

Proposed Changes to Civil Appeal Rules

Proposals to

- restrict oral renewal of permission to appeal applications in the Court of Appeal and
- limit costs in appeals and transfers from the small claims track

Consultation Paper

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This consultation will end on 02/12/2005

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Executive summary

This consultation sets out proposals for reform of the rules in two areas; permission to appeal applications to the Court of Appeal and costs in small claims appeals or where a claim apparently appropriate to the small claims track is allocated initially or re-allocated to another track.

1. Restriction of Renewal of Oral Permission Applications

The first proposal relates to the Court of Appeal. Permission is currently required for most types of civil appeal. The present rule on applying for permission to appeal makes provision for an application to be made at the hearing where the decision to be appealed was made (the lower court). If the lower court refuses permission, a written application may be made to the appeal court. Where the appeal court refuses permission to appeal, the applicant may request that the decision be reconsidered at a hearing.

Court of Appeal judges are concerned that many of the applications they receive, seeking to renew permission to appeal are hopeless (i.e. totally without merit). They consider the renewal of such applications to an oral hearing to be a disproportionate use of resources better directed at dealing with meritorious applications. Moreover, the opportunity to renew a hopeless application maintains for such applicants unrealistic expectations about the outcome and leads to potentially pointless and wasteful increased costs for both parties. It also causes uncertainty for the respondent by needlessly postponing the final resolution of the case.

This paper proposes to add the ability to refuse permission to appeal and to order that there be no right to an oral hearing in cases that are dismissed as totally without merit to the powers available to Court of Appeal judges. This would be in addition to the current options of granting permission or adjourning directly to an oral hearing and of refusing permission while preserving the right to an oral hearing.

The proposal is designed to produce savings in time and costs for applicants, defendants and the courts. It will enable resources to be concentrated on meritorious cases, while providing certainty for respondents at an earlier stage. Recent independent academic research has shown that Court of Appeal judges

were very successful in identifying applications that were totally without merit at the written stage.

2. Limitation of costs in appeals and transfers from the small claims track

The second proposal concerns costs in small claim appeals and cases allocated or re-allocated to another track, despite being within the financial limit for the small claims track. This is usually done because the case is considered too complex for the small claims track. At present, unless a party behaves unreasonably, liability to pay another party's costs in the small claims track is limited principally to court fees and witness expenses. However, this restriction does not apply on appeal where liability for costs is potentially unlimited. The same potential difficulty arises when the claim is transferred to the fast track (where fixed costs apply) or the multi-track (where costs are unlimited). In those circumstances the costs of the higher track will apply. This open exposure to costs is a potential disincentive to bringing or pursuing a claim, particularly where a litigant brings an action against a large corporation, which is legally represented, and whose eventual costs might exceed the value of the claim. This is incompatible with the overall concept of the small claims track, which is designed to provide a simple and informal way of resolving disputes; nor is it likely to be proportionate. For that reason it is proposed that a costs cap be imposed on appeals from small claims.

Three alternatives are proposed:

1. No change;
2. A cap of £1,000 on costs between parties;
3. That the rules, which currently apply in small claims (as referred to above) should also apply to appeals from small claims.

A similar but not identical situation arises where a case which is thought to be a small claim is allocated or re-allocated to another track. Two alternatives are proposed:

1. No change;
2. That the rules, which currently apply in small claims (as referred to above), should also apply to claims which are within the small claims financial limits but which are allocated or re-allocated to another track. However, parties should be able to agree, or the court order in the interests of justice, that the fast track or

multi-track costs limits should apply, or that there should be a cap set at a specified amount.

Introduction

This paper sets out for consultation proposals to:

- amend the provisions concerning applications for permission to appeal to the Court of Appeal by giving the court the power to refuse permission to appeal on the papers and, where the application is hopeless, order that there be no right to renew to an oral hearing.
- limit the costs which can be recovered from another party
 - in appeals from decisions on small claims and
 - where cases apparently suitable for the small claims track are initially allocated (or transferred from the small claims track) to the fast track or the multi-track.

The consultation is aimed at legal professionals, businesses, and individuals and advice groups in England and Wales.

This consultation is being conducted in line with the Code of Practice on Consultation issued by the Cabinet Office and falls within the scope of the Code. The Consultation Criteria, which are set out on page 28, have been followed.

