that there is a perfectly rational explanation for the order made, the Court is likely to draw the inference that this is what motivated the Judge in making the order.

(vi) Thus, in practice, it is only in those cases where an order for costs is made with neither reasons nor any obvious explanation for the order that it is likely to be appropriate to give permission to appeal on the ground of lack of reasons against an order that relates only to costs.

13 The facts of that case show quite how far the court will go in deducing reasons for a judge’s decision. The defendant had offered to settle at £5,500 and the claimant had offered to settle at in excess of £95,000. The claimant succeeded in recovering over £30,000. The judge made no criticisms of either party’s conduct, and made an order that there should be no order for costs. The Court of Appeal held that it could be deduced from the order made that the Judge had come to the view that the claimant had won half the case and lost on the rest, thus both parties had come to court and won on part of their case.

14 As most costs appeals will be way of a review, and as appeal courts are unwilling to allow appeals on the basis that inadequate reasons were given, the importance of getting the judge to give reasons at first instance for the decision that has been made cannot be underestimated. If inadequate reasons are given when the decision is announced, advocates (including costs draftsmen) should ask the court for permission to appeal on the ground that
the reasons given are inadequate, specifying why this is so. When taken to task by an angry district judge for their cheek they should refer “with the greatest respect” to the decision of the Court of Appeal in *English* at [25]:

“Accordingly, we recommend the following course. If an application for permission to appeal on the ground of lack of reasons is made to the trial judge, the judge should consider whether his judgment is defective for lack of reasons, adjourning for that purpose should he find this necessary. If he concludes that it is, he should set out to remedy the defect by the provision of additional reasons refusing permission to appeal on the basis that he has adopted that course. If he concludes that he has given adequate reasons, he will no doubt refuse permission to appeal. If an application for permission to appeal on the ground of lack of reasons is made to the appellate court and it appears to the appellate court that the application is well founded, it should consider adjourning the application and remitting the case to the trial judge with an invitation to provide additional reasons for his decision or, where appropriate, his reasons for a specific finding or findings. Where the appellate court is in doubt as to whether the reasons are adequate, it may be appropriate to direct that the application be adjourned to an oral hearing, on notice to the respondent. “

Re-hearing

15 The Court of Appeal examined the difference between a review and a re-hearing in the case of *El Du Pont Nemours v ST Du Pont* [2003] EWCA Civ 1368. This was not a case concerned with costs appeals but nevertheless provides useful guidance. May LJ said this about reviews under CPR 52.11:

‘The review will engage the merits of the appeal. It will accord appropriate respect to the decision of the lower court. Appropriate respect will be tempered by the nature of the lower court and its decision making process. There will also be a spectrum of appropriate respect depending on the nature of the decision of the lower court which is challenged. At one end of the spectrum will be decisions of primary fact reached after an evaluation of oral evidence where credibility is in issue and purely discretionary decisions. Further along the spectrum will be multi-factorial decisions often dependent on inferences and an analysis of documentary material. Rule 52.11(4) expressly empowers the court to draw inferences.’

16 He set out what a re-hearing was:
'The scope of an appeal by way of review, such as I have described, in my view means that the scope of a rehearing under rule 52.11(1)(b) will normally approximate to that of a rehearing “in the fullest sense of the word” such as Brooke LJ referred to in paragraph 31 of his judgment in Tanfern. On such a rehearing the court will hear the case again. It will if necessary hear evidence again and may well admit fresh evidence. It will reach a fresh decision unconstrained by the decision of the lower court, although it will give to the decision of the lower court the weight that it deserves.'

17 When then, is a rehearing appropriate? The test to be applied is whether it is in the interests of justice for there to be a rehearing. This depends on the facts of a particular case. Thus where a case is being brought as a test case, this may justify a rehearing rather than a review. The fact that the court at first instance did not give reasons for its decision is not a reason to have a re-hearing. Lord Justice May in the Du Pont case however has cast doubt on whether the distinction is of any importance:

The circumstances in which an appeal court hearing an appeal from within the court system will decide to hold such a rehearing will be rare, not least because the appeal court has power under rule 52.10(2)(c) to order a new trial or hearing before the lower court. Circumstances in which the hearing of an appeal will be a rehearing are described in paragraph 9 of the Part 52 practice direction. ................. This apart, it will be rare for the court to consider that the interests of justice require a rehearing in the fullest sense of the word. All other appeals to which rule 52.11 applies will be limited to a review capable of extending in an appropriate case to the extent which I have described.....

