*LONDON SOLICITORS LITIGATION ASSOCIATION:*
*AUTUMN LECTURES – 26TH NOVEMBER 2012*

# *APPEALS: PRACTICE, RECENT DEVELOPMENTS AND PITFALLS*

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## *PRELIMINARY*

1. A general awareness of the broad requirements for an appeal is a useful thing. A client may raise a question at an early stage; and, further, when the time actually comes you and the client may be either cast down by defeat, or raised up by victory, or otherwise perhaps rather distracted.

2. However, the rules and directions about civil appeals are detailed and elements are frequently amended. So, they should always be checked. If, like some visitors to galleries and museums, you like to leave a talk with one thing in mind, this one is a strong candidate. [P. 1]

## *INTRODUCTION*

3. In broad terms (and ignoring appeals to the Privy Council), there are two regimes for civil appeals.

   (A) CPR Part 52 and its five associated PDs cover civil appeals other than to the Supreme Court. (In relation to appeals in insolvency proceedings, note the qualification at para. 49 below.)

   (B) For civil appeals to the Supreme Court there is a different regime, described in the Supreme Court Rules and Practice Directions. They are set out in the White Book, Vol. 2 Section 4A.

4. I shall concentrate on the former, i.e. Part 52, regime. However, I shall add a few words at the end about the latter, i.e. Supreme Court, regime.

## *(A) PART 52 REGIME*

### *Changes on 1st October 2012*

5. With effect on 1st October 2012, there were some changes to the Part 52 regime.

(i) First, three amendments to CPR Part 52 were made by Rule 8 of the Civil Procedure (Amendment No. 2) Rules 2012 (S.I. 2012 No. 2208 (L.8)).

(a) Rule 52.3(4A) previously provided that, where an application to the Court of Appeal for permission to appeal was refused on paper, the Court could prevent the application being renewed at a hearing if it considered that the application was "totally without merit".

One of the amendments extended Rule 52.3(4A) to the case where an application is made to a High Court Judge (for permission to appeal from a Master or Circuit Judge) or to some Circuit Judges (for permission to appeal from a District Judge).

That amendment is unlikely to be relevant to any of you, save where you are acting for the potential respondent.

(b) A second amendment related to judicial review of decisions of the Upper Tribunal. It introduced Rule 52.15(1A), which provides that where permission to apply for judicial review of such a decision has been refused by the High Court, the applicant may apply to the Court of Appeal for permission to appeal, but that application will be dealt with on paper without an oral hearing.

(c) Third, Rule 52.2 requiring all parties to comply with PD 52, was altered to refer to PDs 52A to 52E.

(ii) That leads on to those five PDs. They replaced PD 52 ("old PD 52") with effect on 1st October 2012; and are organised as follows:-

52A – Appeals: General Provisions

52B – Appeals in the county courts and the High Court

52C – Appeals to the Court of Appeal

52D – Statutory appeals and appeals subject to special provisions

52E – Appeals by way of case stated.

In addition to rearranging the previous material, there are many changes of detail, particularly in PD 52C. I shall pick up some of these below in describing key elements of the Part 52 regime. (PD's 52D and E are somewhat specialised; and I do not propose to discuss them.)

At this stage, I mention two points.

(a) The five PDs apply to all appeals where the appeal notice was filed, or permission to appeal was given, on or after 1st October 2012; and the appeal court may at any stage direct that, in relation to any appeal, one or more of the five PDs shall apply irrespective of the date on which the appeal notice was filed or permission to appeal was given: see PD 52A, para. 8.

(b) PDs 52B, para. 5 and 52C, para. 2 contain explicit provisions for case management.

***Destination***

6. The rules identifying the Court to which an appeal will lie are complicated: see CPR 52.0.11; PD 52A, Section III. [P. 2]

7. However, I imagine that in most cases you will be going from a High Court Judge to the Court of Appeal; and I shall say no more about destination.

***Permission to appeal***

8. In almost every case permission is required to appeal: see Rule 52.3(1).

9. An application for permission to appeal may be made:-

(i) to the lower court at the hearing at which the decision to be appealed was made; or

(ii) to the appeal court in an appeal notice:

see Rule 52.3(2); PD 52A, para. 4.1.

10. Although it is possible to seek permission from the appeal court without having first sought it from the lower court, if permission is to be sought it is ordinarily preferable to apply first to the lower court and then, if refused, to apply to the appeal court: see CPR 52.3.4.

