Evaluation of the impact of the reforms in the Court of Appeal (Civil Division)

for

The Lord Chancellor's Department

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EXECUTIVE SUMMARY

- This study looked at the impact of the changes to the Court of Appeal (Civil Division) following the review conducted by Sir Jeffery Bowman in September 1997.
- A combination of approaches was used in carrying out the study: 'shadowing' of staff in the Civil Appeals Office (CAO); examination of the use of the RECAP computer system by the CAO; interviews with administrative staff, office lawyers, judiciary and others involved in the operation of civil justice system; surveys of unrepresented litigants and solicitors; requests for statistical reports to be generated from RECAP; and purpose-designed data collection exercises to obtain quantitative data on specific aspects of the Court's operations.
- The Court's workload and performance changed as follows after the introduction of the new rules:
  - The number of interlocutory appeals from County Courts and the Queens Bench and Chancery Division fell sharply.
  - Final appeals set down increased by nearly a quarter overall although the number arising from the County Court fell slightly.
  - The number of final appeals disposed of was unchanged overall but those from the County Court fell by a third.
  - The number of pending appeals fell and a greater proportion of those disposed of were allowed (32% in 2001 compared with 27% in 1999). Applications for permission to appeal followed a similar pattern.
  - The proportion of all applications set down that were for permission to appeal rose slightly.
  - In the first two years, there were 704 applications for permission to appeal a decision that was already made on appeal. A third were granted permission and half the subsequent appeals were successful.
  - Hearing lengths were largely unchanged despite the weightier nature of the cases before the Court.

- The times for all key stages in the processing of appeals and applications fell . The age of cases at disposal also showed a downward trend.
- The proportion of reserved judgments rose to 54% in 2001/02 compared with 37% in 1997/98.

- Most of the paperwork presented at the Registry's public counter or received through the mail is flawed in some respect. Identifying the errors and ensuring they are rectified accounts for a formidable amount of staff time.
- The most common problems included attempts to set down an appeal where the Court of Appeal had no jurisdiction and failure to obtain the order of the lower court or a transcript of its judgment within the time limit for filing the appeal.
- Litigants advised by the Citizens Advice Bureau at the Royal Courts of Justice (CAB at the RCJ) had great difficulty in understanding the appellate routes. The problems were compounded because lawyers, court staff and judges in other parts of the civil justice system also had a poor grasp of jurisdictional issues.
- Most unrepresented litigants found the procedures hard or impossible to understand. However, among the small number of respondents to our surveys, a majority of experienced solicitors' firms felt that the new appellate procedures and appellate routes were simpler than before.
- Most judicial interviewees admitted that they were insulated from the problems litigants experience in complying with the procedural aspects of the new rules. Some Lords Justices were aware of problems with the new appellate routes. Only one thought the new routes were simpler than before.
- Lawyers within the CAO were clear that the new rules were inflexible and that the objective of simplifying procedure had not been achieved. Lack of understanding of the rules was common among lower courts and solicitors as well as unrepresented litigants.

  The authors suggest it would be helpful to introduce a procedure by which a judge making an order always considers whether there exists a right to appeal the order and if so, whether to grant permission to appeal if that is within the judge's power. Then:

a) *If permission were to be granted, the judge would raise with the appellant or the legal representative the need for a record of the judgment when filing the appeal and how to obtain such a record, stressing the urgency of doing so. Where appropriate, the judge would enquire whether the appellant wishes to apply for an official transcript of the evidence to be provided at public expense. If so, the judge would reach a decision on whether to grant the request based on the appellant's means*

b) *A judge refusing permission to appeal would indicate the court to which any renewed application for permission should be made and again makes it clear that a record of the judgment being appealed will be needed. As before, the urgency and method of doing this should be explained and eligibility for a transcript at public expense should be dealt with.*

The authors also suggest it would be helpful to consider re-designing the layout and content of court orders and introducing the new standard format throughout the civil justice system. In addition to space for the description of what is being ordered, tick-boxes to be completed by the judge could be included on the standard form. These would cover:

- *the status of the judge (district judge, circuit judge etc.)*
- *the level of court (county court, district registry etc.)*
- *track assignment (small claims, fast track, multi-track) where appropriate*
- *whether or not the order is a final order*
- *whether there is a right of appeal against the order*
- *if so, whether permission to appeal is required*
- *if so and if the court has the power, whether permission to appeal is granted or refused*
- *if permission is refused or the lower court has no power to grant permission, the court to which any renewed application for permission should be made*
- *where the order is appealable, the court's decision on whether the cost of obtaining an official transcript of the judgment should be borne at public expense.*

- There is a daunting range of information about the appeals process which litigants can consult but not all of it accurately reflects procedure in the Court of Appeal. Information in leaflets and on the Court Service website is presented as a catalogue instead of leading users to the information they require through decision trees or interactive questions.

  The authors suggest it would be helpful to review the information contained in the various sources of guidance, including the Practice Direction to CPR 52, in light of the inconsistencies and need for clarification identified in this report. The interpretation of the rules provided by case law should also be incorporated into the guidance.

  The authors further suggest that guidance leaflets on procedure in the Court of Appeal should be revised to include decision-trees and step-by-step guides. The Court Service Internet site should be re-designed with interactive features to assist users in finding the information they need.

- Clients of the CAB at the RCJ are generally happy with the service they receive from staff in the CAO.
- The extension of the requirement for permission to appeal was the most widely welcomed aspect of the reforms among Lords Justices. It was generally acknowledged to be effective at filtering out unmeritorious appeals.
- A majority of Lords Justices favoured extending the time limit of 14 days in which to file an appeal or application for permission to appeal and standardising the time allowed across different types of case.

  The authors suggest it would be helpful to increase to 28 days the time allowed to file an Appellant's Notice specified in CPR 52.4(2)(b).

  The authors suggest that it would be helpful in any future legislative change resulting from the Leggatt review of tribunals to bring the time limit for appealing to the courts from a tribunal decision into line with that for appealing a court decision.

- Some Lords Justices expressed concern about differential treatment of represented and unrepresented litigants in respect of applications for permission to appeal but most felt the practice was justified.
- There were objections on practical grounds to allowing litigants to request a hearing at a regional sitting of the Court of Appeal.
- Lords Justices were general sceptical about any claim that the new rules had reduced the cost of appellate litigation.
- Judges generally thought that the reforms had resulted in better use of their time although the pressure on them had increased as a result.
- Supervising Lords Justices saw their role as mainly reactive. They expressed little enthusiasm for the managerial tasks described in the Bowman report. They nevertheless felt that the creation of the role had been worthwhile.

  The authors suggest it would be helpful to appoint an experienced Lord Justice to coordinate the work of SLJs and to encourage discussion between them. Good practice guidance relating to the role should be developed and made available to new appointees.

- The most valuable task undertaken by judicial assistants was preparing bench memoranda in cases involving unrepresented litigants. Poor remuneration made it difficult to recruit and retain judicial assistants of the appropriate calibre.
- A dedicated clerk was regarded as essential by most Lords Justices, particularly those who were not computer literate.
- Many changes have been made to the RECAP computer system used in the CAO to reflect the new environment but much more needs to be done to provide the full range of case management facilities recommended in the Bowman report.
- Very limited use has been made of video and telephone links for conducting hearings. The Master of the Rolls is keen that more use should be made of these technologies.
- The office within the High Court set up to deal with the appellate work transferred to that court under the new rules was poorly resourced in comparison with the CAO.
- Appellate practice in the High Court differed in a number of ways from that in the Court of Appeal and this was a potential source of confusion for litigants.

The authors suggest there is a need for further research to compare appellate practice across all tiers of court.

In addition, it would be helpful to ask the Head of Civil Justice to appoint a senior judge to monitor appellate practice across tiers of court with the power to take the action necessary to remove inconsistencies.

1 INTRODUCTION

1.1 Background to the evaluation

The final report of Lord Woolf's enquiry into civil justice was published in July 1996 (*Access to Justice - Final Report* 1996). It called for a fundamental shift in the ethos of civil litigation which traditionally allowed the parties to dictate the pace at which cases proceed. In chapter 14, Lord Woolf stressed that the principles underlying his recommended changes applied just as much to appellate courts as to courts of the first instance. These principles were brought together in the 'overriding objective' which formed Part 1 of the Civil Procedure Rules introduced on 26 April 1999 in response to Lord Woolf's recommendations.

The initial tranche of changes was not directed at the Court of Appeal. Recognising the specific issues surrounding the work of that court, the Lord Chancellor in October 1996 asked Sir Jeffery Bowman to conduct a review of the Court of Appeal (Civil Division). The review's terms of reference called for an examination of:

- the rules, procedures and working methods of the Civil Division;
- the appropriateness of the scope of the court's jurisdiction;
- the appropriate constitution of the court for different categories of case; and
- the legal and administrative support to the court.

The Bowman Report containing 146 conclusions and recommendations was published on 6 November 1997 (*Review of the Court of Appeal (Civil Division)* 1997). In his 1996/97 review of the legal year, the Master of the Rolls commented:

> 'The main changes recommended in the Bowman Report are a move towards the early management of cases by the Court, extension of the requirement for leave (or permission) to appeal, and the diversion of some smaller appeals away from the Court of Appeal. It is anticipated that, if implemented, the recommendations will lead to a significant reduction in the number of appeals

reaching the Civil Division. I hope that, by focusing the Court's attention on cases of appropriate weight for the Lords Justices, who are the members of the court, and by improving the efficiency of our procedures, we will be able to offer a better service to court users.'

In July 1998, the government issued a consultation paper (*The Court of Appeal (Civil Division) Proposals for Change to Constitution and Jurisdiction* 1998) containing a commitment to implement the Bowman proposals, with minor amendments, through primary legislation. This commitment was subsequently realised in Part IV of the Access to Justice Act 1999. The key features of the new appellate regime it introduced were as follows:

1. Section 54 allowed rules of court to provide, for all levels of court, that the permission of the court is needed to exercise a right of appeal in a civil case. Previously, permission was required for most cases going to the Court of Appeal (Civil Division), but not elsewhere. Exceptions to the permission requirement were orders affecting the liberty of the individual (appeals against committal to prison, refusal to grant habeas corpus, and the making of secure accommodation orders under section 25 of the Children Act 1989). No appeal was allowed against a decision of the court to give or refuse permission, but this did not affect any right under rules of court to make a further application for permission to the same or another court. The rule changes which gave force to these provisions in relation to appeals to the Court of Appeal were introduced in January 1999.[1]

2. Section 59 introduced changes to the rules governing constitution of the Court of Appeal (Civil Division), providing that a court comprising one or more judges can exercise its jurisdiction. The Master of the Rolls with the concurrence of the Lord Chancellor may give directions about the minimum number of judges required to hear specified types of proceedings. Subject to any directions, the Master of the Rolls, or a Lord Justice of Appeal designated by him, can determine the number of judges to hear any particular appeal.

[1] RSC Order 59 r.1B(1)(a)-(c).

3. Section 56 introduced the following new appeal routes in non-family cases:

    - in fast track cases, appeals against decisions of a district judge to a circuit judge and appeals against a circuit judge's decisions to a High Court judge;
    - in multi-track cases, appeals against interlocutory decisions by a district judge to a circuit judge, by a master or circuit judge to a High Court judge, and by a High Court judge to the Court of Appeal; and
    - in multi-track cases, appeals of final orders to the Court of Appeal, irrespective of the court of first instance.

4. Section 55 prevented second appeals as a matter of course by providing that where a county court or the High Court has decided a matter brought on appeal, there will be no possibility of a further appeal of that decision, unless the appeal would raise an important point of principle or practice, or there is some other compelling reason for it to be heard. All applications for permission to bring a further appeal must be made to the Court of Appeal, regardless of the court which heard the first appeal. If permission is given, the appeal will be heard by the Court of Appeal.

5. Section 57 provided that appeals raising questions of particular significance could be heard by the Court of Appeal, even though the normal route would suggest that a lower court should hear the case. A direction for the appeal to be heard by the Court of Appeal can be made by the Master of the Rolls, the court of first instance or the court where the appeal would normally be heard.

6. Section 70 abolished the office of registrar of civil appeals and transferred the administrative functions to a civil servant. The first appointment to the new post of Head of the Civil Appeals Office was made in January 1999.

In light of the Act's provisions, new rules[2] and an accompanying Practice Direction[3] were added to the Civil Procedure Rules and introduced in May 2000. In addition to the measures above, the new rules:

- shortened to 14 days the time allowed for an application to seek to appeal an order;
- introduced a requirement to produce all the documents required for any hearing at the outset; and
- gave a single Lord Justice the power to deal with the applications for leave to pursue judicial review, in line with other leave applications.

Other changes have been made to working practices in the Court of Appeal (Civil Division) since the Bowman report was published. These represented a major change to the culture of the Court which was brought about in a remarkably short space of time. The changes included:

- in November 1997, extension of the scheme by which Supervising Lords Justices are appointed to oversee particular types of appeal;[4]
- in April 1999, a consolidation of more than 40 Practice Directions issued by the Court over the previous 80 years;
- in April 1999, the sitting of an Employment 'Blitz' Court for three weeks to concentrate on cases from the Employment Appeals Tribunal. Up to six applications were listed each day and unrepresented parties were offered free representation through the Bar Pro Bono Unit;
- in October 1999, the introduction of regional sittings of the Court;
- in 1999, a major reorganisation of the structure of the Civil Appeals Office (CAO) under which the office lawyers were given a proactive case management role. Changes

[2] Rule 52 Appeals, 14th update to Civil Procedure Rules, issued 18 April 2000.

[3] Practice Direction 52, 13th update to Civil Procedure Rules, issued 29 March 2000.

[4] This extension had been recommended by Bowman.

introduced to administrative processes included the introduction of a single case number and removal of the requirement to set down an appeal anew after the granting of permission to appeal; and

- during 1999, expansion of the services to unrepresented litigants offered by the Citizens' Advice Bureau located in the Royal Courts of Justice.

Although the Bowman review looked at appeal routes in family cases, it considered them so complex that a special committee was required to examine them and recommend how they might be simplified and rationalised. As a result, the Family Appeals Review Group was set up under the chairmanship of Lord Justice Thorpe and its report was delivered to the Lord Chancellor in July 1998 (*Report to the Lord Chancellor by the Family Appeals Review Group* 1998). In March 2000, the Lord Chancellor's Department issued a consultation paper setting out its plans for reform of the family appeals system. Legislation has not yet been introduced to give force to the government's proposals but, in the meantime, CPR Part 52 does not apply to family proceedings in the county courts and the High Court but does apply to family proceedings in the Court of Appeal.[5]

Bowman also considered that the complexity and diversity of the tribunals structure merited separate consideration. Following his recommendation, the Lord Chancellor asked Sir Andrew Leggatt to undertake such a review and his report was published in August 2001 (*Tribunals for Users – One System, One Service* 2001). Chapter 6 considers in detail the position relating to appeals from decisions of tribunals including the role of the courts and the place of judicial review. In light of Sir Andrew's work, we focus in this report on appeals in the Court of Appeal arising from first instance decisions of courts although many of the procedural issues we explore affect all appellants irrespective of the body whose decision they wish to challenge.

[5] CPR PD 52, para. 2.2.

The Bowman Report made a number of recommendations that did not require legislation. For example, it called for greater use of information and communications technology (ICT) in the Court of Appeal. The report recommended the procurement of a secure local area network linking Lords Justices with the Civil Appeals Office and providing access to the Internet. It also called for improvements in the existing RECAP computer system used by the Civil Appeals Office to manage its workload. The improvements would turn RECAP into a full case management system capable of supporting the greater level of court control that lies at the heart of the civil justice reforms. The enhanced system would also provide improved management information about the Court's performance.

The Court of Appeal Review Team also advocated use of telephone and video conferencing. An option to hear cases by video link was subsequently introduced in 1999 and was first used by Lord Justice Nourse.

This study sets out to provide quantitative and qualitative data on the impact of the changes in the Court of Appeal (Civil Division) and to provide an objective assessment of whether the intended benefits have been delivered.

1.2 The policy relevance of the study

The explanatory notes that accompanied Part IV of the Access to Justice Act 1999 stated that the intention of the legislation was:

> '…to ensure that the appellate system reflects the principle, which underlies the Government's wider programme of civil justice reforms, that cases should be dealt with in a way that is proportionate to the issue at stake.'[6]

The appellate system created by the Act would ensure:

[6] Para 15.

> ‘that appeals are heard at the right level, and dealt with in a way which is proportionate to their weight and complexity; that the appeals system can adapt quickly to other developments in the civil justice system; and that existing resources are used efficiently, enabling the Court of Appeal (Civil Division) to tackle its workload more expeditiously.’[7]

The Court Service Business Plan for 2001-2002 acknowledged the need to monitor the impact of the changes to provide evidence that these objectives were being met:

> ‘In the coming year the Court of Appeal (Civil Division) will be consolidating the practice and procedures following the introduction of the new appeal rules in May 2000 and monitoring the impact of these changes.’

Moreover, the Court Service Plan for 2000-2003 makes it clear that resource calculations concerning the future needs of the Court of Appeal are built on assumptions about the impact of the reforms on the volume and type of work coming to the Court:

> ‘It is expected that the number of applications and appeals will increase overall and the nature of the work will become more complex. There will be a greater need for specialised case management to ensure that decisions affecting all civil courts are distributed quickly so as not to cause pressures elsewhere in the civil justice system.
>
> It is hoped that some of the pressures will be offset by the loss of work delegated to the High Court. Additional judicial resources are planned and it is envisaged that additional staff resources will be required to support the Court and to manage and co-ordinate the Human Rights work.’

[7] Para. 205.

Following the government's spending review in 2000, the Court Service secured £43 million to fund investment in technology to improve the range and quality of the services it provides to customers of the civil and family courts. The government's vision of how this money might be spent is set out in a consultation paper issued in January 2001 (*Modernising the Civil Courts* 2001). A key feature of this vision is the development of the Royal Courts of Justice as a 'Flagship Hearing Centre for Civil Justice, with technology appropriate to the complexity and importance of its caseload'. On 11 April 2001, the Lord Chief Justice announced the appointment of Lord Justice Brooke as judge in charge of modernisation.

It is hoped that the study findings set out in this report provide a picture of how the work of the Court of Appeal has changed as a result of the reforms and that this, in turn, will help to inform future planning and investment decisions.

1.3 Aims and objectives

The overall aim of the study was to describe the impact of the reforms to the Court of Appeal (Civil Division) introduced since the Bowman Report and to assess the extent to which the intentions set out in the Access to Justice Act 1999 have been achieved. Specific study objectives were:

- to examine the operation of the new rules introduced on 2 May 2000 governing the assignment of cases to an appropriate appellate route;
- to establish whether improvements are being achieved in the speed with which appeals are heard;
- to measure the impact on the workload of the Court of Appeal (Civil Division) of changes to leave requirements, diversion of many appeals to lower courts and removal of appellate routes which allow more than one appeal. In particular, to look at how the nature of the cases reaching the Court of Appeal has changed and the shift in the balance of work between appeals and applications for permission to appeal;
- to evaluate the operation of judicial case management in the Court of Appeal (Civil Division), in particular the early setting of a realistic timetable, ensuring compliance

with the timetable, imposition of time limits on oral argument and the reserving of judgments;

- to consider the use of ICT in the Court of Appeal (Civil Division), including the RECAP system to support caseload management and the use of telephone and video conferencing during hearings;
- to examine issues relating to unrepresented applicants and appellants, including the assistance provided by the Citizens' Advice Bureau located in the Royal in the Courts of Justice; and
- to gauge the views of solicitors acting on behalf of applicants and appellants as to the impact of the new rules on the quality of appellate justice.

1.4 Acknowledgements

We would like to thank all the staff and judiciary in the Court of Appeal (Civil Division) for their assistance and cooperation throughout the study. We are particularly grateful to Roger Venne, the Head of the Civil Appeals Office and master, Penny Harvey his personal secretary and Heather Goddard, the court manager at the time the study began, for their help in arranging interviews and for explaining the organisation and procedures of the Civil Appeals Office. David Jenkins, the Registry Manager, and his staff patiently put up with our presence and answered our many questions with unfailing good humour. Deputy masters and office lawyers, case management and listing staff, associates, clerks and judicial assistants all gave up their time for interviews, many on more than one occasion. Special thanks go to Geoff Denman, the Administrative Support Manager, and his IT staff Mark Kirk, Joanne Fraser, Joel Sugarman and Rowena Fehilly who responded to our long list of requests for statistical reports. The Master of the Rolls and Lords Justices graciously accommodated all our requests for interview despite the pressures on their time.

We would also like to thank the many others who granted us interviews or responded to our enquiries, including the staff of the High Court Appeals Office, Sir Jeffery Bowman, His Honour Judge Paul Collins CBE, Paulette James OBE and Perry Timms of the Court Service, Joy Julien and Alexander Mercouris in the Citizens' Advice Bureau at the Royal Courts of

Justice, staff within the Personal Support Unit and the many others to whom we spoke in the course of the research. Finally, our thanks go to the solicitors and unrepresented litigants who responded to our survey questionnaires.

2 METHODOLOGY

2.1 Introduction

This chapter describes the methodology used in carrying out the research which took place between November 2001 and August 2002. A combination of approaches was used:

- a period spent 'shadowing' staff in the CAO to become familiar with working practices and the kinds of problems encountered in processing applications and to map information flows;
- examination of the use of the RECAP system by the Civil Appeals Office to assist in managing the Court's caseload and consideration of the statistics it produces;
- interviews with a range of personnel involved in the operation of civil justice system;
- surveys of unrepresented litigants and solicitors with experience of filing appeals at the Court of Appeal;
- requests to the administration section in the CAO for statistical reports from RECAP; and
- purpose-designed data collection exercises to obtain quantitative data on specific aspects of the Court's operations where such information is not available from other sources.

The changes to appellate procedure have diverted many appeals and applications previously heard by the Court of Appeal (Civil Division) to the High Court. It was not possible within the scope of this study to investigate fully the impact on the High Court of these changes to its workload. However, discussions were held with staff in the appellate office of the High Court and the issues raised are described in this report.

2.2 "Shadowing" staff

We spent a period of a month at the start of the study observing the work of CAO staff in the Registry, case management and listing sections. We watched as new appeals were filed at the public counter or by post and went through a variety of checks before being accepted and entered onto RECAP. We observed bundles being lodged, checked and bar-coded. We watched as bar clerks visited the listing section to discuss and agree hearing dates. We also

observed briefly the conduct of some hearings. Throughout the exercise, we asked staff about how they went about each step in the process and the most common problems that they encountered. The notes taken together with the job descriptions and workflow diagrams produced by the CAO provided an end-to-end picture of the processing of appeals and the nature and prevalence of problems.

2.3 RECAP

The RECAP case tracking system provides support for each stage in the processing of applications. Twenty separate screens provide comprehensive information about the status and progress of cases filed with the Court. Cases input to the system are assigned a unique reference number at set down which includes the year of filing. This number stays with the case throughout its life, even in the case of permission applications that turn into appeals. Information on the system is continuously updated by staff and office lawyers who rely on it when answering queries from the public about their case. We observed the use of RECAP by each section of the CAO and were provided with copies of the various reports it produces.

2.4 Interviews

Using the knowledge we had gained from the shadowing exercise, we developed a list of questions relating to the work of the Court and the operation of the new rules. These were discussed in interviews with the Master of the Rolls and 14 Lords Justices of whom 11 were Supervising Lords Justices (SLJs). All judicial interviews were written up and the note returned for approval by the interviewee. We also discussed many of the issues with the Head of the Civil Appeals Office, the two deputy masters and the other five office lawyers who described in detail the nature of their work and their working relationship with SLJs.

Other interviews were held with associates, members of the administration section, staff in the High Court Appeals Office, Court Service personnel, a lawyer in the Citizens' Advice Bureau at the Royal Courts of Justice (the CAB at the RCJ), members of the recently established Personal Support Unit, Sir Jeffery Bowman and a designated civil judge in the county court. We held discussions with other researchers engaged on related projects including a team from Royal Holloway College, London led by Gavin Drewry who are also considering the

impact of the changes in the Court of Appeal but with a greater emphasis on human rights and quality of justice issues. Their methodology involves tracking a specific tranche of cases in the Court from set down to disposal.

2.5 Surveys

We prepared a questionnaire for solicitors' firms to test their views on the operation of the new appellate rules and the quality of service offered by staff in the CAO. On our behalf, the Head of the Civil Appeals Office contacted twenty firms of solicitors who have work in the Court of Appeal and requested that they cooperate with the research by completing a questionnaire. Ten of the firms were among the most frequent users of the Court and ten had only a single case before the Court in the preceding year. Only nine firms agreed to participate and, in the end, we received back 12 completed questionnaires from solicitors in seven firms.

To supplement this small sample, we contacted the Customer Service Unit within the Court Service which conducts a rolling programme of customer satisfaction surveys. The Court of Appeal (Civil Division) was included in the third wave of the programme which took place in February and March 2002. We were therefore able to draw on the results of the survey which was restricted to professional users of the Court. Only 21 responses were received but we were able to use these to supplement the results of our survey.

We wanted also to obtain the views of some unrepresented litigants although we were aware from previous research of the difficulties that can arise: some litigants find it hard to respond to questions about the quality of service they received without discussing the merits of their case. However, the CAB at the RCJ identified for us eleven unrepresented litigants to receive survey questionnaires. Four of these completed and returned the questionnaire.

All survey responses were analysed on computer using the statistical package *SPSS 11.0 for Windows.*

2.6 Statistical analysis of data on RECAP

Although the CAO produces monthly statistical reports describing various aspects of performance, these represented only a small amount of the analysis we required. The administration section within the CAO kindly agreed to generate a range of statistical reports on our behalf from the RECAP database. We requested a total of 17 reports, many of which updated the information provided in the Bowman Report.

2.7 Data collection

Some of the information we sought was not recorded on RECAP. In particular, we wanted to compile a picture of the defects in paperwork submitted to the Court by litigants. We were able to obtain part of what we wanted by analysing the content of logbooks recording documentation received through the post which is returned to the sender because of the errors it contains. We also examined some of the letters which Registry staff send to unrepresented litigants asking for minor defects to be remedied. There was no paper record of problems with applications submitted in person at the public counter and so we devised a form on which counter staff noted details of all new applications and any defects they contained over a period of 22 working days.