The proposals in relation to oral permission in the Court of Appeal are likely to lead to savings for the public sector and for the parties. The proposals on small claims costs limits are likely to prove cost neutral. A Partial Regulatory Impact Assessment is attached at Annex A on page 16. Comments on this Regulatory Impact Assessment are particularly welcome.

Copies of the consultation paper are being sent to:

The Judiciary

The Law Society

The Bar Council

The Institute of Legal Executives

Advice Services Alliance

Citizens Advice

National Consumer Council

The Confederation of British Industry

Small Business Federation

The Institute of Directors

Consumers' Association

Government Departments

Members of the Civil Procedure Rule Committee

However, this list is not meant to be exhaustive or exclusive and responses are welcomed from anyone with an interest in or views on the subject covered by this paper.

The proposals

This paper considers each of the proposals in turn.

First Proposal: to give the Court of Appeal the ability to refuse permission to appeal and the right to renew the application

Background

The current permission to appeal provisions are set out in Part 52, rule 52.3 of the Civil procedure Rules:

- (2) An application for permission to appeal may be made –
- (a) to the lower court at the hearing at which the decision to be appealed was made; or
 - (b) to the appeal court in an appeal notice.
- (3) Where the lower court refuses an application for permission to appeal, a further application for permission to appeal may be made to the appeal court.
- (4) Where the appeal court, without a hearing, refuses permission to appeal, the person seeking permission may request the decision to be reconsidered at a hearing.

Applications for permission to appeal which are renewed orally and that are totally without merit (i.e. hopeless):

- are wasteful of both the litigants and the court's resources;
- may maintain an applicant's unrealistic expectations of the outcome; and
- create uncertainty for the respondent because finality in the case is postponed.

The Court of Appeal judiciary has been concerned about this issue for some time, for the reasons described. Furthermore, the resources employed to deal with these cases would be better used in dealing with meritorious applications. The applications fall into two main categories:

- those in which an application is refused on paper and renewed to an oral hearing; and
- those which are fast-tracked to an oral hearing because experience has shown that the likelihood is they would renew if dealt with on paper.

Independent Research and Shadow Exercise

In order to establish whether the proposal to restrict access to an oral hearing in some cases might result in meritorious applications being denied permission, a shadow exercise was conducted for the term beginning January 2004 by Professor Hazel Genn, an independent researcher from University College London. A copy of the paper is included with all hard copies of this paper sent to consultees and is also available on the Court of Appeal website at www.hmcourts-service.gov.uk/cms/files/PTAFinalReportMarch20051.pdf

All non-family applications for permission to appeal were sent to a Court of Appeal Judge for consideration on paper with, in addition to the normal paperwork, a form asking 'Do you consider this application to be totally devoid of merit?' The cases designated as totally devoid of merit (TDM) were not listed again before the judge who had made that initial assessment. Where the applicant made a subsequent request for a permission refusal to be reconsidered at an oral hearing the judge hearing the oral application was not aware of the preliminary assessment. The judge hearing the oral application was also asked to assess whether the case was TDM.

In the course of the exercise judges completed 497 assessments relating to 385 cases. Of the 497 assessments 372 were made following a paper assessment and 125 after oral hearings. The most relevant assessments were those made at an oral hearing in cases where an assessment had already been made on paper because these would indicate whether an oral hearing would be likely to result in a different outcome. There were 112 cases in this category. A comparison between evaluations on paper and oral hearings showed a high degree of consistency. In just under a third of cases both the judge at the paper permission application and the judge at the oral permission hearing judged the case to be TDM. In over a third of cases both assessments judged the case not to be TDM. In 17% of cases there was a discrepancy that would have worked in favour of the applicant i.e. not TDM on paper but TDM at the subsequent oral hearing. In 15% of cases there was a discrepancy that might have worked against the applicant i.e. TDM on paper but not at the subsequent oral hearing.

The discrepancy of most concern is where the initial assessment of TDM is not subsequently borne out at the hearing because in these cases there would be no right to renew. There were seventeen such cases. However, closer examination of the data shows that although none were designated TDM at the oral hearing only seven were actually granted permission to appeal. Of the seven cases four were dismissed following the substantive appeal hearing, two settled prior to the hearing and one was allowed in part following a substantive hearing. Thus of the 112 cases analysed where an independent second assessment was available, only three would have suffered any disadvantage had the proposed rule change been in force. This represents fewer than 3% of the 112 cases analysed and in practice only one of these involved a substantive judicial decision.