11. Note that it may not be possible to apply to the lower court even a day or two after the decision to be appealed against is made, unless the hearing has been adjourned in accordance with PD 57A, para. 4.1(a) to enable such application to be made: see the two conflicting authorities cited at CPR 52.3.4. [P. 3]

12. Rule 52.3(6) provides:-

> "Permission to appeal may be given only where –
>
> (a) the court considers that the appeal would have a real prospect of success; or
>
> (b) there is some other compelling reason why the appeal should be heard."

The first ground ("real prospect of success") requires a realistic, as opposed to a fanciful, prospect of success: see CPR 52.3.7.

13. That raises the question in what circumstances will an appeal succeed. Rule 52.11(3) provides:-

> "The appeal court will allow an appeal where the decision of the lower court was –
>
> (a) wrong; or
>
> (b) unjust because of a serious procedural or other irregularity in the proceedings of the lower court."

14. In considering what is necessary to establish that a decision was "wrong", bear in mind the difference between (i) a decision on the law, (ii) a decision as to fact and (iii) a decision involving the exercise of a discretion: see CPR 52.11.4.

15. The second ground for giving permission to appeal ("some other compelling reason") is less common. An example would be if it was desirable for the Court of Appeal to give authoritative guidance.

16. If an application for permission is made to the appeal court, it may, and in many cases will, be dealt with on paper: see PDs 52B, para. 7.1 and 52C, para. 15(1).

17. However, with the limited exceptions referred to at paragraph 5(1)(a) and (b) above, the applicant has the right to have the application reconsidered at an oral hearing: see Rule 52.3(4); PDs 52B, para.7.2 and 52C, para. 15(2). [P. 4] The applicant must request that within 7 days after service of the notice that permission has been refused on paper: see Rule 52.3(5); PDs 52B, para. 7.4 and 52C, para. 15(3).

18. For the procedure in relation to such an oral hearing for permission, see CPR 52.3.16 and 17; PDs 52B, para. 8.1 and 52C, para. 16. In the Court of Appeal the appellant's advocate must at least 4 days before the hearing file a brief written statement identifying the points to be raised at the hearing and setting out the reasons why permission should be granted notwithstanding the reasons given for the previous refusal: see PD 52C, para. 16(1).

19. If the appeal court refuses permission to appeal at or following the oral hearing, that is the end of the matter: see CPR 52.3.8.

***Permission (second appeals)***

20. Where an appeal to the Court of Appeal would be a second appeal (e.g. Master to High Court Judge to Court of Appeal) permission to appeal is required from the Court of Appeal: see Rule 52.13(1); PD 52A, para. 4.7. [P. 5]

21. Moreover, the Court of Appeal will not give permission in such a case unless:-

    (i) the appeal would raise an important point of principle or practice; or

(ii) there is some other compelling reason for the Court of Appeal to hear it:

see Rule 52.13(2).

22. There is a significant exception to the rule at para. 20 above in the case where the initial decision was that of an arbitrator and there is an appeal to the High Court on a point of law pursuant to Section 69 of the Arbitration Act 1996.

23. The subsequent appeal from the High Court is governed by Section 69(8), which provides:-

> "The decision of the court [sc. the High Court] on an appeal under this section shall be treated as a judgment of the court for the purposes of a further appeal.
>
> But no such appeal lies without the leave of the court which shall not be given unless the court considers that the question is one of general importance or is one which for some other special reason should be considered by the Court of Appeal."

24. In such a case, as appears, the leave of the High Court to appeal is necessary. Moreover, it is sufficient, since Section 69(8) displaces the general rule described at para. 20 above: see CPR 52.13.2. [P. 6]

25. There are similar exceptions to the rule at paragraph 20 above in the case where an arbitrator's award is challenged under Section 67 (substantive jurisdiction) or Section 68 (serious irregularity) of the Arbitration Act 1996. Each of Section 67(4) and 68(4) provides:-

> "The leave of the court [sc. the High Court] is required for any appeal from a decision of the court under this section."

***Appellant's notice***

26. An appellant needs an appellant's notice, as to which see Rule 52.4.

27. The form, N 161, includes grounds of appeal. They must be expressed "in simple language, clearly and concisely" (PD 52B, para. 4.2(d)), or "as concisely as possible" (PD 52C, para. 5(1)). (Old PD 52, para. 3.2(1) focused on clarity, not concision.)

28. The appellant's notice must be filed at the appeal court within 21 days after the date of the decision that the appellant wishes to appeal, or such longer or shorter period as may be directed by the lower court: see Rule 52.4(2). Note that time runs from the date when the lower court makes its decision, not when the order to be appealed is drawn up: see CPR 52.4.2. [P. 7]

29. PDs 52B, para. 4.2 and 52C, para. 3(3) to (5) specify the documents to be filed with the appellant's notice.

30. PDs 52B, para. 6.4 and 52C, para. 27(1) to (4) specify the documents to be included, or considered for inclusion, in the appeal bundle. (These provisions are formulated a little more flexibly than old PD 52, para. 5.6A(1).)