3 CHANGES TO THE WORK OF THE COURT

3.1 Introduction

The reforms were intended to affect the character of work in the Court of Appeal (Civil Division) in a number of ways: the volume of cases reaching the Court would reduce and only those cases of appropriate weight would be directed to the Court; the time taken to dispose of cases would reduce; the extension of the requirement for permission to appeal would act as a filter to reduce the number of unmeritorious appeals granted a full appeal hearing; and, as a consequence, the balance of judicial work would tilt more towards reading and less towards sitting in court. This chapter considers the extent to which these expectations have been fulfilled in practice.

3.2 Volume and type of cases

Table 1 in Appendix 1[8] shows, by type of case, the number of interlocutory and final appeals set down and disposed of during the calendar years 1999 (the last full year before the introduction of the new rules) and 2001 (the first full year after the new rules were introduced). As predicted, the number of interlocutory appeals from County Courts and the Queens Bench and Chancery Division fell sharply between the two years. Final appeals set down increased by nearly a quarter overall although the number arising from the County Court fell slightly. The number of final appeals disposed of was unchanged overall but those from the County Court fell by a third.

Table 2 in Appendix 1[9] indicates both that the number of pending appeals fell between the same two years and that a greater proportion of those disposed of were allowed (27% in 1999 compared with 32% in 2001). It seems that the permission to appeal filter is having the desired effect.

[8] See also Table 2 in Appendix 9 of the Bowman report (1997).

[9] See Table 3 of the Bowman report (1997).

The figures for applications for permission to appeal show a similar pattern (Table 3, Appendix 1). The fall in pending applications might have been expected but the rise in successful applications (from 32% in 1999 to 37% in 2001) is less easily explained. It seems that those applications for permission to appeal which have been diverted to a lower court were less likely to be granted than those that remain in the Court of Appeal. This could be because the diverted cases were more likely to involve unrepresented applicants as suggested by Table 4, Appendix 1 which shows a reduction in unrepresented applicants in the Court of Appeal. The success rate of applications in the Court of Appeal by unrepresented parties actually fell (Table 5, Appendix 1) in contrast to the greater success rate of applications in general.

Overall, the proportion of all applications set down that were for permission to appeal rose only slightly (Figure 1, Appendix 1) despite the extension of the leave requirement.

The change in the type of work dealt with by the Court of Appeal was generally welcomed by Lords Justices:

> ‘In our work generally as Lords Justices, our lives are a lot easier and we are now dealing with more appropriate cases. The simple cases are disappearing to the High Court’

> ‘The universal requirement of permission to appeal is proving very effective’

> ‘The Court has been able to concentrate on demanding and stretching cases. Written applications for permission to appeal occupy a significant proportion of judicial time but the effort involved is well worth it. It ensures the Court of Appeal is focusing on cases of real substance’.

But there were some dissenting voices:

> ‘I doubt that there has been a simplification because of the introduction of the requirement for permission to appeal. We can now see cases up to three times. There are various permutations and decisions to be made about whether one judge or two should hear the case and whether the panel should include the same judge that has considered the case on the papers. This has introduced much new work. The permission to appeal process itself has become very complex - sometimes we have three boxes of files for the permission to appeal’

> ‘It takes more effort to clear out the hopeless cases. It involves more administration and more work by the judges. Permissions to appeal impose an extra burden because they are mostly done on your own’.

3.3 Second appeals

One of the appellate principles set out in the Bowman report related to second and subsequent appeals (1997, p.26).

> ‘More than one level of appeal cannot normally be justified except in restricted circumstances where there is an important point of principle or practice or one which for some other reason should be considered by the Court of Appeal’.

CPR 52.13 stipulates that an appeal against any decision that was itself made on appeal lies to the Court of Appeal and that permission is required from the Court of Appeal. Section 55 of the Access to Justice Act 1999 sets out the more stringent criteria that must be met before permission can be granted, namely that ‘the appeal would raise an important point of principle or practice or there is some other compelling reason for the Court of Appeal to hear it’. The figures for second tier applications and appeals disposed of in the first two years following the introduction of the new rules are as follows (in some cases where permission had been granted, the appeal had yet to be decided at the time the figures were produced):

Table 1: Numbers and success rates for second tier applications for permission and appeals during the period May 2000 to April 2002

Year	Applications for permission		Appeals	
	Number	**Percent allowed**	**Number**	**Percent allowed**
May 00 – April 01	145	34.3%	49	44.1%
May 01 – April 02	95	33.8%	32	65.3%
TOTAL	704	34.1%	160	50.6%

These figures need careful interpretation. The number of cases in which permission was sought to appeal for a second time suggests that this is not an exceptional event. Apparently, the higher hurdle that a second appeal must overcome does not deter a significant number of litigants. Nor are they likely to be put off by a low likelihood of success. A third of permission applications were granted in each of the two years considered, only slightly lower than the figure of 37 per cent for all applications for permission in 2001. In respect of the subsequent appeal, the chances of success appear to be increasing. The overall success rate of 50 per cent is strikingly higher than the 32 per cent of all appeals that succeeded in 2001. This higher success rate for second appeals suggests that a more stringent test is indeed being applied at the permission stage. It is less clear why such a high proportion of applications are granted permission. The explanation may be that those cases which are eligible for a second appeal have already been filtered. This is because the claim that is the subject of the second appeal was either upheld at the first instance or judged to merit the granting of permission to appeal at the first appellate stage. Nevertheless, the fact that one in six applications for permission to appeal a second time culminate in a successful appeal is striking evidence in support of a second appellate level.

3.4 Settlement rates

Comparison of settlement rates before and after May 2000 is of limited value due to the extension of the permission requirement and the change in the types of cases directed to the Court of Appeal. Tables 2 and 3 in Appendix 1 show that the settlement rate for permission to appeal applications was 19 per cent in 1999 and 18 per cent in 2001. For appeals, the rates

were 34 per cent in 1999 and 28 per cent in 2001. Despite the figures, one of the office lawyers in the CAO felt that the new rules had made settlements more likely and increased the chance of an early settlement.

3.5 Speed of processing applications and appeals

Applications for permission to appeal from represented litigants are usually reviewed on paper. Those from litigants in person will usually be listed for an oral hearing without a paper review. Experience, confirmed by experiment, has shown that such litigants will invariably renew an application refused on paper to the full Court. There is no further appeal against refusal of permission at an oral hearing.

The times for all key stages in the processing of appeals and applications fell after the introduction of the new rules.

Table 2: Average times for key stages in case processing

KEY STAGE	YEAR			
	1999		2001	
	No of cases	Average time	No of cases	Average time
Set down to paper decision on application for permission to appeal	652	61.9 days	1466	49.7 days
Set down to oral hearing on permission to appeal applications (excluding those refused on paper and then renewed)	1719	138 days	802	98 days
Refusal of permission to appeal on paper to renewed application at oral hearing	786	49 days	409	46 days
Grant of permission by the Court of Appeal to disposal	477	234 days	585	142 days
Grant of permission by a lower court to disposal	555	229 days	247	184 days

The age of cases at disposal also showed a downward trend following introduction of the new rules. The age of appeals in particular is significantly shorter.

Figure 1: Cumulative age of permission to appeal applications at disposal

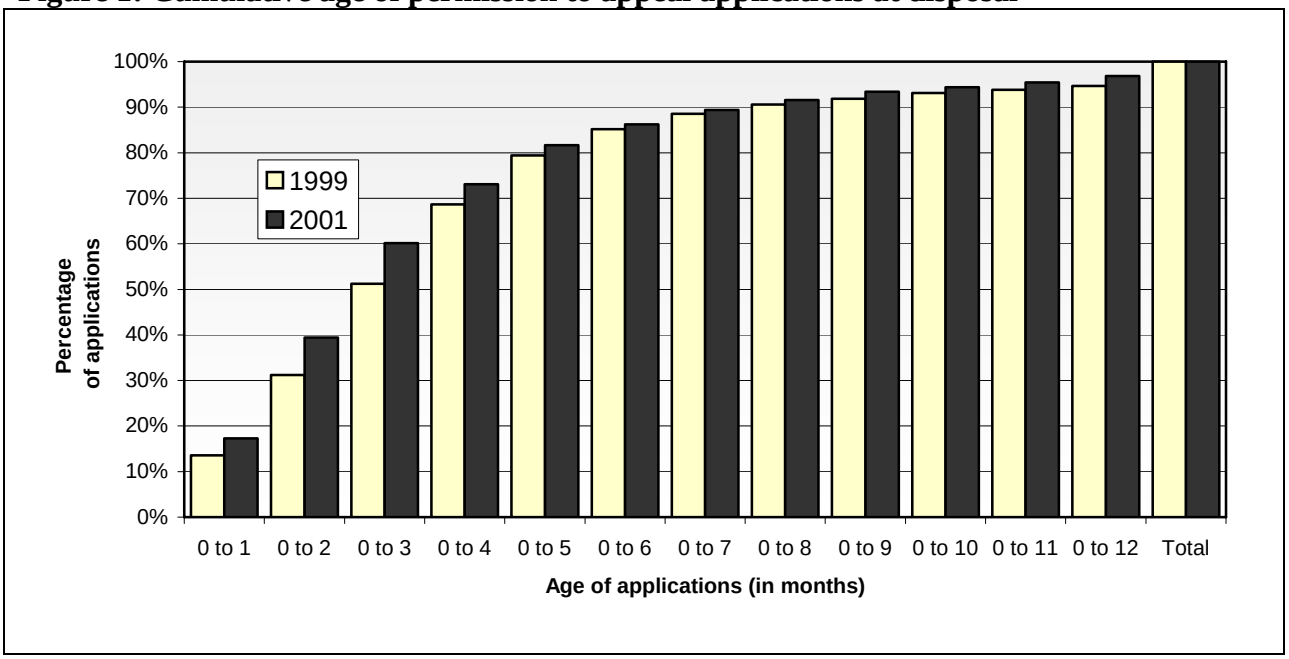
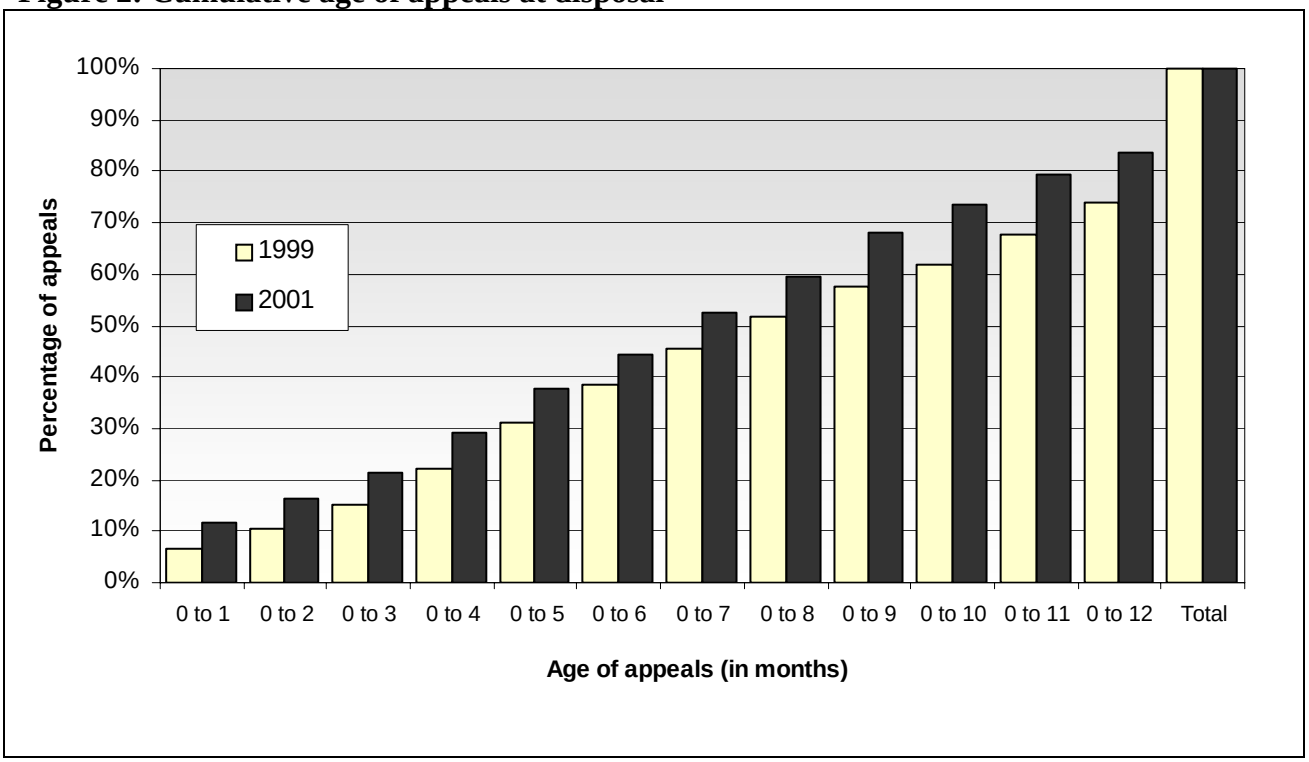


Figure 2: Cumulative age of appeals at disposal



3.6 Hearing length

Many Lords Justices felt that the length of hearings had reduced significantly under the new regime:

> 'We're getting through oral hearings much more quickly. What was previously a three-day hearing is now disposed of in one day. Now you squeeze in all the arguments in a single day'

> 'Hearing lengths have certainly reduced'

> 'Compared to when I was at the Bar 20 years ago, hearings are now only a quarter to a fifth as long'.

Surprisingly, this view is not borne out by figures for hearing lengths, even compared with ten years ago.

Table 3: Average court time spent on various categories of cases disposed of by the Court of Appeal (0.2 = 1 hour, 1.0 = 1 court day)

YEAR	LIST CODE[10]						
	PTA	FAFMI	CCFMI	CHANF	CHANI	QBENF	QBENI
1992	0.14	0.56	0.48	1.44	1.09	1.29	0.76
1999	0.19	0.73	0.33	1.24	1.38	1.10	0.76
2001	0.21	0.70	0.55	1.09	1.16	1.15	0.95

However, the figures need careful examination. Hearing times in appeals from final orders from the Chancery and Queen's Bench Divisions have decreased slightly and such cases represent a substantial proportion of the time expended by the Court. The diversion of many less substantial matters to a lower court may have had the effect of increasing average

[10] For a definition of list codes, see Appendix 9, Table 1 of the Bowman report, (1997).

hearing length. The absence of such an increase could signify that hearing lengths for the more complex cases remaining in the Court of Appeal have indeed reduced. Nevertheless, one judicial interviewee saw scope for further reductions:

> 'There has been an increase in the amount of material needing to be pre-read but without a commensurate reduction in the length of hearings. … The time allocated is largely based on counsel's estimate of how long they want, not how long they should take. Ideally, the Court should take more control and stipulate the amount of time allotted and counsel could then decide to how best to divide it between them. … There is certainly scope to be more robust'.

3.7 Changes to the pattern of judicial work

The great majority of Lords Justices to whom we spoke felt that the improvements in performance under the new rules had been bought at a high price. Virtually all referred to the increased amount of work undertaken out of court without a corresponding reduction in sitting days[11]:

> 'The permission to appeal system is working well but the consequent paper-based administration has a different flavour for judges. There has been a shift in the nature of the work without a corresponding change in the expectation of the administration as to sittings. We are still expected to sit four days a week despite the extra time needed to deal with the paper'.

These new pressures gave rise to concerns about the quality of justice delivered by the Court.

> 'It is now a completely different ball game. Most of our work is done out of court sittings. Those with administrative responsibilities sit only three days a week. The amount of reading required is horrifying. This puts at risk to some

[11] Following the end of the study, we were advised that the allocation for Lords Justices of days in which to pre-read and prepare judgments had been increased to five days in each 15 day period.

extent the quality of decision-making because we are working under such pressure'

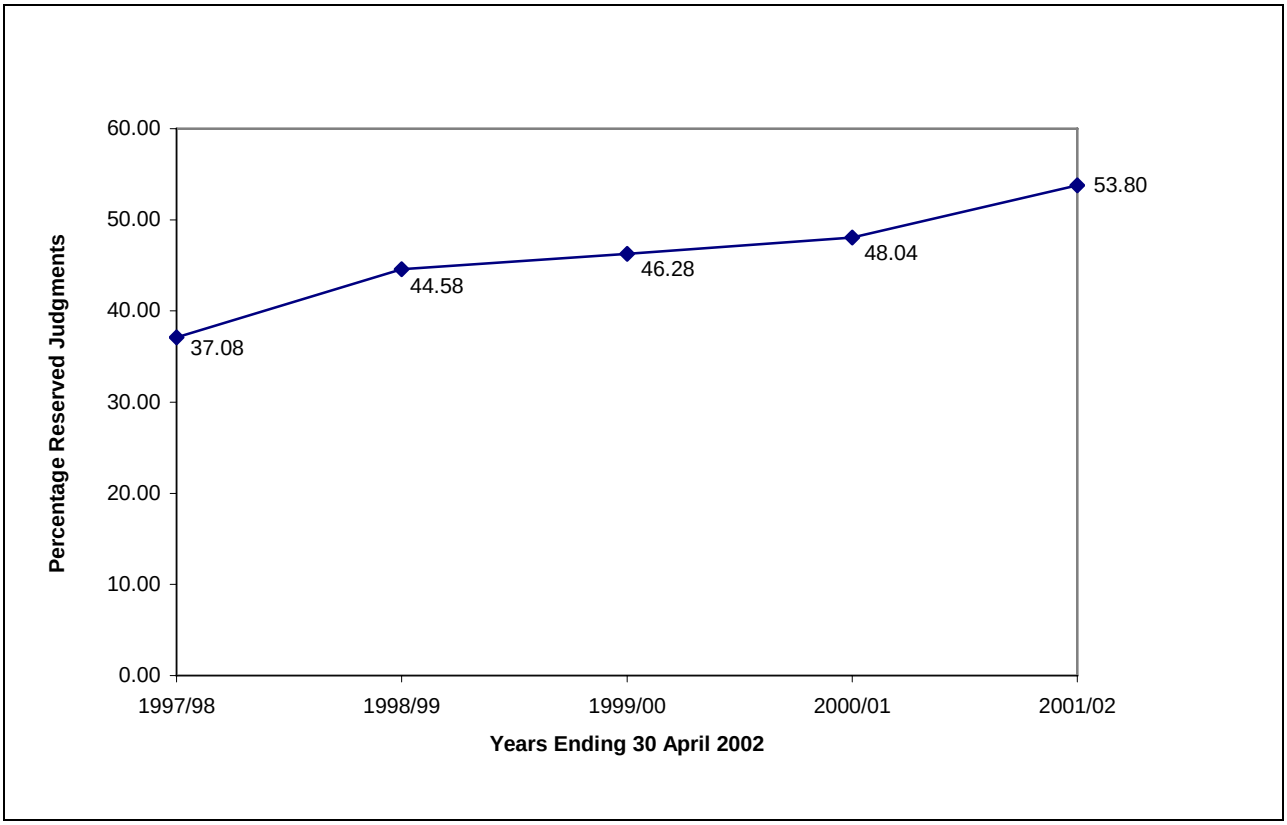
'The current system puts particular pressure on the presider who needs to be on top of the details in order to control argument but there is a tendency not to complain, perhaps because of a macho element, an "I can do it all" syndrome. The presider does not get extra time and also has to pre-read to decide who will write which judgment. We need two reading days each week to cover out-of-court work. Previously, there was no expectation that Lords Justices would read at all in advance of the hearing.'

'Time is the key. None of us feel that we have enough time and certainly nothing like the time we would want. Making decisions quickly is part of our culture. You have to try to provide solutions that will be helpful to the lower court and practitioners but there is not much time to analyse further.'

'We're packing so much into a smaller timespan. I hope that quality has been maintained but it will be difficult to do so if the pressure of work continues to increase'.

One source of out-of-court work gave Lords Justices particular concern. The greater complexity of the work and the pressure on time in court had led to a much higher proportion of judgments being reserved. Part of the increase was because many hearings were listed for completion in one day and there was often no time at the end of the hearing to deliver an *ex tempore* judgment. The increase in reserved judgments is confirmed by the following graph from the monthly statistical reports produced by the Civil Appeals Office.

Figure 3: Percentage of appeal judgments reserved in the period 1997 to 2002



Lords Justices emphasised the additional pressures this had created.

> 'I find that I have no time to do personal research or to think. There are always reserved judgments to be written'

> 'Reserved judgments have increased to more than 50 per cent. Often we are ready to give an *ex tempore* judgment but have no time to do so. This increases the burden of out-of-court work'

> 'There is less time available for *ex tempore* judgments. You do not want to launch into a judgment at 4:30pm. As a result, you need writing time as well as reading time but listing does not formally accommodate writing time'

> ‘There is less time to deliver *ex tempore* judgments or write reserved judgments. In the period before Christmas, I went from one day-long case to another and there was never time to deliver a judgment. I have only just cleared my pre-Christmas judgments. When hearings were longer, you had the opportunity over a two to three-day case to develop your judgment. The term ‘reading day’ is a euphemism: reading is often done in the evenings and writing at weekends’.

However, one Lord Justice pointed out the benefits of reserving judgment:

> ‘The increase in reserved judgments is a good thing in many ways: it means that we write the judgments ourselves; they should be of better quality; and they ought to be shorter with fewer hostages to fortune and off-the-cuff remarks. It may be simpler to go in, hear argument and deliver an *ex tempore* judgment but this is not possible in many cases’.

4 IMPACT ON THE WORK OF THE CIVIL APPEALS OFFICE

4.1 Introduction

The Civil Appeals Office (CAO) was created in 1982 to carry out all administrative tasks associated with the processing of appeals and applications for leave to appeal. The Registrar of Civil Appeals was originally in charge of the CAO but the judicial nature of the role meant he had no line management responsibility for CAO staff. Section 70 of the Access to Justice Act 1999 abolished the role of Registrar and transferred the administrative functions to a new civil service post known as the Head of the Civil Appeals Office. Roger Venne, the current incumbent, is a master of the Court of Appeal in addition to his line management responsibilities for staff within the CAO.

There are around 55 staff within the CAO organised into the following sections:

- The Registry, which takes receipt of new cases and documents relating to existing cases at the public counter and by post, checks that they are in order and enters them onto RECAP, the Court's computer system
- Case management, which sends out acknowledgment letters setting out the deadlines and requirements in relation to the progress of the case, checks bundles and takes the necessary action to correct errors
- Listing, which schedules hearings
- Associates, who act as court clerks, draw and issue orders and enter results on RECAP
- Administration, who pay invoices, deal with complaints, produce statistics and support and maintain RECAP.

This chapter discusses how the work of each of these sections has been affected by the new procedural regime. It also considers the use of information technology in support of that work and to communicate with others. Based on our observations, a list of suggested improvements to current working practice in the CAO is contained at Appendix 3. More far-reaching

procedural changes affecting the work of the CAO are discussed in the final chapter of this report.

4.2 The Registry

The Registry comprises around ten junior staff under the direction of a staff manager and a Registry manager. Retention of junior staff is a continual problem due to the relatively low rates of pay and turnover is high. Detailed descriptions of the work, including flow charts for key tasks, are available for reference purposes. These include checks by managers before paperwork is accepted and new cases are set down.

The vast majority of paperwork presented at the Registry's public counter or received through the mail is flawed in some respect. As a result, much of the work of Registry staff consists of explaining to applicants the Court's procedural requirements and returning documentation for amendment.[12] Information about the defects in the papers is not recorded in a single place (and sometimes not recorded at all) so we drew on several different sources in attempting to estimate the nature and extent of the problems. For this purpose, we used:

- logbooks kept by the CAO relating predominantly to flawed applications from lawyers received through the mail
- alphabetically filed papers recording a ruling on jurisdictional questions relating to postal applications[13], mostly from unrepresented applicants
- a tally of letters from Registry staff to unrepresented litigants in person asking them to remedy other defects in the paperwork they have submitted by post
- a purpose-designed form on which Registry staff were asked to record problems with papers lodged at the public counter over a period of a month.

[12] The range and clarity of procedural guidance available to applicants is discussed in chapter 5.

[13] Jurisdictional problems that arise with applications lodged at the public counter are resolved right away to avoid the need for lengthy correspondence.

The logbooks kept by the CAO relate to defective applications which arrive in the mail with a cheque in payment of the fee. All the paperwork, including the cheque, is returned to the sender because of the errors and an entry is made in the log to provide an audit trail in case the returned material goes astray. During 2001, log entries recorded the return of papers to 326 lawyers and 66 unrepresented litigants. The nature and frequency of the problems were as follows:

Table 4: Problems with papers received through the mail

Nature of problem	**Frequency**
No extension of time application	120
Fee problem	118
Insufficient copies of Appellant's Notice	98
Wrong form or procedure	57
No copy of order being appealed	53
No jurisdiction	50
No copy of order assigning case to the multi-track	41
Form incomplete	40
Other problem	21
No grounds of appeal	5
Skeleton argument not attached	3
TOTAL	**606**

Other applications received through the post raise jurisdictional questions which need to be resolved by a ruling from a master or deputy master.[14] These are mostly from unrepresented applicants. The papers are filed alphabetically together with a copy of the letter informing the applicant of the decision. The paper record is required in case the applicant applies for

[14] Jurisdictional problems that arise with applications lodged at the public counter are resolved right away to avoid the need for lengthy correspondence.

permission to appeal a deputy master's decision that the application cannot be accepted.[15] If the fault can be remedied, the papers are removed from the alphabetical file when the corrected paperwork is received. Our exercise therefore undercounted the total number of such flawed applications received.

We examined the cases in the alphabetical files relating to the year 2001 to determine the kinds of problems they presented. There were 162 cases of which all but five involved unrepresented applicants. The letters from the Court of Appeal to the applicant do not use standard language in explaining why the application cannot be accepted. We categorised the reasons given as follows (in some cases, more than one reason was given):

[15] 'When the Head of the CAO acts in a judicial capacity pursuant to CPR 52.16 he is known as master. Other officers designated to exercise judicial authority are known as deputy masters. The master and deputy masters may exercise the jurisdiction of the Court of Appeal with regard to any matter incidental to any proceedings, any other matter where there is no substantial dispute between the parties and the dismissal of an appeal or application for failure to comply with any order, rule or practice direction. The master and his deputies may give directions in relation to applications and appeals or may refer a request for directions to one of the Supervising Lord Justices', para. 5.63, Manual of Civil Appeals (di Mambro et al. 2000).