The report concluded that the

‘level of discrepancy and potential substantive disadvantage to appellants revealed by the shadow exercise is both small absolutely and as a proportion of decisions made’.

It goes on to say that whether such a discrepancy is acceptable or unacceptable in policy terms will be a matter for discussion but notes two principles. The first is that within the common law system

‘some degree of inconsistency is regarded as both inevitable and legitimate’.

The second is that

‘inherent in current policy on the administration of justice is an acknowledgement that the principles of proportionality and cost effectiveness may result in an occasional injustice’.

Hazel Genn’s conclusion, based on the outcome of the shadow exercise, is that the risk of injustice in a move to paper permission to appeal applications

‘appears to be small if not negligible, particularly in relation to litigants in person’. This small risk should be weighed against the potential gains to the system of releasing judicial time and sparing parties the cost of attending oral PTA hearings’.

Amendment to the Rule

It is proposed that rule 52.3(4) be amended as follows:

To provide the Court of Appeal with four options in respect of permission to appeal applications:

- (a) grant permission – whether on all grounds or some;
- (b) refuse permission but preserve the right to an oral renewal;
- (c) adjourn to an oral hearing – with or without notice;
- (d) refuse permission and order that there be no right to renew to an oral hearing.

The proposed change will only apply to the Court of Appeal at this stage because the problem was originally identified there, and the available research looks at the problem in that context. It is also considered that the small and permanent judiciary within that court will be able to guarantee a level of consistent application of this proposal. No decision has yet been taken as to whether it would be desirable to extend the principle to other appellate courts. This will depend not only on the outcome of any introduction in the Court of Appeal but also on whether a particular problem is evident in other appellate courts and whether consistency in exercising the restriction can be ensured.

Question 1: Do you agree that the Court of Appeal should have the option to refuse permission to appeal on the papers and order that there be no right to renew to an oral hearing in hopeless cases, in addition to the existing options?

Question 1a: If no please explain your objection to the proposal?

Second Proposal: to limit costs on small claims appeals and where small claims are allocated or re-allocated to other tracks

Background

The small claims track was introduced in 1999 with the intention of creating a procedure for dealing proportionately with claims of a relatively low value. It replaced the small claims court arbitration scheme that had existed for low value claims prior to the introduction of the Civil Procedure Rules. It was designed for claims of up to £5,000 (£1,000 for personal injury and £1,000 for damages in

housing disrepair cases). However, provision is included within the rules to deal with claims of higher value with the agreement of the parties or to transfer claims within the £5,000 limit to higher tracks if they are likely to prove too complex or lengthy for the small claims track.

Small claims track costs recovery is limited principally to court fees and witness expenses. In applications for an injunction or specific performance (such as an application for an order that a landlord carry out repairs) the court also has discretion to award up to £260 to cover the obtaining of legal advice. A party incurring other legal costs, for example in respect of legal advice or representation, is required to bear those costs himself unless the other party can be shown to have behaved unreasonably. The Part 27 costs provisions are set out in Annex A.

However, on appeal a party may be liable to the other party's costs, which may be assessed according to the summary procedure. (Summary procedure is where the court, when making an order about costs, orders payment of a sum of money instead of fixed costs or 'detailed assessment' by a costs officer). There is no explicit limit to these costs although the overriding objective will apply to any assessment (i.e. the court should deal with cases justly which includes saving expense and dealing with the case in a way which is proportionate to the amount of money involved).

A similar difficulty may arise when a case, which falls within the financial limits for the small claims track, is allocated or re-allocated to another track. Transfer to the fast track exposes litigants to the fixed costs regime in that track and transfer to the multi-track would potentially expose them to unlimited costs. A litigant who makes what he presumes to be a small claim may not necessarily be aware that the allocation to another track exposes him to a different costs regime. Even where he is aware of this there is little he can do, save to discontinue the claim which would still leave him, as the party who discontinued the claim, liable for costs up until that point.

Proposals for change

The small claims track exists to facilitate access to the courts for small simple money claims. The majority of litigants tend to be unrepresented. The lack of any limit on appeal costs is not only at odds with the provisions at first instance but is also potentially disproportionate. It has the potential to deter unrepresented small claimants. They may fear that a wealthy defendant (such as a store group for example) with whom they would be on relatively equal terms at the initial hearing might appeal an adverse judgment with a view to deterring the applicant from

pursuing the appeal. The threat of potentially unlimited costs on appeal might persuade a claimant not to appeal, to fail to resist an appeal or even dissuade them from bringing the initial claim.