...... the court will not normally interfere with the exercise of a discretion unless the decision of the lower court was reached on wrong principles or was otherwise plainly wrong. And this can be done on a hearing by way of review. Thus, in so far as “rehearing” in rule 52.11(1)(b) may have something of a range of meaning, at the lesser end of the range it merges with that of “review”. At this margin, attributing one label or the other is a semantic exercise which does not answer such questions of substance as arise in any appeal.’

18 Some recent examples of cases in which a rehearing has been held at appeal level are:

7 CPR 52.11(1)
8 Secretary of State for Trade and Industry v Lewis [2001] 2 B.C.L.C. 597
(i) *KU v Liverpool County Council* [2005] EWCA Civ 475. This was a case concerned with the staging of a success fee under a CFA. The first instance judge was a district judge. His decision was appealed to a Circuit Judge, and then up to the Court of Appeal as a second tier appeal. Permission was given by the Court of Appeal on an issue that was not raised at the first appeal. When the claimant objected to this, the court ordered that the matter be by way of rehearing and not review.

(ii) *Rogers v Merthyr Tydfil County Borough Council* [2006] EWCA Civ 1134 was a case concerned with the quantum of an insurance premium. The initial decision had been made at district judge level. This was appealed to a Judge, who relied heavily on a table from Litigation Funding that was not before the first instance judge. This decision was appealed to the Court of Appeal. With the notice of appeal the appellants filed a witness statement. This provided that the appeal was of extreme public importance and of critical importance to the insurance industry in general. The judge’s arbitrary reduction of the premium was so severe that if it could be used as a persuasive precedent and some ATE insurers would stop writing this business overnight. This would be at odds with the Government’s Access to Justice Act requirements. The Court of Appeal agreed, and ordered that the matter should proceed by way of a rehearing. A number of interested parties were invited to intervene. The parties and interveners were able to produce evidence and submissions as they saw appropriate, entirely unconstrained by what had happened in the court below.

19 Appeals from decisions of authorised costs officers are by way of re-hearing not review. As the appeal is a complete re-hearing of the decision in issue, the appeal court exercises it’s own discretion anew on the point in issue. It can make any order that it considers fit.
Permission to appeal
First appeals

20 A party needs permission to appeal.\(^9\) This can be obtained either from the lower court at which the decision is made, or from the appeal court. A party can ask for permission at the first instance hearing, or alternatively ask for an adjournment to make the application at some later date.\(^10\) It is not necessary to have applied to the first instance court for permission before applying to the appeal court, but it is usually desirable to do so.

21 If a party does not get permission to appeal from the costs judge at first instance (either because he did not ask for it, or permission was refused), he must make file an application for permission within 21 days of the date of the decision he wishes to appeal.\(^11\) This means that time starts running for a decision that is made on say, day 4 of a 10 day detailed assessment hearing, on day 4, not at the conclusion of the hearing, or on the date that the order recording the decision is drawn up.\(^12\)

22 Decisions on permission are made first on the papers, without a hearing. If permission is refused at this stage parties have a right to have the matter reconsidered at an oral hearing.\(^13\) Parties must file a request for an oral hearing within 7 days of the service of the notice that permission has been refused.\(^14\) The appeal court does have the power pursuant to CPR 3.1(2)(a) to extend the 7 day period – *Slot v Isaac* [2002] EWCA Civ 481 at 15.