Table 5: Reasons given in rejecting postal applications

Reason	Frequency
No jurisdiction, application should be made to a High Court judge	44
No further right of appeal	41
No jurisdiction, application should be made to a circuit judge in the county court	40
No jurisdiction with no indication of where jurisdiction lies	16
No jurisdiction, application should be made to the Court of Appeal (Criminal Division)	3
No jurisdiction, application should be made to the Administrative Court	2
No jurisdiction, application should be made to the Employment Appeals Tribunal	2
No jurisdiction, application should be made to the Principal Registry of the Family Division	1
No jurisdiction, application should be made to the Supreme Court Costs Officer	1
Other reason (e,g, vexatious litigant, application out of time)	17
TOTAL	**167**

In a number of cases, resolving the matter had involved correspondence with the lower court, with the applicant or both. County court orders in particular were often of poor quality, omitting details such as the status of judge making the order and whether the court was sitting as a county court or a district registry. There was evidence in the correspondence that the lower courts did not always understand the appellate routes in multi-track cases.[16] Some county courts treated a case as belonging to the multi-track without formally allocating the case to that track. The use of language in letters written to the applicant by the Court of Appeal was sometimes imprecise: where an appeal lay to a lower court and the appellant had been refused permission to appeal at an oral hearing in that court, this might be described

[16] This was confirmed anecdotally in discussions with Court staff and office lawyers.

either as ‘no jurisdiction’ or ‘no further right of appeal’. In one instance where the applicant wanted to appeal against a decision of a district judge in the county court, the letter from the Court of Appeal advised that the application for permission to appeal should be made to a circuit judge. It then indicated, incorrectly, that if permission was refused a further application should be made for permission to appeal to the Court of Appeal.

As well as dealing with these jurisdictional issues, various members of Registry staff send letters to unrepresented litigants in person asking them to remedy defects in the paperwork they have submitted. Most of these are not recorded in the logbooks or the alphabetical files analysed above. A check with Registry staff suggested that around 250 such letters were sent out in the first six weeks of 2002, which would equate to over 2000 letters in a full year.

With the help of CAO staff, we recorded the nature and frequency of the most common problems with new cases presented at the public counter over a period of 22 working days during May and June 2002. During this period, papers lodged in relation to 189 cases complied with the Court’s requirements while in exactly the same number of cases papers contained errors that required amendment. We did not record how many of the cases in which the papers were in order had previously been submitted with defective paperwork. The nature and frequency of the problems in the 189 flawed cases were as follows (the paperwork for some cases contained several problems):

Table 6: Problems with papers received at the public counter during a 22 day period

Nature of problem	Frequency
Insufficient copies of Appellant's Notice	41
No jurisdiction	30
No evidence in support of application	29
No copy of order assigning case to the multi-track	27
No copy of order being appealed	25
Fee problem	24
Other problem	23
No extension of time application	20
Skeleton argument not attached	17
No grounds of appeal	11
Wrong form	3
TOTAL	**250**

Even this does not represent the total effort spent by Registry staff on remedying mistakes. For instance, an Appellant's Notice is sometimes submitted without a copy of the order from the county court because this was not available when the 14-day time limit for lodging an application expired. The papers are then returned and re-submitted with a copy of the order but without an application for an extension of time which is then required. Rather than return the papers for a second time, the date of submission is taken as that on the original Appellant's Notice, provided this course of action has first been approved by a deputy master.

Taken together, these activities involve a formidable amount of staff time spent responding to mistakes in paperwork submitted to the Court. This in turn casts doubt on any claim that appellants, even when they are legally represented, find the new procedures simple and easy to comply with. The analysis shows the huge savings that could be made in the time of Registry staff if the Court's requirements could be communicated more effectively to applicants and their legal representatives.

It might reasonably be suggested that many of the problems are transitional in nature and will diminish as litigants become familiar with the new procedures. However, there was little evidence of such a decline in the monthly figures that we examined. Misunderstanding of what is required continues to occur even with regular professional users of the Court. While we were observing in the Registry, a representative from the office of the Treasury Solicitor tried to set down an appeal from a circuit judge. A deputy master ruled that the appeal lay to the High Court and that the Court of Appeal did not have jurisdiction. Counsel had suggested that the matter should be dealt with by the Court of Appeal under CPR 52.14 but there was no reference to this on the order.

Many solicitors' firms bring so few cases to the Court that they have little chance to become accustomed to its rules. The same is true of most unrepresented litigants. More than two years after the changes were introduced, Registry staff reported a sustained flow of procedural questions from professional and lay court users and little improvement in the standard of paperwork that accompanies applications.

Possible changes to the rules and the accompanying guidance that might ease the burden on Registry staff are discussed in later chapters of this report.

4.3 Case Management

The instructions and guidance on preparing bundles for submission to the Court of Appeal are long and complex.[17] It is therefore not surprising that many of the bundles received by the Court contain defects which need to be remedied by the originator. The task of checking bundles and issuing requests to remedy defects is carried out by the case management sections within the CAO. There are three sections, each headed by an office lawyer, dealing with work originating from the High Court, the county court and family work and judicial review. The lawyers in charge of two of the case management sections are deputy masters who provide rulings when litigants challenge information provided by administrative staff.

[17] See chapter 5.

The master and deputy masters also hold a dismissal list each week at which litigants who have failed to follow the correct procedures are given a deadline by which to do so. The office lawyers make a significant contribution to the post-Bowman case management culture.

Most work undertaken by case management arises from problems with documentation submitted to the Court. One staff member said it was 'rare for bundles to be correct first time'. Bundles from unrepresented litigants are particularly prone to mistakes but errors in bundles from lawyers are also commonplace. Minor problems are corrected by staff[18] but in most cases action is needed by the party submitting the bundle. In such circumstances, a 'Bundle Query Letter' is sent indicating the action needed. Parties then have 14 days in which to remedy the defects although extensions of time can be granted. The range and frequency of the most common defects are illustrated in the following figures which compare the years before and after the new rules were introduced.[19]

[18] Some case management staff to whom we spoke were willing to put together a bundle on behalf of a litigant in person but others were not. Determining factors were the state of the bundle and, possibly, the litigation history of the particular applicant.

[19] For the proportion of all applicants and appellants in these years that were unrepresented, see, Table 4.

Figure 4: Defects in bundles submitted by solicitors

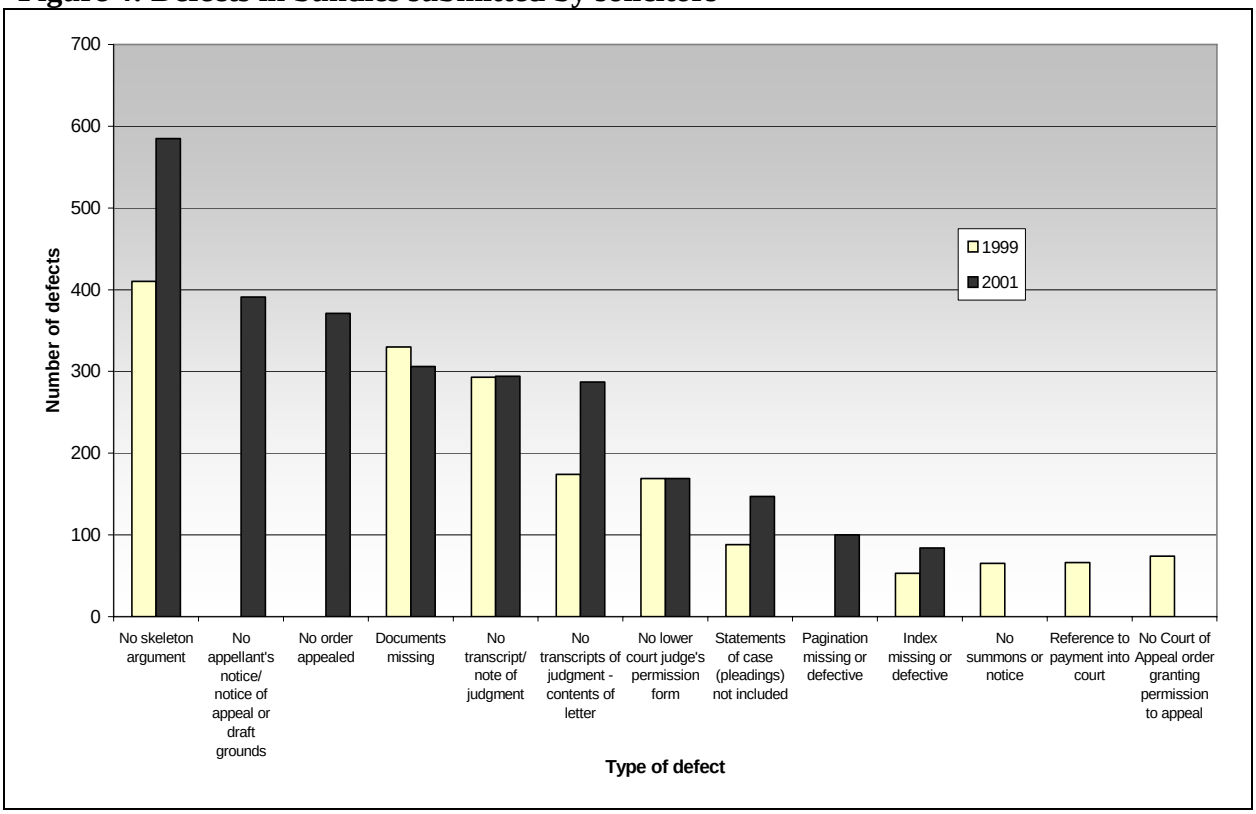
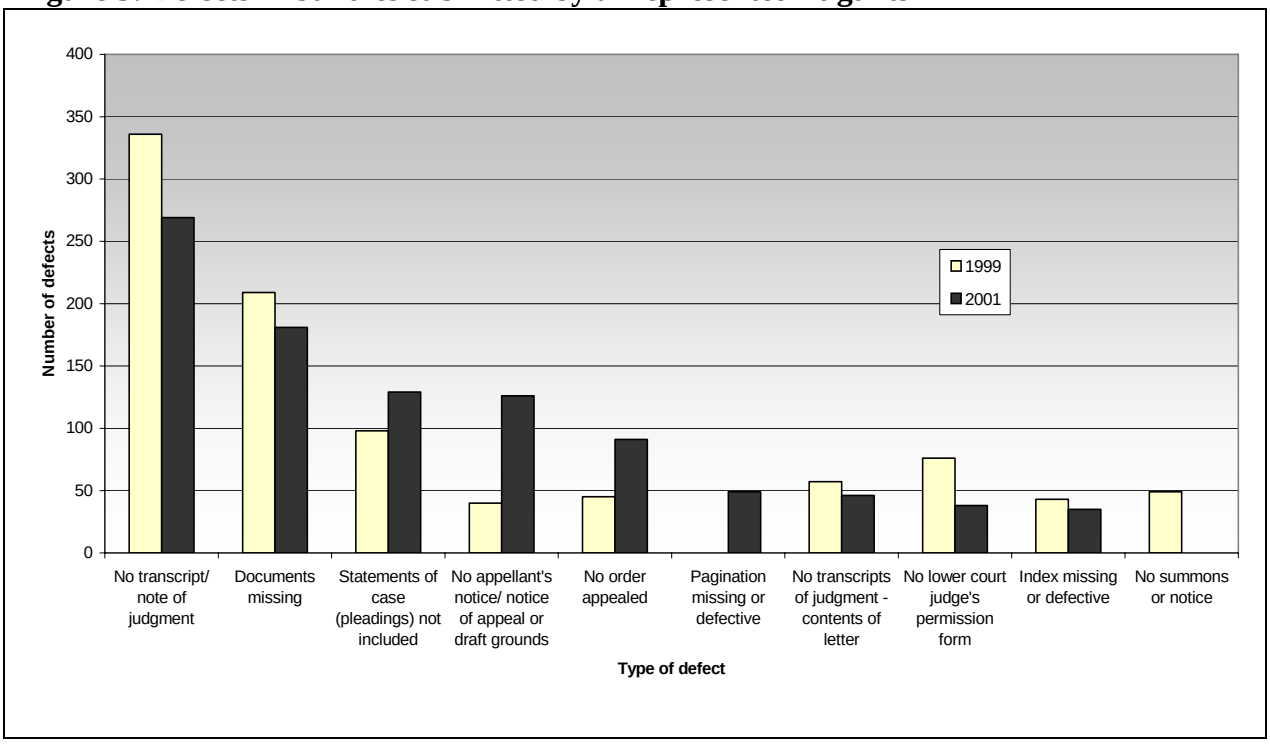


Figure 5: Defects in bundles submitted by unrepresented litigants



There is little to suggest that parties find it easier to comply with the new requirements for bundles. All case management staff to whom we spoke said that failure to provide a transcript of the judgment of the lower court was the single most common problem. Cases are not forwarded to listing until the transcript is available although, in urgent cases, a note of judgment from counsel may be accepted instead. This is not an ideal solution, however, as the note is not approved by the judge and one office lawyer had experience of the other side challenging the contents of an applicant's note. Staff acknowledged the difficulty of obtaining a transcript, particularly from a county court, within the timescale allowed but some of the delay arose because parties did not order a transcript early in the process. The absence of a skeleton argument from so many bundles from solicitors[20] may be due in part to counsel's reluctance to prepare a skeleton without access to the transcript.

In the case of unrepresented litigants, delay can be caused by an application for the cost of a transcript of the judgment to be met from public funds as provided for in CPR PD 52, paragraph 5.17.[21] Many applicants will not order a transcript until such an application has been approved. The delay, which is of particular concern in urgent family cases, is partly caused by the procedure for making an application. Eligibility is identified by case management when a bundle without a transcript is received from an unrepresented litigant who has been granted remission of the fee for lodging an application. The applicant is sent Form 62 which must be completed and sent to the Court together with proof of means, for instance evidence of receipt of state benefits. An office lawyer then considers the application. The process could be short-circuited if Form 62 was included in the pack given to

[20] CPR PD 52, para. 5.9 states that 'An appellant who is not represented need not lodge a skeleton argument but is encouraged to do so since this will be helpful to the court'.

[21] We were told by a designated civil judge in the county court that there is still some uncertainty as to whether the granting of a transcript of judgment at public expense is discretionary for applicants who qualify on the means test. The language of para. 5.17, when considered with that of para. 5.18, might suggest that discretion applies only to the cost of a transcript of the evidence. The judgment in the case of *Plender v Hyams* (1 September 2000, unreported) drew attention to the need for guidance on the exercise of discretion in relation to paras. 5.17 and 5.18 but we are not aware that such guidance has been produced. The Court of Appeal and the High Court in its appellate function exercises discretion in relation to transcripts of both judgment and evidence.

unrepresented litigants who wish to appeal. To avoid a flood of applications, the accompanying guidance could make it clear that only those who qualify for fee remission are eligible for a transcript at public expense[22] and, even then, the award is at the discretion of the Court.

In our view, an applicant who qualifies for fee remission should not have to provide further evidence of their means. This view was not shared by some of those at the Court of Appeal commenting on a draft of this report. The following reasons were given: where public funds are being incurred, the right to check eligibility should exist at each stage; the financial information sought by the fees office is not always sufficient; and there is a difference between fee exemption and fee remission and in those cases where only partial remission is granted, consideration needs to be given as to whether that entitles the litigant to full exemption from the cost of the judgment transcript. We acknowledge the need for stringent controls in determining eligibility for public funding but, in the interests of administrative and procedural simplicity, we believe that means testing should be carried out only once in relation to a single appeal.

Case management staff also spend much time incorporating into case files and bundles documents mailed or delivered to the Court by litigants. They are assisted in this by a bar-coding system which tracks the location of bundles and files. However, the system does not extend to Lords Justices' clerks who collect the bundles prior to hearings. This can cause difficulties when, as often happens, papers are lodged after the bundles have been collected. A further limitation to document management is that the bar-code is only carried by the bundle itself, not its constituent parts or accompanying documents such as skeleton arguments which are often not bound into the bundle.

Practice varied between case management staff as to whether they checked the contents of all copies of the bundle lodged in a particular case. Associates complained that sometimes at a

[22] Although there is no link in the regulations between eligibility for fee remission and for a transcript at public

hearing bundles were found not to match and that time could be wasted while this was sorted out.

Although the question of jurisdiction should have been resolved before the papers reach case management, some slip through the net. Because of this, case management refers to an office lawyer all county court cases that have not been seen previously for a jurisdiction check to be made.

4.4 Listing

The various components of the list of cases to be heard by the Court of Appeal are described in CPD 52, paragraph 15.8. All appeals are automatically assigned a 'listing window' determined by the type of case and the kind of order being appealed.[23] The latest date within the window is known as the 'hear-by' date. Hear-by dates were introduced well before the changes in the rules but they have systematically been reduced so that the longest hear-by date is now 10 months.[24] Procedures for dealing with urgent cases and applications for an expedited hearing also pre-date the new rules and continue to operate.

In the two quarters following 1 October 2001 when hear-by dates were last revised, 65 out of 567 (11.5%) and 72 out of 498 (14.5%) appeals respectively were heard after their hear-by dates. The following graph shows the times by which hear-by dates were missed.

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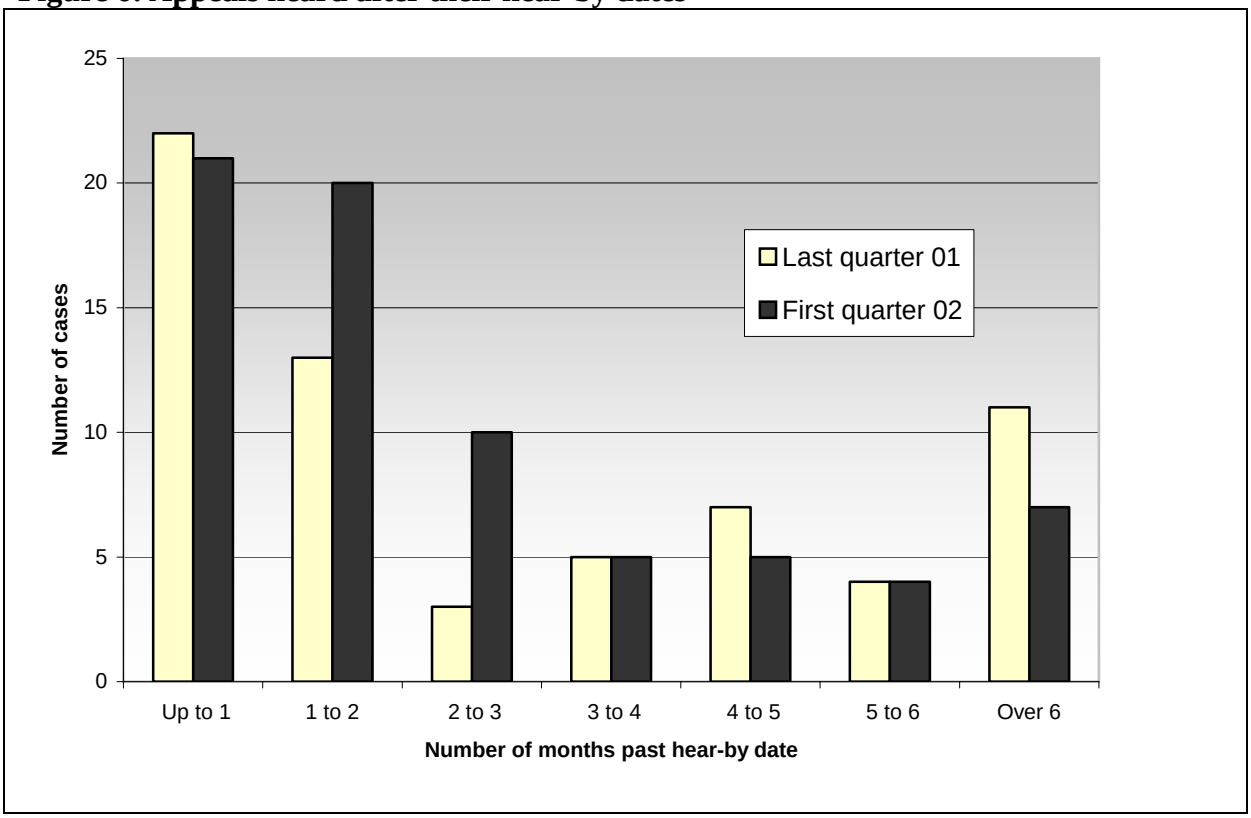
expense, in practice the test applied for each is essentially the same.

[23] Target dates are also set for hearing applications for permission to appeal but, unlike listing windows for appeals, these are not published.

[24] Practice Note, 1 July 2001.

Figure 6: Appeals heard after their hear-by dates



We looked on RECAP and talked to office lawyers to establish the reasons why hear-by dates were missed.[25] In most cases, the delay was caused by matters to do with the circumstances or nature of the case, for instance a decision to amalgamate cases or a request from the parties for an adjournment. Although this might not in itself push the hearing beyond the listing window, it can reduce the number of days within the window on which a hearing can be accommodated. Unavailability of counsel or a suitable judicial constitution can then push the hearing outside the window. In very few cases was a hearing window missed simply because of lack of space on the list.

Staff in the listing office did not feel that their working practices had changed as result of the new rules although the volume of their work had reduced. Some aspects of the new regime had created extra pressures for listing; problems with documentation, especially missing transcripts, and doubts about track assignment could delay the receipt of cases for listing

[25] Some hear-by dates are exceeded with judicial sanction.

from case management. Rather than waiting for cases to arrive, the head of the listing section runs a monthly report to identify cases close to their hear-by dates. This can result in a letter to counsel or alerting an office lawyer if an issue has been overlooked. If the hold up is caused by the lack of a transcript of the judgment, listing will usually risk scheduling the hearing in cases from the High Court but not from a county court. Sometimes cases are identified that are ready for listing but have not yet been received by the listing section.

Following the recommendations in the Bowman report, section 59 of the Access to Justice Act 1999 provided greater flexibility in respect of the number of judges in a constitution of the Court of Appeal. This assists listing in identifying an appropriate constitution to hear an appeal. However, new pressures have been created by the increasing demands on Lords Justices to undertake duties outside the Court. A total of sitting 616 days were lost between October 2000 and July 2001 due to the absence of Lords Justices. Information on the availability of individual Lords Justices is usually only provided a term in advance even though cases are being listed for dates two or three terms ahead.

4.5 Associates

The associates attend hearings, call cases on and prepare court orders. The nature of their work has not been greatly affected by the new rules but they commented on the more business-like approach adopted by the judiciary to hearings. This shows itself in limiting unnecessary discussion and keeping advocates to time. Lords Justices were described as being ‘more conscious of the costs of the hearing’. Some were also ready to recommend alternative dispute resolution (ADR) in appropriate situations. We discuss below the concerns expressed by associates about the work they undertake, even though some of these might not be a direct result of the rule changes.

Associates type up and distribute orders to the parties following a hearing or a decision on permission to appeal made on the papers. Orders are not routinely approved by Lords Justices before being sent out but associates will sometimes consult with counsel on the content of the orders.

Associates complained of various difficulties in producing orders. Because the new rules ensure that the Court is hearing cases of greater weight, complicated orders are more common. Sometimes the parties cannot agree on the wording of an order. A greater proportion of judgments are reserved[26], more cases are 'flagged' as requiring special attention[27] and vexatious litigation is on the increase. The wording of orders relating to the new rules on assessment of costs has proved particularly problematic.[28] Because mechanical recording tapes are hard to get hold of, they are not used for clarifying the text of orders. Although there is not a prescribed format for orders, it is accepted good practice to reproduce in the preamble the words of the order being appealed. Many associates complained that the lower court order is often missing from the file, perhaps because it had been taken to complete a bundle, or sometimes the filed order is not that being appealed. In second tier appeals, the original order can be missing. In these circumstances a copy of the missing order is requested from the parties. Even where the order is on file, the wording must be re-keyed because it is not available in electronic form.[29]

Lords Justices were generally reluctant to adopt a practice of reviewing orders as a matter of course but they were willing to be consulted by an associate who was uncertain about the orders made in a particular case:

> 'We already have enough to do. If the associates have a particular problem they should refer it to the presider but this has to happen quickly while the matter is still fresh in the mind'

[26] See Figure 3.

[27] There were 59 flagged cases in 1999, 108 in 2000 and 135 in 2001.

[28] We understand that there is now a standard format for orders relating to costs.

[29] This illustrates just how far there is to go before the entire bundle is available in electronic as envisaged in chapter 8, para. 42 of Bowman (1997).

> ‘I would certainly hate to have to review orders routinely. Perhaps associates should receive greater encouragement to approach us if they are not certain’.

However, the Master of the Rolls acknowledged the difficulties faced by associates:

> ‘I’d be inclined to say that the Presiding Judge should always look at the draft. If we have perfected our judgment we do not see it again but if not, it is perfectly acceptable to be consulted. The problem is much more likely to arise in the case of *ex tempore* judgments. I am trying to introduce agreed orders so the parties do not have to attend’.

Associates also spoke of other problems encountered in carrying out their duties. Listing errors included failure to include on the list ancillary matters that appeared on RECAP, reference numbers for amalgamated cases being left off the daily court list and missing case reference numbers where judgment is reserved. Associates are not able to correct listing errors on the computer directly. They have to e-mail a request to Registry to make the necessary changes. WordPerfect software is used for correspondence and it is not possible to ‘cut-and-paste’ information from RECAP or addresses from one letter to another. Although orders are given an order number for reference purposes, the number is not entered on RECAP. Associates felt that their training needs were not adequately addressed, particularly in the area of information technology.

4.6 Administration

The administration section is responsible for any aspect of running the CAO that is not specifically within the remit of the other sections. Among other things, this covers the support and maintenance of equipment, stationery supplies, invoicing, publications, handling complaints, contact with the court reporting contractor and liaison with other courts and the Citizens’ Advice Bureau within the Royal Courts of Justice. A key task is support of the RECAP computer system including the implementation of changes in response to user

requests and new procedures. RECAP and other technology issues affecting the Court of Appeal are discussed in the next section.

Administration staff confirmed that most of the effort expended by the CAO stems from the failure of litigants to comply with the Court's procedures. They felt that the new rules were more complicated and harder for litigants to understand. Despite attempts to harmonise the appellate process throughout the court system, the various tiers of court dealt with appeals in very different ways.

Administration tries to resolve problems encountered by other sections within the CAO. Case management were particularly concerned about difficulties with transcripts of judgment due, for instance, to tapes being lost or delay in obtaining judicial approval of the transcript. In such cases, administration will liaise with the lower court to try to overcome the problem. In extreme cases, the Court of Appeal will hear the application without an approved transcript. The liaison role also covers solicitors' firms involved in the scheme to provide *pro bono* help to unrepresented litigants. The head of the section meets with the firms twice a year. The biggest concern is again the quality of bundles although he feels that the quality has improved recently.