It is therefore proposed that a limit be placed on costs payable on appeal from a small claims track decision. Views are sought on three potential options:

- No change
- A cap of £1,000 on all costs between parties.
- The costs rules in Part 27 which apply to claims should apply to appeals also (i.e. only witness expenses and court fees in most cases). It is proposed however that costs may be ordered (as in Part 27) where a party behaves unreasonably or where the appeal, on being heard at a substantive hearing, turns out to be without merit.

The purpose of this last qualification is to prevent the appeals process being abused to merely prolong proceedings in hopeless cases.

Question 2: Do you agree that appeals from the small claims track should be subject to a limit on costs? If not why not?

Question 2a: If you answered yes to the above question please specify which of the above options you prefer?

Question 3: If you agree that small claims appeals should have a cost limit but do not agree with either of the above options what do you believe the limit should be? Please give reasons.

In cases where a small claim is allocated or re-allocated to another track it could lead to either the abandonment of the claim or the unsuccessful party ending up with costs that significantly exceed the value of the claim. It is proposed that the small claims costs limits should apply. However, because cases that begin as small claims but which are allocated to another track are usually by definition more complex than cases which are dealt with in the small claims track it may not always be appropriate to apply Part 27 costs. For that reason it is proposed that the court should have discretion to order that normal fast track or multi-track costs should apply if that is in the interests of justice. Similarly it is proposed that the parties should be able to agree to fast track or multi-track costs if they consider that is appropriate in the context of the issues at stake. Because of the flexibility this approach would provide, for appropriate cases, it is not considered that it is

necessary to have the separate option of a monetary cap similar to the one of £1,000 suggested for small claims appeals. However, it is of course open to respondents who disagree with the proposed approach to suggest alternative approaches including a monetary cap.

Question 4: Do you agree that small claims which are allocated or re-allocated to another track should have their costs limited to those available under Part 27 unless the court orders or the parties agree otherwise? If you disagree please give reasons.

Questionnaire

We would welcome responses to the following questions set out in this consultation paper.

Question 1: Do you agree that the Court of Appeal should have the option to refuse permission to appeal on the papers and order that there be no right to renew to an oral hearing, in addition to the existing options?

Question 1a: If you answered no to the above question what are the reasons for your objection to the proposal?

Question 2: Do you agree that appeals from the small claims track should be subject to a limit on costs? If not why not?

Question 2a: If you answered yes to the above question please specify which of the above options you prefer?

Question 3: If you agree that small claims appeals should have a cost limit but do not agree with either of the above options what do you believe the limit should be? Please give reasons.

Question 4: Do you agree that small claims which are allocated or re-allocated to another track should have their costs limited to those available under Part 27 unless the court orders or the parties agree otherwise? If you disagree please give reasons.

Thank you for participating in this consultation exercise

About you

Please use this section to tell us about yourself

Full name	
Job title or capacity in which you are responding to this consultation exercise (eg. member of the public etc.)	
Date	
Company name/organisation (if applicable):	
Address	
Postcode	
If you would like us to acknowledge receipt of your, please tick this box	<input type="checkbox"/> (please tick box)
Address to which the acknowledgement should be sent, if different from above	

If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.

How to respond

Please send your response by 2 December 2005 to:

Steven Uttley
HM Court Service, Department for Constitutional Affairs
Civil and Family Procedures Branch
1st Floor Southside
105 Victoria Street
London
SW1E 6QT

Tel: 020 7210 1567

Email: Steve.Uttley@HMCOURTS-SERVICE.gsi.gov.uk

Extra copies

Further paper copies of this consultation can be obtained from this address and it is also available on-line at <http://www.dca.gov.uk/index.htm>

Publication of response

A paper summarising the responses to this consultation will be published in [insert publication date, which as far as possible should be within three months of the closing date of the consultation] months time. The response paper will be available on-line at <http://www.dca.gov.uk/index.htm>

Representative groups

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

Confidentiality

Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want other information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the DCA.

The Department will process your personal data in accordance with the DPA and in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.

Annex A

27.14 Costs on the small claims track

(1) This rule applies to any case which has been allocated to the small claims track unless paragraph (5) applies.