31. Note that each of PDs 52B, para. 6.4(2) and 52C, para. 27(3) makes the point that documents listed there to be considered for inclusion in the appeal bundle "should be included only where relevant to the appeal". [P. 8]

32. PD 52B para. 6.3 requires the appeal bundle to be filed as soon as practicable, but in any event within 35 days of the filing of the appellant's notice. PD 52C, para. 21 (Part 1, items 3 and 7) contains a timetable for agreement of the appeal bundle and lodgement not later than 42 days before the appeal hearing or as directed by the Court. (Old PD 52, para. 5.6(2) required the appeal bundle to be filed with the appellant's notice.)

33. For an appeal to the Court of Appeal, old PD 52, para. 15.2 and 15.3 required a core bundle of no more than 150 pages where the appeal bundle comprised more than 500 pages excluding transcripts. That formal requirement has not been reproduced; though, in heavier cases, a core bundle is likely still to be appropriate.

***Respondent's notice***

34. A respondent who wishes to appeal, i.e. to ask the appeal court to vary the order made by the lower court, requires permission under Rule 52.3.

35. A respondent must file a respondent's notice in two cases:-

(i) where the respondent wishes to appeal; and

(ii) where the respondent wishes to ask the appeal court to uphold the order made by the lower court for different or additional reasons: [P. 9]

see Rule 52.5(2); PD 52C, para. 8.

36. A respondent who wishes simply to ask the appeal court to uphold the order made by the lower court for the same reasons does not need to file a respondent's notice.

37. Where a respondent seeks permission from the appeal court to appeal, that must be requested in the respondent's notice: see Rule 52.5(3).

38. The respondent's notice must be filed, together with the further copies required by PD 52C, para. 10, within 14 days after:-

(i) where permission to the appellant to appeal was given by the lower court, the date the respondent is served with the appellant's notice; or

(ii) the date the respondent is served with notification that the appeal court has given the appellant permission to appeal (or that the application for permission to appeal and the appeal itself are to be heard together),

or such other period as may be directed by the lower court: see Rule 52.5.

39. PD 52B, para. 8.2 permits a respondent to file a supplemental appeal bundle of relevant documents. PD 52C, para. 27(3)(g) makes provision for the inclusion in the appeal bundle of documents considered relevant by the respondent. Where agreement is not reached the party proposing their inclusion may prepare a supplemental bundle: see PD 52C, para. 21 (Part 1, item 7).

***Skeleton arguments***

40. PD 52B, para. 8.3 provides that the parties to the appeal should file and serve skeleton arguments only where the complexity of the issues in the appeal justify them, or they would assist the court in respects not readily apparent from the papers in the appeal.

(That represents a modification of old PD 52, para. 5.9, which required every appellant who was represented to file a skeleton argument.)

41. PD 52B, para. 6.4(1)(c) provides for any skeleton argument of the appellant or the respondent to be included in the appeal bundle.

42. PD 52C, for appeals to the Court of Appeal, is more prescriptive.

(i) The appellant's skeleton argument in support of the appeal should be provided with the appellant's notice, or within 14 days thereafter: see PD 52C, paras. 3(3)(g) and 6; Form N161 Section 6

(ii) A skeleton argument in support of an application for permission to appeal may stand as the appeal skeleton argument; but, if not, an appeal skeleton argument must be filed within 21 days after listing window notification: see PD 52C, paras. 21 (Part 1, item 6) and 31(2).

(iii) A respondent who files a respondent's notice must, within 14 days thereafter, lodge and serve a skeleton argument: see PD 52C, para. 9.

(iv) A respondent who does not file a respondent's notice but is legally represented and proposes to address the Court of Appeal must lodge and serve a skeleton argument within 42 days after the date of the listing window notification: see PD 52C, paras. 13 and 21 (Part 1, item 8). (Formerly, the date was 7 days before the appeal hearing: see old PD 52, para. 7.7(2).) [P. 10]

(v) Replacement skeleton arguments, that is amended in order to include cross-references to the appeal bundle, must be lodged and served by the appellant and respondent not later than 14 and 7 days respectively before the hearing: see PD 52C, para. 21 (Part 2, items 2 and 3).

(vi) A party may file a supplementary skeleton argument only where strictly necessary and only with the permission of the Court of Appeal: see PD 52C, para. 32. (That is more restrictive than the provisions of old PD 52, para. 15.11A.)