4.7 Information technology

The RECAP system pre-dates by some years the new regime introduced in 2000. Many changes have been made to reflect the new environment. The introduction of a single reference number for the permission to appeal application and any subsequent appeal was particularly challenging technically, as it involved hiding screens relating to the appeal from the user until permission has been granted.

Administration staff expressed concern that the capabilities of the RECAP system had been stretched to the limit through the addition of new features. It has, up till now, been the focus for delivering the additional automated facilities recommended in chapter 8 of the Bowman report, but much more needs to be done to provide the full range of case management

facilities to which Bowman referred. There are also opportunities for expanding automated support in other ways, some of which are referred to elsewhere in this report. In addition, there is scope for decision-support to help Registry staff determine whether the Court of Appeal has jurisdiction in a particular case. The vast body of guidance and case law relating to procedures in the Court of Appeal could also be incorporated into a context-sensitive online help facility. Some of this functionality could also be made available to the public through a Court of Appeal website.

A further constraint on the current system is that access is restricted to CAO staff. Bowman recommended providing Lords Justices with case planning systems that would draw on case information in the RECAP database. Links to computer systems in lower courts would allow court orders and other key case information to be transferred electronically with consequent improvements in speed and efficiency in processing appeals. Looking further ahead, there is scope to allow members of the public and solicitors to submit applications and even file supporting documentation electronically.[30] In the survey of professional users of the Court of Appeal carried out by the Court Service early in 2002 (*Court Service Survey Wave 3* 2002), 82 per cent of 22 respondents said they would find it very useful or fairly useful to be able to send legal documents to the Court over the Internet and 91 per cent would find it very useful or fairly useful to be able to correspond with the Court by e-mail. Ninety per cent would like to issue papers or fill in forms over the Internet. The development of such facilities, which would be in line with government policy to make all its services available electronically by 2005[31], could contribute significantly to streamlining the work of the CAO.

The provision of these services is a major undertaking. They form part of the vision set out in the strategy paper "*civil.justice.2000*" which is being taken forward by the Courts and Tribunals Modernisation Programme. However, neither the Court Service's consultation paper *Modernising the Civil Courts* (January 2001) nor its subsequent report *Modernising the*

[30] We were told that Court of Appeal plans for an electronic filing pilot including links to Lords Justices had been set aside until it can be fitted into the *Modernising the Civil Courts* programme.

[31] See, for instance, the website of the Office of the e-Envoy, http://www.e-envoy.gov.uk.

Civil and Family Courts (May 2002) make explicit reference to technology projects in the Court of Appeal. Nor are there plans to give the Court of Appeal its own website. There appears to be a real danger that the Court will be left on the sidelines in the planning process. This is particularly disappointing in light of the comments in the Bowman report (1997, chapter 8, para.5) that the manageable size of the Court and its existing commitment to information technology make it suitable as a test-bed for innovative applications of technology. It is to be hoped that the appointment of Lord Justice Brooke as judge in charge of modernisation will help to raise the profile of the Court of Appeal in future planning.

5 IMPACT ON LITIGANTS

5.1 Introduction

In this chapter we look at the experience of solicitors' firms and unrepresented litigants who make applications to the Court of Appeal (Civil Division). The Bowman report said that 'the rules and procedures governing appeals should be reviewed to make them as straightforward as possible' (Recommendation 98). Recommendation 122 went on to advocate that comprehensive general information about appeals and appellate procedure should be made available at the earliest opportunity and that it should be:

- available at the court or tribunal which make the decision against which an appeal is being considered, the Court of Appeal and advice centres;
- delivered in a range of ways which makes use of modern technology; and
- easily understandable.

In light of these recommendations and the problems discussed in the previous chapter concerning the paperwork received by the Court from litigants, we consider the nature and quality of the guidance available on the appeals process and the services provided by staff within the Civil Appeals Office. For the reasons explained in chapter 1, we focus on those appealing from the decision of a lower court although much of what we say applies equally to those appealing from decisions of tribunals.

5.2 Guidance for litigants

There is a formidable range of information about the appeals process which litigants can consult. It includes statute, court rules, Practice Directions, case law, guidance leaflets and reference books[32] as well as the information available on the Internet. The sheer choice available may contribute to its lack of effectiveness as measured by the failure to comply with the requirements of the Court. Moreover, appellate courts retain some discretion as to

[32] Among the most authoritative is the Manual of Civil Appeals (di Mambro et al. 2000) which includes contributions from lawyers within the CAO.

what paperwork they will accept from litigants and the exercise of this discretion differs between tiers of court.

Solicitors appealing on behalf of a client are expected to refer to CPR Part 52 and the associated Practice Direction for guidance. An unrepresented litigant who wishes to appeal to the Court of Appeal receives a pack from the Civil Appeals Office which includes:

- A covering letter
- A copy of the Appellant's Notice (Form N161)
- Guidance leaflets prepared by the Civil Appeals Office entitled *Routes of Appeal* (Form 201), *How to Appeal to the Court of Appeal* (Form 202), *How to Complete an Appellant's Notice* (Form 203) and *How to Prepare a Bundle of Documents for the Court of Appeal* (Form 204).

The Court Service also produces a national form N161A containing guidance notes on completing the Appellant's Notice. Form 203 is based on this form but adapts it to procedure in the Court of Appeal. It also omits the final section in Form 161A entitled 'What happens next?' as some of the advice does not apply in the Court of Appeal.

Litigants in the Court of Appeal and their legal representatives can also make use of a system of practice appointments with the master or deputy masters. Anyone seeking an appointment must first complete a request form identifying the case, their role and the reason for seeking an appointment. A leaflet on the appointments system is available from the Registry but is not included or referred to in the pack for unrepresented litigants. The language used in the leaflet is not very encouraging. The purpose of an appointment is described as:

> 'to enable appropriate directions to be given prior to an appeal or application being set down or in respect of an application or appeal which has already been set down'.

The leaflet goes on to warn that:

> '[The appointment] will not be a means of obtaining legal advice or circumventing existing procedures operating within the Civil Appeals Office'.

A deputy master indicated that few litigants take advantage of the appointments system. A lawyer in the Citizens Advice Bureau in the Royal Courts of Justice who specialises in assisting unrepresented litigants in the Court of Appeal admitted that he had never made use of the system or recommended it to litigants.

Routes of Appeal

The cover letter urges litigants to check first that their appeal lies to the Court of Appeal rather than to some other court. The difficulties this presents, both to legal representatives and unrepresented litigants, is demonstrated by the figures in Tables 1, 2 and 3 in the previous chapter.

Why do litigants find it so hard to understand the rules relating to appellate routes? The leaflet *Routes of Appeal* runs to five pages and is not easy to follow. The reader must grasp a number of potentially unfamiliar concepts including the assignment of cases to tracks under the Civil Procedure Rules, the meaning of a final order[33], the different types of court and judge and the distinction between an application for permission to appeal, an appeal and a second appeal. The leaflet does not contain a glossary of terms nor diagrams to take the litigant through the steps in deciding which is the appropriate appeal court.[34]

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[33] This alone can involve reference to the Access to Justice Act 1999 (Destination of Appeals) Order 2000, SI 2000/1071 art 1(2)(c), (3); CPR PD 52, paras. 2A.3-2A.5; and Tanfern v Cameron-MacDonald [2000] 2 All ER 801, [2000] 1 WLR 1311, CA, para 17. The Appellant's Notice does not ask whether the order being appealed is final or interlocutory.

[34] Appendix 2 contains an example of such a decision tree for appeals from a lower court although it does not deal exhaustively with all the jurisdictional issues that can arise.

Litigants find it particularly hard to understand the circumstances in which they have no further right of appeal. Much of the confusion arises from the provisions dealing with second appeals: when a lower court grants permission to appeal to itself but turns down the consequent appeal, the appellant can then apply for permission to appeal a second time to the Court of Appeal, although the hurdle to overcome in obtaining permission is higher than for a first appeal.[35] However, if the lower court refuses permission to appeal to itself at an oral hearing then no further right of appeal exists. It may seem odd to many litigants that their appellate options depend so crucially on the permission to appeal decision made by the lower court.

Some unrepresented litigants, whether motivated by a misunderstanding of the rules or some other purpose, can create administrative disruption by pressing on in a situation where their rights of appeal have been exhausted. Refusing to accept what they are told by administrative staff they ask for a ruling from an office lawyer. When this confirms the position, they apply for permission to appeal that decision, as they are entitled to do under CPR 52.16(5).[36] This states that 'a party may request any decision of a court officer to be reviewed by the Court of Appeal'. A similar problem can arise in the High Court. In that case, a ruling is sought from a judge and his decision is then appealed to the Court of Appeal. Recognising the problem, the Court of Appeal has recently issues guidance on how such situations should be handled.[37] Nevertheless, the appellate rights set out in the rules remain.

The question of whether appellate routes could be simplified is discussed in the next chapter. However, much misunderstanding about the rules as they currently stand could be removed if court orders indicated whether either party has a right of appeal against the order and, if so, which court has jurisdiction to hear such an appeal. The position in respect of permission to appeal could also be stated on the order. A judicial interviewee expressed support for such a

[35] Section 55, Access to Justice Act 1999.

[36] The wording of the rule actually says the litigant can ask for the Court of Appeal to review the decision but in practice this means filing an application for permission to appeal.

[37] See *Jolly v Jay* [2002] EWCA Civ 277, para. 19 and *Slot v Isaac* [2002] EWCA Civ 481, para. 17.

move although he pointed out that the guidance on information to be included on orders of first instance courts set out in paragraph 46 of the judgment in *Tanfern Ltd v Cameron-MacDonald* is often not followed.

One judge objected to providing appeal information on orders on the grounds that courts and judges do not understand the rules and could not be trusted to state the position accurately. We were not persuaded by this argument. It is surely reasonable to expect those involved in administering justice to understand the rules by which it operates. Appellate routes should be covered in Judicial Studies Board and Court Service training. In any case, the objection could be met by a proviso stating that the information was for advice only.

There are other ways in which the information for litigants on appellate routes could be improved. General telephone enquiries to the CAO are answered by Registry staff in the course of their other duties. An automated system could provide callers with basic information about the appeals procedure and so alleviate the pressure on staff.[38]

The Internet offers the possibility of presenting the information on appellate routes in an accessible form. An interactive decision tree could lead the litigant through the process and hyperlinks could provide detailed explanations of the terms used. The program could also be made available at information kiosks in court buildings. The potential savings in court staff time could easily recoup the investment needed to develop such a system.

Completing the Appellant's Notice

The Appellant's Notice (Form N161N) is intended for use by all appellate courts. Solicitors are expected to refer to the guidance contained in paragraphs 5.1 to 5.25 of CPR 52 when completing the Notice. For unrepresented litigants appealing to the Court of Appeal, guidance is provided in the leaflet *How to Complete an Appellant's Notice* (Form 203). Both this leaflet and *How to Appeal to the Court of Appeal* (Form 202) to which it refers stress the limited time available to in which to file an Appellant's Notice. However, this is not accompanied by

[38] The Registry has recently introduced such a system on an experimental basis.

guidance on what to do if you cannot meet the time limit, a common occurrence because of the difficulty of obtaining the necessary supporting documents. Form 203 discusses this situation under Section 10 on 'other applications' but this is at the end of the guidance and easily overlooked. There is also a reference to late submission in the covering letter that accompanies the pack.

Although the guidance makes it clear that an extension of time should be applied for if the time limits cannot be met, the procedure to be followed is less well explained. Many applicants submit an Appellant's Notice without details of the appeal but applying for an extension of time when they realise they will be unable to comply with the time limit. In fact, the correct procedure is to wait until the necessary documentation is available and then submit a late but fully completed Appellant's Notice, including an extension of time application in Section 10. This may appear counter-intuitive to many litigants. Their failure to follow the correct procedure is due in part to the wording of the guidance and in part to concern that a late submission will be refused. The wording on time limits should be expanded to explain the procedure to follow if the limits cannot be met and to provide reassurance that an out of time application will be accepted if good reasons are given, for instance delay in obtaining key documents from the lower court.

Even solicitors have difficulty with extension of time applications. The description in paragraphs 5.2 to 5.4 of CPR PD 52 is less detailed than in the pack for unrepresented litigants and CAO staff reported receiving regular enquiries from solicitors about the procedure to be followed. Failure to include an extension of time application was the most common problem in Table 4 (chapter 3) which relates mostly to applications submitted by solicitors. There is a case for revised guidance on completing the form to be incorporated into the form itself and so made available to solicitors and unrepresented litigants alike.

Another problematic part of the Appellant's Notice is Section 11 which deals with supporting documentation. The position about the availability of documents is explained on the form and in more detail in the guidance leaflet which states:

> 'If you do not have a document use the box at the end of the section to identify it and explained why it is not available, state what steps you have taken to obtain it and the date you expect it to be available.
>
> **Do not delay filing your Appellant's Notice at the Civil Appeals Office. If you had not been able to obtain any of the documents required within the time allowed, complete the notice as best you can and insure the notice is filed on time.'** (emphasis in the original).

In practice, the CAO requires litigants in person[39] to provide at least a copy of the order being appealed[40] with the Appellant's Notice before they will set down an application or appeal. This is not mentioned in the form or the guidance leaflet although the cover letter states that '**you must provide a copy of the order** you are seeking to appeal**.** Without this, we may not be able to accept your application/appeal'. (emphasis in the original).

In the case of appeals from first instance decisions of the county court, the CAO needs a copy of the county court order allocating the case to a track in order to check that the Court of Appeal has jurisdiction. This is not mentioned in the Appellant's Notice or the guidance leaflet but the cover letter that accompanies the pack states that '**if the matter has been allocated to a track in a county court we will, in addition, require a copy of the order allocating the matter to the appropriate track.**' (emphasis in the original).

The CAO requires a copy of the track allocation order to be provided with the Appellant's Notice irrespective of whether or not the applicant is legally represented. This is not in the Practice Direction but when Appellant's Notices were accepted from solicitors without such

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[39] An Appellant's Notice is accepted from a solicitor without a copy of the order if there is an undertaking to provide a copy within two days of it becoming available.

[40] Para. 5.6 of CPR PD 52 and the leaflet *How to Appeal to the Court of Appeal* refers at para. 6.2 to the need for 'a sealed copy of the order being appealed' although this terminology is not explained or used in the Appellant's Notice, the guidance leaflet *How to Complete an Appellant's Notice* or the cover letter.

an order there were administrative problems when it later transpired in many cases that there was no such order and so the Court of Appeal had no jurisdiction.

Even where the Appellant's Notice is completed correctly, litigants are sometimes unclear about the number of copies required. Paragraph 5.6 of CPR 52 states the requirement as:

> (1) one additional copy of the Appellant's Notice for the appeal court; and
> (2) one copy of the Appellant's Notice for each of the respondents.

The need for extra copies[41] is not mentioned in the Appellant's Notice nor the guidance leaflet on how to complete it. It is referred to in paragraph 6.2 of the leaflet *How to Appeal to the Court of Appeal* and the cover letter which states in bold that 'the Appellant's Notice must be submitted in triplicate'. Failure to provide sufficient copies of the Notice was a common problem in submissions from both solicitors and unrepresented litigants. If the applicant comes to the public counter, they can be directed to a nearby coin-operated photocopying machine to obtain the extra copies. Applications received through the post are returned for the extra copies to be provided although, if the papers are otherwise in order, the applicant may be contacted by phone and allowed to fax through the missing copies. Much of this extra work could be avoided if the need for additional copies was clearly stated on the form itself.

The process of filing an Appellant's Notice in person is set out in paragraph 6.7 of the leaflet *How to Appeal to the Court of Appeal*. It involves first bringing documents to the public counter in the Registry where they are checked. The fee must then be paid in the Fees Room which is on a different floor in another part of building. The litigant must then return to the Registry counter with the documents to complete the filing process. This is a cumbersome procedure which can involve the litigant queuing three times to be served. If the CAO accepted filing fees at the Registry counter, as happens in the High Court appellate office,

[41] The Court requires two copies because one is stamped to indicate the fee has been paid and is filed separately to provide a financial audit trail while the other goes into the case file.

filing could be completed at one visit. In our view, the improvement in customer service would more than justify the administrative inconvenience involved.

Bundles

The CAO advised that a bundle of documents is not required where the application is only for permission to appeal.[42] In the case of an appeal, there is encouragement to provide bundles at the time the Appellant's Notice is filed but it is not an absolute requirement.[43] In practice, it is impossible for litigants to obtain some of the documents within the time allowed[44] and the CAO does not insist on the bundle being served with the Notice although litigants are encouraged to provide the bundle as soon as possible. The documents to be included in the bundle are set out in paragraph 5.6 of CPR PD 52 and in Section 11 of the Appellant's Notice. Further instructions are in the leaflet *How to Prepare a Bundle of Documents for the Court of Appeal.* This includes some requirements not in the Practice Direction, for instance the need for continuous pagination and an index.

Despite the guidance, many of the bundles submitted by or on behalf of litigants are defective in some respect.[45] The most common problem is the omission of key documents from the bundle. In particular, copies of documents submitted with the Appellant's Notice, and the Notice itself, are often missing from the bundle. In the case of unrepresented litigants, this may be due to a lack of understanding how the various copies are used. The Appellant's Notice and accompanying documents, apart from the bundle, are used for administrative purposes, such as determining jurisdiction, and are put into the Court file held in the Registry. The bundle is provided to the judges who review applications for permission to appeal on the papers or preside at a hearing. Because the judges do not have the Court file, the bundle must

[42] This is not made clear in the section on the Appellant's Notice in CPR PD 52.

[43] Para. 5.6 of CPR PD 52 lists the bundle as one of the documents that must be served with an Appellant's Notice although it provides at para. 5.7 for the situation where this is not possible.

[44] For instance, the court reporting firm in the High Court is allowed three weeks to produce a transcript of judgment after receipt of the tapes from the court. The transcript is then returned to the judge for approval before being released to the litigant. In the county court the process can take even longer.

[45] See Figure 4 and Figure 5 in chapter 4.

contain copies of all the key papers relating to the case. If this was explained in the guidance, it could reduce the number of bundles lodged with missing documents.

The document most often found to be missing from the bundle is the transcript of the judgment of the lower court. The guidance leaflet on bundles explains that Lords Justices require the transcript in order properly to assess the basis on which the decision being appealed was made. It stresses the importance of ordering a transcript early in the process and gives detailed instructions on how to obtain one. We have already referred to the difficulty of obtaining a transcript in good time, particularly from a county court. The position relating to transcripts obtained at public expense was discussed in 4.3. The changes to procedure we recommend in that section could reduce the delay in obtaining a transcript in such cases. If they are adopted, the guidance in the leaflets should be amended accordingly. In the final chapter we suggest how the process of obtaining a transcript paid for by the applicant might be expedited.

Respondents

Although procedural complexity for respondents is generally less than for appellants, some misunderstandings still arise, for instance in relation to the need to complete a Respondent's Notice (Form N162). The position is set out in CPR 52.5(2) which states that an obligation to submit such a notice only arises if the respondent

(a) is seeking permission to appeal from the appeal court; or
(b) wishes to ask the appeal court to uphold the order of the lower court for reasons different from or additional to those given by the lower court.

Few unrepresented litigants submit a Respondent's Notice. The Court Service produces guidance notes for respondents as Forms N161B and Form N162A. There are no versions of these aimed specifically at the Court of Appeal. The CAO does not use Form N161B but staff on their own initiative have downloaded Form N162A from the Internet and give it to unrepresented litigants who request a Respondent's Notice.

Although in most circumstances there is no need to submit a Respondent's Notice, we were told that this is not well understood by respondents. Some large firms treat them as obligatory. Some complete the form only for the purpose of submitting a skeleton argument, as they are entitled to do,[46] and complain when they are asked for the filing fee. In fact, a skeleton argument can be submitted on its own without a Respondent's Notice[47] in which case no fee is due.[48] A similar situation arises when the Respondent's Notice is used only to make an ancillary application such as security for costs.

The mistake reported above in which the Appellant's Notice is used to apply for an extension of time occurs also with Respondent's Notices. The layout of the Notice is not easy to follow and can lead to errors in completion, for instance confusion about whether the respondent is asking for permission to cross-appeal or for the order of the lower court to be affirmed.

5.3 The Citizens' Advice Bureau at the Royal Courts of Justice

The Citizen's Advice Bureau at the Royal Courts of Justice (CAB at the RCJ) provides expert advice to litigants and those contemplating litigation. In appropriate cases, it can refer clients for legal advice or even arrange representation at a hearing at no cost to the litigant. The services of the CAB at the RCJ are praised by unrepresented litigants and greatly valued by CAO staff and the judiciary who frequently refer litigants there for advice. However, there were also concerns that the demands on the service exceeded the resources available and some litigants complained that they had to wait a long time to see an adviser.[49]

We spoke to a lawyer in the CAB who specialises in advising unrepresented appellants. He confirmed that his clients had great difficulty in understanding the appellate routes. The problems were compounded because lawyers, court staff and judges also had a poor grasp of

[46] Para. 7.6 CPR PD 52. This is also explained in the guidance notes, Form N162A.

[47] Para. 7.7 CPR PD 52

[48] This is not stated explicitly in CPR PD 52 or Form N162A.

[49] For a description of this and other problems, see Plotnikoff and Woolfson (1998).

jurisdictional issues. He referred to one client in a possession case who had spent a year litigating in the High Court in a matter that should have been directed to the Court of Appeal.

He was critical of the Appellant's and Respondent's Notices which he described as more complex that those used previously. Litigants found them hard to follow. He felt that the layout of the forms and the language used almost invited litigants to do more than was strictly necessary. For instance, Section 8 of the Appellant's Notice seems to require the litigant to submit a skeleton argument even though there is no obligation to do so. Section 10 encourages other applications, some of which may not be appropriate to the Court of Appeal. He agreed that interactive guidance available over the Internet would be particularly helpful to many unrepresented litigants.

The clients he sees are generally happy with the service they receive from staff in the CAO. Overall, the level of complaints about the Court of Appeal was lower than for other courts which was surprising in view of the low success rate.

A recent welcome development is the establishment about a year ago of the Personal Support Unit in the Royal Courts of Justice. The three-year pilot is staffed by volunteers and a paid coordinator. They provide emotional support and practical information to members of the public using the RCJ that is similar to the support provided by the Witness Service in the Crown Court and magistrates' courts. They will accompany those who seek their help around the court building and into court if requested. They do not provide legal or procedural advice but would direct anyone in need of this to the CAB at the RCJ with which they have a memorandum of understanding. A notice about the Personal Support Unit is on display at the public counter in the Registry and elsewhere in the building. A leaflet describing their service is sent out by the Principal Registry of the Family Division and a separate leaflet is currently with the Head of the Civil Appeals Office for his approval.

5.4 Views of professional court users

Our survey of solicitors' firms that have cases in the Court of Appeal produced 13 responses. Nine came from firms with more than ten cases in the Court of Appeal in the previous year, three had between two and five cases and one firm had had a single case in the Court. We added to these the results of a Court Service survey of professional users of the Court conducted during February and March 2002 (*Court Service Survey Wave 3* 2002) to which there were 21 responses to most questions.

Simplicity of the new procedures

In our small sample which was dominated by firms with many cases in the Court of Appeal, a majority felt that both the new appellate routes and appellate procedures overall were simpler than before. The frequency of errors in documentation submitted by firms, which was described in chapter 4, suggests that their views may not be representative of the profession as a whole. Because of the small numbers involved, percentages are omitted in the analysis below.

Table 7: Solicitors' views on the new appellate routes

	Number
The new routes are simpler	7
The new routes are more complicated	1
The old and new routes are equally complex	2
Don't know	3
Total	13

Table 8: Solicitors views on the new appellate procedures overall

	Number
Better than before	6
Neither better nor worse than before	4
Don't know	3
Total	13

In the Court Service survey, 48 per cent thought the civil justice reforms (the question did not single out the reforms relating to appeals) had simplified procedure while 24 per cent disagreed. The remainder did not know. Half the respondents described court procedures as fairly easy to understand.

Time limits and costs

The 14-day time limit for filing an Appellant's Notice was considered too short by eight respondents to our survey and about right by the remaining five.

Six respondents to our survey approved of the requirement to submit documents, including a skeleton argument, when filing an Appellant's Notice.

> 'It is a good idea to focus the appellant's mind and to deter tactical appeals where there is little real intention of proceeding'.

Two felt that this requirement was not working as intended:

> 'This is useful but the rules contemplate much fewer documents will be needed than is usually the case'

> 'It is good for the respondent to know the appeal against him or her. But often documents are delayed in being provided by the appellant and this is unfair. There should be greater emphasis on complying with deadlines.'

The other five did not like the requirement. Three felt the time allowed was unrealistic.

> ‘The time allowed is too short. I understand that the general view is that there is not enough time to properly prepare the skeleton and documents’

> ‘Given how long the court takes to deal with matters, the time limit puts unnecessary pressure on solicitors’

> ‘Most documents are to hand from the first instance hearing but there is some difficulty in filing a skeleton argument within 14 days’.

The other two were particularly concerned about the cost implications.

> ‘This has increased the upfront costs’

> ‘The requirement to submit a skeleton argument at the time of the notice of appeal has greatly increased costs. Counsel is instructed to prepare the skeleton and incurs a significant fee but by the time the case is heard, counsel has not seen the documents for months and charges a further fee for reading the papers all over again’.

Overall, three respondents thought that the new procedures had increased costs, three said costs had decreased and one felt that costs had not changed. The remainder did not know what the effect on costs had been.

Guidance on completing forms

We asked solicitors what documentation they referred to when completing an Appellant’s Notice.

Table 9: Guidance referred to by solicitors

	Number
CPR Part 52	13
Practice Direction to CPR 52	12
Guidance printed on the Appellant's Notice	10
Leaflet *How to Complete an Appellant's Notice*	5
Internet	3
Access to Justice Act 1999	1

All but one of our respondents said the quality of the available guidance on the appellate process was adequate or good. The one dissenting solicitor said that 'as with the CPR generally, material definitions tend to be all over the place in the rules themselves and the Practice Directions'.

Twenty-one respondents in the Court Service survey rated the quality of guidance on the preparation of paperwork relating to a case or appeal. Forty-eight per cent said it was good or fairly good, 24 per cent thought it neither good nor poor and 19 per cent said it was fairly poor or very poor. Ten per cent were unable to rate the guidance. Sixty-four per cent of 22 respondents said they would find it helpful to have advice provided from a central telephone helpline. One respondent found the requirements on submitting several copies of certain documents unnecessary and confusing:

> 'The procedure overall seems unnecessarily bureaucratic, requiring all kinds of duplicate stuff, causing lots of expense. Why not just require parties to provide one copy and get your staff to do the duplicating? You charge enough for the privilege!'