(Rules 44.9 and 44.11 make provision in relation to orders for costs made before a claim has been allocated to the small claims track)

(2) The court may not order a party to pay a sum to another party in respect of that other party's costs except –

(a) the fixed costs attributable to issuing the claim which –

(i) are payable under Part 45; or

(ii) would be payable under Part 45 if that Part applied to the claim;

(b) in proceedings which included a claim for an injunction^(GL) or an order for specific performance a sum not exceeding the amount specified in the relevant practice direction for

legal advice and assistance relating to that claim;

(c) costs assessed by the summary procedure in relation to an appeal and

(d) such further costs as the court may assess by the summary procedure and order to be paid by a party who has behaved unreasonably.

(3) The court may also order a party to pay all or part of –

(a) any court fees paid by another party;

(b) expenses which a party or witness has reasonably incurred in travelling to and from a hearing or in staying away from home for the purposes of attending a hearing;

(c) a sum not exceeding the amount specified in the relevant practice direction for any loss of earnings by a party or witness due to attending a hearing or to staying away from home for the purpose of attending a hearing; and

(d) a sum not exceeding the amount specified in the relevant practice direction for an expert's fees.

(4) The limits on costs imposed by this rule also apply to any fee or reward for acting on behalf of a party to the proceedings charged by a person exercising a right of audience by virtue of an order under section 11 of the Courts and Legal Services Act 1990¹ (a lay representative).

(5) Where –

(a) the financial value of a claim exceeds the limit for the small claims track; but

(b) the claim has been allocated to the small claims track in accordance with rule 26.7(3), the claim shall be treated, for the purposes of costs, as if it were proceeding on the fast track except that trial costs shall be in the discretion of the court and shall not exceed the amount set out for the value of the claim in rule 46.2 (amount of fast track trial costs).

(Rule 26.7(3) allows the parties to consent to a claim being allocated to a track where the financial value of the claim exceeds the limit for that track)

27.15 Claim re-allocated from the small claims track to another track

Where a claim is allocated to the small claims track and subsequently re-allocated to another track, rule 27.14 (costs on the small claims track) will cease to apply after the claim has been

re-allocated and the fast track or multi-track costs rules will apply from the date of reallocation.

Partial Regulatory Impact Assessment – Restriction of oral renewal of permission applications

1. Title of proposal

A proposal to restrict oral renewal of permission applications in the Court of Appeal (Civil Procedure Rule 52.3(4))

2. Purpose and intended effect

Objectives –

To enable the Court of Appeal to deal proportionately and appropriately with appeals that are deemed totally without merit; to have due regard for saving expense and for allotting to such cases an appropriate share of of the Court's resources.

Background

At present a person wishing to appeal must apply for permission (except in certain specified cases) either orally to the court giving judgment or in writing to the appeal court. If a written application to the appeal is unsuccessful the person can ask for his application for permission to appeal to be heard orally. The Court of Appeal is concerned that a significant proportion of applications for permission to appeal are totally without merit. These are applications which are refused but which go on to be renewed, only to be refused again. In such cases the applications may:

- involve significant work and costs for the litigants;
- perpetuate applicants' unrealistic expectations of success;
- defer a final judgment, leaving the respondent uncertain as to the outcome; and
- tie up the Court's time inappropriately.

The Court of Appeal consider this process to be inconsistent with the overriding objective of dealing with a case justly, which includes having due regard for saving expense; dealing with cases proportionately and expeditiously; and allotting to it an appropriate share of the court's resources. At present the Court of Appeal has

the power to allow or dismiss the application to appeal at both the written and oral stages or to adjourn for an oral hearing. It wishes to have the additional power to dismiss a written application to appeal where it is found to be hopeless and to remove the right in such cases to renew the application by way of an oral hearing.

In order to avoid seeking changes without evidence to support their contention, the Court of Appeal commissioned independent research by Professor Hazel Genn. A copy of the research is available on the Court of Appeal website at the following address www.hmcourts-service.gov.uk/cms/files/PTAFinalReportMarch20051.pdf The research involved cases being determined in the normal way, but with the Lord Justice, who dealt with the initial application, invited to assess whether the case was 'totally devoid of merit' (TDM). The cases designated as TDM were not listed again before the judge who made that assessment.