23 The appeal court will only grant permission to appeal where:

(i) The appeal has a real prospect of success, or;

\(^9\) Even where it is a decision in a summary assessment of costs* Hosking v Michaelidis* [2003] EWHC 3029 (Ch)
\(^10\) Paragraph 4.3B of Practice Direction to CPR 52
\(^11\) CPR 52.4
\(^12\) *Kasir v Darlington & Simpson Rolling Mills* (Popplewell J, 1.3.01, unreported).
\(^13\) CPR 52.3(4)
\(^14\) CPR 52.3(5)
Where there is some other compelling reason why the appeal should be heard.\textsuperscript{15}

Lord Woolf MR has explained that the use of the word “real” means that the prospect of success must be realistic rather than fanciful (\textit{Swain v Hillman} [2001] All ER 91 paragraph 10).

Understanding what a compelling reason is, is a little more complex. Case law provides some examples:

(i) Where the law needs clarifying.

(ii) Where it would be in the public interest (ie a test case)

(iii) In order to obtain a decision on a matter of general application.

(iv) Where there is binding authority at the appeal court level making the appeal hopeless, but where a further appeal to a higher court may be successful.

(v) Where the first instance hearing was tainted by some procedural irregularity so as to render the hearing unfair.

Parties should remember that limited permission can be given – ie permission may be given to appeal against only part of the decision challenged, or on only some of the grounds of appeal advanced.

Equally the permission may be given subject to conditions.\textsuperscript{16} Thus in the case of \textit{U v Liverpool City Council} [2004] EWCA Civ 1617 (KU), the Court of Appeal gave permission on the condition that (a) the orders for costs in the court below should remain undisturbed and (b) the appellant should pay both parties’ costs of the appeal. In \textit{Rogers v Merthyr Tydfll} [2006] EWCA Civ 701 the appeal went ahead on the condition that (a) the orders as to costs in the courts below stand in any event and (b) that each side should bear its own costs in the Court of Appeal except that if the appeal is dismissed Merthyr

\textsuperscript{15} 52.3(6)

\textsuperscript{16} CPR 52.3(7) and 52.9
Tydfil to be at liberty to apply for its reasonable costs in relation to the preparation of written submission and evidence, not to exceed £20,000. The case of *Jones v Caradon Catnic* [2005] EWCA Civ 1821 permission was granted for a second appeal on the condition that the appellant paid the respondents costs win or lose.

28 If permission is refused by the appeal court at an oral hearing, this is the end of the road. This is the combined effect of section 54(4) of the Access to Justice Act 1999 and section 4.8 of the Practice Direction to part 52. Thus in cases in which the application for permission and the substantive hearing are heard together, there is a tactical advantage to a respondent in getting permission refused. The appellant cannot take the matter further. Equally, if the appellant gets permission granted, but ultimately the appeal is unsuccessful at such a hearing, the appellant has the opportunity to take the matter to a second tier appeal.

**Second tier appeals**

29 Second tier appeals are just that, cases that having been appealed once, that are appealed again.

30 By the Access to Justice Act 1999 (Destination of Appeals) Order 2000 Article 5, all second appeals (other than from the decision of an authorised costs officer) lie to the Court of Appeal.

31 Second tier appeals are only sanctioned in exceptional cases. Section 55(1) of the Access to Justice Act 1999 provides that:

> "Where an appeal is made to a county court or the High Court in relation to any matter, and on hearing the appeal the court makes a decision in relation to that matter, no appeal may be made to the Court of Appeal from that decision unless the Court of Appeal considers that - (a) the appeal would raise an important point of principle or practice, or (b) there is some other compelling reason for the Court of Appeal to hear it."
The decision of the first appeal court is now to be given primacy unless the Court of Appeal itself considers that the appeal would raise an important point of principle or practice, or that there is some other compelling reason for it to hear this second appeal. The Court of Appeal adds to that the requirement for there to be a reasonable prospect of success.\(^{17}\)

Cases in which the Court of Appeal have granted permission for a second tier appeal include:

(i) \textit{Garret v Halton Borough Council} [2005] EWCA Civ 1265 on the basis that ‘There is reason to think that the issue may have wider implications than was originally thought. It seems to me at least that it is an issue which deserves consideration in order to clarify the position. …… this is a question of general importance which has yet to be authoritatively determined, and it is one on which there are reasonable prospects of the appeal succeeding on the facts of the case.’