Twelve respondents in our survey had asked CAO staff for help on the appeals procedure. Eight commented on the quality of the service they received. Three said it was good and two that it was excellent.

> ‘This Civil Appeals Office is very helpful in dealing with inquiries. The letters they send out at various stages in the appeal are useful, informative and straightforward. Wherever the new rules are not clear, the Civil Appeals Office provides a highly efficient service’.

Three respondents were less happy with the service.

> ‘They tend to be a little inflexible’

> ‘Generally quite good but we have received some confusing instructions recently when there was a joint appeal filed’

> ‘The counter staff are unhelpful and generally inexperienced. The lawyers are very helpful’.

The final respondent was very unhappy with the service:

> ‘Terrible; rude; unhelpful. One young woman was quite unbelievably obstructive, maintaining she had returned a document to me when she had not. When she reluctantly checked her file, she found the document. No apology was given’.

The following suggestions were made for improving the service provided by the CAO:

> ‘E-mail contact’

> ‘A dedicated hotline for queries with a ring back option if answer needs to be checked by a court officer’

> ‘Better training of counter staff’
>
> ‘The CAO could take more care in checking the bundle filed and covering letter lodged with the bundle before sending out a proforma asking for missing documents’
>
> ‘Trained staff to appreciate that we’re not the enemy. Filing an appeal should not be regarded as an assault course with the Civil Appeals Office playing Sergeant Major’.

The Court Service survey yielded some additional information. Of the 11 respondents who had been to the Registry in the last six months, none had waited more than ten minutes to be served. Two of the 11 said they were ‘fairly dissatisfied’ with the politeness of staff and two were ‘very dissatisfied’ with the helpfulness of staff. Three were dissatisfied in some degree with the knowledge of staff and the overall service they received.

A quarter of 20 respondents reported waiting over 30 seconds for their call to be answered on the last occasion they had telephoned the Court of Appeal. Satisfaction rates with the service received over the phone were slightly higher than for the public counter.

Seventeen respondents had written to the Court in the last six months and all but one had received a reply although seven were dissatisfied with the time the Court had taken to respond. Four out of 16 were not satisfied with the written reply they received.

A Lord Justice to whom we spoke provided a copy of a telephone attendance note submitted by a large firm of solicitors in support of an application for an extension of time in which to apply for permission to appeal. We reproduce it here to illustrate the difficulties that even experienced users encounter in understanding the new procedures and obtaining information.

TELEPHONE ATTENDANCE NOTE

ENGAGED WITH – Royal Courts of Justice

1340

Called above on 020 7947 6000

Asked what the fee was to appeal a circuit judge's order. Was given loads of figures and got asked loads of questions!

Is it Civil or Queen's Bench?

If it's QB then if we need permission it's £150.00.
If we don't it's £100.

I asked why it was less if we don't and she said because if we do get permission they will request a further £200.

Spoke with —, he said he thinks it's Civil.
Called the Court back, asked for Fee Section, explained above. A gentleman told me it would be £80. Told him that I was just speaking with someone a few minutes to go re: fees. I asked what section he worked in it and he said Family and Divorce. Switchboard put me through to the wrong section.

Was put through to Civil again. They said the fee was as stated above but she would transfer me to the High Court to make sure.

They confirmed fees. I asked why it would have to go to the High Court. She said because it's against a circuit judge's order and not district. I explained that I was sending it Special Delivery and that it needed to be at the Court tomorrow at the latest. She advised me to send it to the Royal Courts of Justice and it will make its own way to the Court Department.

5.5 Views of unrepresented litigants

Unrepresented litigants[50] completed and returned four of the 11 questionnaires distributed by the CAB at the RCJ on our behalf. Three of these had applied to the Court of Appeal for permission to appeal and one had appealed with permission granted by the High Court. Two had been told where to appeal by the lower court, one of these by the clerk of the court. One of the others had been told by the CAB and the fourth had been advised by a lawyer.

There was no agreement about the 14 days allowed for filing an appeal. Two said it was too short, one that it was about right and one that it was too long. There was more consensus on the procedures to be followed in filing an appeal. Two described them as hard to understand and two as impossible to understand without help. One of the latter two had relied totally on the CAB at the RCJ for help in completing the Appellant's Notice. The others had referred also to at least two other sources. These were:

- leaflets issued by the CAO (3 litigants)
- the Practice Direction to CPR 52 (3 litigants)
- CPR Part 52 (2 litigants)
- Blackstone's guide to the CPR (1 litigant)
- the library at the RCJ (1 litigant)
- the British Library (1 litigant).

We asked for views on the quality of the written guidance available on the appeals process with the following results:

'Not much'

[50] During the course of our research, Richard Moorhead was undertaking a study on behalf of the Lord Chancellor's Department entitled *Understanding unrepresented litigants and their impact on the justice system.* His study did not include unrepresented litigants in the Court of Appeal.

> ‘I needed help’
>
> ‘Generally very helpful and coherent but some clarification is needed on which points you challenge from the lower court for inclusion in the skeleton argument’
>
> ‘It is most difficult for a litigant in person to write the witness statement and skeleton argument. The written guidance was of no help in this respect. I relied on my own research and the wonderful help received from the duty solicitor and the honorary legal advisers at the Citizens Advice Bureau’.

All four had requested help on the procedures from CAO staff at the public counter. Two had also made such a request by phone and letter. One described staff as ‘very helpful. They assisted me in every way possible’. The other three had some reservations about the quality of the help they had received.

> ‘ Most staff were helpful with general and listing enquiries but when it came to a legality they suggested the Citizens Advice Bureau’
>
> ‘I was told to wait until I hear from them’
>
> ‘The case manager was exceptionally diligent and helpful. Counter staff were competent but required assistance in booking in and processing documents. The office solicitor was very helpful’.

The following suggestions were made for improving the quality of service provided:

‘A better integration of staff positions to have a more competent service if staff allocated to a particular job are absent’

‘The counters for lodging papers and bundles are under-staffed and I did not find staff particularly helpful’

‘Go back to the CPR Part 1 overriding objective, “ensuring that the parties are on an equal footing” etc. Extend the service of the Citizens Advice Bureau with legally qualified staff as the CAO staff are administrative and not legal’.

‘There should be more information on how your case proceeds at all stages. This would alleviate anxieties. The process of collecting your bundles of documents after appeal should be more flexible as limited funds and distance from the Court of Appeal causes difficulties’

‘Procedures are a bit awesome to litigants in person. The judge’s directions and judgment were wrongly typed’

‘I found the Queen’s Bench Appeals Office staff competent in matters concerning form-filling and court procedures. But as a litigant in person, I required legal help and found that the only place I could get this was at this CAB. They approached the Bar Pro Bono Unit and a barrister represented me at the appeal hearing. I don’t know how I would have managed without this service. When I lost at the lower court, I arrived at the appeals procedure not knowing just where to begin and demoralised at the verdict of the lower court trial. But I managed to get through it somehow thanks to the court staff and the administrative and legal staff at the CAB’.

6 THE JUDICIAL PERSPECTIVE

6.1 Introduction

This chapter presents the views of the Master of the Rolls and the 14 Lords Justices (including 11 SLJs) interviewed during the study on the impact of the changes to the appellate regime. It draws also on the views of the master, deputy masters and other office lawyers within the Civil Appeals Office. In the interests of brevity, we use some terms collectively, so that Lords Justices should be taken to include Lady Justices on the Court of Appeal and office lawyers include the master and deputy masters.

6.2 Achievement of the Bowman objectives

The Bowman report (1997 chapter 1, para. 37) set out the following objectives for the reforms to procedure in the Civil Division of the Court of Appeal:

a. reducing the time cases take to reach a hearing
b. reducing the length of the hearing
c. maintaining the quality of the decision-making
d. simplifying procedure
e. reducing cost
f. reducing the demand on the Court, the administration and the parties
g. producing a system which disposes of cases with no real prospect of success at the earliest possible stage
h. introducing greater certainty as to the cost and time
i. ensuring that these objectives are reflected in the structure for fees charged in the Court of Appeal.

We asked Lords Justices for their views on whether these objectives had been achieved. Their views on the first three were reported in sections 3.3, 3.6 and 3.7 above. We now look at the remaining items on Bowman's list.

Simplifying procedure

Most judicial interviewees admitted that they were insulated from the problems litigants experience in complying with the procedural aspects of the new rules. These issues were sorted out by administrative staff and the office lawyers before the papers were put before a judge.

> 'It is good that we don't get tangled up in the procedure but I am aware of the problems in getting the customers to comply. I don't know if procedures can be further simplified.'

One felt that complexity was unavoidable.

> 'It is as simple as it can be although not significantly simpler than before Bowman.'

Lawyers within the CAO are more exposed to the problems that litigants experience in complying with the requirements of the Court. They were clear that the new rules were inflexible and that the objective of simplifying procedure had not been achieved. Lack of understanding of the rules was common among lower courts and solicitors as well as unrepresented litigants.

> 'The new rules have not worked as intended to simplify things. We thought it might take a year for the changes to bed down but we are still having problems 18 months on'.

Section 54(4) of the Access to Justice Act 1999 was quoted as an example of the confusing nature of the new provisions. In referring to applications for permission to appeal, it states:

> No appeal may be made against a decision of a court under this section to give or refuse permission (but this subsection does not affect any right under rules

of court to make a further application for permission to the same or another court).

The intention was to preclude applicants who had exhausted the avenues open to them from taking up any more administrative or court time. The qualification in parenthesis refers to the possibility, in some circumstances, of making a further application for permission to appeal. This is a new application, not an appeal against a previous refusal, and so does not conflict with the wording that precedes it. Nevertheless, the net effect for applicants appears much the same as appealing a refusal and so the section is a potential source of confusion.

Office lawyers frequently have to explain the full meaning of 54(4) to unrepresented litigants and to solicitors. The explanation involves referring to CPR 52.3(3) and (4), CPR PD 52 paragraph 4.13 and the interpretation provided in paragraphs 19–22 of the judgment in Clark v Perks [2001] 1 WLR 17. The multiple references and the detailed nature of this exercise contrasts sharply with the simplification which 54(4) was intended to bring about.

Another example of complexity cited by office lawyers was the position relating to appeals against costs orders, which also had to be explained to litigants on a regular basis. CPR Part 52 does not apply to appeals against decisions made by authorised costs officers[51] and permission is not required for such appeals. The appeal is heard by a costs judge or a district judge of the High Court.[52] If that decision is again appealed, CPR Part 52 now applies as the exception relates only to decisions of costs officers. Permission is required but, because the first appeal did not fall under CPR Part 52, this is not a second appeal for the purposes of section 55 of the Access to Justice Act 1999. The appeal is therefore heard not by the Court of Appeal but by a High Court judge.[53] The rules then allow for a further appeal (in fact, a third appeal) to which section 55 of the Access to Justice Act would apply. The appeal therefore lies to the Court of Appeal and permission is required from that Court of Appeal.

[51] CPR 52.1(2).

[52] CPR 47.21, as substituted by SI 2000/940.

[53] Access to Justice Act 1999 (Destination of Appeals) Order 2000, SI 2000/1071, art 2.

Reducing cost

Lords Justices were general sceptical about any claim that the new rules had reduced the cost of appellate litigation. Although shorter hearings should have the effect of lowering costs, this was balanced by the need to prepare and submit documents at an early stage.

> 'Cost reductions must follow if hearings are shorter but the new procedures front-load costs because of the need for early skeleton arguments'

> 'I am troubled by what I see in costs schedules. The early preparation work we require results in additional costs. I cannot say whether there is an equivalent trade-off because cases are dealt with in a day'

> 'I doubt if costs have reduced. The more demanding the court the more expensive the process'.

Inconsistency was also a problem in relation to costs.

> 'There are staggering variations in costs in the Court of Appeal. In one case the cost might be around £10,000 while in others that are not much longer the costs can rise dramatically to £40,000 or more'.

Summary assessment of costs was not seen as an effective control mechanism.

> 'I am deeply sceptical of claims that costs have reduced as a result of summary assessment of costs'

> 'We see bills when we do a summary assessment of costs. The winning party submits its costs and the other side does not object if the costs are less than or similar to their own. In my limited experience, we tend to wave it through

> unless there is an objection from the loser. I feel that more careful scrutiny is required … I am concerned that there might be attempts by the profession to keep costs artificially high'.

There was some support for a fixed costs regime to combat disproportionality.

> 'The cost to litigants has not decreased. Drastic action is needed in this area and one possibility to consider might be fixed cost recovery'.

The concerns were not confined to appellate costs.

> 'The civil reforms generally have not reduced costs'

> 'I have a multi-track case from the County Court next week where there is an issue of proportionality of costs. It is a clinical negligence case involving two disciplines. There was an award of £3,000 in damages and £19,000 costs which were taxed down to £16,000. The defendant is saying that the judge should have looked globally at the costs in deciding whether they were proportionate. The claimant argues that each element of the costs should be considered separately as was done here'.

Reducing the demand on the Court, the administration and the parties

The extra pressures felt by some judges as a result of the changed pattern of their work were discussed in 3.7. Others confirmed that demands on the judiciary had increased rather than reduced.

> 'The new procedures have increased demand. We have filtered out the cases without merit and so cases have more substance making it difficult to give *ex tempore* judgments as there is not enough time to prepare in advance. The position is made worse by the lack of reading time and so we are trying to reduce the number of sitting days from four to three to allow for reading'

> ‘The reforms have significantly increased the pressures on our time and workload. One example of the source of increased pressure is the requirement for leave in every case. There is a tremendous amount of pre-reading required’

> ‘The demand on the judges has not reduced. The perception is that workload is increasing a little every year. The much greater volume of permissions to appeal is not factored into calculations of our time’.

But not everyone welcomed the prospect of more reading time.

> ‘I am not sure about the desirability of further increasing reading time. The important thing is to have three people working together for a block of time. The presider can then better organise writing of judgments etc. Time gained is time for the pool, for instance whoever has the heaviest writing can then be left out while the other two sit’

> ‘I do not favour moving generally to a three-day week in court. Being in court is the enjoyable part of the job’.

Most Lords Justices could not say whether the administrative burden on the Court had increased although thought it probably had. As mentioned above, many felt that the requirement to produce skeleton arguments at the outset had increased the burden on the parties.

Producing a system which disposes of cases with no real prospect of success at the earliest possible stage

The extension of the requirement for permission to appeal was the most widely welcomed aspect of the reforms. It was generally acknowledged to be effective at filtering out unmeritorious appeals.

> ‘The permission filter has proved a great success’
>
> ‘This is the best thing about the reforms. We even get complaints that the process happens too quickly’
>
> The permission to appeal requirement has taken the trivial work away. This is demonstrated by the increase in the proportion of reserved judgments’.

However, many judges underlined the cost in judicial time and stress of operating the filter.

> ‘It has the consequence that our job becomes harder’
>
> ‘There have been increased stress levels for the judiciary because the work we deal with is more weighty’.

One interviewee pointed out a possible tightening of the process which would produce savings in court time.

> ‘I am not sure that the current system disposes of cases with no prospect of success at the earliest possible stage. You could have a more draconian requirement in which there was only one consideration of whether to grant permission’.

Introducing greater certainty as to the cost and time

The Master of the Rolls was clear that this objective had been achieved and others agreed.

> ‘Certainly this has happened. We list fairly stringently and in court we keep counsel to time’

> ‘Estimates of time in court have to be accurate. The presider will ensure they are kept to’.

One expressed reservations about cost.

> ‘There is greater certainty with respect to time, but I am not sure about cost’.

Ensuring that these objectives are reflected in the structure for fees charged in the Court of Appeal

None of our judicial interviewees expressed a view on this.

6.3 Appellate routes

Simplicity

Only one of our judicial interviewees stated unequivocally that the new appellate routes were simpler than previously.

> ‘I think the new system is simpler and more logical’.

Some judges were apparently unaware of the problems encountered by court staff in resolving jurisdictional questions.

> ‘I am insulated from these problems’

> ‘This is not a problem I have to deal with’

> ‘I have not had an ambiguous case. I was not aware that this was a problem for the office’.

All the rest referred acknowledged problems with the new routes.

> ‘The appellate routes are still pretty complicated. For the average litigant, it is hard to know which is the right appeal court and certainly there is still confusion’

> ‘The new appellate routes are still fairly baffling’.

Two interviewees provided graphic examples of the problems.

> ‘I had a permission to appeal application last week where there had been an interlocutory ruling in the County Court that the defendant was debarred from defending because he had failed to comply with another interlocutory order. He appealed to the High Court but at the same time judgment in the main proceedings in the County Court was appealed to the Court of Appeal. Permission to appeal was refused on paper and renewed orally. But the debarring matter had not yet been heard in the High Court. Lord Justice Thorpe adjourned the permission to appeal hearing and ordered that both appeals should come to the same court. As a result, the High Court transferred the interlocutory appeal to the Court of Appeal. This highlights the weakness of the rules on routes of appeal. Both applications eventually reached this court. The substantive decision was last September and the interlocutory was last July. Permission to appeal was refused on both. It serves as an object lesson on how not to do things’.

> ‘The complexity of the rules governing appellate routes and the difficulties they pose for unrepresented litigants were demonstrated in the recent case of *Slot v Isaac* [2002] EWCA Civ 481 (12th April 2002). The problem is that the Practice Direction to CPR 52 and Court Service guidance are not worded as carefully as the Access to Justice Act or the rules themselves. A three judge court was presented with the following situation:

- case management decision by a district judge
- permission to appeal refused on paper by a circuit judge
- claimants did not exercise their right to renew their application to the circuit judge at an oral hearing. Instead, they sought to appeal to a High Court judge
- a circuit judge (not the one who refused permission to appeal on paper) ordered that the permission to appeal application should be listed for an oral hearing before the circuit judge who refused permission to appeal on paper
- the claimants refused this course of action and eventually their application was placed before a High Court judge
- the High Court judge ruled that he had no jurisdiction to hear the application for permission to appeal the original refusal on paper. He also refused permission to appeal the order of the second circuit judge directing an oral hearing in front of the first circuit judge
- the claimants applied for permission to appeal the order of the High Court judge to the Court of Appeal.

In its judgment dismissing the application, the court drew attention to potentially confusing language in paragraph 4.8 of the Practice Direction to CPR 52, in CPR 52.3(5) and in the Court Service Guide "I want to appeal – The High Court or a county court". The judgment clarified the position in a way that sought to avoid in the future the High Court having to hear oral argument about a matter where it manifestly has no jurisdiction'.

As mentioned above, office lawyers were unanimously of the view that the new routes were not simpler than those they replaced and confusion was not limited to unrepresented litigants.

'Splitting the routes of appeal has made it more difficult for litigants in person and also for some practitioners. This happened in a recent case in which both

> sides were represented and two or three months were lost as a result. Lower courts get the routes wrong too'
>
> 'We get High Court judges asking us if something is appealable'.

The 'leapfrog' procedure

Section 57 of the Access to Justice Act 1999 allows the lower court judge or the Master of the Rolls to direct that a specific appeal be heard by the Court of Appeal even though the normal route would be an appeal to a lower court. The 'lower court' in this context can be either the court whose order is being appealed or the court to which an appeal or application for permission to appeal is made. CPR 52.14 explains that the power should be exercised where the appeal would raise an important point of principle or practice or there is some other compelling reason for the Court of Appeal to hear it. If the Court of Appeal feels that this power has been invoked inappropriately by a lower court, it may remit the appeal back to the court where the appeal would normally be heard.

Prior to the introduction of the new rules, the Lord Chief Justice was concerned about how this power would be used. He therefore wrote to presiding judges and designated civil judges suggesting criteria to be used in a particular case. He included a form on which the judge invoking the procedure could indicate which of the criteria applied although the language in the letter suggested that completion of the form was optional. Neither the criteria nor the form are referred to in CPR 52 or a Practice Direction.

Office lawyers to whom we spoke had never received a completed form in relation to such an appeal. SLJs indicated that this was not acceptable.

> 'This is a failing of the administration in the lower courts. It is something they should be made to do'

> ‘I have asked the High Court to ensure that a justification is provided for bypassing the normal appellate level. We have to go back and ask for this if it is not provided’.

Cases received under CPR 52.14 are referred to a Lord Justice for review. Office lawyers spoke of a number needing to be returned to a lower court during the first year but could not say precisely how many are sent back as they are not usually entered on RECAP. One judge admitted holding on to a case even though he did not consider that it met the criteria.

> ‘I had a recent case which we accepted under 52.14 where two High Court judges had said it should come up but we felt it should have been heard by the High Court. However, we took the case in order to avoid any further to-ing and fro-ing’.

Second appeals

Lords Justices were generally content with the arrangement that second and subsequent appeals should be heard by the Court of Appeal.[54]

> ‘The rules say that you are reviewing the decision of the court below, not holding a rehearing of the case. The litigant’s case is subjected to a stricter test than that applied to first appeals. I consider it right that the Court of Appeal should deal with all second appeals’.

> ‘There is no strong case for arguing that second appeals should go elsewhere. Litigants are entitled to have a go and it would be a failure of the system if it weeded out sensible cases. Someone has to look at these cases and the first instance judge is not best placed to decide the importance of the issues raised. These are generally cases of some importance which the Court of Appeal should look at’.

[54] See CPR 52.13 and the Access to Justice Act 1999, s 55.

Office lawyers were less convinced. One pointed out the opportunity of a second appeal was denied in those cases where the Court of Appeal heard the first appeal. He also suggested a 'fast track' system for second appeals in which applicants filed fewer documents than for a first appeal. A decision on whether to grant permission could then be taken quickly in light of the more stringent test that applied.

Another lawyer questioned whether small claims decisions from a district judge should come within the scope of the rule.

> 'I think it would have been better not to focus on second appeals. The Court of Appeal should deal only with the weightiest matters. The High Court should deal with fast track and small claims cases'.

However, a Lord Justice disagreed. He expressed concern about the poor quality of decision-making by some district judges and saw CPR 52.13 as a safety net to prevent miscarriages of justice.

Lawyers were also concerned that the principle of one level of appeal being the norm did not apply to some decisions of tribunals. One gave the example of a decision of an adjudication officer being appealed to a tribunal, then to an appeals tribunal, then to the Social Security Commissioners, then to the Court of Appeal, making five 'bites of the cherry' in all. Moreover, some Lords Justices are unwilling to apply the more restrictive test to appeals from tribunal decisions as these are not second appeals in the strict sense.

An alternative approach

The new routes of appeal are essentially those recommended in chapter 4 of the Bowman report. In arriving at his recommendations, Bowman considered a system based simply on appealing to the next level of court in the hierarchy but rejected this for the good reason that there is no simple correlation between level of court and the level of judge that hears a

particular case. However, he did not explicitly consider a system based simply on appealing to the next level of judge.[55] In view of the confusion about jurisdiction among litigants under the new rules, we asked judges whether an alternative appellate system based on level of judge would be acceptable.

Many judges had no objections to such a system, provided safeguards were in place.

> 'I think such a system would be a good thing provided there was a mechanism to "leapfrog" in appropriate cases'

> 'As long as the progression is reasonable, something simpler would help'

> 'I have no objections to anything that would make it simpler. The details of the process are very complex'.

Others had reservations based on problems with allocation of work among the existing judicial hierarchy. They felt that the current distinction between the jurisdictions of circuit and High Court judges was somewhat artificial and would disappear in the longer term.

> 'I do not necessarily have an objection from the judicial standpoint but it would not work at the moment. There are four levels of judge. Circuit and High Court judges are in the middle of the sandwich and they hear multi-track cases that are essentially the same. There would be no logic in appealing a multi-track decision from a circuit judge to a High Court judge because they have a co-ordinated jurisdiction in multi-track cases. The situation with multi-track interlocutory appeals is anomalous in this respect, but a lot of them are not suitable for the Court of Appeal and Bowman was right to move them out.

[55] See *Tanfern Ltd v Cameron-MacDonald, paras 15-19*. This describes an appeal to the next level in the judicial hierarchy as 'the general rule' and describes the new appellate routes in terms of departures from that rule.

On the other hand, multi-track interlocutory appeals from one High Court judge cannot easily go to another High Court judge'

'In the long-term, I believe that the distinction between the High Court and county court is likely to disappear. At the moment, a lot of cases are being heard by deputy High Court judges and it would be better to match the right level of judge to the case. There should still be some smaller category of work which is done solely by a High Court judges and a second tier of work which could be done by either High Court or circuit judges but not discriminating between the level of judge. If such a system were in place, it would then be logical to have an appeal system based on gradation of judge'

'The problem with this is that there is no rhyme or reason regarding what decisions are taken by what judge in the first instance. Circuit judges decide complex and difficult matters. District judges decide quantum in cases involving six figure sums. Theoretically, the route should be determined by the type of case. A system based on appealing to the next level of judge would work if there was a better allocation process'

One of the difficulties is that we are in a transitional stage. There is still a nominal distinction between the High Court and the county court in the private civil jurisdiction. There is also a problem with the distinction between district judges and circuit judges. Lord Woolf thought that district judges would be able to do fast track cases as well as small claims but some district judges could not do fast track trials. Also, circuit judges would resent losing fast track cases and having to concentrate only on the multi-track. There are other paradoxical features: assessment of damages has always been considered as work for masters and district judges but, in practice, it can be even more complex than questions of liability. Because work was distributed from the

bottom up rather than the top down, district judges might determine the allocation of work inappropriately'.

A few had objections in principle.

'It is not just a question of simplicity; it must also be appropriate. The current system is appropriate and I would not want to change the routes to a system based solely on the level of judge'

'There is a problem with a system based an appealing to the next level of judge. Most appellate judges do not like one judge second-guessing another. It is contrary to the general principle that applies in most countries that you should appeal to a greater number of judges'

'The crunch would be with decisions of district judges. I would query whether a single High Court judge should deal with a second appeal from a district judge. I think we would want to retain all second appeals here'.

6.4 Time limits

The time limit for filing most appeals and applications for permission to appeal is 14 days after the date of the decision of the lower court, unless the lower court directs otherwise.[56] In practice, this often proves to be less than the time needed to obtain the documentation to accompany the Appellant's Notice. Office lawyers described the problems.

'Time limits are a headache. County courts cannot get their orders out in 14 days. Getting a transcript of the judgment within this time is also a problem, and not just with the county courts'

[56] CPR 52.4(2).