43. General rules about the form and content of skeleton arguments appear at PD 52A, para. 5.1(1) to (4). In the Court of Appeal, PD 52C, para. 31(1) provides that they must be printed on A4 paper in not less than 12 point font and 1.5 line spacing, and must not normally exceed 25 pages. The guidance as to length is more prescriptive than old PD 52, para. 5.10. Obviously, though, an intricate or heavy appeal may well require a longer skeleton argument.

44. Note that PD 52A, para. 5.3 requires any statement of costs to show separately the amount claimed for a skeleton argument. [P. 11]

***Hearing of appeals***

45. The general rule is that the appeal will be by way of review rather than re-hearing: see Rule 52.11(1) and CPR 52.11.1.

46. The appeal court will not receive fresh evidence, either oral or written, unless special grounds can be shown: see Rule 52.11(2) and CPR 52.11.2.

47. As to the grounds for allowing an appeal, see Rule 52.11.3 and CPR 52.11.4, and paras. 13 and 14 above.

***Re-opening of final appeals***

48. Rule 52.17 identifies the very limited circumstances in which the High Court and the Court of Appeal may re-open a final determination of any appeal. [P. 12] The procedure is described at PD 52A, para. 7.

***Appeals in insolvency proceedings***

49. For appeals in insolvency proceedings see paras. 19.1 to 19.9.2 of the Insolvency Proceedings Practice Direction, that came into force on 23rd February 2012, set out in the White Book, Vol. 2 Section 3E (in the Winter 2012 Supplement).

## *(B) CIVIL APPEALS TO THE SUPREME COURT*

***Permission to appeal***

50. An appeal to the Supreme Court from any order or judgment of the Court of Appeal of England and Wales may be brought only with the leave of the Court of Appeal or of the Supreme Court: see Section 40(6) of the Constitutional Reform Act 2005.

51. An application for permission to appeal must be made first to the Court of Appeal: see Rule 10(2) of the Supreme Court Rules. Only after that Court refuses leave, which it usually does, may application be made to the Supreme Court. [P. 13]

52. Such application is made in Form 1 (annexed to Practice Direction 7).

53. The petition should be lodged within 28 days from the date of the order appealed from (not the date on which that order is sealed): see Rule 11(1). [P. 14]

54. It must be served on the respondents before filing: see Rule 12.

55. Within seven days of filing of the application, four copies of the additional papers listed at Practice Direction 3.2.1 must be filed.

56. Within 14 days of service on them of the application, the respondents may submit written objections in Form 3 (annexed to Practice Direction 7), giving their reasons why permission to appeal should be refused: see Rule 13; Practice Direction 3.1.8 to 3.1.10.

57. The application is considered by an Appeal Panel consisting of, usually, three Supreme Court Justices, without a hearing: see Rule 16 and Practice Direction 3.3.1 to 3.3.3.

58. Practice Direction 3.3.3 provides:-

> "Permission to appeal is granted for applications that, in the opinion of the Appeal Panel, raise an arguable point of law of general public importance which ought to be considered by the Supreme Court at that time, bearing in mind that the matter will already have been the subject of judicial decision and may have already been reviewed on appeal. An application which in the opinion of the Appeal Panel does not raise such a point of law is refused on that ground. The Appeal Panel gives brief reasons for refusing permission to appeal." [P. 15]

59. The Appeal Panel may:-

(i) grant or refuse permission to advance all or any of the grounds of appeal;

(ii) invite the parties to file written submissions as to the grant of permission on terms, within 14 days;

(iii) direct an oral hearing (usually 30 minutes), in which case respondents may seek to file more fully reasoned objections within 14 days of being informed of that direction.

see Rule 16.

60. If permission to appeal is given, the application for permission to appeal stands as the notice of appeal: see Rule 18(1).

61. It is worth adding that a "leapfrog" appeal will lie from the High Court to the Supreme Court, pursuant to Sections 12 to 15 of the Administration of Justice Act 1969: see Practice Direction 1.2.17 to 1.2.19.

***Thereafter***

62. There follow detailed requirements for:-

(i) preparation and filing of a statement of the facts and issues, with an appendix of documents necessary for the appeal;

(ii) preparation, sequential exchange and filing of the appellant's written case (i.e. statement of its argument on the appeal) and the respondents' written case;

(iii) incorporation of the relevant documents in bound volumes, and production of the authorities' volumes:

see Rules 22 to 24 and Practice Directions 5 and 6. Thereafter the matter will proceed to a hearing.

63. Reference should be made to the Rules and Practice Directions for the detailed requirements in relation to these steps and generally.