(ii) \textit{Rogers v Merthyr Tydfil} [2006] EWCA Civ 701 permission was given on the basis of ‘public interest in the Court of Appeal determining the issues in this case at a reasonably early date..’

A party has a right to appeal a decision made by an authorised costs officer.\(^{18}\) The provisions of CPR 52 do not apply to decisions made by authorised costs officers in detailed assessments. Instead the provisions are set out at CPR 47.22. Where a party wishes to appeal against such a decision they must file an appeal notice within 14 days.\(^{19}\) The appeal is made either to a costs judge or a district judge. No permission is required for the appeal, and the appeal itself is a re-hearing of the decision referred to in the appeal notice. It is not a review of that decision.\(^{20}\)

\(^{17}\) Garrett [2005] EWCA Civ 1265
\(^{18}\) CPR 47.20(1).
\(^{19}\) CPR 47.22(1)
\(^{20}\) See section 48 of the Costs Practice Direction.
Procedure – non-costs officer appeals

Route of appeal

35 The procedure to be followed when making these kinds of appeals is set out in detail in CPR 52 and the accompanying practice direction. CPR 52.2 makes it clear that parties must comply with the practice direction. This was substantially amended and amplified in June 2004.

36 The route of appeals is as follows:

(i) From a decision of a Costs Judge in a High Court matter parties may, if permission is granted, bring an appeal to a High Court Judge with a further appeal to the Court of Appeal.

(ii) The route of an appeal from a decision of a Costs Judge in a County Court matter depends upon whether the Costs Judge heard the matter whilst sitting as a Deputy District Judge of the County Court. If he did so the parties may, if permission is granted, bring an appeal to a Circuit Judge in the County Court with a further appeal to the Court of Appeal.

(iii) In London County Court cases which are transferred to the SCCO pursuant to Costs PD 31 an appeal lies to the Designated Civil Judge for the London Group of County Courts or such other judge as he shall nominate. This rule applies unless an order is made under CPR 47.4(2) that the SCCO as part of the High Court shall be the appropriate office, in which case an appeal will lie to the High Court.

(iv) If the entirety of proceedings are transferred from a County Court outside London to the SCCO, then any appeal will be to the High Court. If just the costs proceedings are transferred, then any appeal will be to the Circuit Judge in the original County Court.

(v) Appeals from a costs judge or district judge of the High Court are to a High Court Judge.\(^{21}\)

Leapfrogging

37 On a first appeal, either the lower court or the appeal court may order the appeal to be transferred to the Court of Appeal if they consider that it would raise an important point of principle or practice or there is some other compelling reason for the Court of Appeal to hear it. Therefore, if the lower court refuses permission to ‘leapfrog’, the party must approach the appeal court (as opposed to the Court of Appeal) to renew the submission.

38 The Master of the Rolls also has the power to direct that an appeal which would normally be heard by a circuit judge or a high court judge should be heard instead by the Court of Appeal. In such cases the Master of the Rolls and the Court of Appeal also have the power to remit an appeal to the court in which the original appeal was or would have been brought (CPR 52.14(2)).

39 This power is to be used sparingly by the lower court. Where there is a doubt, it should be referred to the Master of the Rolls for consideration.

40 It should not be used for an application for permission to appeal – In the Matter of Claims Direct Test Cases [2005] EWCA Civ 428 at paragraph 23.

Time Limits

41 Parties wishing to appeal, whether or not they already have permission, must file an appellant’s notice within 21 days of the date of the decision they wish to appeal. It must be in the form N161. It must be served on the respondent as soon as reasonably practicable, and within 7 days of filing.

42 If a party wants to extend the time for serving the appellant’s notice, he can obtain permission from the lower court (CPR 52.4(2)(a)), or alternatively

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22 CPR 52.14(1)
23 Access to Justice Act 1999 Act section 57(1)
24 Clark (Inspector of Taxes) v Perks [2001] 1 W.L.R. 17 at paragraph 9
25 CPR 52.4
make an application to the appeal court pursuant to CPR 52.6. On such applications, the appeal court must have regard to the factors in CPR 3.9. Where the arguments for granting or refusing the application are finely balanced, the court should evaluate the merits of the proposed appeal in coming to a decision.26

43 The appellant must file a skeleton argument with his appellant’s notice. Where this is not practicable it must be filed and served within 14 days.27

Respondents

44 Once a respondent has been served with an appellant’s notice, he is of course on notice that an appeal is on foot. CPR 52.5 gives the respondent permission to file and serve a respondent’s notice if he so wishes. Where however the respondent himself wishes to (a) seek permission to appeal from the appeal court or (b) wishes the appeal court to uphold the order of the lower court for different reasons from or additional ones to those given by the lower court, he must serve a respondent's notice.