> ‘The time limit of 14 days in which to appeal is too tight. It is seldom possible to get the order or put together the bundle in that time’.

There are some exceptions to the rule with time limits that are both longer and shorter than 14 days, for instance seven days for judicial review and six weeks for appeals from Social Security Commissioners. In view of the confusion referred to in 5.2 about applying for an extension of time, we asked judges if the time allowed should be standardised and increased, say, to 28 days. Most interviewees favoured extending the 14-day time limit, although one preferred 21 to 28 days.

> ‘Fourteen days is on the short side, particularly as the applicant’s skeleton argument is required at the same time as the notice is lodged. An extension to 28 days would probably not affect overall case length’

> ‘The 14 day limit “unhorses” a huge number of publicly-funded cases. There is quite a lot to be said for increasing the time allowed to 28 days’

> ‘Fourteen days is too short. Applicants are lucky to get an order out of the County Court in 14 days’

> ‘There may need to be an increase in the time allowed. I would not want the time doubled to 28 days. If 14 days is problematic then it should be raised to no more than 21 days’.

There were two dissenting voices.

> ‘Fourteen days is a useful time to allow for lodging appeal notices as it forces appellants to get their papers in order quickly. Allowing more time may just increase the delay before appellants concentrate on what they have to do. It is also unfair to the respondent who wants to enforce the judgment in his favour.

> I appreciate that there can be problems in obtaining a copy of the order of the lower court. With the current plans for investing in IT infrastructure for the courts, I would like to move to a situation where litigants leave the court with a copy of the judge's order that has been generated on the spot'
>
> 'The time allowed is a question for the Rules Committee. It was set at 14 days because we wanted people to get on with things. The Rules Committee was completely against tailoring the rules to inefficient court administration. The answer is not to extend the time allowed but to improve the administration. Problems with transcripts are not relevant; you do not need a transcript to decide whether to appeal'.

There was also support for standardising the time allowed.

> 'We should get rid of the differences. They simply produce confusion'
>
> 'I agree that it is unsatisfactory to have many different times allowed in which to lodge an appeal, particularly if the tightest limit is unrealistic'
>
> 'There is no case for allowing a longer time for second appeals from tribunals. These are specialist bodies which hand down written reasons'
>
> 'Appeals from the Social Security Commissioner should be brought into line. There is no reason why the time to appeal should not be shorter than six weeks'.

One interviewee referred to the magnitude of the task in relation to tribunals.

> 'The whole raft of statutory appeals and the procedures that relate to them is unsatisfactory. Legislation and then rules need to be harmonised. We need to

look at appeals from the 40 or 50 statutory bodies and decide which should require permission to appeal and the extent to which times, procedures and routes of appeal can be standardised. This is a massive task to undertake and it is made more complicated because many of the statutory tribunals come under the Department of Trade and Industry. The solution involves examining the detail. It will involve a piece-by-piece review of the legislation'.

Judicial review also presented some unique features.

> 'It is a different jurisdiction and although it is a sort of appeal, it is not against a determinate judicial decision. There is a compelling case for a standard time of 14 days in which to appeal within the judicial system. Judicial review is not an exact parallel. I am not sure whether seven days for renewal is too short. There may be a case to increase the time allowed to 14 days'

> 'As most judicial reviews are in the hands of highly paid lawyers, I do not feel so strongly. 28 days for all other appeals would make sense'.

6.5 Skeleton arguments and bundles

Represented parties are required to submit a skeleton argument with the Appellant's Notice. If this is impracticable, it must be lodged and served on all respondents within 14 days of filing the Notice. Unrepresented appellants are not required to submit a skeleton argument but are encouraged to do so.[57]

We were told by office lawyers that in order to comply with this requirement, solicitors would often lodge a 'holding bundle', perhaps the trial bundle used in the first instance, and then update it subsequently. Amended skeletons were often submitted on the eve of a hearing. This is not only disruptive to the administration, it defeats the intention of ensuring counsel is briefed and addresses the issues at an early stage. We asked judges if, in light of this tactic,

[57] CPR PD para. 5.9.

there was a need to review the requirement. There was no support for doing so. An early skeleton was needed for the permission stage and it did not matter if this was later updated.

> ‘Having a skeleton argument early is valuable and having a revised skeleton later is not a bad thing. There are two reasons for this: firstly, the skeleton is better than the grounds for identifying issues. Secondly, producing the skeleton concentrates the mind of the appellant on the issues. We could require that the skeleton must be related to the grounds of appeal’

> ‘It is a great improvement that they put in something relating to the grounds. It is a great help to the judge dealing with the permission to appeal. You do get supplementary skeletons at a later stage but that is unavoidable, even though it increases costs, because there may have been a change in counsel, and there may, after consideration, be further legitimate points to be made’

> ‘You need a skeleton argument for the permission to appeal. I do not mind if this is just a provisional skeleton argument. The grounds of appeal should not be the long documents which they often are. They should be pithy and accompanied by a skeleton argument. Getting a revised skeleton argument at a later date does not cause problems’.

Judges were unconcerned about late changes to bundles in general.

> ‘I favour flexibility with regard to bundles. I don’t want people rigidly shut out for failing to submit documents within the time limit’

> ‘I would rather have bundles right and they are often not right when I get them two weeks ahead. I’d rather have the correct bundle there than not, no matter how late’

> ‘The start of hearings is never delayed because of late additions to bundles’

> ‘Late amendment to bundles are a bugbear but to exclude them might affect the justice of the whole case’.

One supported the principle of excluding late changes to bundles but had doubts about the practicalities.

> ‘There would be value in a cut-off, for instance 14 days before the hearing. But in some cases this would be difficult to apply, for instance those on the short warned list, where you cannot identify the 14-day limit in advance’.

Most felt that the only sanction against abuse should be criticism from the bench.

> ‘The mechanism is criticism in court’

> ‘We need to make heavy noises when it happens’.

One judge felt even this could be counter-productive.

> ‘Complaining to counsel is a waste of time and can get the case off on the wrong foot’.

Office lawyers were less happy with the status quo. An early bundle was needed in an application for permission to appeal but there was less justification in the case of a straight appeal. Lawyers referred to errors in the bundles that were lodged. Because of this, one lawyer felt that the requirement for an early bundle had actually slowed down the processing of cases and this could be unfair to respondents.

6.6 Unrepresented litigants

We asked judges their views on the differential treatment described in 3.3 of represented and unrepresented litigants in respect of applications for permission to appeal. Most felt this was justified.

> ‘It is purely a question of pragmatism. A paper decision would be a complete waste of time. Litigants in person do not create problems about this but about other things’

> ‘There is no point in dealing with applications from litigants in person on paper … I don’t consider that the current procedure amounts to a two-tier system’

> ‘It is simply not in their interests or in the interests of justice to give them a double bite of the cherry. As things operate now we provide them with the correct minimal right’

> ‘We tried an experiment in which litigant in person permissions to appeal were considered on the papers but they all renewed their application if it was refused. There is no force in the argument that they should be entitled to both’.

Some did not agree.

> ‘I do not have the sense that the experiment relating to this practice failed. It is very dangerous to assume that litigants in person are in the wrong - there are many that simply cannot afford a lawyer. It is therefore fundamentally unjust to approach litigants in person with the assumption that they present “a problem”, even though some do’

> ‘I am a bit concerned about the practice. It does appear to be discriminatory and unfair’

> ‘I feel strongly that litigants in person should not be treated any differently than represented parties, even though most of them will renew to an oral hearing an application for permission which has been refused on the papers. By definition, many litigants in person distrust the system already and to treat them differently simply confirms their prejudices. Many of them see this process as a disbenefit’.

One judge was concerned about a further distinction in treatment.

> ‘Most oral hearings for litigants in person are listed before a single Lord Justice unlike renewed applications in represented cases which are quite often listed in front of two. With litigants in person, there is a great inhibition to bringing in someone else’.

An office lawyer was also concerned. He pointed out that a represented litigant had the advantage denied to a litigant in person of receiving an expensive opinion on paper. That distinction did not exist elsewhere in the system.

Judicial anxiety in relation to unrepresented litigants centred on those who qualified for fee remission and used this to abuse the system.[58]

> ‘A small number of determined and disruptive litigants in person cause great difficulties. They could be excluded from the building and required to communicate only by post but this raises problems with Article 6. *Grepe v*

[58] There is no limit on the number of applications that a fee exempt litigant can make. The Court Service discussed the possibility of introducing such a limit with the Treasury who ruled it out.

> *Loam* and vexatious litigant orders are of limited value in relation to these litigants'.

Office lawyers confirmed the problems caused by such litigants and the disproportionate amount of time spent dealing with them. One described being 'harassed' by such a litigant who had been banned from the building but still communicated with the Court by phone and fax. The process of getting a litigant declared vexatious was seen as bureaucratic and slow. It did not provide an effective means of constraining the activities of persistently disruptive litigants. The alternative was a *Grepe v Loam* order[59] which had a lower threshold but it did not restrain litigious behaviour to the same extent.

The magnitude of the problem was causing some judges to re-examine the right to an oral hearing.

> 'There is a particular dilemma with litigants in person on income support who qualify automatically for fee remission. There is no merits test for them to pass. Even if a lawyer says their case has no merit it may be appealed. The judgment in *Slot v Isaac* may dissuade some but we need to look again at the fees rules. The message from Lords Justices at our recent meeting was that we may need to think again about the automatic right to an oral hearing if permission is refused by the court below and on paper in this court. I strongly recommend that we look at this for obviously hopeless cases'.

The possibility of a human rights challenge was not considered a serious risk.

> 'It is unlikely we would have a human rights problem with Strasbourg who are having similar difficulties of their own'.

[59] There were nine such orders in place at the end of April 2002.

Although these judgments may close down some avenues by which litigants might abuse the system, a new one has recently opened up.[60]

> 'A judgment of a five-man court last week set out that where justice demands it, the Court of Appeal will re-open a case even where its judgment has been perfected. This will impact litigants in person seeking to re-open refusal of leave to appeal. However, we will need a clear procedure for stamping fast on vexatious behaviour. We must be able to stop further applications in such circumstances'.

The Court of Appeal sat in Wales for the first time in 1998. Since then, regional sittings have been extended to other locations including Exeter, Manchester and Leeds. Although regional sittings could potentially benefit unrepresented litigants in these areas by avoiding the need to travel to London for a hearing, they have not yet been used for this purpose to any great extent. The hearings in the region are usually before a full constitution of the Court of Appeal and there is currently no mechanism by which unrepresented litigants can request that their case be included on a regional list. The Master of the Rolls explained this as follows:

> 'Litigants should not be able to request that their cases are heard at a regional sitting of the court because we go out so rarely. The exercise of sitting in the regions is aimed principally at improving morale'.

Another interviewee pointed to the practical difficulties of sitting in the regions.

> 'Regional settings are, by definition, an administrative nightmare. A theoretical case is easy to make but it simply does not work because many cases settle and you can only run this court on the basis of a pool of work. It is not an effective use of time'.

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[60] See *Taylor v Lawrence* [2002] EWCA Civ 90.

An office lawyer suggested that a single Lord Justice could sit in the regions on a regular basis to dispose of applications for permission to appeal and second appeals from unrepresented litigants. He suggested that this had not happened largely because of inertia on the part of the court. There was certainly little judicial support for the idea.

> ‘If you have enough work then this could perhaps be justified. However a single Lord Justice would not be the same thing as the current regional sittings where we go out “with the flag flying”’

> ‘Single Lords Justices operate mostly on paper and it is better for the paper to travel’.

Video and telephone links offer alternative ways of avoiding the need for unrepresented litigants to travel to London. The Bowman report (1997 chapter 8, para. 11(c)) recommended that their use should be piloted for suitable cases in the Court of Appeal and, if successful, their use should be extended. Both technologies have been used on a single occasion to hear permission to appeal applications and a reserved judgment in an appeal heard in Cardiff was delivered by videolink. However, neither technology has become a regular feature of the Court’s work. The Master of the Rolls remained enthusiastic about extending their use.

> ‘I am keen to use this technology wherever possible in order to cut down costs. It could also be used to improve access to our hearings: for instance if a litigant is in Cardiff, he should be able to observe what is happening here without physically coming. I am a pragmatist in these matters - if it saves money then it should be considered’.

Office lawyers agreed that there was scope to make better use of technology. As well as benefiting unrepresented litigants who live outside London, videolinks could be used for litigation brought by prisoners.[61]

6.7 The Practice Direction to Part 52

About a year before the introduction of the new appellate rules, the Court of Appeal issued a consolidated Practice Direction which brought together guidance on a range of procedural matters accumulated over many years. It was superseded by the much shorter Practice Direction to CPR 52[62] but the new document is silent on many issues covered in the document it replaced, for example the requirement that a request for an extension of time in which to lodge a skeleton argument must be made in writing by the advocate.[63] Office lawyers told us that they still referred to the old Practice Direction even though it has no standing. They described the situation as 'unsatisfactory'.

A Lord Justice felt that the need to refer to the old Practice Direction would disappear in time. Some things would be included in the updated version of the new Practice Direction but not all guidance needed to be enshrined in a Practice Direction.

> 'There is necessarily a blurred line between prescriptive Practice Directions and acceptable practice which has not necessarily been written down. The office does many things that are sensible but not written down. If there are important points in the old Practice Direction which are missing in the new one, we can put these back but they need to be identified. We will be putting back the provisions on core bundles'.

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[61] Videolinks between prisons and magistrates' courts are being installed in many parts of England and Wales in order to hold pre-trial hearings in criminal cases as allowed by Section 57 of the Crime and Disorder Act 1998.

[62] An updated version is due to be issued shortly. This will cover some matters addressed in the old Practice Direction.

[63] Para. 3.10.

Another suggested some radical changes were needed to the way the content of Practice Directions was managed.

> ‘I agree on the need to retrieve much of the information that was in the consolidated Practice Direction. We also need to introduce proper document management of Practice Directions to ensure they carry an audit trail including a reference number, the date of issue and the dates they were changed. New Practice Directions are introduced in a fairly haphazard way. There is no neutral citation even though they are law of a sort’.

6.8 Use of judicial time

We asked all judges who had joined the Court before the new rules were introduced whether the changes had resulted in a more effective use of their time. All said they had but some were more enthusiastic about this than others.

> ‘We are better off than before Bowman. We deal with much less work of a simple nature’

> ‘We are dealing with more substantial matters at the appeal stage. Listing broadly performs well in matching judicial skills to cases’

> ‘Use of my time has improved but it is still not as effective as it could be. permissions to appeal are very hard work. The timetable was not devised on the basis that we should decide a certain number of permissions to appeal in a given week. The time it takes to review the papers is not built into the calculations. It is much quicker to grant permission than to refuse it. The size of a bundle is not a good guide to how easy or difficult the decision will be. You have to be much more on top of the details and to give reasons when refusing permission, all of which takes longer’

> ‘Use of my time has improved in some ways but not in others. I spend less time hearing hopeless appeals but I also have less time for writing judgments. In oral permissions to appeal, *ex tempore* judgments are given and that requires pre-drafting. In effect, you are giving someone a final judgment and so you need to set out the history and the reasons. You cannot do this in a page although it was initially thought by the Lord Chief Justice that you could. A permission to appeal transcript can be several pages long. So the main change is that there is more work involved’.

6.9 Relationship with the CAO

The Bowman report (1997 chapter 6, para. 53 and recommendation 61) recommended that all Lords Justices needed to understand the organisation and responsibilities of the Civil Appeals Office. The responses to questions about the procedure for setting down appeals and preparation of papers for court had revealed that knowledge in this area was patchy at best. We asked judges what information they received about the work of the office and whether there was anything additional they would like to receive. For most, the interaction was mainly with the office lawyers or with listing. Some were happy with this arrangement, others less so.

> ‘I don’t know if new Lords Justices are given an explanation. I was not. A few pages of guidance would have helped’

> ‘Usually I call my lawyer and let her liaise with the Civil Appeals Office staff’

> ‘I see the Head of Civil Appeals, both lawyers and the listing officer and I often go into the office. But I have less clear information about what happens when a litigant in person first arrives to lodge an application and what happens to the papers’

‘I receive no information on the operation of the Civil Appeals Office. Once a year I try to tour the office’

‘When I was recently made a Supervising Lord Justice, a senior office lawyer offered me a tour of the office for an hour. I think this was appreciated by the staff and I will go again. There is a danger that the staff might feel forgotten and misunderstood but on the other hand we feel hard pressed getting through the work’

‘Feedback is not volunteered. I visit the office from time to time but not as often as I would like. I am conscious of the high turnover of staff which cannot be good for morale’

‘I am happy with the quality of communication. My main line is through an office lawyer with whom I communicate well. I do not deal with listing directly as I am not a presider’

‘I have never received an explanation of the operation of the Civil Appeals Office but I have good links with the lawyers. I do not visit the Office as often as I should although it is a good thing to do. There is no additional information that I need’

‘I was given no information at all about this at first. Before we had the benchbook, I had to find out everything for myself. I had to ask to visit the office and see what people did. I did not know about RECAP. This is information that we should receive. People coming to sit in the Court of Appeal from a lower court may need this information even more’.

This last interviewee gave an example of how the lack of communication can lead to inefficiencies.

‘We have a system in which the presider’s clerk collects the papers from the office and our clerks collect from the presider’s clerk. However, sometimes you need the papers before the presider’s clerk has collected them and this can be a problem, especially if the presider is on leave. When I first came to the Court of Appeal, I was not aware of the convention and sent my clerk to collect the papers. This would be a better and more efficient system. Nor should masters and lawyers feel they should have to go through our clerk in order to speak to us, especially as our clerks often leave before us at the end of the day. These adjustments to our current practice would not disrupt the delicate judge - clerk - staff relationship’.

7 THE ROLE OF SUPERVISING LORDS JUSTICES

7.1 Introduction

A system of Supervising Lords Justices (SLJs) was formally established in the Court of Appeal in the mid-nineties and extended in November 1997. They were described in the Court of Appeal Civil Division Review of the Legal Year for 1996/97 as exercising 'a supervisory role over particular types of appeals, to ensure that appropriate directions concerning the future conduct of cases are made at an early stage'.

The Bowman report described the tasks which SLJs are asked to undertake as:

- monitoring the flow of cases. This includes looking at the statistics and measuring delays;
- giving directions. This includes giving general directions about the handling of specific types of cases. The Lord Justice will also give directions in individual cases after leave has been granted and before a case is allocated to a particular constitution;
- liaison with the lower courts and their judges so that particular problems which might require the attention of the Court of Appeal are identified at an early stage.

The report commended the initiative and recommended that it be developed and evaluated. However, one Lord Justice warned of the difficulties.

> 'The Bowman vision of Supervising Lords Justices exercising tight control over the area of work for which they are responsible will be hard to achieve. It will need a high level of commitment to such a regime from those at the top, otherwise the message will not be communicated to Supervising Lords Justices … Opportunities for a managerial approach have been lost in the past'.

This chapter describes the views of nine SLJs on their role and how they carry out their supervisory duties. It draws also on the views of the office lawyers with whom they work.

7.2 Information on appointment

Interviewees' length of time in the role of SLJ varied from seven years to a few weeks. A number had been given their supervisory responsibilities shortly after joining the Court of Appeal even though Sir Jeffery Bowman had intended for SLJs to be appointed from among the most experienced Lords Justices.[64] We asked SLJs what information they had been given on taking up their appointment. Many had received nothing. Some of the more recent appointees had talked briefly with their predecessor and the office lawyers about what was involved.

> 'The only introduction I received was being asked to do it'

> 'There was not a lot of introduction. Even a very brief job description would be helpful'

> 'There was no formal handover. I am not sure who my predecessor was'

> I do not recall receiving any introduction to the role. I was not entirely sure what I should be doing and I did not have a predecessor to consult. I spoke to the office lawyers instead'

> 'My predecessor gave me well-organised files and a short "teach-in"'.

A senior Lord Justice pointed out that not everyone was suited to the SLJ role.

[64] Interview, 23 May 2002.

> ‘Lords Justices may be unfamiliar with the culture of the jurisdiction which they are supervising. They may also lack the management skills which Bowman envisaged for the role’.

However, most SLJs felt that the job involved few challenges and that there was no need for more of an introduction.

> ‘It is not a complicated job’

> ‘The expertise rests as much with the office lawyers as with the judges’.

Nor was there much support for a period of overlap when a new SLJ was appointed, the system used in appointing Presiding Judges of circuits.

> ‘In my area there is no need for an overlap. If I had a question I could and would call up my predecessor’

> ‘There is no need for an overlap as long as the new incumbent has a chance to discuss the role with his predecessor and can call on the support of the lawyers’

> ‘A well-organised file and an hour’s discussion with one’s predecessor is quite enough’

> ‘There is a case for it but it would not work in practice. Immediate decisions need to be taken on an ad hoc basis. You cannot split a single responsibility’.

A single SLJ thought an overlap would be beneficial.

> ‘Some overlap would be useful. In might be possible to put the work into larger blocks and to stagger appointments or have two Lords Justices in post with one acting as an understudy for a year or so’.

7.3 Nature of the role

Bowman envisaged management-minded SLJs who monitor the changing pattern of work, investigate the reasons behind delays and develop strategies for improving future performance. There was little enthusiasm for such management activities among our interviewees.

> ‘Most judges do not want to be administrators. I do the task because it is a duty rather than because I enjoy it’

> ‘It is a responsive role with only a small amount of supervision with respect to progress’

> ‘We tend to be reactive rather than proactive’

> ‘Supervising Lords Justices respond to problems as they arise in particular cases. They do not have time to perform a pro-active case management role. Each Supervising Lord Justice gives a report at our meetings and each says that there are no problems to report’.

> ‘I am not looking to see how the system should be improved, only whether a wheel is about to fall-off. I see my role as hearing and deciding cases. I do not see management as my primary function. I try to do the supervising job in as low-key a way as possible’

One struck a more positive note.

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> ‘It has led to a closer relationship with the Office and improved the management of cases’.

For the vast majority of SLJs, their role centred on the case reports prepared for them by office lawyers in advance of the thrice-yearly meetings presided over by the Master of the Rolls.

> ‘I get reports for meetings with cover notes explaining why hear-by dates have been missed’

> ‘The lawyer prepares a report which identifies those cases past their hear-by date. This makes sure they don’t get lost. Every case has a ‘next action’ date at which time it is reviewed. At the beginning of each term we report any problems at the meeting of Lords Justices. I do not feel that it is my responsibility to monitor or chase up reserved judgments although I would do so if one were significantly delayed’

> ‘I get reports for meetings of Supervising Lords Justices. These cover all cases and show hear-by dates and when the cases were listed. Problems are referred to me but I don’t get many queries, perhaps one a week’

> ‘I receive a statistical report on case progress before the meetings of Lords Justices which are held three times a year. I look at the statistics for that purpose. I don’t receive reports at any other time’.

Some received more frequent reports but the emphasis was still on exceptions.

> I get an annotated report around once a month which highlights relevant important dates with reasons why they were missed. The focus is on “exceptions”’

> ‘I receive statistical print-outs seven or eight times a year or whenever I request them. The lawyer annotates the reports and we have a meeting to go through each case. We concentrate on live unlisted appeals. If cases are live and listed there is not much to discuss’.

At least one SLJ also used the reports for other purposes.

> ‘The report gives a breakdown of pending cases and a summary of what they’re about. I ask the lawyer to check, or he spots, if there are several cases to be heard concurrently or consecutively. He will see if there is a case on which I should sit in. There are about five judges with relevant experience and some cases should be listed with one of them in the constitution as they are aware of the differences in procedure. If it is a straightforward case then this is not necessary. You’re not stipulating before whom cases should be listed, just giving guidance’.

We asked SLJs if they had developed general directions about the handling of specific types of cases as the Bowman report had recommended. There were few examples of this happening. Many SLJs took issue with the view that general directions were appropriate in the Court of Appeal.

> ‘No, I deal instead with the needs of exceptional cases as they arise. I do not think there is much scope for general directions. We do not have time to move to a *juge rapporteur* system and I am a little sceptical as to whether it would be justified to do this. Lawyers are highly paid to prepare cases’

> ‘I have not developed any general directions. The routine directions tend to cover the field. I have not received any complaints that what we are doing has created problems’

> ‘I do not consider this to be appropriate at this level. We deal with things on a case-by-case basis’
>
> ‘This would not fit with the type of work we do. We deal with individual cases according to their needs’
>
> ‘No. I doubt if there is a case for it in my area’.

However, one SLJ had found general directions to be useful.

> ‘There are two examples worth mentioning. The first is for interlocutory appeals where we generally have two Lords Justices but in commercial cases the issues can involve substantial points of law and if the two judges do not agree, it creates problems. I arranged with my lawyer that she should flag up when a case is problematic and I direct that the appeal be before either three Lords Justices or two Lords Justices and a High Court judge on the basis that, in either case, at least one member of the Court has experience of the area. The second is for substantial final appeals which involve longer hearings. In such cases we give directions, for instance about exchange of further skeleton arguments, and we decide the reading time required in advance. We ask the parties what they want us to read in advance and get them to decide how the time should be divided up’.

However, there were examples of a strategic approach that did not involve general directions.

> ‘I sit with the presider for three two-week periods during the year. In my case management role, I make sure that any cases that are of particular importance or raise practice issues are listed during one of these two-week slots’

> ‘We report to our term meetings and sometimes discussions lead to a new approach, for instance how to deal with permission to appeal in very complex cases: one took two days before three judges so now I give directions on paper or have a hearing for directions in an attempt to simplify the appeal or reduce the scope by dealing was one of the points first. This might then sort out the rest of the case’.

But sometimes a strategy was developed without reference to the appropriate SLJ.

> ‘You do sometimes get groups of cases, for instance in relation to psychological damage caused by stress at work. We grouped four of these together for hearing and managed them together. This also happened with mesothelioma cases but I was not consulted on the strategy. There is no culture of consulting the Supervising Lord Justice if giving directions in such cases. Bowman’s vision of a Supervising Lord Justice taking strategic responsibility for the management of cases is simply not practical. E.g. I thought that we should be reluctant to grant permission to appeal from specialist second tier tribunals and spoke to a supervising Lord Justice about grouping some from different tribunals to consider the question, but it came to nothing. Presiders are the hardest worked and could not do the supervising role but this means that supervisors are junior to those who are often taking the decisions in these cases’.

Liaison with the lower courts was not only advocated by Bowman, its value was highlighted by Lord Woolf in his review of the legal year for 1996/97 when he was Master of the Rolls.