Potential risk identified:

Where the applicant made a subsequent request for permission to be reconsidered at an oral hearing the judge hearing the oral application was not aware of the preliminary assessment. The judge hearing the oral application was also asked to assess whether the case was TDM. The research found that the potential risk of unjustly barring further appeal appeared to be small if not negligible. This small risk must be weighed against the potential gains to the system of releasing judicial time and sparing parties the cost of attending oral hearings. The common law system has always had some degree of inconsistency in judicial decision-making which has been regarded as both inevitable and legitimate. Similarly the principles of proportionality and cost effectiveness may result in an occasional injustice.

Measure to reduce identified risk:

It is to restrict the scope for injustice that this proposal is limited to applications to appeal to the Court of Appeal where the judiciary is senior, experienced and can ensure a commonality of approach, whilst maintaining judicial independence.

The same potential pitfall exists where a claimant commences what he expects to be a small claim, with the cost protection afforded by that track, but the claim is then allocated or subsequently re-allocated to a higher track where costs are usually higher. Small claims may sometimes be allocated to the multi-track where costs are potentially unlimited.

It is proposed to invite comments on various proposals to limit litigants' exposure to costs in these scenarios.

Rationale for government intervention

The Civil Procedure Rules can only be changed by statutory instrument. Therefore the involvement of the Government and the Civil Procedure Rules Committee (a non-departmental statutory public body) is required if the existing rule is to be changed. Without intervention there will continue to be a high number of permission applications coming before the Court of Appeal that are totally without merit, each one will be entitled to an oral permission hearing if refused permission on paper. In the period covered by the above study 112 cases were identified as totally without merit at the paper stage and again on renewal to an oral hearing. If these cases were prevented from going further at the written stage it would represent a significant reduction in the number of oral hearings which are conducted unnecessarily. Each oral hearing consumes at least one hour of a Court of Appeal Judge's time.

Consultation

The Judiciary

The Law Society

The Bar Council

The Institute of Legal Executives

Advice Services Alliance

Citizens Advice

National Consumer Council

The Confederation of British Industry

Small Business Federation

The Institute of Directors

Consumers Association

Government Departments

Members of the Civil Procedure Rule Committee

Options

Option 1 – No change This would not fulfil the objective of enabling the Court to deal proportionately with permission to appeal applications that are totally without merit and the situation would continue as now. For written applications to the Court of Appeal those litigants with hopeless cases would be allowed to renew their application orally involving them in time, cost and stress when their case is totally without merit. The other party to the case would be left with uncertainty until such time as the decision on the permission application was decided. The Court of Appeal would be spending time on unmeritorious applications for oral renewal, which could be used more effectively on other cases.

Option 2 – Barring oral renewal of applications to appeal in hopeless cases. Initial applications for permission to appeal to the Court of Appeal would continue as now and would be allowed, dismissed or adjourned for an oral hearing. Only where an application was made in writing to the Court of Appeal and was hopeless would the Court use the additional power to dismiss the application and refuse leave to orally renew the application. The litigant's rights are safeguarded especially as this provision will be limited to the Court of Appeal. In addition fruitless, costly, unnecessary and stressful renewal applications would be prevented. The other party would know with certainty the outcome of the case and the Court would have dealt with the case justly and proportionately. The time of the senior judiciary would also be used more effectively.

Costs and benefits

Sectors and groups affected

Applicants for permission to appeal to the Court of Appeal will be affected if their written application to appeal is totally without merit. This may include businesses (large and small), insurers, the legal profession, the judiciary, government, litigants in person and voluntary organisations. The above research was undertaken to ensure that the proposed change would not have a negative impact either on

litigants generally or on any particular group. This found that in terms of case outcomes, the proposed change is unlikely to produce different results; applicants will, however, avoid exposure to the additional costs, time and stress associated with renewing applications. In addition, the other party will know with certainty the outcome of the application at an earlier stage. Any time released for the legal profession by a reduction in the number of oral permission renewals would allow them to concentrate resources on more meritorious cases or to take on additional cases.

Benefits

In the light of the research outlined above, the outcome for the applicant for permission to appeal should not change. However there will be less time and money spent in fruitlessly pursuing a hopeless case and they will have a clear early decision which may give them closure. For the other party there will be a quicker outcome and an end to their potential exposure to further costs etc. For the Court of Appeal and Her Majesty's Courts Service justice will have been delivered in a way which is just and proportionate to the case with a consequential saving of time and money. For the legal profession there is potential to pursue other more productive and potentially higher value work.

Costs

Her Majesty's Courts Service does not have detailed information about the costs incurred by claimants or defendants in bringing an application for permission to appeal to the Court of Appeal. HMCS would welcome information from consultees about the likely costs.