45 The notice must be filed within 14 days of the date that the respondent is served with the appellant’s notice where permission to appeal has been given (whether by the lower or appeal court), or 14 days from the date the respondent is served with notification that the application for permission to appeal and the appeal itself are to be heard together.28 There is no obligation on the respondent to file a respondent’s notice before the appellant is granted permission.

46 In appeals to the Court of Appeal however, pursuant to section 15.6 of the practice direction to CPR 52, the respondent must, within 21 days of receiving notification that permission has been granted (or the permission and

26 Sayers v Clarke Walker [2002] EWCA Civ 645
27 Section 5.9 of the practice direction to CPR 52.
28 CPR 52.5(5)
Where a respondent wishes to extend time for filing of the respondent’s notice, this must be requested in the notice, with reasons.29

Where a respondent files a respondent’s notice, and wishes to address arguments to the court, he must file a skeleton argument with the notice. Alternatively, he must file and serve the skeleton argument within 14 days of the respondent’s notice.

Where a respondent does not file a respondent’s notice, he must file and serve any skeleton on which he intends to rely 7 days before the appeal hearing.30

Generally speaking respondents should not make submissions at the permission stage – Jolly v Jay [2002] EWCA Civ 277. If the respondent does wish to file submissions at this stage, they should only go to (a) whether the appeal would meet the relevant threshold or test, or (b) to remedy a material inaccuracy in the papers before the court.

A respondent who does provide submissions (either written or oral) is unlikely to recover their costs of so doing, unless their attendance or presence was specifically requested by the court.31

It is really only sensible for a respondent to engage in the process at the permission stage if they (i) want conditions attached or (ii) if the application or appellant’s notice or skeleton is misleading.

29 Section 7.5 practice direction to CPR 52
30 Section 7.7 practice direction to CPR 52
31 Section 4.22 of the practice direction to CPR 52
It is open to a respondent who was not present at a hearing where permission was given to set aside permission when granted. The court will only accede to such an application where there is a ‘compelling reason for doing so’. However the Court of Appeal in Nathan v Smilovitch [2002] EWCA Civ 759 warned against making applications of this nature on the basis that it was a waste of the court’s resources to consider the substance of an appeal between permission and the substantive hearing.

As to what amounts to a compelling reason, it has been suggested that this may arise where the court has been misled and so the court’s process abused, alternatively where some statute or decisive authority has been overlooked. The authority and statute must however be plainly and unarguably decisive of the issue – Barings Bank (in liquidation) v Coopers & Lybrand [2002] EWCA Civ 1155.

CPR 52.9 also enables the court to place conditions on a previously unconditional permission to appeal. Again there must be a compelling reason so to do. Examples of where the court has imposed conditions in this way are:

(i) Hammond Suddards v Agrichem International Holdings Ltd [2001] EWCA Civ 2065 in which the Court of Appeal required the appellant defendant to pay into court the amount of the judgment debt plus costs as a condition of proceeding with its appeal. The defendant appellant was a foreign limited company which appeared to have ample assets overseas but was unlikely to honour the original judgment if the appeal failed.

(ii) Bell Electric Ltd v Aweco Appliance System [2002] EWCA Civ 150 in which the Court of Appeal required the defendant appellant to give security for the judgment sum as a condition of the appeal, even though there would have been no insuperable difficulty enforcing the

32 CPR 52.9
judgment debt. This was because the defendant appellant had deliberately breached an earlier order to pay the judgment sum.