> ‘The Supervising Lords Justices play a role, not only in monitoring the progress of cases through the Court of Appeal, but also in identifying problems which occur in other parts of the civil justice system which affect the way we carry out our work. This system uncovered the fact that serious delays

were being experienced after requests for transcripts of judgments were made to some county courts. There were a number of different causes of these delays, and a range of remedial measures are now being taken to address each of them'.

We found that SLJs had differing practice in relation to liaison.

'We have very little formal interaction with the lower courts'

'I do not liaise in this way. Most of the problems come from courts around the country and you cannot liaise with them individually'

'I don't liaise with lower courts. It would be unrealistic to expect this to happen'

'We never consult lower courts about individual cases. We do get requests about getting key questions resolved as soon as possible by the Court of Appeal and the lower courts sometimes ask for case management assistance'

'This does not happen. It would need a route into the lower court and for them to come to us'

'I don't consult with the lower court but sometimes a Family Division judge rings up to discuss the likelihood of an appeal in a particular case'

'I am in regular touch with the President of the EAT and, to a lesser extent, with the Social Security Commissioners. They tell me when a case is urgent and if I need to expedite. They also let me know if we need to hear cases together that raise the same point or, if not together, at least to make sure they

> are all heard consecutively by the same constitution. We then case manage the cases for the House of Lords'
>
> 'The Lands Tribunal has contacted me about its rules for leave to appeal to the Court of Appeal which were quirky. I have also spoken to the President of the Immigration Appeals Tribunal and from time to time with the lead judge of the Administrative Court about cases which are inevitably going to find their way here. I also speak to the President of the VAT tribunal on an informal basis'.

A former SLJ highlighted the problems that liaising with the lower courts can present.

> I have tried to liaise with the lower courts but this has proved rather difficult. In relation to the credit hire litigation, everyone wanted the Court of Appeal to sort it out. *Dimond v Lovell* took two years and it did not answer all the questions. When we tried again, the cases were listed before the Court of Appeal but then settled. It demonstrates how difficult this process can be. It is simply not possible to regiment events. At present, the Court cannot require to hear an appeal on a particular point. You can encourage appeals in limited circumstances but, in truth, you are in the hands of the parties'.

A senior Lord Justice was concerned about the different ways in which SLJs approached their role. He felt that supervisors themselves needed some supervision.

> 'One way forward might be the appointment of a deputy president of the Court of Appeal with precise terms of reference of the kind used for the role of Head of Civil Justice to oversee and liaise with Supervising Lords Justices and with the different constituencies affected by the work of the Court of Appeal. At present, too much depends on the personality and competences of a particular judge at a particular time'.

Despite its limitations, the SLJ role was generally felt to be worthwhile.

> 'The supervising role is useful to the office as a point of contact, even though the role might not live up to the grandiose notion that Bowman had in mind'.

An experienced office lawyer agreed.

> 'The introduction of SLJs has probably been the best thing to make the work of the Court of Appeal more efficient on a case-by-case basis'.

7.4 The judicial assistants scheme

The scheme began in 1996 at the instigation of Lord Justice Otton. Its original purpose was to assist in reducing the backlog of applications from unrepresented litigants although the role subsequently expanded to providing assistance generally to Lords Justices. The judicial assistants are young solicitors and barristers who join the Court of Appeal for a short period at an early stage in their career.

Nine judicial assistants were recruited for the Easter and Summer terms in 2002 from the 55 applicants who responded to an advertisement, bringing the total number to ten. Despite the large number of applicants, the low level of remuneration makes it hard to find candidates of the necessary high calibre. Judicial assistants are assigned mostly to presiders, although other Lords Justices can also call on their services for specific projects or cases.

Judicial assistants usually stay with the Court of Appeal for around three months although one has been there for a year. They are generally matched with a judge in whose area of expertise they have an interest. They can be asked to undertake research assignments, proof-reading and writing speeches but they are most frequently called on to prepare bench memoranda, mostly in relation to unrepresented litigants. This involves examining bundles which are often poorly organised. The memorandum is usually prepared at the permission stage and comprises an introduction, a summary of facts and the relevant law, the decisions of

the lower court with reasons, the grounds of the appeal and an opinion on the merits. The main purpose of the memorandum is to give the judge an overview of what the case is about and to address any human rights or case law issues. A judgment on an application by an unrepresented litigant ruled that bench memoranda prepared by judicial assistants or office lawyers should not be disclosed unless their contents might prejudice the judge.[65]

Judicial assistants work in an office on their own or in a Lord Justice's chambers and have little contact with office lawyers or other CAO staff. There is little direct management of their work although they sometimes receive judicial feedback on the quality of a memorandum they have written. Although there is a standard feedback form, we were told by a judicial assistant that it was not routinely completed.

We asked twelve Lords Justices for their views of the judicial assistant scheme. They were overwhelmingly of the view that their usefulness lay in preparing bench memoranda in cases involving unrepresented litigants. Some questioned the value of the scheme.

> 'I do not need a judicial assistant to do research and on the few occasions when I have asked for this it has not been of sufficient quality. It is better to indicate to counsel on both sides what work you want done. The Bar's pro bono scheme is working well for appeals and if you have this you don't need a judicial assistant at this stage. They can contribute at the application stage but they tend not to do it well'

> 'I had a really good summary from a judicial assistant today but I question whether their contribution adds anything to the skeleton arguments. Maybe they get more out of the process than we do'

[65] *Parker v the Law Society*, [1999] C.O.D. 183.

> ‘I do not find judicial assistants very helpful except when they provide a summary in litigant in person cases where the papers are in a mess. It can also be helpful to have a good summary even in a well-organised case. I have a half-share of a judicial assistant but I ask her to do very little. One feels obliged to give them something interesting but, in functional terms, the system in the Criminal Division of the Court of Appeal is more useful. There, fully employed members of the office work hard at producing high standard summaries’

> ‘Fundamentally, judicial assistants are being asked to do a job they are not qualified to do and do not want to do.’

Others were more favourably inclined.

> ‘I am very positive about judicial assistants. One of their principal values is the preparation of bench memos in litigant in person or “messy facts” cases’ although this is probably the work that interests them least. I am not sure that I have ever used them for research although I can see the merits of doing so’

> ‘They do a valuable job and we should retain them’.

Even those who valued the contribution of judicial assistants acknowledged difficulties with the scheme as it currently operates.

> ‘There is a real problem in knowing how best to use them, especially as we have a strong oral tradition and write our own judgments’

> ‘When I first started sitting here there was a bench memo from a staff lawyer in all litigant in person cases. The lawyers had a good understanding of appellate systems and what the rules were. Judicial assistants may be

extremely helpful but often they are not familiar with these details. We need more people who know the process and who stay with us rather than high flyers for a short time. At present, many want to do the interesting work of researching complex cases and tricky points. One exception is comparative law exercises which would be good for judicial assistants to undertake but the results must be of high quality and reliable. Not all presiders share case notes with us. If we all had judicial assistants we could develop ways of using them most effectively. Alternatively, we could have one judicial assistant for each Lord Justice at the top level and floating judicial assistants whose services were available to all of us'

'The judicial assistant system is successful in part but it is hard to marry the needs of the Court with those of young barristers or solicitors. It is not realistic to expect a tenant to give up six months to be a judicial assistant. He or she can earn more in chambers than here, even at the start of their career'

'I have seen very good work from judicial assistants in difficult cases addressing whether all issues have been covered in skeleton arguments. They can perhaps do "a bit of the thinking" but we do not necessarily get associates who are as experienced as is necessary for that level of work'

'I think the system is worth keeping but one could argue that lawyers in the office should write bench memoranda. In the Criminal Division a lawyer in the office writes a summary like a bench memo and that is sent to counsel to check its accuracy. I'm not sure that we should distinguish criminal and civil work here'.

The Lord Justice currently responsibility for the scheme described it as a 'sticking plaster'. He pointed to how poorly Lords Justices were supported compared with their counterparts in other countries, particularly the United States. Federal district judges each have two law

clerks who are hired as employees for one or two year terms. The clerks are integrated into the staff management structure of the court and the role has high status. The contrast was even sharper in light of the fact that the Court of Appeal serves the appellate needs of the whole country which equates to one Lord Justice per 1.4 million people. The corresponding figures in California and New South Wales are one in 200,000 and one in 400,000 respectively.

A significant increase in remuneration was needed to attract judicial assistants of the right calibre and to retain them for more than three months. He felt that the ideal period of service was around a year.

He agreed that views differed as to the value of judicial assistants but said that some of those who expressed dissatisfaction had a misconceived view of the practicalities. There were simply insufficient resources to provide Lords Justices with the support they wanted through the scheme.

7.5 Lord Justices' clerks

Like High Court judges, Lords Justices have assigned to them a full-time clerk who is an employee of the Court Service. The role has been compared to that of a 'batman' in the army: the clerk attends to the more mundane needs of his or her judge such as coffee-making and collecting bundles prior to a hearing. Depending on the computer skills of the judge, a clerk may also undertake word-processing tasks, for instance typing up judgments. Some of the issues concerning judicial assistants apply also to clerks: they are not well paid and, because they are assigned to an individual judge, they are not integrated into the management or career structure that applies to other court staff.

In the last two years, there has been a sharp decrease in the number of applicants for the position of judges' clerks. The age and employment background of candidates has also changed. In response to concerns about the shortage of suitable applicants, Mr Justice Butterfield was asked to chair a working group to investigate the problems and suggest a way

forward. In its report in March 2002, the group did not propose any significant changes in the role, for instance moving to a pool of clerks rather than individual assignment or requiring legal skills. It recommended a more targeted recruitment campaign aimed at matching applicants' skills to the needs of individual judges. It also suggested better training for clerks and greater flexibility to allow clerks to change to a different judge where a successful working relationship has not been established.

We asked SLJs about the functions that their clerk performed and how they saw the role evolving. Clerks were universally considered indispensable. The less computer literate judges were particularly keen on retaining the existing system.

> 'The support of clerks is a vital aspect of judicial work. My clerk collects work for the next two weeks and I look to decide who will write the lead judgment. The clerk checks what's in the bundle and pulls out the judgment and the two skeleton arguments. If you dictate as I do then the clerk needs to be able to type up and format. Clerks are crucial to effectiveness especially for Presiding Judges'

> 'I could not function without a clerk that does the jobs ours do such as fetching papers, dealing with listing and finding out where we are meant to be'

> My clerk is indispensable. I don't use a computer and my clerk does word-processing to a high standard. The degree of a general support provided is high. We are insulated from interruptions'

> 'I am hugely dependent on my clerk as I do not use a computer. I dictate everything. My system's usefulness is limited by the fact it will not accept e-mail attachments. My clerk has better equipment and he can receive attachments so we are taking my e-mail address off the notepaper and adding my clerk's e-mail address'

> ‘A clerk of some kind is essential to me. I do not type well enough to do my own judgments and 50 per cent of judgments are reserved. Beyond that, the clerk tries to make sure that you have papers in time and in order and there is always chasing to do. They set up times to meet fellow judges and organise the work diary’
>
> My clerk is completely invaluable. I don’t type my own judgments and I have always worked best by dictating. I need a competent audio typist but my clerk is much more than that. He is the link between myself and the administration and listing. It is better that he goes down and finds things out rather than having the staff come up’.

There was a mixed reception to the idea of a new role combining the skills of clerk and judicial assistant.

> ‘There is little enthusiasm for legally qualified clerks’
>
> ‘One could see that the roles of clerk and associate could be usefully combined (as, for instance, in the Family Court of Australia) and, if those involved were suitably trained and qualified, it could improve service. Messengers could then do more of the physical job of moving files around’
>
> ‘There is a question as to whether the job should be a undertaken by a legal professional. This would make some aspects of the job more efficient but my clerk is happy to undertake tasks on my behalf however great or small, which leaves me free to get on with judging. The relationship with a professional equal would be quite different’.

One judge was particularly enthusiastic to obtain the services of a legally qualified clerk. He pointed to the delay in using a judicial assistant because, unlike clerks, their services were not 'on tap'.

Moving away from clerks assigned to individual judges was not popular. Some judges wanted an increase in the level of dedicated support.

> 'If we had one clerk shared by three Lords Justices it would simply require more staff elsewhere in the system'

> 'Having a pool of clerks would not work. They need to be familiar with individual needs and to interface with court staff and counsel'

> 'It is crucial to have a clerk dedicated for your use. In fact there is more work than a single clerk can do. For instance, in a very long case one can be in court all day and you need someone to transport things to court and back at the end of the day, to take calls and messages and to type. Then there is the extra work of handing down of judgments, sending out drafts and receiving corrections. Clerks also spend a lot of time negotiating with listing. One really needs a secretary in addition to a clerk for filing and dealing with correspondence relating to one's other responsibilities'.

One of the more computer literate judges saw a need to look again at this aspect in light of changed circumstances.

> 'There are pluses and minuses to the one-to-one relationship with one's clerk. My clerk is under-worked because I type all my own judgments. It is a great deal quicker and it suits my working style. Someone needs to do a proper study of the role. The current system is largely based on the history of going out on circuit which we do not do'.

8 THE APPELLATE FUNCTION OF THE HIGH COURT

8.1 Introduction

The reforms diverted many appeals formerly heard by the Court of Appeal to the High Court. Because the High Court had up to that point been overwhelmingly a court of first instance, it was necessary to set up a new appellate office to deal with the administrative processing of appeals. This office was faced with the same challenges as the CAO in operating the new procedures but without comparable staff levels, experience or expertise.

Some Lords Justices criticised the way in which work had been devolved.

> 'We have offloaded a lot of work to the High Court without giving them the infrastructure to deal with it'

> The Court of Appeal works well because it has sufficient staff and a separate budget. This is not the case in the High Court'

> 'Bowman did not consult on the impact on High Court judges of taking appeals from circuit judges, especially as they had no tradition of handling appellate work. He did not consider whether this new tranche of work could be accommodated in addition to their first instance commitments.'

It was not possible within the scope of our study to evaluate in depth the operation of the High Court's new appellate function. We were not able to visit the various appeal centres in district registries throughout the country and we did not interview High Court judges. However, we spoke to some of those responsible for setting up and operating the office at the Royal Courts of Justice responsible for processing appeals to the High Court and this chapter presents a brief account of the issues and concerns they raised. We hope this will provide useful pointers to anyone undertaking the more comprehensive evaluation which this appellate tier merits.

8.2 The High Court Appeals Office

The appeals office at the Royal Courts of Justice was set up over a period of three months. It is the appeals centre for county courts in Inner London and also handles appeals from decisions of High Court masters and district judges. Although the High Court assumed responsibility for a significant proportion of the work previously handled by the Court of Appeal, no staff from the CAO were transferred. The office has a staff of four and deals with all appeals that lie to the High Court with the exception of appeals in family cases. A different office within the High Court handles family appeals from district judges in district registries. Staff told us that much of their mail is actually for the family appeals office or the CAO and needs to be re-directed.

Unlike the CAO, the High Court Appeals Office does not have masters or office lawyers to assist with the preparation of cases. Those wishing to challenge a decision of a court officer must appeal to the Court of Appeal. Staff acknowledged the support they had received from a deputy master in the Court of Appeal and two High Court judges are available to provide advice if necessary.

The court manager of the CAO provided support to the High Court Appeals Office during the setting-up process. This included providing a cut-down version of the RECAP computer system which has been used to log applications and track their progress since June 2001. In the eight months up to February 2002, about 1000 appeals and applications for permission to appeal and 700 ancillary matters had been recorded on RECAP.

8.3 Procedural issues

Unrepresented litigants wishing to appeal to the High Court receive a pack similar to that described in 5.2 as used in the Court of Appeal. It comprises:

- A covering letter
- A copy of the Appellant's Notice (Form N161)
- Guidance notes on completing the Appellant's Notice (N161A)
- The leaflet *Routes of Appeal* (Form 201)

- The High Court Appeals Office Fees Guide
- A Practice Statement on High Court Appeals from the Vice Chancellor.

The comments in chapter 5 on style and organisation of guidance apply equally to the pack used by the High Court Appeals Office. Office staff confirmed that litigants find the material hard to follow. Around 80 per cent of applications are filed at the public counter and staff seem to adopt a more flexible attitude to errors than in the CAO, only rejecting in total those applications where the High Court does not have jurisdiction. Otherwise, staff try to assist applicants in sorting out the problems with the form and supporting documents. If an unrepresented litigant cannot get a transcript at public expense, a lawyer's note of the judgment of the lower court will be accepted instead. Section 11 of the Appellant's Notice was considered unhelpful as it does not clearly distinguish documents filed with the Notice and those to be submitted at a later date. The human rights 'tick-box' at the end of Section 6 was also inadequate as it did not require the applicant to indicate the nature of the human rights issues involved.[66]

The quality of county court orders was described as 'appalling' by administrative staff and delays in obtaining copies of orders are as much a problem for the High Court as for the Court of Appeal. A high proportion of unrepresented litigants are fee exempt. For the rest, the office accepts payment by cheque of the appropriate filing fee at the counter.

Unlike the CAO, bundle checking is restricted to ensuring that key documents are present. Even so, problems with documents missing from bundles abound. Staff paid tribute to the work of the CAB at the RCJ in helping litigants put bundles together but their involvement nevertheless introduced further delay into the process.

[66] Office lawyers in the CAO expressed a similar concern. One pointed out that where the box was ticked, the grounds for the appeal in Section 7 could range from 'not fair' to specifying the Article on which the appeal was based and a description of why it had been violated.

Unrepresented litigants applying for permission to appeal are given the option of a paper review or an oral hearing. They have five days to respond, otherwise the matter is listed for an oral hearing. Staff indicated that in nine out of ten cases where permission is refused on paper, litigants renew their application at an oral hearing. All oral hearings are presided over by a single High Court judge and the work is spread across all High Court judges. The office tries to ensure that renewed applications are heard by the same judge who refused on paper. An associate draws up the order which is returned with the file to the office for entry onto RECAP. Section 9 judges deal with many of the ancillary matters although care must be taken to ensure they do not receive cases involving a colleague.

Staff suggested that one of the major drawbacks of the new arrangements was the ability of litigants to appeal their decisions to the Court of Appeal. This had created a completely new tier of litigation and had diluted the benefits of diverting appellate work to the High Court. This was a problem even where the Court of Appeal had no jurisdiction, for instance where permission to appeal was refused at an oral hearing. Unrepresented litigants described by staff as 'pre-vexatious' still attempted to appeal such decisions and took up the time of CAO staff in the process.[67] The administration had to be alert to situations where litigants applied for an extension of time in which to file an application for permission to appeal. The decision on the extension of time application can be appealed while that on the permission to appeal application cannot. Much nugatory work can be avoided if an extension of time is granted and a decision reached on the permission decision at the same time. The Court of Appeal drew attention to this in its judgment in *Foenander v Bond Lewis and Co* [2001] EWCA Civ 759. Paragraph 19 states:

> 'If a circuit judge or a High Court judge sitting in an appeal court has the choice of disposing of a belated and unmeritorious appeal either by refusing to extend time for appealing or by refusing permission to appeal, he/she should bear in mind that taking the latter course will bring the appellate proceedings

[67] See *Jolly v Jay* [2002] EWCA Civ 277, para. 19.

to an end. The adoption of the former course, on the other hand, may entail further expense and delay while a challenge is launched at a higher appeal court against the decision not to extend time for appealing'.

8.4 Differences with the approach in the Court of Appeal

Appellate practice in the High Court differs in a number of ways with that in the Court of Appeal. The differences, which may be linked to resourcing levels, are a potential source of confusion to litigants and may contribute to their widespread failure to comply with appellate requirements. Areas where procedure differs include:

- the High Court Appeals Office accepts payment of court fees at the counter while the Registry in the CAO does not;
- different fees are charged by the two courts for filing both an appeal and an application for permission to appeal
- in the High Court, an application for a transcript at public expense goes before a judge while in the Court of Appeal the decision is made by a deputy master (although the decision is appealable in both cases)
- the High Court serves papers on respondents while in the Court of Appeal this is left to applicants
- the Court of Appeal will generally hear appeals immediately after granting permission to appeal at an oral hearing. This is not the case in the High Court
- the High Court uses a different convention in calculating the time intervals, including that between the judgment of the lower court and the filing of an appeal or application for permission to appeal
- the High Court is more strict than the Court of Appeal in enforcing deadlines. Missing a due date requires payment of an additional fee to get a deadline extended
- the High Court takes a more relaxed approach to the content of bundles and the provision of documentation in support of an Appellant's Notice

- the High Court is more likely to allow a litigant to have the assistance of a MacKenzie friend.[68]

[68] See *Noueiri v Paragon Finance plc* [2001] WLR 2357.

9 CONCLUSIONS

9.1 Achievement of the Bowman objectives

The most impressive change in the Court of Appeal since the introduction of the new rules is the improvement in processing the Court's caseload. Waiting times and pending caseloads have reduced substantially and the length of hearings has not increased despite the weightier nature of matters being litigated. Staff within the CAO must take much of the credit for the improved performance of the Court. Their hard work ensured that the many errors with paperwork submitted to the Court by the parties were rectified in time for the great majority of cases to be reviewed and hearings held within targets that have been made progressively more demanding. Job descriptions and workflows were well documented and the improved RECAP computer system provided effective and comprehensive support to all sections within the CAO. Reliance on paper files had been reduced to a minimum.

There are other positive features. The diversion of some appeals to the High Court has meant that weightier matters requiring the judicial power offered by the Court of Appeal form a higher proportion of its workload. The extension of the requirement for permission to appeal has proved effective at filtering out many unmeritorious appeals without the need for a full appeal hearing. Lords Justices have risen to the challenges that this changing work pattern presents. They have accommodated the additional paper reviews and exercised control over hearings to ensure that time estimates are adhered to. We did not encounter any widespread feeling that the quality of justice provided by the Court had suffered as a result.

In other respects the reforms had been less successful. Judges were not enthusiastic about the increase in out-of-court work. This change had been predicted in the Bowman report (1997, Recommendation 103) but it was also expected that the workload of Lords Justices would ease as a result (chapter 7, para. 62). Judges were adamant that this had not happened. They pointed to the increased pressures produced by the more complex character of cases, packed lists, reviewing applications on paper and producing reserved judgments which had soared in number.

Because of the extra work required to prepare documentation early in the process, expected savings in legal costs had not materialised. Unrepresented litigants found the new appellate procedures hard to understand or comply with. The quality of written guidance was not rated highly although there was appreciation of the help provided by Court staff and by the CAB at the RCJ. Much staff time within the CAO was spent dealing with litigants who either were trying to appeal to the wrong court or had exhausted their rights of appeal. Refusal to accept the situation had led to a new tranche of litigious behaviour under CPR 52.16(5) whereby a party could ask for any decision of a court officer assigned to the Civil Appeals Office (essentially an office lawyer) to be reviewed by the Court of Appeal. Litigation of a similar nature found its way to the Court of Appeal from the High Court in its appellate function and this had negated some of the benefits of the new regime.

Other procedural complexity had also increased demands on the Court, the administration and the parties. Most work of CAO staff involves rectifying defects with paperwork submitted to the Court. We monitored the public counter in the Registry over a period of 22 days during which 189 cases, half of those filed, had errors. This equates to around 2000 flawed submissions each year. Paperwork received through the post was equally poor. Two thousand letters requesting corrections were sent to unrepresented litigants each year. Logbooks contained records of another 800 cases in which papers were returned, nearly half to solicitors. Bundle query letters requesting defects to be corrected were at least as numerous after the new rules were introduced as before. No record is kept of other remedial action on the part of CAO staff. The overall picture is of an administration struggling to deal with users who fail to comply with the Court's requirements either because they do not understand them or because they find it impossible to do so.

9.2 Time limits

The time limit of 14 days in which to set down an application to appeal or for permission to appeal was generally acknowledged to be unrealistic. The time needed to obtain a copy of the order being appealed and a transcript of the judgment almost inevitably means that the

deadline will not be met. The appellate court has discretion to set down an application without these documents but the Court of Appeal exercises this differently in respect of represented and unrepresented parties. Where the application is filed after the deadline, it must be accompanied by an extension of time application. This is another procedure which litigants find confusing and which generates more work for CAO staff as a result.

It is surely not sensible to set a deadline which applicants cannot meet through no fault of their own, particularly as the fault often lies with the court system itself. Until the time that lower courts can produce orders and approved transcripts of judgments well within 14 days, it would seem appropriate to increase the time limit for lodging an appeal. We suggest a time limit of 28 days which should be periodically reviewed in light of improvements in the time taken by lower courts to produce key documents.

The authors suggest it would be helpful to increase to 28 days the time allowed to file an Appellant's Notice specified in CPR 52.4(2)(b).

There are a number of exceptions to the 14-day limit which can only cause confusion among litigants. Most of these relate to appeals from tribunals[69] and the position is likely to change when the recommendations of the Leggatt review are implemented. The legislative changes that this will involve should include bringing into line the time to appeal decisions of tribunals where the appeal lies to the court system.

The authors suggest that it would be helpful in any future legislative change resulting from the Leggatt review of tribunals to bring the time limit for appealing to the courts from a tribunal decision into line with that for appealing a court decision.

[69] The other exception is the time limit in which to apply for permission to appeal a refusal to apply for judicial review. This time limit is set by CPR 52.15(2) at seven days. In the interests of consistency, it would be sensible to bring the time limit into line with other appeals. However, we do not make an explicit recommendation as the

9.3 Orders and transcripts

Although some causes of delay are outside the control of litigants, the problems can be compounded by failure to order a transcript of the judgment of the lower court at the earliest opportunity. Other delays are caused by the poor quality of orders drawn by some courts which we referred to in 4.2. It seems that the ability to transfer information electronically between the tiers of the court system is still some way off. There is therefore a pressing need to review and re-design the layout and information provided in court orders. In our view, this should include giving details of whether and how it can be appealed on the order itself. This is not legal advice; it is simply a statement of the rules on procedure as they apply in a particular case.

We recognise the concern that providing appeals information on orders may encourage more appeals. We do no think that this constitutes a valid objection. Firstly, our proposal is in line with an underpinning principle of the Civil Procedure Rules, namely that issues should be addressed as early as possible in order to expedite subsequent events. Secondly, a refusal of permission to appeal by the lower court may actually dissuade some litigants from making an application to the Court of Appeal. Finally, to keep litigants in ignorance of their right to appeal is neither in the interests of justice nor is it an acceptable mechanism for limiting the number of appeals.

Digital audio recording produces an electronic record of proceedings which can be transported by e-mail anywhere in the world for overnight transcription and return. The Court Service's consultation paper *Modernising the Civil Courts* seems committed to the use of digital recording but we understand that analogue recording is still the norm in county courts. We therefore propose that along with revised orders should go changes in the procedure when orders are made to ensure that action to obtain a transcript is initiated as quickly as possible.