Small Firms Impact Test

Small firms are likely to be affected in much the same way as other litigants by the proposal. However, we do not believe the proposal is likely to have a significant negative impact on small businesses. The measure is intended to deal with cases justly, proportionately and to give litigants a degree of certainty about their exposure to additional costs. Through this consultation we are conducting soundings with small business representative organisations to ascertain their views on whether they believe their members may be significantly negatively affected by the proposals.

Should any negative impact or unintended consequences on small firms be identified during these soundings, we will conduct further research with small businesses. We have consulted the Small Business Service who accept this approach.

Competition assessment

The proposal should not impact on competition.

Monitoring

Feedback will be requested from the judiciary and the Court of Appeal office on whether the measure has resulted in resource savings by reducing the number of totally without merit permission applications that go on to an oral hearing. Consideration will be given to undertaking further research to monitor the effects of any changes introduced

Partial Regulatory Impact Assessment – Costs in Small Claims appeals and on allocation to higher tracks

Title of proposal

A review of costs in small claims appeals and the allocation of small claims to higher tracks (Civil Procedure Rule 27.14).

Purpose and intended effect

Objectives -

To limit litigants' exposure to costs in

- appeals from a decision in a small claims court or
- where a claim which falls within the financial limits for the small claims track is initially allocated or reallocated to a higher track.

Background

Low value¹ defended claims in England and Wales are normally allocated to the small claims track which is designed to provide a quick, relatively informal system for resolving civil disputes with limited exposure to costs. However, on appeal, there is no current limit on exposure to costs. Litigants are not always aware of their potential liability to costs in these circumstances and may face considerable bills especially e.g. where the party representing themselves loses and becomes liable not only for the amount awarded, but also for the other party's costs including legal fees etc.

The same potential pitfall exists where a claimant commences what he expects to be a small claim, with the cost protection afforded by that track, but the claim is

¹ For most claims the limit is not more than £5,000. For housing disrepair the limit is not more than £1,000 for the disrepair and £1,000 for damages. For personal injury cases the limit is not more than £1,000. Complex cases may be transferred to the fast track or multi track.

then allocated or subsequently re-allocated to a higher track where costs are usually higher. Small claims may sometimes be allocated to the multi-track where costs are potentially unlimited.

It is proposed to invite comments on various proposals to limit litigants' exposure to costs in these scenarios.

Rationale for government intervention

The Civil Procedure Rules can only be changed by statutory instrument. Therefore the involvement of the Government and the Civil Procedure Rules Committee (a non-departmental statutory public body) is required if the existing rule is to be changed. Without intervention the potential for small claimants to incur disproportionate costs on appeal or transfer to another track will remain. This may deter small claimants from bringing an appeal or even from making a claim. It may also lead to a appeal being conceded, even where the case is strong, to try and avoid potential costs. Alternatively some litigants may incur costs without being aware that on appeal from a small claim or transfer to a higher track they no longer enjoy the costs protection of the small claims track.

Consultation

The Judiciary

The Law Society

The Bar Council

The Institute of Legal Executives

Advice Services Alliance

Citizens Advice

National Consumer Council

The Confederation of British Industry

Small Business Federation

The Institute of Directors

Consumers Association

Government Departments

Members of the Civil Procedure Rule Committee

Options

Option 1 – No change. The current unlimited exposure to costs would continue. The potential exists for a claim for a few hundred pounds to incur costs far in excess of the value of the claim. This may deter some people from bringing cases in the first place, or from applying for permission to appeal, thereby potentially denying them access to justice.

Option 2 –Applying the same cost regime as applies in the small claims track. In this scenario the existing provisions of rule 27.14 will apply to appeals and to cases transferred to another track (but on transfers the court will have the ability to order that fast or multi-track limits may apply in the interests of justice or parties may agree to higher limits). This protects both parties and yet controls the level of costs. This option potentially may incline some parties not to involve legal professionals in a claim. It may also deter the legal profession from offering conditional fee agreements and insurers from offering after-the- event insurance to such cases. Any reduction in the involvement of solicitors in small claims will not necessarily adversely affect either litigants - who may seek help from legal advice centres or receive pro bono legal advice - or solicitors, as they may take on other cases instead. In addition, many claims are covered by before-the-event insurance, e.g. road traffic accident claims, personal injury claims where a trade union may take up the case and generally involve solicitors, and this is likely to continue.