Documents

Any supplemental skeleton arguments on which the appellant wishes to rely must be filed at least 14 days prior to the hearing. The respondent’s supplementary skeleton must be filed at least 7 days prior to the hearing. 33

Section 15 of the practice direction to CPR 52 sets out the documents that must be before the court, and when these are to be filed. This was explained by the Court of Appeal in the case of Scribes West v Relsa Anstalt [2004] 4 All ER 653.

Parties should be aware of section 15.11 of the practice direction to CPR 52 which sets out the way in which bundles of authorities should be provided to the court. This should be limited to 10 authorities to be filed 7 days before the hearing.

Taking new points on appeal

General guidance was given by the Court of Appeal in Jones v MBNA at paragraph 38:

*It is not in dispute that to withdraw a concession or take a point not argued in the lower court requires the leave of this court. In general the court expects each party to advance his whole case at the trial. In the interests of fairness to the other party this court should be slow to allow new points, which were available to be taken at the trial but were not taken, to be advanced for the first time in this court. That consideration is the weightier if further evidence might have been adduced at the trial, had the point been taken then, or if the decision on the point requires an evaluation of all the evidence and could be affected by the impression which the trial judge receives from seeing and hearing the witnesses. Indeed it is hard to see how, if those circumstances obtained, this court, having regard to the overriding objective of dealing with cases justly, could allow that new point to be taken.*

33 Paragraph 15.11A of the practice direction to CPR 52
Generally speaking therefore an appeal court on a review will not allow a party to argue a factual point unexplored in evidence below. However the attitudes to new purely legal points seem to vary:

(i) *Connecticut Fire Ins* 1892 AC 473 provides that the usual approach is to let in new law but not any point requiring any new facts or evidence:

> "When a question of law is raised for the first time in a court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea."

(ii) *Connecticut Fire* case was followed by the Court of Appeal in *DnB Mortgages v Bullock & Lees*, Times 24/3/2000 where the court excluded the appellant from bringing a new factual point.

(iii) *Pittalis v Grant* [1989] QB 605 – It was held in this case that the Court of Appeal should generally allow new points of law. Although this case was decided before the CPR came into force, the CPR impact on appeals has been to bring appeals from District Judges and Masters into line with the established approach to appeals from judges to the Court of Appeal (*Tanfern*). Accordingly it is certainly arguable that *Pittalis* is still authoritative.

(iv) In *Jones v MBNA* 30.6.2000 unreported, the Court of Appeal refused permission to the appellant to raise new points on appeal that were not argued in the court at first instance on the basis that (a) had the appellants case been put that way at first instance, the respondent may well have put their case differently; (b) the way in which the case was being put at appeal stage required further findings of fact to be made; and (c) there had been no impediment to taking these new points at first instance.

(v) *Schmidt v Wong* 2006 1 WLR 561 is a case in which the Court of Appeal held that they would have refused permission to appeal on new grounds not raised at first instance on the basis that it was simply...
impossible to say a judge was ‘wrong’ on a point where that point was not taken before him.

61 Thus new points that require findings remain shut out, unless the appellant can get past the *Ladd v Marshall* criteria set out below. On pure law however the point may be allowed, but it is in the discretion of the appeal court, and the discretion to allow the point is not as freely exercised as it was in pre CPR cases like *Connecticut Fire & Pittalis*.

**Evidence on appeal**

62 An appeal court will not receive oral evidence or evidence that was not before the lower court unless the appeal court orders otherwise.\(^{34}\)

63 Prior to the CPR, the rules set out in the case of *Ladd v Marshall* [1954] 1 WLR 1489 were applied to decisions of this kind. These were that:

(i) The evidence could not have been obtained with reasonable diligence for use at the trial.

(ii) The evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive.

(iii) The evidence must be such as is presumably to be believed; it must be credible, though not incontrovertible.

64 These were approved as being relevant principles (not rules) post CPR in the Court of Appeal case *Hertfordshire Investments Ltd v Bubb* [2000] 1WLR 2318. Clearly the court must also apply the Overriding objective. This shows the courts moving to a slightly more flexible approach to evidence post CPR.

65 Generally speaking however it is difficult to obtain permission to rely on evidence before the appeal court that was not before the court at first instance.