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comments we received point to some special features of judicial review that might mean 28 days in which to apply for permission was too long.

The authors suggest it would be helpful to introduce a procedure by which a judge making an order always considers whether there exists a right to appeal the order and if so, whether to grant permission to appeal if that is within the judge's power. Then:

a) If permission were to be granted, the judge would raise with the appellant or the legal representative the need for a record of the judgment when filing the appeal and how to obtain such a record, stressing the urgency of doing so. Where appropriate, the judge would enquire whether the appellant wishes to apply for an official transcript of the evidence to be provided at public expense. If so, the judge would reach a decision on whether to grant the request based on the appellant's means

b) A judge refusing permission to appeal would indicate the court to which any renewed application for permission should be made and again makes it clear that a record of the judgment being appealed will be needed. As before, the urgency and method of doing this should be explained and eligibility for a transcript at public expense should be dealt with.

The authors also suggest it would be helpful to consider re-designing the layout and content of court orders and introducing the new standard format throughout the civil justice system. In addition to space for the description of what is being ordered, tick-boxes to be completed by the judge could be included on the standard form. These would cover:

- *the status of the judge (district judge, circuit judge etc.)*
- *the level of court (county court, district registry etc.)*
- *track assignment (small claims, fast track, multi-track) where appropriate*
- *whether or not the order is a final order*
- *whether there is a right of appeal against the order*
- *if so, whether permission to appeal is required*
- *if so and if the court has the power, whether permission to appeal is granted or refused*

- *if permission is refused or the lower court has no power to grant permission, the court to which any renewed application for permission should be made*
- *where the order is appealable, the court's decision on whether the cost of obtaining an official transcript of the judgment should be borne at public expense.*

We appreciate that this represents a significant departure from current practice and has implications for judicial training. However, the information we suggest putting on the order is crucial in processing any appeal and the advantages of recording it on the order more than outweigh the effort involved. Addressing transcript issues at the earliest opportunity is in line with existing guidance and has the potential to reduce delay and save court staff time.

9.4 Appellate routes

We have discussed at length the failure of litigants to understand or accept the rules governing the new appellate routes and the difficulties this causes. A system based on appealing to the next level in the judicial hierarchy would be clearer to litigants and easier to administer. Such a scheme was not considered by Bowman. Many of those to whom we spoke had no objection to such a system although some of those with misgivings spoke with the authority that comes with long experience of the appellate process. Some objectors were willing to look again at the issue once anomalies in the court structure had been removed. In the meantime, improved guidance and the indication of appellate routes on court orders as recommended above should help to reduce the confusion that currently exists.

9.5 Guidance for litigants

At least part of the blame for the confusion about the Court of Appeal's procedural requirements must lie with the quality of guidance for litigants. We discussed these issues at length in chapter 5 and referred there to the multiplicity of guidance documents and the inconsistencies between them. There is a need to improve this body of guidance and eliminate ambiguities.

The authors suggest it would be helpful to review the information contained in the various sources of guidance, including the Practice Direction to CPR 52, in light of the

inconsistencies and need for clarification identified in this report. The interpretation of the rules provided by case law should also be incorporated into the guidance.

We also wish to raise a fundamental issue about the design of the guidance that is currently available. The general approach adopted by the Court Service in its information for court users is to produce a comprehensive description of every aspect of the subject in question. The leaflet *Routes of Appeal* provides an example: successive sections describe the rules governing appellate routes in family proceedings, multi-track claims and specialist proceedings, small claims, fast track and so on. Readers must select from this catalogue of information those aspects that are relevant to their particular situation. The same is true of the design of the Court Service Internet site. It is structured according to the organisation of the Court Service which users must search through to find the information they want. That task can be made easier with an effective search engine but the one offered on the site is of limited use. For example, searching on 'Court of Appeal' (which is not one of the links on the Court Service's homepage) yields 1392 hits, the first of which is an index of selected Commissioners decisions for 2001 with a claimed relevance of 99.5 per cent. The other hits are equally unhelpful to a litigant seeking information on appellate procedure.

Instead of being left to search a catalogue of facts, litigants need to be taken on a route through the information that is driven by their particular requirements, gleaned from answers to a series of questions. This 'decision tree' approach can be used in both written and electronic guidance. Appendix 2 gives examples of trees for determining appellate jurisdiction. A decision tree in a leaflet can be annotated with pointers to where terms used in the tree are explained in the text. In electronic form, this becomes even easier through the use of hyperlinks. Information is therefore interactively profiled to individual needs. A similar approach could be used for taking a litigant through the steps in completing an Appellant's Notice or preparing a bundle. The improvements in communicating information that such techniques produce should reduce demands on court staff and the delays caused by misunderstanding court rules.

The authors suggest that guidance leaflets on procedure in the Court of Appeal should be revised to include decision-trees and step-by-step guides. The Court Service Internet site should be re-designed with interactive features to assist users in finding the information they need.

9.6 Supervising Lords Justices

The picture that emerged from our interviews with SLJs was reminiscent of our findings relating to designated civil judges in an earlier project (Plotnikoff & Woolfson 2002). In both cases, a vague description of the supervisory responsibilities had led to marked differences in the way the role is approached. However, SLJs were even less enthusiastic than designated civil judges about adopting a managerial approach. SLJs generally saw their role as reacting to problems when they arise. These was little judicial appetite to get involved in strategic planning, communication with lower courts or forging closer links with the administration. The full vision of the role set out in the Bowman report was therefore not being realised.

Despite an intention that SLJs should be drawn from the ranks of experienced Lords Justices, many had taken on the role months or even weeks after joining the Court of Appeal. This was a factor in how the role was perceived. One judge saw it mainly as a way of enriching the career structure for Lords Justices by providing a first rung on the ladder to becoming a presider.

SLJs received no preparation other than a short briefing from their predecessor, where one was available, and a discussion with an office lawyer. No-one had oversight of the way different SLJs approached the role and there was no formal exchange of ideas about the role between SLJs.

Persuading SLJs to adopt a more managerial approach may take time. The transition could be assisted by introducing a element of coordination and the development of guidance on carrying out the role.

The authors suggest it would be helpful to appoint an experienced Lord Justice to coordinate the work of SLJs and to encourage discussion between them. Good practice guidance relating to the role should be developed and made available to new appointees.

9.7 Diverging appellate cultures

The reforms to appellate justice attempted at the same time to spread work more widely across the court system and to unify procedure. However resource constraints and other factors have led to the requirements set out in CPR 52 and the associated Practice Direction being interpreted in different ways by different levels of court. We have highlighted in 8.4 some examples in relation to practice in the High Court and the Court of Appeal. While such divergence is understandable, it provides a further source of confusion for litigants and their legal representatives and creates extra work for courts when case management decisions are challenged. It is also contrary to the objectives of simplicity and unification which the reforms were intended to produce.

The divergence in practice is likely to increase unless positive action is taken to control it. SLJs have shown little interest in becoming involved in the work of appellate courts other than the Court of Appeal. One possibility in the Royal Courts of Justice would be to merge the CAO and the High Court Appeals Office into a single administration serving both appellate courts. This would certainly make it easier for litigants who come to file an appeal. However, the Head of the Civil Appeals Office has made it clear that he is unwilling to take back the administration of the large number of appeals so recently transferred to the High Court. In any case, there would remain the issue of regional appeals centres and appellate work in county courts. A detailed study is needed to establish the differences of interpretation and practice that exist within the appeals system.

The authors suggest there is a need for further research to compare appellate practice across all tiers of court.

In addition, it would be helpful to ask the Head of Civil Justice to appoint a senior judge to monitor appellate practice across tiers of court with the power to take the action necessary to remove inconsistencies.

9.8 Resource implications

Some of the possible actions suggested in this chapter have no resource implications, for instance increasing to 28 days the time allowed to file an Appellant's Notice. Other tasks can be easily accommodated with action that is already planned, for instance the changes to be incorporated in the legislation following the Leggatt review of tribunals. The revisions to guidance on procedure in the Court of Appeal would form part of the Court Service's on-going review and maintenance of information for Court Users. The changes to the Internet site could be incorporated in the programme of redesigning the Court Service's web presence that is already underway.

The new judicial responsibilities for coordinating the work of SLJs and monitoring appellate practice across tiers of court will involve some expenditure of judicial time. However, these tasks are unlikely to prove labour-intensive and the impact should be small compared with the significant time already spent by Lords Justices on other duties.

There are resource implications associated with the suggested changes to the layout and content of court orders and to judicial practice in the lower courts relating to appeals. The design and production of new standard forms will involve some expense but the greatest cost will be the judicial training required before the procedures are adopted nationally. Nevertheless, the costs could be controlled by addressing the practice changes needed within the existing civil justice training programmes provided by the Judicial Studies Board.

The changes are likely to repay the investment of resources involved in their implementation. Facilitating compliance with appellate procedures would increase court user satisfaction while reducing the pressures on court staff in identifying defects and setting in train the necessary remedial action.

APPENDIX 1

Statistical Tables

Table 1: Number of appeals to the Court of Appeal set down and disposed of during 1999 and 2001

	SET DOWN						DISPOSED OF					
APPEALS FROM	**Final**		**Interlocutory**		**Total**		**Final**		**Interlocutory**		**Total**	
	1999	**2001**	**1999**	**2001**	**1999**	**2001**	**1999**	**2001**	**1999**	**2001**	**1999**	**2001**
Chancery Division	103	117	65	36	168	153	125	128	79	34	204	162
Chancery Revenue	14	11	0	1	14	12	9	16	0	1	9	17
Chancery Bankruptcy	14	14	1	10	15	24	16	12	1	5	17	17
Chancery Patents	17	15	19	0	36	15	17	16	20	1	37	17
Family Division	6	4	18	21	24	25	8	5	16	18	24	23
QBD	129	182	140	92	269	274	258	226	181	93	439	319
QBD Admiralty	5	5	1	1	6	6	6	9	3	1	9	10
QBD Commercial	28	64	30	34	58	98	30	71	42	34	72	105
QBD Crown Office& Divisional	111	172	0	0	111	172	111	179	0	1	111	180
County courts	319	295	141	45	460	340	420	293	149	43	569	336
County courts Family	10	20	50	46	60	66	16	18	54	42	70	60
Lands Tribunal	3	9	0	0	3	9	8	12	0	0	8	12
Employment Appeal Tribunal	31	42	1	2	32	44	33	54	1	1	34	55
Immigration Appeal Tribunal	70	50	0	0	70	50	51	53	0	0	51	53
Social Security Commissioners	11	13	0	0	11	13	22	16	0	0	22	16
Miscellaneous Appeal Tribunals	2	2	0	0	2	2	0	3	0	1	0	4
TOTAL	873	1015	466	288	1339	1303	1130	1111	546	275	1676	1386

Table 2: Number of appeals to the Court of Appeal set down, disposed of (by method of disposal) and outstanding

Year	Outstanding at start	Set down	DISPOSED						Outstanding at end
			Allowed	Dismissed	DBC*	Struck Out	Otherwise Disposed	Total	
1999	1285	1339	457	633	421	24	141	1676	948
2001	825	1303	448	553	272	2	111	1386	744

* Dismissed by consent

Table 3: Number of applications to the Court of Appeal set down, disposed of (by method of disposal) and outstanding

Year	Outstanding at start	Set down	DISPOSED						Outstanding at end
			Allowed	Dismissed	DBC	Struck Out	Otherwise Disposed	Total	
1999	954	3186	997	1406	321	68	242	3034	1174
2001	899	3144	1213	1375	321	89	261	3259	873

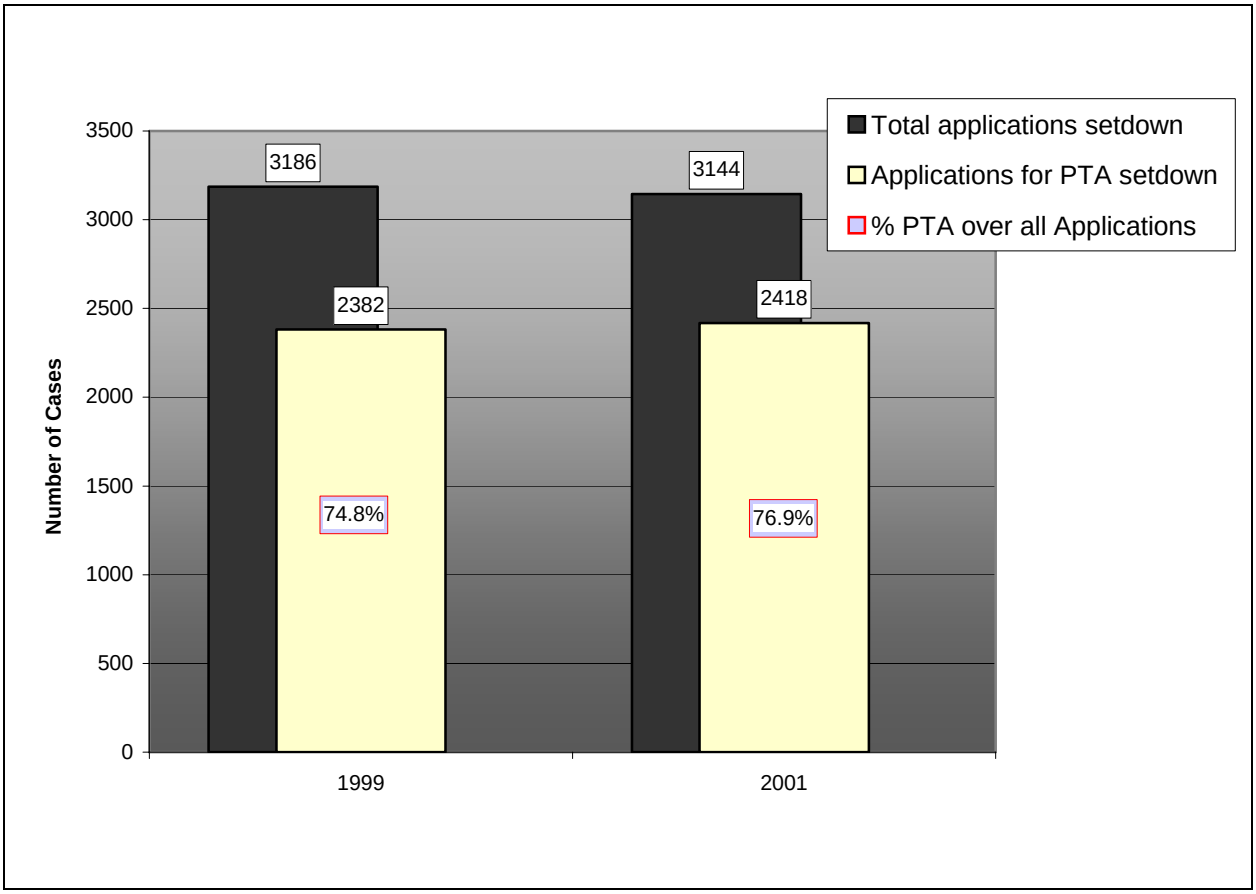
Table 4: Number and percentage of applicants/appellants in person in the Court of Appeal

	1999		2001	
	Number	Percentage of total	Number	Percentage of total
Applicants in person	1190	37.4%	932	29.6%
Appellants in person	92	6.9%	80	6.1%

Table 5: Success rates for litigant in person (LIP) applications and appeals in the Court of Appeal

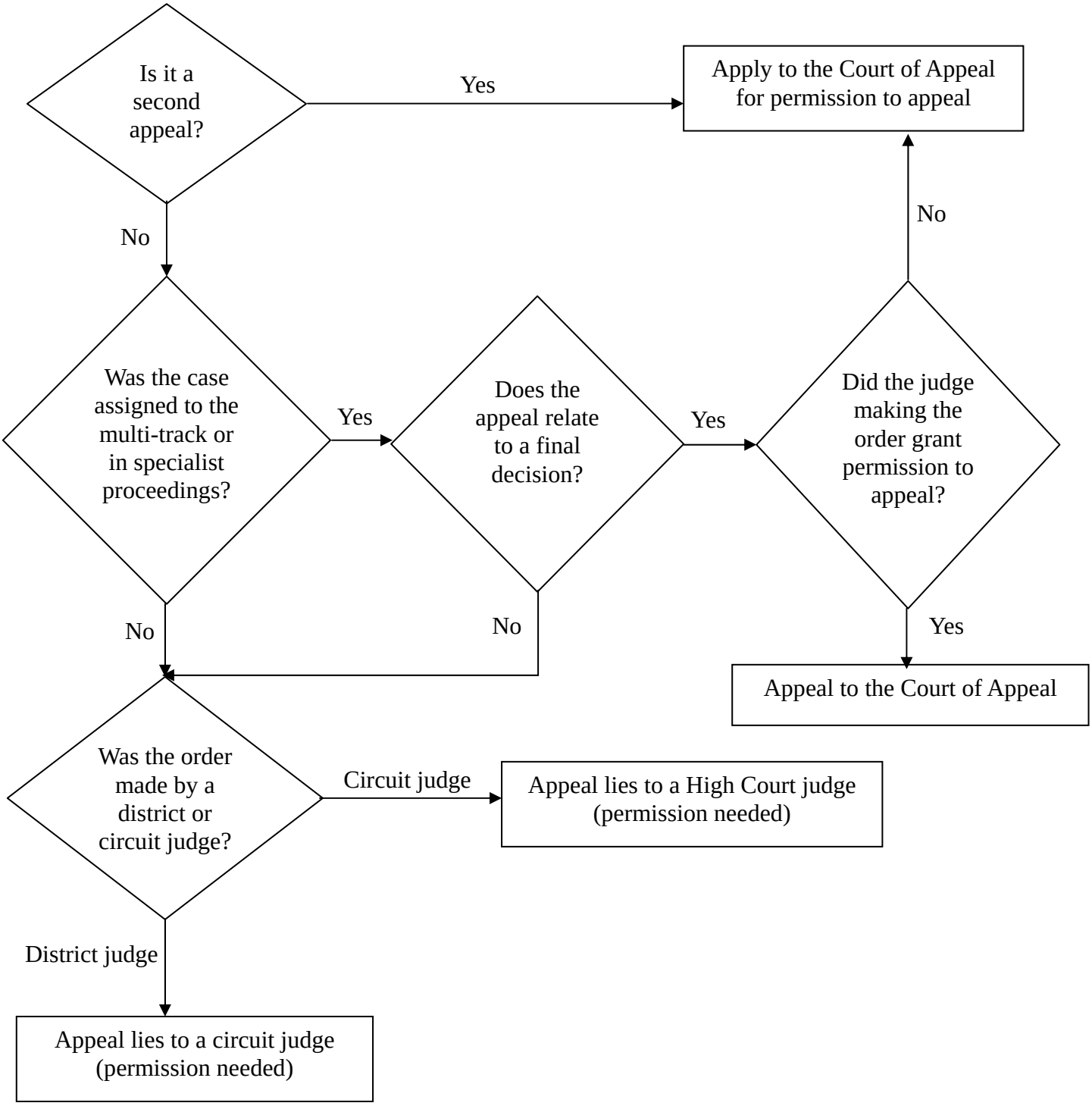
Year	LIP applications disposed	Number allowed	Success rate	LIP appeals disposed	Number allowed	Success rate
1999	1087	136	12.5%	183	51	27.9%
2001	983	94	9.6%	104	42	40.4%

Figure 1: Proportion of all applications set down in the Court of Appeal which are for permission to appeal

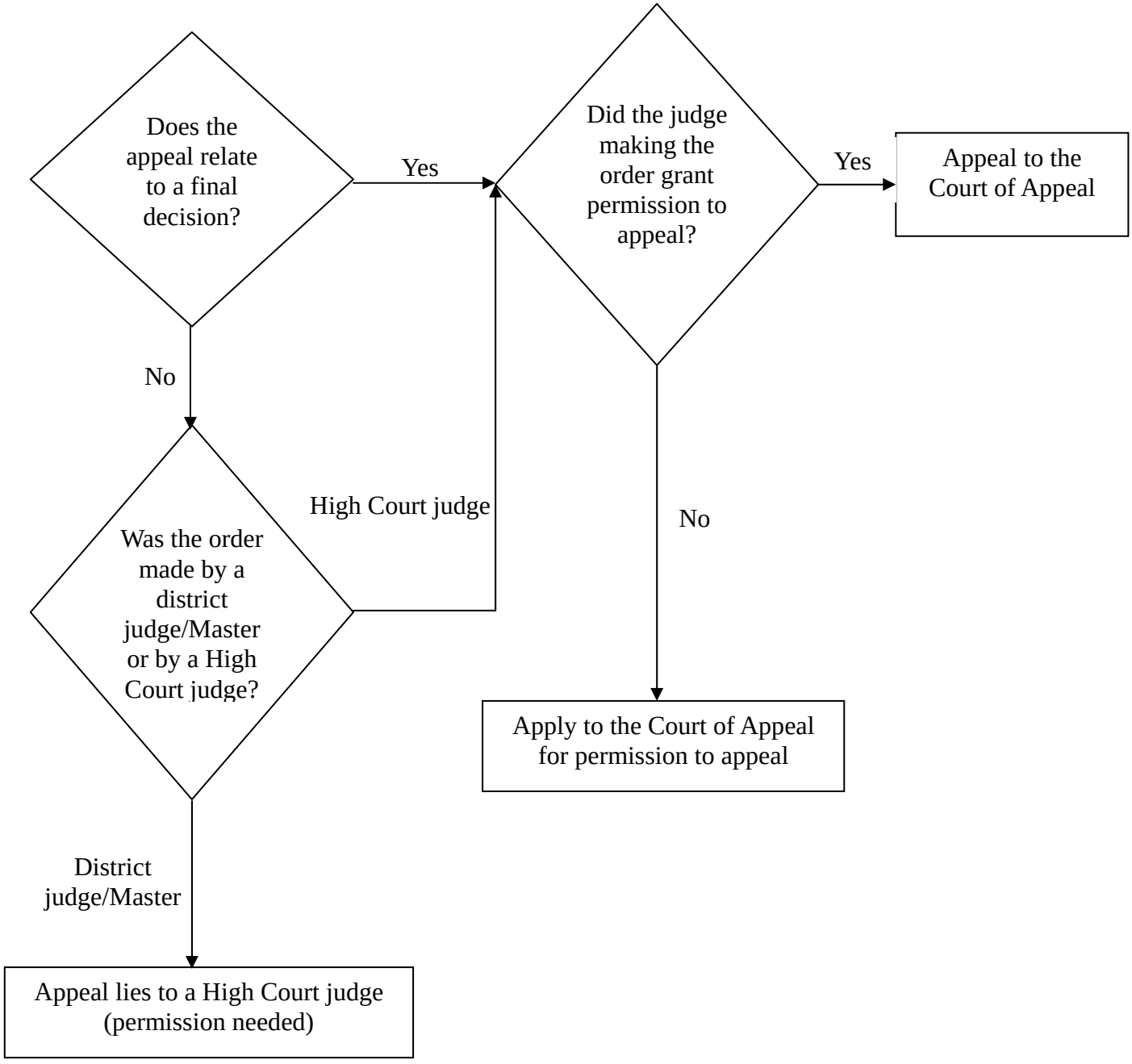


APPENDIX 2

Decision-tree to determine the court that would normally hear appeals from orders made in the County Court (not exhaustive)



Decision-tree to determine the court that would normally hear appeals from orders made in the High Court (not exhaustive)



APPENDIX 3

Suggested changes to current working practices within the CAO

Registry

- Greater use of standard letters incorporating tick-boxes to inform litigants of the need to remedy paperwork submitted to the Court or the reasons why the Court of Appeal has no jurisdiction to deal with their application
- use of 'intelligent' phone features, for instance to provide recorded advice on Court procedures, voicemail, 'call waiting' information, analysis of waiting times and unanswered calls[70]
- collection and analysis of information on the prevalence and types of problems that occur in paperwork sent to the Court to inform the design of procedural guidance
- re-siting of the seal on the Appellant's Notice to avoid overprinting fee receipt information.

Case management

- Inclusion in the pack for unrepresented litigants of the form to obtain a transcript of judgment at public expense, making it clear that eligibility is restricted to those who are fee exempt
- design of a standard bundle index form using the terminology in paragraph 4.1 of the leaflet *How to Prepare a Bundle of Documents for the Court of Appeal*. The form could include blank spaces for indexing additional documents included in the bundle. At present, confusion is caused for staff when indexes refer to documents by different names or where documents are filed but not identified in the index

[70] Some improvements in telephone services have already been introduced since our fieldwork was completed.

- expanded guidance for litigants to be included in the pack for unrepresented litigants and to solicitors. Additional guidance is needed on:
  - transcripts of judgments, for instance whether a faxed copy is acceptable for a permission to appeal application and the status of a judgment handed down subject to editorial corrections
  - bundle submission, including the need to quote the reference numbers of all cases to be heard together and the procedure and 'cut-off' times for lodging amendments to bundles
  - skeleton arguments, including the timing of submission where the skeleton is not filed with the Appellant's Notice and whether a copy is required in the bundle if a separate copy has been served with the Appellant's Notice
- analysis of codes from BQ letters to provide information on the prevalence of problems with documentation from solicitors and unrepresented litigants
- checking of all copies of bundles submitted by parties to ensure that they match
- receipts signed by Lords Justices' clerks when collecting bundles should be redesigned. The new design should include the following features:
  - 'tick-boxes' for key documents should ask explicitly for bundle page numbers
  - additional tick-boxes for authorities and for a respondent's notice
  - a way of noting that a bench memorandum has been requested but not yet received
  - a record of whose order is being appealed and the date of the order
  - an indication of whether loose documents are also supplied
  - a duplicate copy of the receipt to be retained by the clerk
- extension to judges' clerks of the system of scanning bar-codes to track the location of bundles.

Associates

- Guidance on the importance of consulting Lords Justices to clarify uncertainty over the content of orders made in court.

Improvements to RECAP

- Use of 'auto-complete' features, for instance to complete addresses on the basis of postcodes or DX numbers and to recognise the name of a court from the first few letters
- cut and paste facilities for use in conjunction with standard templates for letters
- ability to generate address labels
- ability to search simultaneously pre-appeals and appeals databases to retrieve cases involving a named individual
- improved audit trailing of data input, for instance to identify who records an indication of dismissal by consent
- facility to record when a skeleton argument is received separately from the bundle
- a report on orders not produced within the target time (currently done manually in the associates' office).

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