Option 3 - Imposing an upper cash limit of say £1,000 on appeal costs. This has the advantages of a clear-cut approach. However, for some very low claims e.g. £300 it may seem disproportionate to have such a limit. (Note that court fee exemptions and remissions are available for those who cannot afford the fees or the full fees but there will be other associated costs.) As £1,000 is a significant sum of money for many people, they may not be able to afford it and so it may therefore disadvantage low income or socially excluded groups. On the other

hand, with the proviso that the court would determine the appropriate level of costs and will take proportionality into account, the winner would not only gain the award but also his costs up to the £1,000 limit. This option is not proposed on transfers since the court and parties will have discretion to exceed the Part 27 limits where appropriate.

Costs and benefits

Sectors and groups affected

Both parties will be affected. Under current provisions for both appeals from small claims and allocations to a higher track there is provision for the winner to claim costs from the other party. These proposals to limit costs will reduce the ability of the winning party to recover their costs while at the same time reducing the liability of the losing party by a commensurate amount. Groups affected may include businesses, insurers, the legal profession, the judiciary, government, litigants in person and voluntary organisations. The outcome for litigants is likely to be a case of 'swings and roundabouts': in those cases where they win they will not be able to recover full costs, but conversely where they lose they will not be completely exposed to potentially significant costs. The legal profession may lose some business from this particular measure, but this is likely to be offset by their ability to take on other cases. Overall, unrepresented litigants are likely to gain more from the proposal than they lose, because the amount that they will be unable to claim where they are the winning party will normally be less than their liability for the costs of the other party where the other party is represented.

Benefits

As indicated above, the outcome for litigants is likely to be a case of 'swings and roundabouts': In those cases where they win they will not be able to recover full costs, but conversely where they lose they will not be completely exposed to potentially significant costs. On the other hand they will have greater certainty about their exposure to costs. Any reduction by the legal profession in handling small claims appeals or transfers to another track is likely to be offset by them taking on other cases.

Costs

Her Majesty's Courts Service does not have detailed information about the costs incurred by claimants or defendants in bringing an application to appeal to the Court of Appeal or for small claims appeals. The HMCS would welcome

information from consultees about the likely costs and in particular on cases where litigants' costs have been greater than the value of the original claim.

Small Firms Impact Test

Small firms are likely to be affected in much the same way as other litigants by the proposals. However, we do not believe the proposals are likely to have a significant negative impact on small businesses. They are intended to deal with cases justly, proportionately and to give litigants a degree of certainty about their exposure to additional costs, and to limit their exposure to those costs. Some small firms may face costs for some cases which they do not currently have but this is likely to be offset by not facing or facing limited costs in other cases.

Through this consultation we are conducting soundings with small business representative organisations to ascertain their views on whether they believe their members may be significantly negatively affected by the proposals.

Should any negative impact or unintended consequences on small firms be identified during these soundings, we will conduct further research with small businesses. We have consulted the Small Business Service who accept this approach.

Competition assessment

The proposal should not have an impact on competition.

Monitoring

Consideration will be given to undertaking further research to monitor the effects of any changes introduced.

The Consultation Criteria

The six consultation criteria are as follows:

1. Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.
2. Be clear about what your proposals are, who may be affected, what questions are being asked and the time scale for responses.
3. Ensure that your consultation is clear, concise and widely accessible.
4. Give feedback regarding the responses received and how the consultation process influenced the policy.
5. Monitor your department's effectiveness at consultation, including through the use of a designated consultation co-ordinator.
6. Ensure your consultation follows better regulation best practice, including carrying out a Regulatory Impact Assessment if appropriate.

These criteria must be reproduced within all consultation documents.

Consultation Co-ordinator contact details

If you have any complaints or comments about the consultation **process** rather than about the topic covered by this paper, you should contact the Department for Constitutional Affairs Consultation Co-ordinator, Laurence Fiddler, on 020 7210 2622, or email him at: consultation@dca.gsi.gov.uk

Alternatively, you may wish to write to the address below:

Laurence Fiddler
Consultation Co-ordinator
Department for Constitutional Affairs
5th Floor Selborne House
54-60 Victoria Street
London
SW1E 6QW

If your complaints or comments refer to the topic covered by this paper rather than the consultation process, please direct them to the contact given under **the How to respond** section of this paper at page 17.

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