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\(^{34}\) CPR 52.11(2)
This means that it is crucial to prepare the cases with appropriate care at first instance. Failures to obtain relevant evidence can rarely be remedied at the appeal stage.

Perhaps one notable exception to this is where cases are going forward on the basis that they are test cases. This does not fit easily with the *Ladd v Marshall* principles. It was said in a case management decision of the Court of Appeal in the *Garrett* case [2005] EWCA Civ 1621 that new evidence could in principle be adduced in that case, where its purpose was to educate the court.

It is interesting to note the way in which the Court of Appeal dealt with this issue in the case of *Sarwar v Alam* [2001] EWCA Civ 1401. Permission had been given to a number of parties to intervene before the Court of Appeal, there was therefore a lot of evidence before the appeal court that had not been available at first instance. It is clear in reading the judgment that the Court of Appeal were content to receive much of the evidence by way of submission through counsel, rather than formal witness statement. Brooke LJ was Vice-President of the CA at the time (he has just retired). He was concerned that CA judgments on costs, particularly the Access to Justice Act, should be practical and take into account as far as possible the impact the decision would have on the profession. Accordingly a more relaxed approach to fresh evidence was adopted in *Sarwar*. It is unlikely that this stance would be adopted by courts below the Court of Appeal.

The appropriate time in which to seek permission to rely on new evidence in an appeal is not clear. In the December 2005 *Garrett* case, the Court of Appeal refused to make a case management decision about evidence. They considered it appropriate to leave the matter to the discretion of the Court hearing the appeal, on the basis that ‘the Court of Appeal hearing the appeal at which there is an application to adduce fresh evidence should not have its hands tied by any preliminary decision of the court at a case management
As experience shows, it is only when the issues on appeal have been properly explored, with the help of proper preparation for the appeal and argument before the court, that these issues can be seen for their full worth.'

**Outcome of an appeal**

Generally speaking the appeal court will determine the matter in issue for themselves, rather than sending the matter back to the Judge at first instance for another decision, thus avoiding incurring further costs.35

**Procedure – costs officer appeals**

*Decisions of Authorised Costs Officers*

An authorised costs officer means an officer of a county court, a district registry, the Principal Registry of the family division or of the SCCO.36

An authorised costs officer is authorised to assess bills of up to £30,00. Principal officers can assess bills with a value of up to £75,000. There are in fact no authorised costs officers outside the SCCO.

From a decision of a costs officer in a High Court case there is a right of appeal (no permission to appeal is needed) to a Costs Judge with a further appeal (for which permission is required) to a High Court Judge. This is governed not by CPR 52 but CPR 47.20.

The appellant must file an appeal notice within 14 days of the date the decision was made. Although the appeal is a complete re-hearing of the decision that is under appeal the court will still want a note of the decision that is being re-heard. The court will only re-hear the decisions set out in the

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35 *MacDonald v Taree Holdings Ltd* The Times December 28 2000
36 See CPR 43.2(1)(d).
appellant’s notice. They will not open up all the other decisions made by the authorised costs officer in the detailed assessment. Accordingly the appeal notice must identify precisely which parts of the costs officer’s decision he wishes to appeal against.

**Conclusions**

74 It is important to consider the context in which the order you seek to appeal was made:

(i) Even in a case in which the Judge has given insufficient reasons, appeals from orders for costs where the court is exercising its discretion as to where the costs should fall, are notoriously difficult to sustain.\(^{37}\) It was said by the court of appeal in *English v Emery Reimbold* at paragraph 30 that the ‘appellate court will seldom be as well placed as the trial judge to exercise a discretion in relation to costs.’

(ii) The same can be said of the quantum decisions made by the trial/applications judge on a summary assessment. The appeal court will give more weight to a decision by a judge who heard the substantive matter that gives rise to the costs order. He is after all in the best position to decide whether a particular item was reasonable or not.

(iii) Where however the Judge has applied the wrong test, or there is a point of principle or construction, then an appeal may have more chance of success.

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\(^{37}\) *Burchel v Bullard* [2005] BLR 330 at paragraph 25